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**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE FRANK A. PFIFFNER

ALASKA POLICY FORUM'S REPLY BRIEF

Filed in the Supreme Court
for the State of Alaska on
this ___ day of _____ 2023.

Meredith Montgomery, Clerk
Appellate Courts

By: _____
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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.

Alaska Statutes

2. 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)

[. . .]

(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;

ARGUMENT

I. APOC'S SELECTIVE USE OF LEGISLATIVE INTENT AND HISTORY DOES NOT OVERCOME THE PLAIN STATUTORY TEXT.

Appellees Alaska Public Offices Commission ("APOC" or the "Commission") and Yes On 2 For Better Elections ("Yes on 2") both concede that the statutory terms "express communication" and "issues communication" refer only to candidate elections. [Yes On 2 Br. 13; APOC Br. 12]. APOC concedes that "no statute elaborates on what it means for a communication to be made for the purpose of influencing the outcome of a ballot measure such that the spending on it qualifies as an 'expenditure' . . ." [APOC Br. 12]. Yet APOC admits that it shoehorns "statutory definitions applicable to *candidate* elections," [*id.*] (emphasis added), to reach its desired result. Correctly noting that the definition of "express communication does not directly apply to ballot measures," [APOC Br. 13] (internal citation omitted), APOC claims that the legislature's failure to mention ballot measures in defining express communication "does not mean the Commission was wrong to apply those definitions to evaluate [APF's] activities." [APOC Br. 14].

Because AFP's speech about ranked-choice voting did not fall within the statutory definition of "express communications," APOC wants this Court to defer to its "longstanding interpretation" of legislative intent that reads

ballot measure speech into the definition of "expenditures." [APOC Br. 12]. But "matters of constitutional or statutory interpretation are questions of law to which we apply our independent judgment."[1] This Court's independent judgment should not sustain APOC's strained approach.

APOC's invocation of legislative intent and history only undermines its position. The Commission notes various legislative discussions about regulating communications advocating for or against ballot measures, as well as other debates about provisions in which the legislature did in fact mention ballot measures. [APOC Br. 12-14]. But that makes the legislature's omission as to "express communications" in the ballot measure context even more telling. Even though the legislature discussed ballot measures, and even though it demonstrated that it knew how to include ballot measures in statutory provisions regulating the conduct of election campaigns, it chose not to regulate "express communications" pertaining to ballot measures. If anything, APOC's decision contravenes the legislature's intent.[2]

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[1] *State Com. Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 858 (Alaska 2003); *see also City of Skagway v. Robertson*, 143 P.3d 965, 968 (Alaska 2006).

[2] *See State v. Fyfe*, 370 P.3d 1092, 1099 (Alaska 2016) (noting that "the principle of *expressio unius est exclusio alterius* . . . directs [courts] to presume that a statute designating only certain powers excludes those not specifically designated." (quotation marks omitted)).

APOC nonetheless claims that the doctrine of *expressio unius est exclusio alterius* ought not apply here because "context matters." [APOC Br. 14]. For this context, APOC directs the Court to other terms, "expenditure"[3] and "communication,"[4] that mention "ballot initiatives." [APOC Br. 13-14]. APOC argues that because these terms mention "ballot initiatives and "proposition," it can be extrapolated that the legislature intended that "express communications" be understood to *also* include "ballot initiatives" and "proposition." [APOC Br. 18]. When a term is used in a statute, courts "generally presume that definition applies to the statute's use of that term."[5] "Ballot initiatives" or "proposition" are parts of the definitions of "expenditures" and "communication," but not "express communication."

The legislature is presumed to have drafted the definitions with "great care for the precise language" needed.[6] Because there is no mention of "ballot initiatives" or "proposition" in "express communication," APOC's emphasis on "context" does not pass muster.

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[3] *See* A.S. 15.13.400(7).

[4] *See* A.S. 15.13.400(3).

[5] *United States v. Olson*, 856 F.3d 1216, 1223 (9th Cir. 2017). *See also United States v. Lettiere*, 640 F.3d 1271, 1274 (9th Cir. 2011) ("[There is a] well-settled principle that, for purposes of statutory interpretation, the language of the statute is the first and, if the language is clear, the only relevant inquiry.").

Again, despite APOC's long discussion of numerous statutes, it bases its case against APF on an "express communications" theory. Its "staff conclude[d] that APF's ranked choice communications are express communications," and "[a]s such APF has violated AS 15.13 by failing to register as an entity and failing to file independent expenditure reports." [EXC000054-55]. In noticing the hearing, APOC stated it would "consider whether [APF] 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." [EXC000072]. But lacking any legislative authority to hold that APF's messages were express communications, the APOC should have dismissed the Complaint. Accordingly, the Superior Court's decision should be reversed, and APOC's decision should be vacated.

II. AFP'S CRITICISM OF RANKED CHOICE VOTING DID NOT AMOUNT TO EXPRESS ADVOCACY

APOC believes that AFP's "inflammatory language—'alarming ramifications,' 'disenfranchis[ing] voters,' and 'threatening our democracy,'—can reasonably be seen as alarm bells to readers and viewers to incite them to action" and fall under the purview of Alaska's election law. [APOC Br. 23].

However, the Supreme Court's decision in *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.* ("*WRTL*")[7] forecloses that argument.

In *WRTL*, the Supreme Court found that Wisconsin Right To Life's advertisements were "plainly not the functional equivalent of express advocacy."[8] The radio advertisements alerted the public to a "filibuster delay tactic to block federal judicial nominees" from an up or down vote.[9] The advertisements also urged the public to contact their senators to "oppose the filibuster."[10] In ruling for Wisconsin Right to Life, the Supreme Court found first that the "content is consistent with that of a genuine issue ad: [t]he ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter."[11]

Second, the Supreme Court noted that Wisconsin Right to Life's advertisements "lack[] [the] indicia of express advocacy: [t]he ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.[12]

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[7] 551 U.S. 449 (2007).
[8] *WRTL*, 551 U.S. at 457.
[9] *Id.* at 458-59.
[10] *Id.* at 459.
[11] *Id.* at 470
[12] *Id.*

Here, just like in *WRTL*, AFP's communications, while critical of ranked choice voting, did not step into the realm of express advocacy. The communications were educational and took a position on an issue, such as the press release that analyzed 96 elections in ranked choice voting jurisdictions, [EXC000066-67], the article that discussed mechanics of ranked choice voting, [*id.*], and the research studies that noted that ranked choice voting lessened voter turnout. [EXC00061-62]. As in *WRTL*, AFP's communications amounted to "issue advocacy," which "conveys information and educates."[13]

APOC reliance on *Fed. Election Comm'n v. Furgatch*[14] in asserting that APF's communications are "express communications," [APOC Br. 21], is unavailing. Harvey Furgatch paid for a full-page advertisement critical of then-President Jimmy Carter entitled "Don't let him do it," which ran in both *The New York Times* and *The Boston Globe* prior to the 1980 election.[15] The ad excoriated President Carter for "degrading the electoral process" and "cultivat[ing] the fears, not the hopes, of the voting public," and argued that "if he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion."[16] The Ninth Circuit ultimately agreed

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[13] *Id.*
[14] 807 F.2d 857 (9th Cir. 1987).
[15] *Id.* at 858.
[16] *Id.*

with the FEC's argument that Furgatch's advertisement "expressly advocate[d] the defeat of Jimmy Carter and therefore [was] an independent expenditure which must be reported to the FEC."[17] It held that in order for a communication "to be express advocacy . . . it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."[18]

APOC's reliance on *Furgatch* is misplaced for two reasons. First, *Furgatch* explicitly acknowledged and reaffirmed the careful distinction found in *Buckley v. Valeo*[19], between "issue-oriented speech" and speech that attacks a candidate, with the former being excluded under the Federal Election Campaign Act.[20] Second, Furgatch's ad, when compared to AFP's communications, could not be more different in its message and its call to action.

As the Ninth Circuit correctly noted, "reasonable minds could not dispute that Furgatch's advertisement urged readers to vote against Jimmy Carter. This was the only action open to those who would not 'let him do it.'"[21] Here,

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[17] *Id.* at 860.
[18] *Id.* at 864.
[19] 424 U.S. 1 (1976)
[20] *Id.* at 865.
[21] *Id.* at 866.

for example, all APOC had to say about Protect My Ballot's reposted video is that it "disparage[ed] ranked-choice voting." [EXC0000271]. But was there anything in the video that mentioned Alaska? Anything that referred to the November election? Anything that referred to Measure 2? And, given that the APOC expressly held that Protect My Ballot's website and the materials on it were "susceptible of other reasonable interpretations," [EXC0000275], what about APF's asserted posting of a link to the video transformed it into the functional equivalent of express advocacy?

Another example that shows the stark difference between AFP's speech and *Furgatch*'s advocacy was APOC's admission that Protect My Ballot's July 24, 2020, press release "tout[ed]" a "national campaign." [EXC0000273]. Thus, in its own words, the APOC admits that the press release concerned Protect My Ballot's national campaign, not any specific Alaska ballot measure. In fact, the press release lacked any of the "indicia of express advocacy," as it did "not mention an election" or ballot measure, much less "take a position" on a named ballot measure.[22]

Indeed, in line with its own asserted purpose of announcing a "national education campaign," the press release discussed bipartisan opposition to the voting method across the country, linked to resources about the national

[22] *WRTL*, 551 U.S. at 470.

campaign and ranked choice voting in general, explained how the voting method works in general (as opposed to how Alaska's method would work), and explained problems with the voting method. It then gave statements from leaders of four coalition members: Annette Meeks from the Freedom Foundation of Minnesota; Trent England of the Oklahoma Council of Public Affairs; Matthew Gagnon of the Maine Policy Institute; and Bethany Marcum of APF. They each stated why the voting method would be bad for their state and the country. Indeed, while Bethany Marcum's statement mentioned Alaska, she also addressed a national audience, stating that "[w]e need to encourage Americans of all backgrounds to visit the polls, not give them another reason to avoid casting a ballot." [EXC000061].

The most reasonable interpretation of this communication is that it announced a national campaign, not that it advocated against Measure 2. One cannot say that it is "susceptible of no other reasonable interpretation but as an exhortation to vote" against Ballot Measure 2, especially when, as required, the communication is "read as a whole."[23]

Again, with respect to the press release, the Superior Court's characterization of APF's messages as a "drumbeat" against ranked-choice voting is off base. [EXC0000379]. The text of APF's speech, read in its

[23] AS 15.13.400(8).

entirety, is clear. APOC's ruling devotes a single sentence to both the white paper and the press release about it, culling two words from the former (the claim that ranked-choice voting is "a 'failed experiment'"), and from the latter a statement that the white paper reveals "the 'alarming ramifications' of ranked-choice voting." [EXC0000275]. But, as with APF's other communications, these communications contained additional language beyond that selectively cited by APOC, which supports different interpretations. Unlike *Furgatch*'s ad, an abundantly clear excoriation of Jimmy Carter's presidency and a "call to action" to vote against him, APF's communications are susceptible to reasonable interpretations well beyond election advocacy, namely that they sought to educate the public about ranked choice voting in general.

Appellees also err in suggesting that *Bags for Change*[24] supports the commission's decision. [*See* APOC Br. 20, 27; Yes on 2 Br. 16]. However, the facts in *Bags for Change* are similar to the facts here. The outcome in that case—that an advocacy group's educational efforts did not trigger registration and reporting requirements—should follow here. Just like Bags for Change, APF had long been researching and publishing educational materials on election-related issues, and as a 501(c)(3) organization, it can "only

[24] *Bags for Change* Advisory Op., AO 19-04-CD (approved Sept. 18, 2019)

participate in educational efforts." [EXC000026]. Yes on 2, however, believes that AFP only changed its "communications strategy" after Ballot Measure 2 started "collecting signatures for Ballot Measure 2." [Yes on 2 Br. 20]. But ranked-choice voting was a national issue in 2020, warranting additional discussion about the topic as many states and cities considered ranked-choice voting proposals.[25]

CONCLUSION

The Superior Court's ruling should be reversed, and the case remanded with instructions to dismiss the charges against APF.

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Respectfully submitted,

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[25] *See* 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); Richard H. Pildes and G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 Cal. L. Rev. 1773 (2021).