

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ALASKA POLICY FORUM,

Appellant,

v.

ALASKA PUBLIC OFFICES  
COMMISSION; YES ON 2 FOR  
BETTER ELECTIONS; AND  
PROTECT MY BALLOT,

Appellee.

Case No. S-18533

Superior Court No.: 3AN-21-07137CI

**APPELLANT ALASKA POLICY FORUM'S OPENING BRIEF**

APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT  
HON. FRANK A. PFIFFNER

Filed in the Supreme Court  
for the State of Alaska on  
this 5th of January 2023.

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## AUTHORITIES RELIED UPON

### Constitutional Provisions

#### Constitution of the United States

##### 1. First Amendment

Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

##### 2. Fourteenth Amendment

No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### Alaska Statutes

##### 1. AS 15.13.010. Applicability

...

(b) Except as otherwise provided, this chapter applies to contributions, expenditures, and communications made for the purpose of influencing the outcome of a ballot proposition or question as well as those made to influence the nomination or election of a candidate.

2. AS 15.13.040. Contributions, expenditures, and supplying of services to be reported.

...

- (d) Every person making an independent expenditure shall make a full report of expenditures made and contributions received, upon a form prescribed by the commission, unless exempt from reporting.
- (e) Each person required to report under (d) of this section shall file a full report. ... The report must contain
  - (1) the name, address, principal occupation, and employer of the individual filing the report;
  - (2) an itemized list of all expenditures made, incurred, or authorized by the person;
  - (3) the name of the candidate or the title of the ballot proposition or question supported or opposed by each expenditure and whether the expenditure is made to support or oppose the candidate or ballot proposition or question;
  - (4) the name and address of each officer and director, when applicable;
  - (5) the aggregate amount of all contributions made to the person, if any, for the purpose of influencing the outcome of an election; for all contributions, the date of the contribution and amount contributed by each contributor; and, for a contributor
    - (A) who is an individual, the name and address of the contributor and, for contributions in excess of \$50 in the aggregate during a calendar year, the name, address, principal occupation, and employer of the contributor; or
    - (B) that is not an individual, the name and address of the contributor and the name and address of each officer and director of the contributor.

3. AS 15.13.050. Registration before expenditure.

- (a) Before making an expenditure ... in support of or in opposition to a ballot proposition ... each person other than an individual shall register, on forms provided by the commission, with the commission.

4. AS 15.13.090. Identification of communication.

- (a) All communications shall be clearly identified by the words "paid for by" followed by the name and address of the person paying for the communication. In addition, except as provided by (d) of this section, a person shall clearly

- (1) provide the person's address or the person's principal place of business;

- (2) for a person other than an individual or candidate, include

- (A) the name and title of the person's principal officer;

- (B) a statement from the principal officer approving the communication; and

- (C) unless the person is a political party, identification of the name and city and state of residence or principal place of business, as applicable, of each of the person's three largest contributors under AS 15.13.040(e)(5), if any, during the 12-month period before the date of the communication.

...

- (c) To satisfy the requirements of (a)(1) of this section and, if applicable, (a)(2)(C) of this section, a communication that includes a print or video component must have the following statement or statements placed in the communication so as to be easily discernible; the second statement is not required if the person paying for the communication has no contributors or is a political party: This communication was paid for by (person's name and city and state of principal place of business). The top contributors of (person's name) are (the name and city and state of residence or principal place of

business, as applicable, of the largest contributors to the person under AS 15.13.090(a)(2)(C))

5. AS 15.13.140. Independent expenditures for or against ballot proposition or question.

...

(b) An independent expenditure for or against a ballot proposition or question (1) shall be reported in accordance with AS 15.13.040 and 15.13.100 -15.13.110 and other requirements of this chapter:

...

6. AS 15.13.400. Definitions.

...

(3) "communication" means an announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass mailing, excluding those placed by an individual or nongroup entity and costing \$500 or less and those that do not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c);

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made, and includes the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party, and that is made for the purpose of

...

(ii) influencing a ballot proposition or question: ...

...

(7) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(iv) influencing the outcome of a ballot proposition or question;

...

(C) includes an express communication and an electioneering communication, but does not include an issues communication

(8) "express communication" means a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate;

...

(11) "independent expenditure" means an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or, deputy campaign treasurer, or another person acting as a principal -or agent of the candidate;

(13) "issues communication" means a communication that

(A) directly or indirectly identifies a candidate; and

(B) addresses an issue of national, state, or local political importance and does not support or oppose a candidate for election to public office;

## ISSUES PRESENTED

1. The Superior Court erred when it found that the Alaska Public Offices Commission did not act ultra vires in creating and enforcing statutory offenses not contemplated by the Alaska legislature, extending the offenses for express communications and independent expenditures to communications other than those covered under the definitions of AS 15.13.400(8) and (11).

2. The Superior Court erred when it found that the Commission did not violate APF's rights under the First Amendment to the United States Constitution when the Commission discriminated against APF in concluding that APF violated campaign finance law when it reposted communications originally published by other groups, while ignoring or dismissing any violation by those who produced and first published the communications.

3. The Superior Court erred when it ruled that AS 15.13.010(b), 15.13.040(e), 15.13.050(a), 15.13.400(3), and 15.13.400(7) were not unconstitutionally vague and overbroad under the First Amendment.

4. The Superior Court erred when it ruled that the registration requirements at AS 15.13.050(a), the independent expenditure reporting requirements at AS 15.13.040(d) and (e) and AS 15.13.140, and identification requirements at AS 15.13.090 were constitutionally valid on their face and as applied to APF.

5. The Superior Court erred when it ruled that the dollar threshold for registration under AS 15.13.050(a) and for independent expenditure reporting under AS 15.13.040(d) and (e) and AS 15.13.140, requiring registration and reporting for the first cent spent, is constitutionally permissible under the First Amendment.

6. The Superior Court erred when it ruled that the dollar threshold for the identification requirements at AS 15.13.090, requiring identification even for communications of de minimis or no value, is constitutionally permissible under the First Amendment.

## INTRODUCTION

The Alaska Public Offices Commission fined the Alaska Policy Forum (“APF”) for the offense of discussing ranked-choice voting—merely because that issue happened to be addressed in an election. This decision sets a dangerous precedent. If issue advocacy can trigger campaign finance regulations, Alaskans must look over their shoulders before offering any opinions about any topic—the environment, gun control, abortion, taxes—once a ballot measure concerning these subjects is submitted to the voters.

But however the state might regulate campaign speech, it cannot regulate all speech concerning political topics that are also the subject of some campaign. Americans retain the right to engage in issue advocacy without

registering beforehand, reporting their speech to authorities, or disclosing their private associations.

The legislature created definitions for “expenditure,” “express communication,” and “communication” to regulate campaign speech. In these definitions it targeted campaign speech that urged voters to take specific action in an identified election contest. Accordingly, APF did not violate Alaska’s registration, reporting, disclosure, and identification requirement merely by publishing on ranked-choice voting as part of a national coalition of similar organizations. This conclusion necessarily follows from the legislature’s definitions of these terms, which are the lynchpins of APOC’s final order. For this reason alone, reversal and a judgment for APF is warranted.

Moreover, APOC’s interpretation would place Alaska’s law in conflict with the First Amendment and the Due Process Clause. Under the Commission’s interpretive gloss, which concentrates on external context rather a publication’s text as a whole, the definitions of “expenditure,” “express communication,” and “communication” which underlie Alaska’s campaign speech statutes, lack objective minimum standards necessary to overcome vagueness problems and provide the necessary breathing space for political speech.



This Court should vacate APOC's final order, reverse the Superior Court, and order that judgment be entered for APF.

#### JURISDICTIONAL STATEMENT

APF appeals the Superior Court's August 16, 2022, order affirming APOC's Final Order and Final Order on Reconsideration. [EXC 000350]. APF noticed its appeal on September 15, 2022. [EXC 000489]. Accordingly, this Court has appellate jurisdiction under AS 22.05.010(c) and Alaska Appellate Rule 202(a).

#### LIST OF ALL PARTIES

1. Appellant Alaska Policy Forum is a 501(c)(3) nonprofit organization, established for educational purposes to grow freedom for all. It was the Respondent in APOC Case No. 20-05-CD and the Appellant in Superior Court Case #3AN-21-07137CI.

2. Appellee Alaska Public Offices Commission presided over APOC Case No. 20-05-CD, issued the Final Order and Final Order on Reconsideration, and was an Appellee in Superior Court Case #3AN-21-07137CI.

3. Appellee Yes on 2 for Better Elections is a 501(c)(4) organization that advocated for Ballot Measure 2, was the Complainant in APOC Case No. 20-05-CD, and an Appellee in Superior Court Case #3AN-21-07137CI.

4. Protect My Ballot is a national coalition of state-based non-profit organizations established to publish on the issue of ranked-choice voting. It was also a Respondent APOC Case No. 20-05-CD.

## STATEMENT OF THE CASE

### **A. Statutory background**

Alaska requires that each person, prior to making an expenditure supporting or opposing a candidate or ballot initiative, register with APOC on forms that APOC provides for that purpose.<sup>1</sup>

Alaska also mandates that persons making expenditures independent of any candidate campaign report all such expenditures, and contributions received, to APOC.<sup>2</sup> Such reports must identify the person making the report, itemize all expenditures made, identify all of the reporting entity's officers and directors as well as the aggregate amount of all contributions received for the purpose of influencing the election, and identify each contributor.<sup>3</sup> These requirements also apply to persons making independent expenditures for or against a ballot proposition.<sup>4</sup>

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<sup>1</sup> AS 15.13.050(a).

<sup>2</sup> AS 15.13.040(d).

<sup>3</sup> AS 15.13.040(e)(1)-(5).

<sup>4</sup> AS 15.13.140(b)

All election “communications” must include a “paid-for-by” identifier and the name and address of person paying for the communication.<sup>5</sup> Each communication must also include that person’s address or principal place of business and, if an entity, the name and title of the entity’s principal officer and that principal officer’s statement approving the message.<sup>6</sup> The communication must also include a disclosure of the person’s three largest donors for the 12 months preceding the communication, and their name, city, and state of residence.<sup>7</sup>

An expenditure means a “purchase or transfer of money . . . made for the purpose of . . . influencing the outcome of a ballot proposition or question[.]”<sup>8</sup> The term “expenditure” includes an “express communication,” but not an “issue communication.”<sup>9</sup> However, the legislative limited the application of “express communication” to “a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a

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<sup>5</sup> AS 15.13.090(a).

<sup>6</sup> AS 15.13.090(a)(1)-(2).

<sup>7</sup> AS 15.13.090(a)(1)(C).

<sup>8</sup> AS 15.13.400(7)(A)(iv At the time of APOC’s decision below, “expenditure” was defined at AS 15.13.400(6).

<sup>9</sup> AS 15.13.400(7)(C).

specific candidate.”<sup>10</sup> Similarly, “issue communication” applies only to candidate elections, and to a communication that “directly or indirectly identify a candidate . . . and addresses an issue of national, state, or local political importance and does not support or oppose a candidate for election to public office.”<sup>11</sup>

And finally, a “communication” is “an announcement or advertisement” distributed through various means, but “excluding those placed by an individual or nongroup entity and costing \$500 or less and those that do not directly or indirectly identify a candidate or proposition . . .”<sup>12</sup>

## **B. Ranked-choice voting**

In contrast to a winner-take-all electoral method, a ranked-choice voting system allows voters to choose multiple candidates by order of preference.<sup>13</sup> If no candidate reaches 50% of the votes, then the lowest-ranking choice is eliminated, and the remaining candidates compete as before until a candidate reaches 50%.<sup>14</sup>

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<sup>10</sup> AS 15.13.400(8). At the time of APOC’s decision below, “express communication” was defined at AS 15.13.400(7).

<sup>11</sup> AS 15.13.400(13). At the time of APOC’s decision below, “issue communication” was defined at AS 15.13.400(12).

<sup>12</sup> AS 15.13.400(3).

<sup>13</sup> Amanda Zoch, *The Rise of Ranked-Choice Voting*, Nat’l Conf. State Legislatures Legisbrief (Nov. 2020).

<sup>14</sup> *Id.*

Ranked-choice voting's fortunes have ebbed and flowed. After initial success, cities began repealing ranked-choice voting statutes in the 1960s.<sup>15</sup> The election method re-emerged on the national stage after Maine adopted it for state-wide and federal election races in 2016.<sup>16</sup>

Ranked-choice voting was a national issue in 2020. Alaska and Massachusetts voters considered initiatives to adopt ranked-choice voting.<sup>17</sup> Several major American cities considered similar proposals.<sup>18</sup> Maine first used ranked-choice voting in a presidential election in November 2020.<sup>19</sup>

### **C. Ballot Question 2**

In July 2019, a group of Alaska residents filed the “Alaska’s Better Elections Initiative,” also known as Ballot Question 2, with Alaska’s Lieutenant Governor. [EXC 000351]. On October 31, 2019, the Division of Elections issued petition booklets. [EXC 000352]. On March 9, 2020, Alaska’s Lieutenant Governor accepted sufficient signatures qualifying the measure for the voters’ consideration in the November 2020 election. *Id.*

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<sup>15</sup> Angela Sbano, *How Should Alaskans Choose?: The Debate Over Ranked Choice Voting*, 37 Alaska L. Rev. 295, 298-99 (2020).

<sup>16</sup> Richard H. Pildes and G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 Cal. L. Rev. 1773 (2021).

<sup>17</sup> Brandon Bryer, *One Vote, Two Votes, Three Votes, Four: How Ranked Choice Voting Burdens Voting Rights and More*, 90 U. Cin. L. Rev. 711, 714-15 (2021).

<sup>18</sup> Pildes at 1776.

<sup>19</sup> Sbano at 302.

#### **D. APF's speech about ranked-choice voting**

APF has long researched and published educational materials on election-related issues. It has published about how elections are funded, election spending, the electoral college system, all-mail elections, election integrity, and what it means to be an informed voter. [EXC 000219]. Based on its research into election-related issues, it has earned “a well-established skepticism of efforts to change the status quo.” [EXC 0000045]. “Given this history, APF enthusiastically agreed in January 2020,” months before Measure 2 was approved for the ballot, “to join as a founding member a national coalition called Protect My Ballot.” [EXC 000021].

Protect My Ballot “was organized by the Washington, DC-based §501(c)(3) nonprofit Employment Policies Institute Foundation (EPIF) owns the web domain ProtectMyBallot.com and has registered Protect My Ballot as a trade name.” *Id.* “Other coalition members include nonprofits in Minnesota, Maine, Massachusetts, and Oklahoma.” *Id.* On PMB’s website, the public could find descriptions of how ranked-choice voting works, testimonials from elected officials in ranked-choice voting jurisdictions, frequently asked questions and responses, news articles, and opinion columns. [EXC 000022, EXC 000044].

Because it is a 501(c)(3) organization, APF can “only participate in educational efforts.” [EXC 000026]. In 2020, it did just that by publishing about the issue of ranked-choice voting. On February 11, 2020, APF

republished an Anchorage Daily News column called “Ranked-Choice Voting Fails to Deliver its Promises,” written by Jacob Posik of the Maine Heritage Policy Center in response to another Anchorage Daily News piece on the issue. [EXC 000045].

On July 24, 2020, APF emailed a PMB published a press release announcing a “national campaign . . . detail[ing] the harmful consequences of an electoral scheme known as Ranked Choice Voting.” [EXC 000060]. The press release contained statements from coalition members in Minnesota, Oklahoma, and Maine, and linked to and described a San Francisco State University professor’s research paper finding that ranked-choice voting diminished voter turnout in the municipalities he studied. [EXC 00061-62].

On July 31, 2020, APF created a blog post that linked to an EPIF YouTube video available on PMB’s channel, which addressed ranked-choice voting. [EXC 000053].

On October 8, 2020, APF issued a press release describing and linking to a report jointly authored by APF and the Maine Policy Institute, describing an analysis of 96 elections in ranked-choice voting jurisdictions. [EXC 000066-67].

Lastly, APF published an article on its website on October 12, 2020. [EXC 000068-70]. “Ranked-Choice Voting Disenfranchises Voters” focused on the mechanics of ranked-choice voting, possible flaws in its operation, and the

history of ranked-choice voting in ranked-choice voting jurisdictions. *Id.* It explained the methodology’s potential for voter confusion, the problem of ballot exhaustion, and the potential for voter disenfranchisement, citing examples from San Francisco, Oakland, and Minneapolis. [EXC 000069]. The article concluded by identifying jurisdictions in Vermont and Colorado that experimented with ranked-choice voting only to repeal it. *Id.*

### **E. Administrative proceedings**

On September 8, 2020, Yes on 2 for Better Elections filed a complaint against APF, an individual named Brett Huber, and PMB. [EXC 000004]. Yes on 2 alleged that “[b]ecause many of Respondents’ materials openly call for a ‘no’ on Ballot Measure 2, and because the rest of their communications cannot reasonably be interpreted as anything but an exhortation to vote against the measure, they are all campaign activities triggering registration and reporting activities with APOC.” [EXC 000007].

Specifically, Yes on 2 alleged that APF had made “express communications” without registering beforehand (AS 15.13.050(g)), failed to create a political activities account prior to making an expenditure (AS 15.13.052), failed to report all contributions received or expenditures made (AS 15.13.110(g)), and failed to report all independent expenditures within 10 days (AS 15.13.110(h)). [EXC 000008].



On October 15, 2020, APOC’s staff published its report. [EXC 000042]. It explained that “[t]he primary issue is whether [APF] made one or more expenditures . . . trigger[ing] registration or reporting requirements.” [EXC 000047]. In their view, APF could have only made an expenditure if APF’s “posts and press releases amount to activity in opposition to Ballot Measure 2[.]” [EXC 000048].

The staff then explained its analytical framework using the definitions of “express communication” and “issues communications,” though these terms apply to candidate elections, not ballot initiatives. [EXC 000048-49]. Using these definitions, staff explained that an “issues/educational communication” can lose its “non-regulated character if disseminated near the time of a ballot proposition involving a similar or the same subject.” [EXC 000049].

Staff recommended that APOC find that APF made express communications. [EXC 000054]. “Based on the evidence provided, the timing of the alleged activity alleged, and the context of APF’s ranked choice voting communications, staff concludes that APF’s ranked choice voting communications are express communications.” *Id.* It then recommended that APOC find that APF violated AS 15.13.050(a) (failing to register as an entity prior to making an expenditure), AS 15.13.040(d) (failure to file independent expenditure reports), and AS 15.13.090(a) (failure to include paid-for-by

identifiers on communications and disclose APF's top 3 donors). [EXC 000054-55]. Staff recommended a fine of \$8,065. [EXC 000059].

APF denied making express communications and expenditures opposing Ballot Question 2, and advanced five primary arguments that it believed APOC overlooked. [EXC 000211].

First, APF observed there was a mis-match between urging a no-vote on Ballot Question 2, which was a 3-part proposal, and APF's critiques of ranked-choice voting. *Id.* Second, APF contended staff flipped the statutory standard, which focuses on the publication's text with limited reference to outside events, to concentrate on external factors. [EXC 000212]. APF argued that staff's focus on external context unnecessarily caused constitutional trouble since speech cannot be regulated absent the speaker's "clear plea for action" in the text. [EXC 000213-14].<sup>20</sup> Third, APF cited its years of publishing about electoral methods and systems to show staff's evidentiary error but also to observe that focusing on external factors, e.g., an organization's history and scope of communications, injected subjectivity into staff's standard that chills speech. [EXC 000216]. Fourth, APF showed that it published from June through October 2020 not because of any nexus to Ballot Question 2, but because the COVID-19 pandemic delayed its prior

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<sup>20</sup> quoting *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

publications on ranked-choice voting. [EXC 000217]. Fifth, staff could not attribute the PMB web domain to APF. APF never owned it. [EXC 000217]. And lastly, APF objected that an \$8,065 fine was high compared to the \$643.20 APF incurred on staff time with a nexus to the publications. [EXC 000218].

APF filed a motion to dismiss Yes on 2's complaint. [EXC 000076]. APF argued that Alaska's definition of express communication does not reach issue advocacy in the ballot initiative context. [EXC 000220]. APF also urged a narrowing construction of the term express communication, even if could be construed to apply to ballot measures, to avoid "constitutional doubts as to the validity of Alaska's statutory and regulatory scheme." [EXC 00085-86].

By a 3-2 vote, APOC mostly adopted its staff's legal conclusions and findings. [EXC 000277 n.28]. It dismissed PMB, [EXC 000275], and accepted its staff's conclusions as to APF's putative campaign finance violations as of the July press release, but issued no fine. [EXC 000274].

In APOC's view, registration, reporting, and identification requirements never arise absent an expenditure. [EXC 000270]. APOC reasoned that "[c]overed expenditures include express, but not issues, communications." *Id.* Though these terms' respective definitions apply only to candidate elections, the Commission used them as a "useful framework even though they do not strictly apply." [EXC 000271].

APOC weighed the entity’s “history of communications about the topic and the substance of the communications at issue, including the extent to which they were neutral and whether they identified the ballot measure.” [EXC 000272]. It also considered the primacy of the topic in the initiative, i.e., whether the topic was “a key component of the initiative.” [EXC 000274].

The Commission concluded that APF’s postings on ranked-choice voting were expenditures “at least as of its July press release,” *id.*, because APF allegedly lacked a history of writing about ranked-choice voting or elections in general, its educational materials were critical of ranked-choice voting, and it published about ranked-choice voting after Ballot Question 2 was proposed for the November 2002 ballot. [EXC 000272]. Accordingly, the Commission held that APF violated AS 15.13.050(a) by failing to register as an entity prior to making an expenditure, AS 15.13.040(d) by failing to file independent expenditure reports, and AS 15.13.090(a) by failing to include paid-for-by identifiers on communications and disclose APF’s top 3 donors.

#### **F. Superior Court proceedings**

The Superior Court started its statutory analysis by finding that an entity could make an expenditure through an express communication in the context of ballot initiatives [EXC 000377], despite acknowledging that the legislature implicitly excluded express communications from the ballot initiative context. [EXC 000375]. Turning next to APOC’s test for an express communication,

the Superior Court had no quibble with the Commission’s focus on external context, rather than the publication’s text, believing that its approach was consistent with the federal definition of express advocacy. [EXC 000376-77].

The Superior Court also reviewed APOC’s charge under AS 15.13.090(a), which requires a paid-for-by identifier to be included with a communication and a disclosure of the speaker’s 3 largest donors who made donations within 12 months of the communication. AS 15.13.090(a), AS 15.13.090(a)(2)(C).

Because the making of a communication is the essential element of this charge, the Superior Court analyzed APOC’s construction of the legislature’s definition of communication and whether APF’s speech fit that definition.

[EXC 000378-80]. The Superior Court acknowledged that the legislature’s definition of communication contains an exception for “pure issues speech.”

[EXC 000379]. It also conceded that APOC never expressly found that APF made a non-exempt communication. *Id.* The Superior Court nonetheless

deferred to APOC’s order because it “implicitly, if not explicitly” determined that APF made communications because (i) even though APF never

mentioned Ballot Question 2 by name, ranked-choice voting was a key part of the initiative; (ii) APF was “a newcomer to the RCV opposition world[;]” and

(iii) APF’s speech about ranked-choice voting “did not begin until it knew that [ranked-choice voting] was likely going to be on the November, 2020, ballot.”

[EXC 000379-80].

The Superior Court also deferred to APOC’s findings of fact in declaring that APF’s publications fit within the definition of express communication and communication. “APF set the stage for its opposition to [ranked-choice voting], and hence [Ballot Question 2], [in] its February 2020 republication of an AND article critical of RCV.” [EXC 000382]. It then reviewed the July 24, 2020 press release, PMB’s YouTube video on ranked-choice voting, and APF’s October blogpost – all were critical of ranked-choice voting. *Id.* Based on its review, the Superior Court held “APOC could reasonably that APF was clearly urging voters to oppose [ranked-choice voting] by defeating [the initiative].” *Id.* The Superior Court deferred to APOC’s use of external factors as the centerpiece of its ruling that APF’s speech could only be reasonably construed as an exhortation to vote against the initiative. [EXC 000383-84].

The Superior Court rejected APF’s constitutional challenges. As an initial matter, it imposed the burden of proof onto APF and observed that “APF has not supplied sufficient evidence to bring any constitutional case, whether its challenges are treated as facial or as-applied.” [EXC 000386].

It then rejected APF’s First Amendment challenge to AS 15.13.050(a) (registration statute), AS 15.13.040(d) (reporting statute), AS 15.13.090(a) (paid-for-by identifier and donor disclosure statute), and AS 15.13.140(b) (reporting for independent expenditures statute). The Superior Court ruled that APF’s facial challenge to AS 15.13.040(d), AS 15.13.050(a), and AS

15.13.140(b) was hypothetical. [EXC 000396-97]. Turning to APF's as-applied challenge, the court ruled that APF had not met its alleged burden of proof to demonstrate that Alaska's disclosure and reporting were "overly burdensome or that compliance will reduce its capacity to fundraise." [EXC 000397].

Similarly, the Superior Court rejected APF's facial and as-applied challenges as to AS 15.13.090(a)(2)(C). The court wrote held APF did not meet its burden of proof to demonstrate that AFP and its donors would be burdened thorough compliance with Alaska's identification and disclosure law. [EXC 000400].

The court wrote, . . . "donors could have each contributed \$50,000 and be perfectly fine having their names disclosed." EXC 400-01. APF, in the court's view, was wrongly "shift[ing] the burden onto APOC without first establishing a prima facie case of either facial or as-applied invalidity." [EXC 000401].

#### STANDARD OF REVIEW

This Court reviews an administrative agency's decision directly when reviewing a superior court's decision issued as an intermediate appellate tribunal.<sup>21</sup> The Court applies its independent judgment to constitutional

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<sup>21</sup> *Alaska Trademark Shellfish, LLC v. State*, 91 P.3d 953, 956 (Alaska 2004).

questions and reviews them *de novo*. Likewise, this Court reviews questions of statutory interpretation *de novo*.<sup>22</sup>

This Court reviews factual findings for substantial evidence.<sup>23</sup>

“Substantial” means relevant evidence a reasonable person might accept as sufficient to support a conclusion.<sup>24</sup>

#### SUMMARY OF ARGUMENT

This case starts with the text. It can, and should, end there too. The statutory definitions of “expenditure,” “express communication,” and “communication” do not encompass APF’s issue advocacy on ranked-choice voting.

Having dislodged its analysis of APF’s speech from the legislature’s definitions of the controlling terms, the Commission interpreted Alaska law into a conflict with the Due Process Clause and violated APF’s due process rights, applying a standardless framework to find campaign finance violations that APF, and no reasonable person, could predict in advance.

Alaska’s registration, reporting, disclosure, and identification requirements, which are all triggered at the zero-dollar level, would also be

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<sup>22</sup> *State Dep’t of Revenue v. Andrade*, 23 P.3d 58, 65 (Alaska 2001).

<sup>23</sup> *Griswold v. Homer Advisory Planning Comm’n*, 484 P.3d 120, 128 (Alaska 2021).

<sup>24</sup> *Id.*



unable to withstand exacting scrutiny. APOC cannot explain the rational informational interest at this level. APOC also cannot explain how these statutes satisfy the essential element of narrowly tailoring. Given these flaws, if Alaska’s campaign finance restrictions are as broad as APOC contends, they are unconstitutional.

Accordingly, APOC’s final order, and the Superior Court’s order affirming it, should be reversed and the complaint against APF should be dismissed.

#### ARGUMENT

I. ALASKA’S CAMPAIGN FINANCE REGULATIONS DID NOT REACH APF’S ISSUE ADVOCACY MERELY BECAUSE A BALLOT MEASURE ADDRESSED A SUBJECT OF APF’S SPEECH.

**A. APOC erred by applying the legislature’s definition of express communication in the ballot initiative context**

APOC’s staff recommended charges under AS 15.13.040(d), AS 15.13.050(a), AS 15.13.090(a), and 15.13.140(b) based on an express communication theory. As APOC advised in its Notice of Hearing and Procedural Order, “[a]t the hearing, The Commission will consider whether Respondents failed to comply with AS 15.13 by making express communications opposing Ballot Measure 2 without registering and reporting contributions received or expenditures made and by failing to identify their communications.” [EXC 000072]. APOC held that APF made express communications, and therefore expenditures, “requiring compliance with AS

15.13.” [EXC 000274]. But APOC’s interpretation of “express communications” is wrong.

The Court must begin its analysis with the legislature’s text.<sup>25</sup> “It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.”<sup>26</sup> The legislature’s definition of “express communication” is plain enough. It provides that express communication means “a communication that, when read as a whole and with limited reference to outside events is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”<sup>27</sup> It is equally plain that candidates and ballot propositions are not synonymous because they are defined separately and used separately.<sup>28</sup>

The Commission conceded as much in its final order: “This is true” that these definitions refer “exclusively to candidate elections, and not ballot measures.” [EXC 000271]. The Commission nonetheless applied them to APF’s speech in finding the group violated AS 15.13, because they provided a “useful framework.” *Id.* But this Court presumes the legislature used every

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<sup>25</sup> *Alaska Pub. Offices Comm’n v. Not Tammie*, 482 P.3d 386, 388 (2021).

<sup>26</sup> *Messe v. Keene*, 481 U.S. 465, 484-85 (1987).

<sup>27</sup> AS 15.13.400(8).

<sup>28</sup> *See* AS 15.13.400(1)(A) (a candidate is “an individual who files for election”); *see also* AS 15.13.400(3) (“identify a candidate or proposition”); AS 15.13.400(4)(A) (ii) (same).

word in the statute to have purpose, and that no words are superfluous.<sup>29</sup> If the legislature wanted its definition of express communication to apply to ballot initiatives, it would have said so. It did not.

**B. APF’s speech could not be a “communication” under AS 15.13.400(3) because it did not “identify a candidate or proposition.”**

For APF’s speech to be an “express communication,” it must at least be a “communication.” More critically, AS 15.13.090(a)’s disclaimer requirement applies only to a “communication.”

But none of APF’s speech could be a “communication,” because the legislature excluded from that term’s definition publications “that do not directly or indirectly identify a candidate or proposition.” AS 15.13.400(3). And none of APF’s speech at issue did so. APOC never confronted the meaning of this exclusion. Having applied the “express communication” framework, it also simply concluded that APF’s publications on ranked-choice voting fall under AS 15.13.090(a). [EXC 000270 and EXC 000274].

The Commission apparently interprets AS 15.13.090(a) to apply to all issues communications, except those under the \$500 floor published by an individual or nongroup entity. “[I]ssues communications require a paid-for-by identifier if they cost in excess of \$500 to create and disseminate and are not

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<sup>29</sup> *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341, 345 (Alaska 2011).

done by an individual or non-entity group.”<sup>30</sup> By doing so, it ran roughshod over the legislature’s exclusion for issue advocacy.

Nothing allows APOC to skip over legislative text or to interpret various sections in a common scheme at odds with one another.<sup>31</sup> AS 15.13.090(a)’s initial exclusion is for “those [communications] placed by an individual or non-group entity and costing \$500 or less.”<sup>32</sup> The legislature’s use of the conjunction “and” following this language demonstrates an additional exclusion for “those [communications] that do not directly or indirectly identify a candidate or proposition.”<sup>33</sup>

This latter exclusion in AS 15.13.090(a) for speech that does not identify propositions should be construed consistently with AS 15.13.400(7)(A)(iv)’s exclusion of speech that is not “made for the purpose of . . . influencing the outcome of a ballot proposition or question.” It makes little sense for issue advocacy to remain unregulated under the AS 15.13.400(7)(A)(iv) definition of “expenditure,” only to lose its non-regulated status under a different section,

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<sup>30</sup> APOC Advisory Opinion, *Bags for Change*, AO 19-04-CD (approved as modified Sept. 18, 2019), <https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=21018> (citing AS 15.13.090(a), AS 15.13.400(3); and AO 17-03-CD) (emphasis deleted).

<sup>31</sup> *McDonnell v. State Farm Mut. Ins. Co.*, 299 P.3d 715, 721 (Alaska 2013).

<sup>32</sup> AS 15.13.400(3).

<sup>33</sup> *Id.*

AS 15.13.090(a), within the same regulatory chapter. Construing AS 15.13.400(3), and by necessary extension AS 15.13.090(a), to provide for the issue advocacy exception the legislature created would keep faith with the “safe harbor for those who wish to exercise their First Amendment rights.”<sup>34</sup>

**C. APOC’s focus on political speech’s external context contravenes the requirement that AS 15.13.400(7)(A)(iv)’s definition of “expenditure” be construed narrowly to avoid violating the First Amendment**

As discussed supra, APOC went off the rails in deciding that “Alaska Policy Forum’s communications on ranked-choice voting were expenditures,” [EXC 000270], by looking to the definition of “express communication.” This Court must construe a statute to avoid constitutional infirmities if it is reasonable to do so.<sup>35</sup> Properly construed, Alaska’s definition of “expenditure” avoids the constitutional doubt inherent in regulating APF’s issue advocacy.

An expenditure is a “purchase or a transfer of money . . . made for the purpose of influencing the outcome of a ballot proposition or question.”<sup>36</sup> To maintain conformity with the First Amendment, an expenditure means express advocacy or its functional equivalent—“explicit words of advocacy of

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<sup>34</sup> *Wis. Right to Life, Inc.*, 551 U.S. 449, 467 (2007).

<sup>35</sup> *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979).

<sup>36</sup> AS 15.13.400(7)(A)(iv).

election or defeat of a candidate.”<sup>37</sup> APOC apparently believed its reliance upon the “express communication” definition reflected its adherence to this concept of express advocacy. APOC staff, after all, cited federal case law for its view that the “express communication” definition was “appropriate for ballot proposition campaigns.” [EXC 000048-49]<sup>38</sup>

But APOC’s view of express advocacy, with its focus on the speech’s context rather than its content, is incorrect. “When the constitutional and statutory standard is ‘express advocacy’ . . . the weight we give to the context of speech declines considerably.”<sup>39</sup> Courts must be cognizant of the highest court’s admonition in *Buckley* that regulatory statutes that rub against First Amendment rights must be construed narrowly.<sup>40</sup>

Focusing primarily on the text of the publication, the test for express advocacy can be broken down into three elements. First, speech is “express” if it is “suggestive of only one plausible meaning.”<sup>41</sup> Second, speech is “advocacy” if it calls for action, instead of just being informative.<sup>42</sup> Third,

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<sup>37</sup> *Buckley v. Valeo*, 424 U.S. 1, 43 (1976).

<sup>38</sup> citing *McIntyre v. Ohio Elections*, 514 U.S. 344 (1995); *Calif. ProLife Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003); and *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

<sup>39</sup> *Furgatch*, 807 F.2d at 864.

<sup>40</sup> *Id.* at 861.

<sup>41</sup> *Id.* at 864.

<sup>42</sup> *Id.*

speech cannot be “advocacy” if reasonable minds can differ as to what action the speaker is encouraging.<sup>43</sup> Outside events such as those considered by APOC are not relevant here, but even if they were, external context cannot “supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words.”<sup>44</sup>

APOC’s use of context renders its understanding of express advocacy much broader than the First Amendment permits. The Commission’s outside context analysis focuses on the length and content of a speaker’s historical publications and the timing of the communications before the Commission. [EXC 000272]. APOC never analyzed any APF publication as a whole. Because its focus was on the outside context, APOC isolated snippets of text in various APF publications merely to confirm APOC’s understanding of outside context. [See *e.g.*, EXC 000273]. Instead of limiting the use of context in its approach as the First Amendment demands, APOC allowed context to dominate its analysis.

When the government attempts to regulate campaign speech, its laws must be narrowly construed to limit their reach to explicit words that command a reader to take an unmistakable action in an election, to avoid the

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

general regulation of political speech.<sup>45</sup> This Court should presume that when Alaska’s legislature limited the scope of “expenditure” to money used for speech “made for the purpose of influencing the outcome of a ballot proposition or question,” it meant conform its campaign finance laws to the First Amendment’s requirements. The inquiry must focus on whether the speaker unmistakably implores the reader to vote a particular way. APF’s speech did no such thing.

## II. APOC’S FINDINGS LACK EVIDENTIARY SUPPORT.

APOC’s findings are not supported by substantial evidence. None of APF’s publications meet the definition of express advocacy or its functional equivalent.

The Commission conducted a minimal textual analysis of APF’s respective publications. *See e.g.*, [EXC 000273]. But isolating a sentence from a publication is inconsistent with the proper approach to discerning express advocacy. The entirety of a text “may give a clear impression that is never succinctly stated in a single phrase or sentence.”<sup>46</sup>

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<sup>45</sup> *Buckley*, 424 U.S. at 41.

<sup>46</sup> *Furgatch*, 807 F.2d at 863.



Classic issue advocacy, as opposed to express advocacy, isolates a single issue, takes a position on it, and exhorts the public to adopt the speaker's view on that issue.<sup>47</sup> That is what APF did here with each of its publications.

The Commission latched onto APF's lack of neutrality on ranked-choice voting. [EXC 000272]. But issue advocacy need not be neutral to keep its non-regulated character.<sup>48</sup> Nor is the timing of APF's publications relevant. An issue communication does not lose its character as such even if it occurs during an election.<sup>49</sup>

Keeping the focus where it should be, on the text of APF's respective publications, demonstrates that they are classic issue advocacy. APF's July press release announced the national coalition of PMB, included statements of coalition members from other states, took a position on ranked-choice voting as a single issue, and linked the San Francisco State study on ranked-choice voting. [EXC 000195-97]. Nowhere did APF, or any of the other coalition members, exhort readers to act on the ballot initiative. *Id.*

Similarly, nothing in PMB's YouTube video constituted express advocacy. All the Commission had to say about the video is that it disparaged ranked-choice voting. [EXC 000273]. Likewise, APF's October report, and press

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<sup>47</sup> *Wis. Right to Life, Inc.*, 551 U.S. at 470.

<sup>48</sup> *Wis. Right to Life, Inc.*, 551 U.S. at 470.

<sup>49</sup> *Id.* at 472.

release about it, garnered barely a mention from the Commission. APOC simply lifted a line from each to show that they were not neutral on ranked-choice voting. [EXC 000273-74]. But, again, taking a position on an issue is protected by the First Amendment. “Issues advocacy conveys information and educates.”<sup>50</sup> There is no requirement that speech can only keep its status as an issue *advocacy* by meeting some standard of neutrality, let alone that of the government.<sup>51</sup> Nothing requires APF’s publications to be neutral, and APOC never explained how cutting out a sentence from a publication can eliminate all other reasonable interpretations, let alone the reasonable conclusion that APF was simply educating the public about ranked-choice voting.

### III. ABSENT NARROWING CONSTRUCTIONS, ALASKA’S REGULATION OF ISSUE ADVOCACY IS VOID FOR VAGUENESS.

If the Commission’s interpretations of the basic statutory definitions such as “expenditure” and “communication” are correct, then Alaska’s registration, reporting, and identification requirements that rely on them are unconstitutionally vague.

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<sup>50</sup> *Wis. Right to Life, Inc.*, 551 U.S. at 470.

<sup>51</sup> *Id.*

The vagueness doctrine, as applied to the states, derives from the Fourteenth Amendment’s due process clause.<sup>52</sup> It applies to civil laws that seek to regulate First Amendment freedoms.<sup>53</sup>

The Constitution requires that laws contain sufficient clarity so as not to inhibit the exercise of constitutionally protected rights.<sup>54</sup> The First Amendment requires “breathing space,” and statutes that press on its protections “must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.”<sup>55</sup> Accordingly, where First Amendment claims are raised, “[s]tricter standards of permissible statutory vagueness may be applied.”<sup>56</sup>

Due process is offended when a statute’s prohibitions are not clearly defined.<sup>57</sup> A law is void when it (i) fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (ii) does not contain guardrails to prevent arbitrary and discriminatory enforcement.<sup>58</sup>

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<sup>52</sup> *Kolender v. Lawson*, 461 U.S. 352, 353 (1983).

<sup>53</sup> *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239 (2012).

<sup>54</sup> *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982).

<sup>55</sup> *Broadrick v. Okla.*, 413 U.S. 601, 611-12 (1973).

<sup>56</sup> *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 620 (1976).

<sup>57</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

<sup>58</sup> *Id.*

Vague laws impermissibly inject subjectivity into enforcement.<sup>59</sup> This means that a vague law entrusts enforcement on an *ad hoc* basis “with the attendant dangers of arbitrary and discriminatory enforcement.”<sup>60</sup>

There are two types of challenges to vague laws, facial and as-applied.<sup>61</sup> A law is facially invalid where vagueness permeates its text.<sup>62</sup> An as-applied challenge requires the reviewing court to examine the statute given the charged conduct.<sup>63</sup> Here, APF makes both types of challenges.

**A. As construed by APOC, AS 15.13’s regulation of issue advocacy is facially vague.**

In defining “expenditure,” Alaska uses the exact phrase that the Supreme Court deemed constitutionally infirm on vagueness grounds absent a narrowing construction: “for the purpose of influencing the outcome.”<sup>64</sup>

The phrase “directly or indirectly identify . . . a proposition” in AS 15.13.400(3)’s definition of “communication” is equally vague absent a narrowing construction. Relying on *Alaska Right to Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006), the Superior Court reasoned that “the question

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<sup>59</sup> *Id.* at 108-09.

<sup>60</sup> *Id.* at 109.

<sup>61</sup> *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1346 (9th Cir. 1984).

<sup>62</sup> *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).

<sup>63</sup> *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 758-59 (1988).

<sup>64</sup> *Buckley*, 424 U.S. at 77 (“It is the ambiguity of this phrase that poses constitutional problems.”)

is whether APF's activities made any 'unambiguous reference' to the ballot measure. [EXC 000382]. And that might be acceptable, if APF had unambiguously exhorted voters to vote a particular way on the ballot measure.

But the Superior Court equated opposition to ranked-choice voting with opposition to the initiative. [EXC 000382]. Given this construction, it is impossible to envision any speech taking a position on an issue qualifying as issue advocacy, if the issue happens to be before the voters.

Due process requires that regulated parties should know what is required of them so they can act consistently with what the law commands.<sup>65</sup> Here, APOC's focus on an entity's history of publications fails to provide notice to any person of ordinary intelligence that its current publication is either a covered expenditure or requires an identifier.<sup>66</sup> No speaker can know how much prior speech suffices, how broadly or narrowly APOC may construe a ballot measure's subject matter compared to the speaker's prior publications, the degree of neutrality required to steer clear of publishing a covered expenditure that may also require a paid-for-by identifier, or, as here, whether the speaker may run afoul of Alaska's campaign finance regulations

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<sup>65</sup> *Fox TV Stations, Inc.*, 567 U.S. at 240.

<sup>66</sup> *United States v. Williams*, 553 U.S. 285, 304 (2008).

because it publishes on an issue that has recently acquired or returned to national prominence such that APOC views it as a “key issue.”

“[P]recision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”<sup>67</sup> APOC used no minimum standards to determine that Ballot Question 2’s “key issue” was ranked-choice voting. [EXC 000274]. The Commission also never explains what limits its discretion to evaluate the neutrality of a speaker’s message. [EXC 000272].

And finally, APOC’s use of external context, such as comparing the timing of an initiative’s proposition to the time at which the speaker’s publications began is arbitrary. APOC simply cites to both the time booklets are circulated and the date, months later, when the Lieutenant Governor accepted the initiative for placement on the ballot. [EXC 000272-73]. It provides no guidance to the unwary as to when the relevant time period starts. *Id.*

**B. As-applied to APF’s issue advocacy, AS 15.13 is void for vagueness.**

AS 15.13’s campaign finance regime did not apply to APF’s issue advocacy. Even if it did, APF had no notice that it would do so.

The definition of communication refers to the direct or indirect identification of a ballot initiative, not to the discussion of any “key” issue

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<sup>67</sup> *Fox TV Stations, Inc.*, 567 U.S. at 240.

that happens to be within it.<sup>68</sup> One person may view the initiative’s key issue to be its more robust campaign finance laws. Another may identify the initiative with replacement of the party primary system by an open primary. Still another may view the initiative more broadly from its findings and intent section as a virtuous attack on “dark money” in candidate elections.<sup>69</sup>

Nothing about the topic of ranked-choice voting as an issue in 2020 would alert APF that opposition to ranked-choice voting necessarily meant opposition to Ballot Question 2. APF joined a national coalition to educate the public on ranked-choice voting. Ranked-choice voting was a national issue in the year 2020’s election cycle.<sup>70</sup>

APF engaged in exempt issue advocacy on ranked-choice voting, and nothing in either its publications or AS 15.13 would have tipped it off otherwise. APOC’s application of AS 15.13’s disclosure, reporting, and identification campaign finance regime to APF’s issue advocacy violates due process.

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<sup>68</sup> AS 15.13.400(3).

<sup>69</sup> *Meyer v. Alaskans for Better Elections*, 465 P.3d 477 (Alaska 2020) (discussing Ballot Question 2’s subject matter).

<sup>70</sup> *See Pildes*, 714-15; *see also Sbano, supra* at 302.

IV. ALASKA’S IDENTIFICATION, REGISTRATION, REPORTING, AND DISCLOSURE REQUIREMENTS VIOLATE THE FIRST AMENDMENT

**A. APOC bears the burden to justify the constitutionality of its actions**

APF’s right to speak freely on rank-choice voting rests on solid ground.

Our nation is committed to allowing uninhibited debate on public issues.<sup>71</sup>

This is because “[d]iscussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution.”<sup>72</sup> Publications on ranked-choice voting are precisely the type of conduct the First Amendment was designed to protect.

Alaska’s campaign finance regime, as interpreted by APOC, burdens APF’s political speech. It is well-established that disclosure of contributions burdens First Amendment rights.<sup>73</sup> Further, compelled disclosure (reporting) and disclaimer (identification) requirements burden free speech and must be justified by the government.<sup>74</sup> Accordingly, APF met its initial burden to

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<sup>71</sup> *Buckley*, 424 U.S. at 14 (citing *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>72</sup> *Roth v. U.S.*, 354 476, 484 (1957).

<sup>73</sup> *Buckley*, 424 U.S. at 658 (public disclosure of contributions will deter some individuals who otherwise might contribute).

<sup>74</sup> *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (“AFPF”); *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (same).



demonstrate that its speech was protected by the First Amendment and APOC burdened it through its charges of campaign finance violations.

The Superior Court wrote that speech and associational rights “must be balanced against competing rights and interests.” [EXC 000371]. The court’s statement is fair as far as it goes, but that does not mean, as the court held, that APF bore the burden to justify its right to speak freely. [EXC 000390]. On the contrary, the burden falls on the censor, and it is not light.

APOC carries the burden to justify its restrictions on APF’s freedom of speech.<sup>75</sup> Whether APOC met its burden is determined by the appropriate level of scrutiny.<sup>76</sup>

**B. Alaska’s first penny thresholds for registration, reporting, disclosure, and identification cannot withstand exacting scrutiny.**

Alaska requires disclosure for any amount spent or incurred and compels reporting of all contributors, even those giving less than a dollar.<sup>77</sup> Likewise, the state requires speakers to register before they make any expenditure.<sup>78</sup>

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<sup>75</sup> *Minneapolis Star & Tribune v. Min. Comm’r of Revenue*, 460 U.S. 575, 583 n.6 (1983).

<sup>76</sup> *See McCutcheon v. FEC*, 572 U.S. 185, 210 (2014) (plurality opinion) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”).

<sup>77</sup> AS 15.13.040(d) (“making an independent expenditure”); AS 15.13.040(e)(5) (“amount contributed by each contributor”).

<sup>78</sup> AS 15.13.050(a).

And finally, the identification requirement in AS 15.13.090(a)(2)(C) requires the compelled disclosure of the speaker's three largest contributors on the face of the publication regardless of the size of their contribution.<sup>79</sup> These laws are constitutionally infirm.

Alaska's imposition on APF's First Amendment rights cannot survive the exacting scrutiny required for compelled disclosure (reporting) and disclaimer (identification) requirements.<sup>80</sup> Exacting scrutiny requires both that a law directly serve an important interest and that it be tailored to that interest. That is, the State must demonstrate "a substantial relation between the disclosure requirement and a sufficiently important governmental interest."<sup>81</sup> And, because "fit matters," the State must demonstrate that the burdens it imposes are "narrowly tailored to the government's asserted interest."<sup>82</sup>

The Superior Court determined that the government's objective was the informational interest. [EXC 000396]. And to be sure, this Court has recognized that one of the purposes of Alaska's campaign finance laws is to provide for an informed electorate.<sup>83</sup> For its part, the Supreme Court has

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<sup>79</sup> AS 15.13.090(a)(2)(C).

<sup>80</sup> See *AFPF*, 141 S. Ct. at 2383 (Roberts, C.J., plurality op.) (requiring exacting scrutiny); *Citizens United*, 558 U.S. at 366 (same).

<sup>81</sup> *AFPF*, 141 S. Ct. at 2383 (internal quotation marks omitted).

<sup>82</sup> *Id.* at 2383-84 (majority op.) (internal quotation marks omitted).

<sup>83</sup> *Libertarian Party of Alaska, Inc. v. State*, 101 P.3d 616, 621 (Alaska 2004).

noted three interests that may support compelled disclosure—fighting actual or apparent corruption, combatting circumvention of contribution limits, and the informational interest,<sup>84</sup> but only the informational interest can apply here.<sup>85</sup> And the registration, reporting, and identification requirements are not tailored to the informational interest.

### **C. First dollar requirements are insufficiently tied to the informational interest**

Alaska’s minimal thresholds for its registration, donor reporting, and identification requirements divorces them from the informational interest. Alaska requires disclosure for any amount spent, even less than a dollar, and compels the reporting of all contributors, even those giving less than a dollar.<sup>86</sup> Furthermore, the identification requirement demands that speakers include their three largest contributors on the face of the communication, regardless of how small those contributions are.<sup>87</sup> And registration is required before making any expenditure, no matter how small.<sup>88</sup>

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<sup>84</sup> *Buckley*, 424 U.S. at 66-68

<sup>85</sup> *See Citizens United*, 558 U.S. at 357 (anticorruption interest applies only to expenditures made in cooperation with candidates); *Republican Party v. King*, 741 F.3d 1089, 1102 (10th Cir. 2013) (anti-circumvention interest cannot exist apart from the anticorruption interest).

<sup>86</sup> AS 15.13.040(e)(5).

<sup>87</sup> AS 15.13.090(a)(2)(C), (c), and (d).

<sup>88</sup> AS 15.13.050(a).

Disclosure laws justified under the government’s informational interest must inform voters “concerning those who support” a candidate,<sup>89</sup> and courts “must . . . analyze the public interest in knowing who is spending and receiving money to support or oppose a ballot issue.”<sup>90</sup> And it is not an interest in knowing who supports the speaker, but in knowing who through the speaker financially supports a candidate or ballot measure.<sup>91</sup>

Moreover, reviewing a range of laws, courts have held that low thresholds are suspect.<sup>92</sup> And the scrutiny only intensifies as the threshold goes to zero.<sup>93</sup>

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<sup>89</sup> *Buckley*, 424 U.S. at 81

<sup>90</sup> *Sampson v. Buescher*, 625 F.3d 1247, 1256 (10th Cir. 2010).

<sup>91</sup> See *Buckley*, 424 U.S. at 66 (noting interest in “where political campaign money comes from” (internal quotation marks omitted)); *Van Hollen v. Fed. Election Comm’n*, 811 F.3d 486, 497 (D.C. Cir. 2016) (using cancer society example to explain earmarking requirement); *Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016) (noting importance of earmarking); *Lakewood Citizens Watchdog Grp. v. City of Lakewood*, No. 21-cv-01488-PAB, 2021 U.S. Dist. LEXIS 168731, at \*33-36 (D. Colo. Sep. 7, 2021) (same); *Indep. Inst. v. Fed. Election Comm’n*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016) (three judge panel) (noting that requirements tailored to donors giving “for the specific purpose of supporting the advertisement”).

<sup>92</sup> See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 248-62 (2006) (Breyer, J., controlling op.); *Williams v. Coal. for Secular Gov’t*, 815 F.3d 1267 (10th Cir. 2016) (registration and reporting requirement unconstitutional for group spending less than \$3,500 on a Colorado ballot measure); *Sampson*, 625 F.3d 1247 (holding similar).

<sup>93</sup> *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (“As a matter of common sense, the value of this financial information to the voters declines drastically as the value of the

Given that Alaska triggers its registration, reporting, and identification requirements at less than a dollar, the value of the information required sinks to nothing and cannot satisfy the informational interest. They are facially unconstitutional.

But the imposition is most glaringly unconstitutional as applied to APF's communications. The Final Order notes that APF spent \$643.20 on ranked-choice voting materials, [EXC 000275], yet the Commission failed to introduce evidence that expenditures on any communication individually was more than negligible. In particular, reposting materials from other sources could not have incurred more than minimal costs. Thus, the information provided about those supporting the ballot measure would have little or no value, and the Commission has failed to demonstrate that the registration, reporting, and identification requirements are tailored to the information interest as applied to APF's communications.

**D. The identification requirement cannot serve the informational interest for reposted materials**

The identification requirements, as applied to the reposted materials, further fails to sustain the informational interest because it in fact misleads voters. Section 15.13.090 requires that all the communications at issue here

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expenditure or contribution sinks to a negligible level" (emphasis removed)); *Vote Choice v. DiStefano*, 4 F.3d 26 (1st Cir. 1993) (striking down regime forcing donor disclosure upon the giving of the first dollar).

state that they were “paid for by” APF, APF’s address, APF’s principal officer, that its principal officer approved the communication, and APF’s three largest contributors. That is, when applied to reposted materials, the identification requirements force APF to take credit for others’ communications. The Commission would thus force speakers to open themselves up to the expenses and burdens of copyright suits and plagiarism accusations. But it would also force speakers to confuse voters as to who actually made the communications. This does not serve the informational interest, and the identification requirement is therefore unconstitutional as applied to reposted materials like the July 24, 2020 press release and the Protect My Ballot YouTube video.

**E. There are less restrictive means than demanding on-communication disclosure with the identification requirement**

The on-communication disclosure included in the identification requirement unconstitutionally compels a government-scripted message as part of the speaker’s message. Compelled speech normally demands strict scrutiny, and that should apply here. But with little briefing or analysis on the point, the Supreme Court in *Citizens United* held that disclaimer requirements must meet exacting scrutiny.<sup>94</sup> Under exacting scrutiny, “fit

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<sup>94</sup> 558 U.S. at 366-67.

matters.”<sup>95</sup> Thus, even though the government is not limited to “the least restrictive means of achieving” its interests, its imposition on First Amendment freedoms “must be narrowly tailored to the interest it promotes.”<sup>96</sup> And that means that Alaska “must demonstrate its need” for requirements that impose burdens on First Amendment freedoms “in light of any less intrusive alternatives.”<sup>97</sup>

In *American Civil Liberties Union of Nevada v. Heller*, the Ninth Circuit struck down a similar Nevada law, which “require[d] certain groups or entities publishing ‘any material or information relating to an election, candidate[,] or any question on a ballot’ to reveal on the publication the names and addresses of the publications’ financial sponsors.”<sup>98</sup> The *Heller* Court found that while the reporting of such financial sponsorship through disclosure reports filed with a state agency is generally constitutional, compelling that information on the face of a message is not; the “distinction

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<sup>95</sup> *AFPP*, 141 S. Ct. at 2384 (internal quotation marks omitted).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 2386; *see also id.* (noting ability to subpoena information from specific organizations rather than demanding universal production); *Fed. Election Comm’n v. Mass Citizens for Life*, 479 U.S. 238, 262 (1986) (holding disclosure requirements unconstitutional because the governmental “interest in disclosure [could] be met in a manner less restrictive”).

<sup>98</sup> 378 F.3d 979, 981 (9th Cir. 2003).

between on-publication identity disclosure requirements and after-the-fact reporting requirements” is “constitutionally determinative.”<sup>99</sup>

More recently, the Supreme Court struck down a requirement that pregnancy centers put up notices notifying patients of other available services.<sup>100</sup> The *NIFLA* Court declined to decide whether strict scrutiny or some form of intermediate scrutiny applied to the compelled speech, holding simply that the state requirement could not “survive even intermediate scrutiny.”<sup>101</sup> There was a less restrictive alternative because, “obviously, [the state] could inform” the public itself, and thus avoid “burdening a speaker with unwanted speech.”<sup>102</sup>

The District of Colorado recently struck down a municipal electioneering-disclosure requirement.<sup>103</sup> Specifically, the court reasoned that the Lakewood ordinance did not have an earmarking requirement, which would have the practical effect of forcing the overinclusive disclosure of donors who may not

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<sup>99</sup> *Id.* at 991.

<sup>100</sup> *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2368-70 (2018) (“*NIFLA*”).

<sup>101</sup> *Id.* at 2375.

<sup>102</sup> *Id.* at 2376 (internal quotation marks omitted); *see also Riley v. Nat’l Fed’n of Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (holding unconstitutional a law requiring that fundraisers disclose their professional status because the government could “itself publish” the information).

<sup>103</sup> *Lakewood Citizens Watchdog Grp.*, , 2021 U.S. Dist. LEXIS 168731 at \*36.



have contributed intending to support election-related press coverage.<sup>104</sup> The Colorado district court concluded that the lack of an earmarking component caused the ordinance to fail exacting scrutiny because requiring disclosure of only earmarked donations would be a less-intrusive alternative.<sup>105</sup>

Alaska similarly wishes to burden APF with unwanted speech, with the name, city, and state of its three largest contributors. But earmarking remains a less-intrusive alternative. And, as in *NIFLA*, if the state wants the public to have information about a speaker’s donors, it can easily keep a public database for everyone to look up the information. While the state may object that it is more convenient for the public to get the information as part of the speaker’s message, “[t]he First Amendment does not permit the State to sacrifice speech for efficiency.”<sup>106</sup> The on-communication disclosure provision of the identification requirements is unconstitutional.

#### CONCLUSION

APOC’s orders should be vacated, and the charges be dismissed.

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<sup>104</sup> *Id.* at \*34-35 (“This creates a ‘mismatch’ between the interest served—knowing who is speaking about a candidate—and the information given”).

<sup>105</sup> *Id.* at \*36; *See also Wyo. Gun Owners v. Buchanan*, 592 F. Supp. 3d 1014 (D. Wyo. 2022) appeal docketed No. 22-8021 (10th Cir. May 10, 2022); *New Ga. Project, Inc. v. Carr*, No. 1:22-cv-03533-VMC, 2022 U.S. Dist. LEXIS 224818, \*55-56 (N.D. Ga. Dec. 14, 2022).

<sup>106</sup> *NIFLA*, 138 S. Ct. at 2376.