

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE**

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ALASKA POLICY FORUM,  
*Appellant,*

v.

ALASKA PUBLIC OFFICES COMMISSION,  
YES ON 2 FOR BETTER ELECTIONS, and  
PROTECT MY BALLOT,  
*Appellees.*

Case No. 3AN-21-07137 CI

APOC No. 20-05-CD

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**OPENING BRIEF OF APPELLANT ALASKA POLICY FORUM**

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Appeal from the Alaska Public Offices Commission

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## AUTHORITIES PRINCIPALLY RELIED UPON

### A. Amendments to the United States Constitution

#### 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.

### B. Alaska Statutes

#### 1. *AS 44.62.360. Accusation.*

A hearing . . . is initiated by filing an accusation. The accusation must

(1) be a written statement of charges setting out in ordinary and concise language the acts or omissions with which the respondent is charged, so that the respondent is able to prepare a defense;

(2) specify the statute and regulation that the respondent is alleged to have violated, but may not consist merely of charges phrased in the language of the statute and regulation; . . .

#### 2. *AS 44.62.370. Statement of issues.*

(a) A hearing . . . is initiated by filing a statement of issues. The statement of issues is a written statement specifying

(1) the statute and regulation with which the respondent must show compliance by producing proof at the hearing; . . .



3. *AS 44.62.420. Form of notice of hearing.*

(a) The agency shall deliver . . . a notice of hearing to all parties  
...

(b) The notice to respondent must be substantially in the following form but may include other information:

You are notified that a hearing will be held . . . upon the charges made in the accusation served upon you. . . .

4. *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.

...

5. *AS 15.13.040. Contributions, expenditures, and supplying of services to be reported.*<sup>1</sup>

...

(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

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<sup>1</sup> The version effective until February 28, 2021, is used throughout.

- (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.

6. *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.

...

7. *AS 15.13.090. Identification of communication.*<sup>2</sup>

- (a) All communications shall be clearly identified by the words “paid for by” followed by the name and address of the person

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<sup>2</sup> The version effective until February 28, 2021, is used throughout.

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))

...

8. *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;

...

9. AS 15.13.400. Definitions.<sup>3</sup>

...

(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 . . . 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; . . .

...

(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

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<sup>3</sup> The version effective until February 28, 2021, is used throughout.

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;

### C. Regulations

1. *2 AAC 50.891. Hearing; record; decision.*

...

(d) . . . The staff shall present the investigation report, and bears the burden of proving a violation by a preponderance of the evidence.

...

### D. Rules

1. *Alaska R. Evid. 404. Character Evidence Not Admissible to Prove Conduct – Exceptions – Other Crimes*

(a) Character Evidence Generally. — Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion . . .

(b) Other Crimes, Wrongs, or Acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith. . . .

## INTRODUCTION

The inherent danger in campaign finance laws is that they will be used to silence or punish disfavored speech. The Alaska Policy Forum (“APF”) joined a coalition called Protect My Ballot to participate in a national education campaign about the problems with ranked-choice voting. A proponent of a ballot measure that included ranked-choice voting—of Ballot Measure 2—filed a complaint about the communications APF and its partners made as part of the national education campaign, alleging that they were advocating against Measure 2.

Despite a lack of statutory authority and a variety of irregularities that violated due process, the Alaska Public Offices Commission (“Commission”) went forward with the complaint and concluded that APF violated Alaska’s registration, reporting, and identification requirements. The Commission failed to create a record or explain its reasoning to demonstrate substantial evidence that any of the six communications at issue were express advocacy against Measure 2.

Beyond the procedural irregularities that compel reversal, the statutory requirements themselves are unconstitutional. The underlying definitions, and thus the registration, reporting, and identification requirements relying on them, are void for vagueness absent a constitutionally required narrowing

construction. That is, the scope of campaign finance regulations using vague language—using phrases like “for the purpose of influencing”—must be limited to speech that is express advocacy or its functional equivalent. But if the narrowing construction required by the First Amendment is applied here, APF’s communications cannot violate Alaska’s registration, reporting, and identification requirements. The only way to create the appearance of such a violation is by improperly stringing the communications together as character propensity evidence.

Moreover, the registration, reporting, and identification requirements cannot pass the exacting scrutiny required for campaign disclosure regulations. Such requirements must be substantially related to the informational interest, and those requirements must be narrowly tailored. But when registration, reporting, and identification requirements are triggered by minimal spending and contributions, the information provided to voters about a candidate’s or measure’s constituencies is too small to justify First Amendment burdens. In addition, in requiring that speakers identify themselves as having created materials they reposted from other speakers, the requirements in fact do not inform voters, but mislead them, defeating the state’s interests. Finally, forcing donor disclosure on the face of a message

is unconstitutional because the government may publish the information on its own, without burdening speakers.

Accordingly, the Final Order should be reversed and the Complaint against APF should be dismissed.

#### JURISDICTIONAL STATEMENT

A party may appeal a final administrative order to the superior court “by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters.” AS 44.62.560(a). Such a final order closes the record, permitting “no more time to submit evidence or alter the decision through administrative means.” *Allen v. Alaska, Dep’t of Revenue, Child Support Enf’t Div.*, 15 P.3d 743, 747 (Alaska 2000).

This matter arises out of the July 12, 2021 final administrative order (“Final Order”) issued by Alaska Public Offices Commission (“APOC” or “Commission”) in APOC Case No. 20-05-CD, after a hearing and motion for consideration by Complainant Yes on 2 for Better Elections (“Yes on 2”). The Final Order was a final appealable order for purposes of AS 44.62.560. Appellant was the Respondent to the complaint filed with Appellee Alaska Public Offices Commission by Yes on 2. The Commission dismissed the complaint against respondent Protect My Ballot. Appellant and Appellees were therefore all parties to the Commission proceeding.



## LIST OF ALL PARTIES

1. Appellant Alaska Policy Forum is a 501(c)(3) nonprofit organization, established to educate Alaskans and policymakers by promoting policies that grow freedom for all. It was a Respondent in APOC Case No. 20-05-CD.

2. Appellee Alaska Public Offices Commission is the administrative agency that presided over APOC Case No. 20-05-CD and issued the Final Order that is the subject of this appeal.

3. Appellee Yes on 2 for Better Elections is a 501(c)(4) organization that advocated for Ballot Measure 2. It was the complainant in APOC Case No. 20-05-CD.

4. Appellee Protect My Ballot is a coalition of state-based groups, established to sustain a national education campaign about ranked-choice voting. It was a respondent in APOC Case No. 20-05-CD, although the Commission dismissed the claims against it.

## STATEMENT OF ISSUES FOR REVIEW

On July 12, 2021, the Commission concluded that APF's communications made as part of Protect My Ballot's national education campaign were intended to influence the election on Ballot Measure 2, and it ordered APF to comply with the registration, reporting, and identification requirements at

AS 15.13.050(a), AS 15.13.040(d), AS 15.13.140(b), and AS 15.13.090. APF raises the following issues for review:

1. The Commission acted ultra vires in creating and enforcing statutory offenses not contemplated by the Alaska legislature, and it violated APF's due process rights when it failed to follow Alaska's Administrative Procedures Act notice requirements.

2. The Final Order is incorrect as a matter of law and not supported by substantial evidence.

3. The statutes enforced against APF are unconstitutionally vague, and their requirements cannot apply to APF under the narrowing construction required by the First Amendment.

4. The registration, reporting, and disclosure requirements fail the exacting scrutiny required by the First Amendment.

#### STATEMENT OF THE CASE

In November 2019, petition booklets began circulating for future Ballot Measure 2, a broad measure that included the implementation of ranked-choice voting. Final Order at 1, 4 [Exc. 146, 149]; Staff Report at 1 [Exc. 042]. The Division of Elections initially rejected the Measure, Staff Report at 2 [Exc. 043], but in March 2020 "the lieutenant governor" finally accepted it

“for placement on the ballot in the November 2020 election,” Final Order at 5 [Exc. 150].

APF has long communicated information to Alaskans regarding electoral reforms, consistent with its organizational mission “to provide research, information[,] and public education in support of individual rights, limited government, personal responsibility[,] and government accountability.” Staff Report at 4 [Exc. 045] (internal quotation marks omitted). This includes “publishing educational materials on the integrity of elections,” with a “well-established skepticism of efforts to change the status quo.” Answer at 1 [Exc. 021]. For example, APF in 2016 “wrote a detailed analysis of a voter registration scheme” requiring the “universal use of mail-ballots.” *Id.*

“Given this history, APF enthusiastically agreed in January 2020,” before Measure 2 was approved for the ballot, “to join as a founding member a national coalition called Protect My Ballot.” *Id.* Protect My Ballot “was organized by the Washington, DC-based §501(c)(3) nonprofit Employment Policies Institute Foundation (EPIF), which owns the web domain ProtectMyBallot.com and has registered Protect My Ballot as a trade name,” and “coalition members include nonprofits in Minnesota, Maine, Massachusetts, and Oklahoma.” *Id.* Because it is a 501(c)(3) organization,

APF stated that it could “only participate in educational efforts.” Answer, App. B ¶ 2 [Exc. 030].

Although only three of them are in the record, the Commission concluded that six of APF’s communications violated election law—communications made both before and after Measure 2 was approved. First, the Commission addressed a communication it asserted APF to have made a “month or so” before Measure 2 was approved. Final Order at 5 [Exc. 150]. The Commission claimed that an op-ed written by another party, and originally published in the Anchorage Daily News, was supposedly advocacy because it concluded with a statement comparing Maine to Alaska and noted that ranked-choice voting might soon come to Alaska. *Id.*; Staff Report at 4 [Exc. 045]. The communication is not in the record, however. Moreover, the Commission did not explain how the piece could have been advocacy when APF reposted it, but was not when its author and the Anchorage Daily News originally published it.

Second, the Commission pointed to a July 24, 2020 press release, in which Protect My Ballot announced “a coalition of state-based think tanks . . . [that] had launched a national education campaign detailing the harmful consequences of . . . ranked choice voting.” Staff Report at 5 [Exc. 046]. The Press Release did not discuss Ballot Measure 2. *See* Staff Report, Ex. 14 [Exc.

060-65]. But, according to the Staff Report, a single statement by APF's Bethany Marcum about the November election, among quotations by other coalition members and analysis about the dangers of ranked-choice voting, made the entire press release an express communication about Ballot Measure 2. *See* Staff Report at 5, 12-13 [Exc. 046, 053-54]; Final Order at 5-6 [Exc. 150-51]. Notably, the Commission introduced into the record a copy of the press release from Protect My Ballot's website, proving that Protect My Ballot published it but not that APF did. *See* Staff Report, Ex. 14 [Exc. 060-65]. Furthermore, this communication is one of those that the Commission dismissed when published by Protect My Ballot. Final Order at 7-8 [Exc. 152-53].

Third, the Commission asserted that APF reposted on its website a "YouTube video . . . from [Protect My Ballot]'s YouTube channel." Staff Report at 5 [Exc. 046]. The Commission did not enter this video into the record, and its Final Order gave only conclusory description and analysis of the communication for appellate review. Final Order at 5 [Exc. 150]. In particular, the Commission did not assert that the video mentioned the November 2020 election, much less Measure 2.

Fourth, the Commission asserted that APF posted a white paper to its website on October 8, 2020, titled *The Failed Experiment of Ranked-Choice*

*Voting*. Staff Report at 5 [Exc. 046]. The Commission failed to include this white paper in the record for review. In the Staff Report and Final Order, though, it noted that the white paper discussed ranked-choice voting across the country, as well as arguments for and against ranked-choice voting. *See id.*; Final Order at 5-6 [Exc. 150-51]. It did not allege that the white paper discussed Measure 2, the November election, or even Alaska.

Fifth, the Commission claimed that an October 8, 2020 press release announcing the publication of the white paper was advocacy against Measure 2. Staff Report at 5, 13 [Exc. 046, 054]; Final Order at 5 [Exc. 150]. The press release summarized the *Failed Experiment* study and provided a comment from APF's vice president of operations and communications, stating that ranked-choice voting "has no place in Alaska or anywhere else in the United States." Staff Report, Ex. 22 [Exc. 066]. But the Commission nowhere alleged that this press release mentioned Measure 2 or the November election.

Lastly, the Commission raised an article by an intern on APF's website. Final Order at 6 [Exc. 151]; Staff Report at 13 [Exc. 054]. The two-page article, titled "Ranked-Choice Voting Disenfranchises Voters," was supposedly advocacy against Measure 2 because it asserted that ranked-choice voting was "sweeping the country and ha[d] made it all the way to Alaska." Staff Report, Ex. 26 at 2 [Exc. 068]. It concluded by noting that "[i]t

is critical for our country that elections maintain their integrity,” that ranked-choice voting “disenfranchise[es] voters,” and that “[a]ll Alaskans deserve to have their votes counted.” *Id.*, Ex. 26 at 3 [Exc. 069]. Nowhere did the communication mention Measure 2 or the November election.

On September 8, 2020, Yes on 2 filed a complaint against the Respondents. Notice of Hearing and Procedural Order at 1 (“Notice”) [Exc. 072]. APF answered the Complaint on September 25, 2020. *Id.* at 1-2 [Exc. 072-73]. Commission staff investigated and issued a staff report, which APF responded to on October 30, 2020. *Id.* at 2 [Exc. 073]. APOC noticed a hearing for January 13, 2021, which was continued upon APF’s request until June 10, 2021. *Id.* at 1-2 [Exc. 072-73].

APF filed a motion to dismiss before the hearing, alleging that the allegations in the Complaint and the Staff Report could not, by definition, apply to APF and thus that the charges and action by the Commission were ultra vires. Motion at 12-17 [Exc. 079-84]. The Motion also asked that any charges related to the reposted video be dismissed, arguing that there was no set of facts under which a video that did not even mention Alaska, much less hint at an election or Measure 2, could be advocacy. *Id.* at 17-18 [Exc. 084-85]. Lastly, APF urged the Commission to stay within statutory limits, which

would require dismissal of the Complaint, as doing so would avoid multiple constitutional problems. Motion at 19-30 [Exc. 086-97].

In its response, the Attorney General's office, writing for the Commission, admitted that the charges in the complaint and the Staff Report did not apply to APF's communications. Staff Response at 2 [Exc. 105]. It stated that other charges would apply, however. *Id.* at 3-5 [Exc. 106-08].

At the hearing, APF reiterated the objections from its motion to dismiss. Tr. 18 [Exc. 120]. APF also objected to the newly developed charges, in the Staff Response and at the hearing, as a violation of its due process rights and Alaska's Administrative Procedures Act. *Id.* at 18-19, 33-34 [Exc. 120-21, 135-36]. It noted that three of the communications were not in the record, could not be before the commission at the hearing or be reviewed on appeal, and should be dismissed as a matter of law: the reposted op-ed, the reposted video, and the white paper. *Id.* at 24, 35 [Exc. 126, 137]. APF also discussed the other constitutional issues raised in its motion. *Id.* at 20-35 [Exc. 122-37].

In its final order, the Commission noted that the named allegations could not apply to APF's communications, but then created new charges. Final Order at 2-3 [Exc. 147-48]. It also stated that it could not address APF's constitutional arguments. *Id.* at 3 n.8 [Exc. 148]. It concluded that APF had violated the registration requirements at AS 16.13.050(a), the disclosure



requirements at AS 15.13.040(d) and AS 15.13.140(b), and the disclaimer requirements at AS 15.13.090. *Id.* at 6 [Exc. 151]. It then ordered APF to comply with the registration, disclosure, and disclaimer requirements within 30 days. *Id.* at 9 [Exc. 154].

The Commission dismissed the Complaint against Protect My Ballot, which had produced several of the communications that APF allegedly reposted. *Id.* at 7-8, 9 [Exc. 152-53, 154].

The Final Order on Reconsideration was filed July 12, 2021. *Id.* at 9 [Exc. 154]. APF timely appealed on August 11, 2021. On October 7, 2021, the Court granted APF's motion to stay the Final Order pending appeal.

#### STANDARD OF REVIEW

Although Alaska law generally requires more deferential standards for review of administrative decisions, higher scrutiny applies when an administrative decision violates First Amendment rights. In general, this Court reviews de novo whether “substantial evidence supports the [Commission’s] factual findings by independently reviewing the record and the Board’s findings.” *Sumpter v. Fairbanks N. Star Borough Sch. Dist.*, 494 P.3d 505, 514 (Alaska 2021) (internal quotation marks omitted). The evidence is substantial only if it is relevant and “a reasonable mind might accept [it] as

adequate to support a conclusion.” *Id.* The Court also reviews de novo whether the Commission “made sufficient findings.” *Id.*

Alaska courts review agency interpretations of statute under either “the reasonable basis test”—when those questions involve agency expertise—or “under the substitution of judgment test”—when those questions do not involve agency expertise or where agency experience is not probative. *Haar v. State*, 349 P.3d 173, 177 (Alaska 2015); *Club SinRock, LLC v. Mun. of Anchorage, Off. of the Mun. Clerk*, 445 P.3d 1031, 1034 (Alaska 2019). Under the former, a court examines “whether the agency’s decision is supported by the facts and has a reasonable basis in law.” *Haar*, 349 P.3d at 177. Under the latter, a court may substitute its own judgment, “adopt[ing] the rule of law that is most persuasive in light of precedent, reason, and policy.” *Studley v. Alaska Pub. Offs. Comm’n*, 389 P.3d 18, 22 (Alaska 2017). Alaska courts also review “constitutional questions” de novo. *Stevens v. State*, 257 P.3d 1154, 1156 (Alaska 2011).

Furthermore, the First Amendment requires de novo review of both constitutional questions and intertwined questions of fact. That is, in First Amendment cases, courts must “make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Bose Corp. v. Consumers*

*Union*, 466 U.S. 485, 499 (1984) (internal quotation marks omitted). This requires that a court independently review constitutional facts, or mixed questions of fact and constitutional issues, “because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace.” *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp.*, 515 U.S. 557, 567 (1995).<sup>4</sup>

Because this case involves constitutional questions, and because any factual questions that might be at issue are constitutional facts, this Court’s review must be plenary.

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<sup>4</sup> See also *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 2021 U.S. App. LEXIS 27658, at \*11 (9th Cir. 2021) (requiring “independent examination of the whole record,” reviewing “constitutional facts *de novo*” (internal quotation marks omitted)); *Cressman v. Thompson*, 798 F.3d 938, 946 (10th Cir. 2015) (“In a matter involving First Amendment rights, . . . [t]he factual findings, as well as the conclusions of law, are reviewed without deference to the trial court.” (citations and internal quotation marks omitted)); *CBS Corp. v. Fed. Comm’n’s Comm’n*, 663 F.3d 122, 137 (3d Cir. 2011) (noting “obligation to make an independent examination of the whole record” (internal quotation marks omitted)); *Flanigan’s Enters. v. Fulton Cnty.*, 596 F.3d 1265, 1276 (11th Cir. 2010) (“Where the First Amendment Free Speech Clause is involved our review of the district court’s findings of ‘constitutional facts,’ as distinguished from ordinary historical facts, is *de novo*.” (internal quotation marks omitted)); *Sullivan v. City of Augusta*, 511 F.3d 16, 24 (1st Cir. 2007) (“where the trial court is called upon to resolve a number of mixed law/fact matters which implicate core First Amendment concerns, the review . . . is plenary” (internal quotation marks omitted)).

## ARGUMENT

### I. THE COMMISSION ACTED ULTRA VIRES AND VIOLATED DUE PROCESS

The Commission acted ultra vires in applying the registration, reporting, and identification requirements to APF's communications. The Staff Report and the Notice of Hearing and Order are plain: the charges presented against APF's communications regard whether APF violated the registration, reporting, and identification requirements "by making express communications." Notice at 1 [Exc. 072]; *see also* Staff Report at 1 [Exc. 042]. The statutory definition of "express communication" is equally plain: it is "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*." AS 15.13.400(8) (emphasis added). And the law defines a candidate as "an individual who files for election," not as a ballot proposition. AS 15.13.400(1)(A). Candidates and ballot propositions are not synonymous. *Compare* AS 15.13.400(4)(A)(i) ("influencing the nomination or election of a candidate"), *with* AS 15.13.400(4)(A)(ii) ("influencing a ballot proposition or question"); *see also* AS 15.13.400(3) ("identify a candidate *or* proposition" (emphasis supplied)). Nor does any other statutory provision or any provision of the Alaska

Administrative Code permit “candidate” to be read interchangeably with “ballot proposition.”

The Commission admits that “these definitions are specific to communications regarding candidates,” that is, that the statutory text of the noticed charges does not cover ballot measures. Staff Report at 7-8 [Exc. 048-49]; *see also* Final Order at 2-3 [Exc. 147-48]; Staff Response at 3-4 [Exc. 106-07]. Nonetheless, the Commission doubles down on treating the communications as express advocacy—acting outside its statutory authority—and creating new charges on the eve of the hearing—violating Alaska’s Administrative Procedures Act and APF’s due process rights.

First, the Commission states that “definitions of express and issues communications offer a useful framework even though they do not strictly apply.” Final Order at 3 [Exc. 148]. That is, even though the statutory definitions cover only communications about candidates, the Commission finds it useful to apply them to APF’s communications to make it easier to find a violation. It provides no further authority for treating regulations of candidates and ballot measures the same, or for creating an offense for ballot measures, than this ipse dixit.

Of course, the Commission lacks the authority to rewrite the statutes or create new statutory offenses. *See Pretka v. Kolter City Plaza II, Inc.*, 608

F.3d 744, 763 (11th Cir. 2010) (“The entire process of statutory interpretation is premised on the principle that statutory words have meaning.”); *see also City of Arlington v. Fed. Commc’ns Comm’n*, 569 U.S. 290, 297 (2013) (when agencies “act beyond their jurisdiction, what they do is ultra vires”). An administrative agency, at either the federal or state level, “may not confer power upon itself.” *La. Pub. Serv. Comm’n v. Fed. Commc’ns Comm’n*, 476 U.S. 355, 374 (1986). And that is true even if APOC is taking “action which it thinks will best effectuate a [State] policy.” *Id.*

Second, recognizing that there is a statutory problem, the Commission charged APF with new offenses, thus violating Alaska’s Administrative Procedures Act and APF’s due process rights. The Attorney General’s office, after admitting that APF’s communications could not be express communications, stated that APF’s messages could be treated as other types of communications to which the statutory requirements might apply. Staff Response at 3-4 [Exc. 106-07]; *see also* Final Order at 3 [Exc. 148] (stating that other “definitions . . . are not so limited”).

But Alaska law requires that a hearing be “initiated by filing an accusation,” which must state “the acts or omissions with which the respondent is charged” and “specify the statute and regulation that the respondent is alleged to have violated.” AS 44.62.360(1)-(2). The notice of

hearing must further specify “the charges made in the accusation.” AS 44.62.420(b); *see also* AS 44.62.370(a)(1) (“A hearing . . . is initiated by filing a statement of issues . . . specifying . . . the statute[s] and regulation[s] . . .”).

The Notice of Hearing was deficient from the beginning, failing to name the communications at issue or give statutory citations for the alleged violations. But it did state that the violations involved “express communications,” not the new offenses that the Commission and the Attorney General’s Office vaguely raise in the Staff Response and the Final Order. And those new offenses are not in the Staff Report or the Complaint. Such violations of Alaska’s APA, and of APF’s “right to reasonable notice of [the] charge[s] against” it, amount to “a denial of due process of law.” *In re Oliver*, 333 U.S. 257, 273 (1948).

Given the actions of the Commission, both *ultra vires* and in violation of due process, the Commission’s decision should be vacated and the charges against APF should be dismissed.

## II. THE COMMISSION FAILED TO PROVIDE SUBSTANTIAL EVIDENCE

The Commission’s decision as to the reposted Anchorage Daily News op-ed, the reposted Protect My Ballot YouTube Video, and the white paper, should be reversed and the claims dismissed. The Commission failed to create a record that could demonstrate that its decision is based on substantial

evidence, that is, on “relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Sumpter*, 494 P.3d at 514 (internal quotation marks omitted).

“[T]he record on appeal . . . consists of evidence that was either submitted to or considered by the administrative board.” *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 793 (Alaska 2015) (internal quotation marks omitted). But a court’s review does not extend even to all the evidence submitted to an agency, but only to the evidence actually in the record and considered by the agency. *Alvarez v. Ketchikan Gateway Borough*, 28 P.3d 935, 939 n.10 (Alaska 2001) (noting improper supplementation when basing decision on other parts of the record).

The point of a record is to “to apprise the reviewing court of the basis of the agency’s action.” *Eureka Tchrs. Ass’n v. Bd. of Educ.*, 199 Cal. App. 3d 353, 367 (1988). This “requires that the grounds upon which the administrative agency acted be clearly disclosed,” *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 301 (2015), and that evidence actually be in the record. The record must show that the agency met its burden of demonstrating a violation by a preponderance of the evidence.

The Commission failed to meet these requirements as to the op-ed, the YouTube video, or the white paper. The First Amendment imposes a high



standard to regulate communications as advocacy: they must be “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (“*WRTL II*”) (Roberts, CJ, controlling op.). This standard demands close scrutiny of a communication to determine “the substance of the communication.” *Id.* at 469. That is impossible to do, when the Commission has failed to enter the communications into the record.

Furthermore, the Commission’s minimal analysis of each of these communications fails the requirement that “that the grounds upon which the administrative agency acted be clearly disclosed.” *T-Mobile S.*, 574 U.S. at 301. For the op-ed, the Commission latched onto a statement that “ended” the communication. Final Order at 5 [Exc. 150]. But what did the rest of the op-ed say? And how did one statement at the end so color the communication that, because of it, there could be no reasonable interpretation but as an appeal to vote?

All the Commission had to say about Protect My Ballot’s reposted video is that it “disparage[ed] ranked-choice voting.” *Id.* 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 Commission expressly held that Protect My Ballot’s website and the

materials on it were “susceptible of other reasonable interpretations,” *id.* at 7 [Exc. 152], what about APF’s asserted posting of a link to the video transformed it into the functional equivalent of express advocacy? The Commission analyzed none of these questions, and it gave the Court nothing about its reasoning to review.

The Commission devoted 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.” *Id.* at 5 [Exc. 150]. But, as with the other communications, what else did the communications say, that might indicate other interpretations than as the functional equivalent of express advocacy? And why were the quoted phrases—not even complete sentences—so overwhelming as to conclusively eliminate all other interpretations?

Moreover, while the Commission at least included in the record the July press release, the white paper press release, and the October article, its analysis was similarly conclusory, giving no idea how it balanced the rest of each communication’s content with the statements it culled from each. *Id.* at 6-7 [Exc. 151-52]. The record and analysis established by the Commission is far from demonstrating substantial evidence that each of APF’s

communications had no other reasonable interpretation than as advocacy against Measure 2.

III. UNDER THE NARROWING CONSTRUCTION REQUIRED BY THE FIRST AMENDMENT, ALASKA'S REGISTRATION, REPORTING, AND IDENTIFICATION REQUIREMENTS CANNOT APPLY TO APF'S COMMUNICATIONS

Alaska's campaign finance laws are replete with vague definitions, and both those definitions and the provisions incorporating and relying on them are unconstitutional. In particular, AS 15.13.010(b), 15.13.040(e), 15.13.050(a), 15.13.400(3), 15.13.400(4), and 15.13.400(7), are unconstitutionally vague. Consequently, the registration, reporting, and identification requirements at AS 15.13.050(a), 15.13.040(d) and (e), 15.13.140, and 15.13.090, that rely on those vague statutes are also unconstitutional. But even properly narrowed, the statutes cannot be constitutionally applied to APF's speech.

A. The Statutes' vagueness requires a narrowing construction.

The statutory provisions asserted here are "void for vagueness" because they "trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the

first essential of due process of law.”). “A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008). And “[w]here First Amendment rights are involved,” as here, “an even greater degree of specificity is required” than under normal Due Process Clause vagueness review. *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (per curiam) (internal quotation marks omitted).

Alaska treats as a communication covered by its campaign finance laws any “announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass mailing.” AS 15.13.400(3). Of course, this statutory provision cannot mean what it says, pulling in any communication, whether or not it has anything to do with campaigns and elections. Such a law would unconstitutionally control more speech than could ever fall within its “plainly legitimate sweep.” *Williams*, 553 U.S. at 292.

The state might try to save this provision from unconstitutional overbreadth by arguing that it applies only to communications that “directly or indirectly identify a . . . proposition,” AS 15.13.400(3), but this vague

phrase does little to protect speech. It will chill speech because speakers will not know whether a government regulator or political opponent, unhappy about what they say about an issue, will decide that a statement indirectly touches on a proposition.

Alternatively, the state might ironically try to use Chapter 13's catch-all provision to limit the overbreadth of AS 15.13.400(3), by arguing that the definition covers only "communications *made for the purpose of influencing* the outcome of a ballot proposition." AS 15.13.010(b) (emphasis added). Indeed, similar "for the purpose of influencing" language appears across the campaign finance statutes involved in the complaint against APF: The reporting requirements apply to "contributions made . . . for the purpose of influencing the outcome of an election." AS 15.13.040(e)(5). A contribution is defined as any "payment . . . made for the purpose of . . . influencing a ballot proposition or question." AS 15.13.400(4). And an expenditure is similarly defined as a "purchase . . . made for the purpose of . . . influencing the outcome of a ballot proposition or question." AS 15.13.400(7). And the registration requirement at AS 15.13.050 applies to similarly qualified expenditures, to those made "in support of or in opposition to a ballot proposition." AS 15.13.050(a). But these phrases give speakers little guidance about what speech is safe and what will be punished, as the government may

decide that almost any speech influences an election or opposes a ballot measure.

Given that “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,” *NAACP v. Button*, 371 U.S. 415, 438 (1963), the Supreme Court has already held that attempts “to be all-inclusive” through such phrases is unconstitutional, *Buckley*, 424 U.S. at 76. In particular, the Supreme Court held that “indefinite” phrases like “relative to’ a candidate” and “for the purpose of . . . influencing” “fail[] to clearly mark the boundary between permissible and impermissible speech.” *Buckley*, 424 U.S. at 41, 77. When the government attempts to control speech using such vague regulatory triggers, their reach must be narrowed to “explicit words of advocacy of election or defeat of a candidate.” *Id.* at 43; *see also id.* at 76-80 (requiring narrowing construction when using “for the purpose of influencing”). That is, to express advocacy or its functional equivalent.

Alaska uses the exact phrase that the Supreme Court has already held unconstitutional at AS 15.13.010(b), 15.13.040(e)(5), and 15.13.400(4) and (7). It uses similarly vague phrases at AS 15.13.050(a) (“support of or in opposition to”) and 15.13.400(3) (any “announcement or advertisement . . . [except] those that do not . . . indirectly identify a . . . proposition”). And Alaska’s registration, reporting, and identification requirements incorporate

and are built on these vague definitions. See AS 15.13.050(a) (using “expenditure,” as defined at 15.13.400(7)); AS 15.13.040(d) and (e) (using “expenditure” and “contribution,” as defined at AS 15.13.400(4) and (7)); AS 15.13.140 (using the definition of “independent expenditure” at AS 15.13.400(11), which in turn depends on the definition of “expenditure” at AS 15.13.400(7)); and AS 15.13.090 (using definition of “communication” at AS 15.13.400(3), and definition of “contribution” as AS 15.13.400(4), as inherent in the term “contributor”). Accordingly, absent *Buckley*’s required narrowing construction, these statutes are unconstitutionally vague and cannot be applied to APF’s speech.

B. Properly narrowed, the speech requirements cannot apply to APF.

*Buckley*’s narrowing construction requires either that APF’s speech be express advocacy or its functional equivalent if it is to be regulated. The Commission did not even attempt to prove the first, and it misapplied the test for the second.

To be express advocacy, communications must “contain[] express words of advocacy of election or defeat, such as ‘vote for,’ . . . ‘vote against,’ [or] ‘defeat.’” *Buckley*, 424 U.S. at 44 n.52. The Commission has not asserted that any of APF’s communications have express words of advocacy against Measure 2.

The Commission erred in concluding that APF’s communications are the functional equivalent of express advocacy—that they are “susceptible of no reasonable interpretation other than as an appeal to vote for or against” Measure 2. *WRTL II*, 551 U.S. at 469-70; *see* Final Order at 6 [Exc. 151]. But the Commission’s order failed to demonstrate that it in fact applied the test. Following cherry-picked quotations—lacking pincites to the communications even in the record—the Commission made only the conclusory assertion that “there is no other reasonable interpretation of these communications.” Final Order at 6 [Exc. 151]. This conclusory assertion failed to demonstrate that the communications are indeed “susceptible of no” other “reasonable interpretation.” The Final Order failed to discuss what else the communications said and how the probative value of selected words could so overwhelm the probative value of everything else. The dearth of reasoning calls into question whether the Commission in fact conducted the required analysis. But at the very least the lack of reasoning is insufficient to survive judicial review.

But even if the Commission did attempt the required analysis, an examination of the communications in the record shows that the Commission failed to apply the test correctly. The Commission quotes Protect My Ballot’s July 24, 2020 press release as stating that Protect My Ballot’s “national



campaign ‘exposes flaws in ranked choice voting.’” Final Order at 5 [Exc. 150]. Thus, in its own words, the Commission admits that the press release is about Protect My Ballot’s national campaign—that it was not directed at Measure 2. 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. *WRTL II*, 551 U.S. at 470.

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 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 the Alaska Policy Forum. 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.” Staff Report, Ex. 14 at 2 [Exc. 061].

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.” AS 15.13.400(8).

Second, the Commission found a violation in the press release for the white paper, when it mentioned that ranked-choice voting raises “alarming ramifications.” Final Order at 5 [Exc. 150]. This communication similarly 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. *WRTL II*, 551 U.S. at 470. The Commission concluded that the press release violated Alaska’s rules because it stated that ranked-choice voting “has no place in Alaska or anywhere else in the United States,” and that “no Alaskan should have to worry that their ballot won’t be counted in the final tally.” Staff Report, Ex. 22 at 1 [Exc. 066].

But from reading the communication, one would not know that Measure 2 existed or that ranked-choice voting was a current issue in Alaska. Rather, the press release noted that the white paper was “completed in conjunction

with [the] Maine Policy Institute,” a coalition member from across the country. *Id.* And it discussed the findings from studying elections across the country, in particular that the results of ranked-choice voting are often different from those promised by proponents. As with the July 24, 2020 press release, the most likely interpretation of this communication is that it constitutes education about ranked-choice voting in general. One cannot conclude that there is no other reasonable interpretation than as advocacy about Measure 2.

Lastly, the Commission concluded that a two-page article, titled “Ranked-Choice Voting Disenfranchises Voters,” supposedly amounted to advocacy against Measure 2. Again, the article lacked the indicia of express advocacy: it didn’t mention any ballot measure regarding ranked-choice voting, much less Measure 2. It didn’t mention any election where ranked-choice voting would be on the ballot, much less the November 2020 election. The Commission nonetheless concluded that the article must be advocacy because of two statements.

First, the Commission noted a statement that ranked-choice voting “ha[d] made it all the way to Alaska.” Final Order at 6 [Exc. 151]. But the Commission conveniently left out the rest of the sentence, which embraces a broader, national context: “A voting trend to uproot the electoral process is

sweeping the country and has made it all the way to Alaska: ranked-choice voting (RCV).” Staff Report, Ex. 26 at 2 [Exc. 068]. This generic statement could refer to any number of things, including educational efforts against ranked-choice voting at both the state and national levels. Linking it to Measure 2 requires knowledge outside the communication about the Measure and a leap of imagination.

Second, a statement that the Commission treated as an Alaskan call to action also has a national emphasis: “It is critical for our country that elections maintain their integrity, and disenfranchising voters through RCV accomplishes the opposite. All Alaskans deserve to have their votes counted.” *Id.* at 3 [Exc. 069]. Moreover, looking at the article as a whole—as both AS 15.13.400(7) and the *WRTL II* test requires—the article is best viewed as an educational piece on ranked-choice voting, not as advocacy against Measure 2. Because it is susceptible to another interpretation, the Commission erred in treating the communication as the functional equivalent of express advocacy.

Were they in the record, the other communications would similarly be susceptible to reasonable interpretations other than as express advocacy against Measure 2. Accordingly, the Commission unconstitutionally concluded that APF’s messages were communications, expenditures, and

independent expenditures, and thus that APF violated the registration, reporting, and disclosure requirements at AS 15.13.050(a), 15.13.040(d), 15.13.140(b), and 15.13.090.

C. The Commission improperly strung the communications together to create the appearance of guilt.

Unable to demonstrate that any individual communication violated Alaska's requirements, the Commission improperly aggregated the communications and APF's history to create an appearance of guilt. This is directly contrary to the standards the Supreme Court established in *WRTL II*, as well as to standards of evidence and proof required by due process.

“Evidence of other . . . acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith.” Alaska R. Evid. 404(b)(1); *see Berezyuk v. State*, 407 P.3d 512, 517 (Alaska Ct. App. 2017) (reversing conviction based on use of impermissible propensity evidence). But that is precisely what the Final Order does. It states that APF never spoke about ranked-choice voting before the initiative proposal, conveniently forgetting that APF's communications arose from the invitation to join Protect My Ballot's national campaign. Final Order at 4 [Exc. 149]; Answer, App. B ¶ 2 [Exc. 030]. It then aggregates cherry-picked quotations from six communications, without analyzing the communications as a whole, and finally declares that “there is

no other reasonable interpretation of these communications but as an exhortation to vote against” a ballot measure the communications never mention. *Id.* at 6 [Exc. 151]. That is, the Commission grouped these messages, hoping that together they would hint at advocacy that was not apparent in any message individually, to then argue that the individual communications at issue must have been advocacy against Ballot Measure 2. Liability cannot be imposed based on such propensity evidence. *See Diamond v. Platinum Jaxx, Inc.*, 446 P.3d 341, 347 (Alaska 2019) (applying propensity rule in civil cases).

Even if APOC somehow avoided Rule 404(b)’s prohibitions by arguing that the allegations were admissible to prove intent, the intent-based test it creates is prohibited by the First Amendment. To conclude that each of APF’s six messages were express communications, APOC had to go beyond each message’s content, seeking intent in APF’s larger educational campaign about ranked-choice voting.<sup>5</sup>

But looking beyond the communications’ four corners to divine intent is unconstitutional following the Supreme Court’s *WRTL II* decision. “An

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<sup>5</sup> In and of itself, the need to look for context beyond the four corners of APF’s messaging suggests that these messages are all subject to alternative reasonable interpretations other than exhorting a vote against Ballot Measure 2.

intent-based standard” like that used by APOC “offers no security for free discussion” and “could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to . . . penalties for another.” 551 U.S. at 468 (Roberts, C.J., controlling op.); *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (noting that requirements that distinguish between speakers, “allowing speech by some but not others,” are unconstitutional because they are “all too often simply a means to control content”). If a communication is the functional equivalent of express advocacy, it must be the functional equivalent of express advocacy for everyone posting it.

The Commission has created the unconstitutional, bizarre result that the Supreme Court decried, concluding that APF violated Alaska’s laws but that others did not, for the same communications. The Commission held that APF was liable for reposting the op-ed published in the Anchorage Daily News, reposting Protect My Ballot’s July 24, 2020 press release, and reposting Protect My Ballot’s YouTube video. But the Commission never pursued the Anchorage Daily News for publishing the op-ed, and it dismissed the complaint against Protect My Ballot, stating that the communications, when made by Protect My Ballot, were susceptible of other interpretations. Final Order at 7-8 [Exc. 152-53].

Furthermore, the process of imposing an intent-and-effect test unconstitutionally chills protected speech. Investigation and examination of “changes in the number of activities and the context of the activities” is part of APOC’s test. Staff Report at 13 [Exc. 054]. But the Supreme Court’s concern about an intent test stemmed precisely from the test’s tendency toward “a burdensome, expert-driven inquiry” aimed at ferreting out the speaker’s true state of mind. *WRTL II*, 551 U.S. at 469. Because “First Amendment freedoms need breathing space to survive” and “[a]n intent test provides none,” the Court affirmed its rejection of intent-based tests for political speech. *Id.* at 468-69 (quoting *NAACP*, 371 U.S. at 433).

The Final Order should be reversed because of the Commission’s use of improper propensity evidence and an unconstitutional intent-and-effect test.

#### IV. THE REGISTRATION, REPORTING, AND DISCLOSURE REQUIREMENTS VIOLATE EXACTING SCRUTINY

Alaska’s imposition on APF’s First Amendment rights cannot survive the exacting scrutiny required for compelled disclosure (reporting) and disclaimer (identification) requirements. *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (“*AFPF*”) (Roberts, C.J., plurality op.) (requiring exacting scrutiny); *Citizens United*, 558 U.S. at 366 (same). 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.” *AFPF*, 141 S. Ct. at 2383 (internal quotation marks omitted). And, because “fit matters,” the State must demonstrate that the burdens it imposes are “narrowly tailored to the government’s asserted interest.” *Id.* at 2383-84 (majority op.) (internal quotation marks omitted).

The Supreme Court has noted three interests that may support compelled disclosure—fighting actual or apparent corruption, combatting circumvention of contribution limits, and the informational interest, *Buckley*, 424 U.S. at 66-68, but only the informational interest can apply here. *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). And the registration, reporting, and identification requirements are not tailored to the informational interest.

A. 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. AS 15.13.040(d) (“making an independent expenditure”); AS 15.13.040(e)(5)

(“amount contributed by each contributor”). Furthermore, the identification requirement demands that speakers include their three largest contributors on the face of the communication, regardless of the size of their contributions. AS 15.13.090(a)(2)(C) (“three largest contributors”); AS 15.13.090(c) (required statement). That is, reporting is required even if the largest contributors made de minimis contributions. And registration is required before making any expenditure, no matter how small. AS 15.13.050(a).

Disclosure laws justified under the government’s informational interest must inform voters “concerning those who support” a candidate, *Buckley*, 424 U.S. at 81, and courts “must . . . analyze the public interest in knowing who is spending and receiving money to support or oppose a ballot issue.” *Sampson v. Buescher*, 625 F.3d 1247, 1256 (10th Cir. 2010). 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. *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”).

Moreover, reviewing a range of laws, courts have held that low thresholds are suspect. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 248-62 (2006) (Breyer, J., controlling op.); *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1278 (10th Cir. 2016) (“But at a \$3,500 contribution level, we cannot under *Sampson*’s reasoning characterize the disclosure interest as substantial.”); *Sampson*, 625 F.3d at 1260-61 (addressing “the public interest in disclosure” for spending less than \$2,179, holding that the “governmental interest . . . is minimal, if not nonexistent, in light of the small size of the contributions”). And the scrutiny only intensifies as the threshold goes to zero. *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 expenditure or contribution sinks to a negligible level” (emphasis removed)).

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. The requirements 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. Final Order at 7 [Exc. 152]. But the Commission failed to introduce evidence that expenditures on any communication individually were 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.

B. 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 state that they were "paid for by" APF and that its principal officer approved the communication. AS 15.13.090(a). 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 accusations of plagiarism and the expenses and burdens of copyright suits. 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 Anchorage Daily News op-ed, the July 24, 2020 press release, and the Protect My Ballot YouTube video.

C. There are less restrictive means than demanding on-communication disclosure.

The on-communication disclosure included in the identification requirement—that a speaker identify in its message its three largest contributors, AS 15.13.090(a)(2)(C)—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, as they are generally known, must instead meet exacting scrutiny. 558 U.S. at 366-67. Even under exacting scrutiny, though, “fit matters.” *AFPPF*, 141 S. Ct. at 2384 (internal quotation marks omitted). This means that any imposition on First Amendment freedoms “must be narrowly tailored to the interest it promotes.” *Id.* Therefore, Alaska “must demonstrate its need” for requirements that impose burdens on First Amendment freedoms “in light of any less intrusive

alternatives.” *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”).

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.” 378 F.3d 979, 981 (9th Cir. 2003). 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 between on-publication identity disclosure requirements and after-the-fact reporting requirements” is “constitutionally determinative.” *Id.* at 991.

More recently, the Supreme Court struck down a requirement that pregnancy centers put up notices notifying patients of other available services. *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2368-70 (2018) (“*NIFLA*”). 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.” *Id.* at 2375. There was a less restrictive alternative because, “obviously, [the state] could inform” the public itself, and thus avoid “burdening a speaker with unwanted speech.” *Id.* at 2376 (internal quotation marks omitted); *see also Riley v. Nat’l Fed’n of Blind*, 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).

Alaska wishes to burden APF with unwanted speech, with the name, city, and state of its three largest contributors. But, as in *Heller*, the distinction between disclosure on the face of a speaker’s message and after the fact reporting is “constitutionally determinative.” 378 F.3d at 991. And, as in *NIFLA*, if the state wants the public to have information about a speaker’s donors, it can publish the information in an easily accessible database. While the state may object that it is much easier and 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.” *NIFLA*, 138 S. Ct. at 2376 (internal quotation marks omitted); *see also McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (noting that “mere

convenience” and efficiency cannot satisfy tailoring). The on-communication disclosure provision of the identification requirements is unconstitutional.

#### CONCLUSION

For the foregoing reasons, the July 12, 2021 Final Order should be reversed and the Complaint against APF dismissed.

DATED this 17<sup>th</sup> day of December, 2021,

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*Counsel for Alaska Policy Forum*



CERTIFICATE OF COMPLIANCE

Pursuant to Alaska R. App. P. 513.5(c)(2), I certify that this document was prepared in 13-point Century Schoolbook font, complying with the typeface and point size requirements at Rule 513.5(c)(1)(B).

Dated: December 17, 2021

*/s/Shaunalee Nichols*

CERTIFICATE OF SERVICE

I certify a copy of this document was emailed to the following on the 17<sup>th</sup>  
day of December, 2021:

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*Counsel for Protect My Ballot*

Dated: December 17, 2021

/s/Shaunalee Nichols

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

---

ALASKA POLICY FORUM,  
*Appellant,*

v.

ALASKA PUBLIC OFFICES  
COMMISSION, YES ON 2 FOR BETTER  
ELECTIONS, and PROTECT MY  
BALLOT,  
*Appellees.*

Case No. 3AN-21-07137 CI

APOC No. 20-05-CD

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**APPELLANT'S EXCERPT OF RECORD**

Volume 1 of 1

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Appeal from the Alaska Public Offices Commission

HOLMES WEDDLE & BARCOTT  
Attorneys for Appellant

By: /s/ Stacey C. Stone

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I certify that on December 17, 2021,  
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## **Complaint by Yes on 2**

September 8, 2020

[SOA 00001-16]



# Alaska Public Offices Commission

# ARRIVED

SEP 08 2020  
APOC - ANCHORAGE  
PM HC FAX ELL



## COMPLAINT

FILING A COMPLAINT <i>To be accepted, complaint must include</i>	APOC LAWS ALLEGEDLY VIOLATED <i>Specify section of law or regulation</i>		APOC case name/number/date
1. Complainant's name + contact info 2. Respondent's name + contact info 3. Laws, regulations allegedly violated 4. Description of allegations 5. Basis of knowledge of alleged facts 6. Documentation to support allegations 7. Notarized signature of the complainant 8. Proof that complaint and all supporting documents were served on respondent	Campaign Disclosure Law Public Official Financial Disclosure Legislative Financial Disclosure Lobbying Regulation	<input checked="" type="checkbox"/> AS 15.13 <input checked="" type="checkbox"/> 2 AAC 50.250-405 <input type="checkbox"/> AS 39.50 <input type="checkbox"/> 2 AAC 50.680-799 <input type="checkbox"/> AS 24.60 <input type="checkbox"/> 2 AAC 50.680-799 <input checked="" type="checkbox"/> AS 24.45 <input checked="" type="checkbox"/> 2 AAC 50.550-590	20-05-CD

If complaint meets requirements for acceptance, APOC will investigate the allegations and notify the respondent of the right to respond. APOC will notify Complainant and Respondent when APOC accepts or rejects a complaint.

<input type="checkbox"/> APOC <input type="checkbox"/> Person <input type="checkbox"/> Party <input type="checkbox"/> Group	COMPLAINANT	<input checked="" type="checkbox"/> Person <input type="checkbox"/> Party <input checked="" type="checkbox"/> Group	RESPONDENT
	Yes for 2 for Better Elections		Person or group allegedly violating law Brett Huber Protect My Ballot Alaska Policy Forum
Address City / Zip	P.O. Box 210295, Anchorage, AK 99521	Please see attached supporting information and documentation, page 3, footnotes 10, 11, and 12.	
Phone/Fax	907-250-1125		
E-mail	Shae@AlaskansForBetterElections.com		
COMPLAINANT'S REPRESENTATIVE		RESPONDENT'S REPRESENTATIVE	

If complainant or respondent is political party or group, list contact person. If complainant or respondent is represented by attorney, list name + contact info

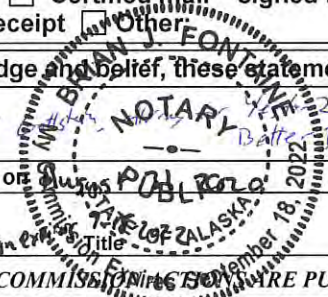
Name/Title	Samuel Gottstein, Esq., for Yes for 2 for Better Elections	Please see attached at page 3, footnotes 10, 11, and 12.	
Address	701 W. 8th Ave., Ste 700, Anchorage, AK 99501		
Phone/Fax	907-274-0666 / 907-277-4657		
E-mail	sgottstein@hwb-law.com		

DESCRIPTION or SUMMARY of ALLEGED VIOLATION	Use extra pages if needed	<input type="checkbox"/> SUPPORTING DOCUMENTS – DESCRIBE:
Please see attached supporting information and documentation.		Please see attached.

PROOF of SERVICE ATTACHED:  Fax – receipt confirmation  Certified mail – signed receipt  
 Process server – return of service  E-mail – delivery/read receipt  Other

COMPLAINANT'S SWORN STATEMENT: To the best of my knowledge and belief, these statements are true

Signature: Title: Samuel Gottstein, Esq. Date: 8-31-2020  
 Subscribed and sworn to or affirmed by me at Anchorage, Ak on August 31, 2020  
 Signature: Notary in for Alaska, my commission expires September 18, 2022



APOC COMPLAINTS, RESPONSES, INVESTIGATION REPORTS & COMMISSION FINDINGS ARE PUBLIC DOCUMENTS		
APOC ANCHORAGE	APOC JUNEAU	APOC COMPLAINT PROCESS: 2 AAC 50.450 - 476
2221 E. NORTHERN LIGHTS #128	240 MAIN STREET #500	FILING COMPLAINTS: 2AAC 50.870   ANSWERING COMPLAINTS: 2AAC 50.880
ANCHORAGE, AK 99508	P.O. BOX 110222	APOC CRITERIA for ACCEPTING COMPLAINTS: 2 AAC 50.870
907-276-4176 / FAX 907-276-7018	JUNEAU, AK 99811	INVESTIGATIONS & HEARINGS: 2 AAC 50.875-891
TOLL-FREE 800-478-4176	465-4864 / FAX 465-4832	RULES for REQUESTING EXPEDITED CONSIDERATION: AS15.13.380(c)
WEB: <a href="http://doa.alaska.gov/apoc/">http://doa.alaska.gov/apoc/</a>	APOC FORMS: <a href="http://doa.alaska.gov/apoc/forms_all.html">http://doa.alaska.gov/apoc/forms_all.html</a>	APOC LAWS: <a href="http://doa.alaska.gov/apoc/apoclaws.html">http://doa.alaska.gov/apoc/apoclaws.html</a>



August 31, 2020

To: Alaska Public Offices Commission  
From: Yes on 2 for Better Elections

Re: Supporting Information and Documentation for APOC Complaint Against Brett Huber, Alaska Policy Forum, and Protect My Ballot

### **Introduction and Parties**

Brett Huber is Governor Michael J. Dunleavy's former campaign manager and senior advisor. Huber has been actively opposing Ballot Measure 2, the Better Elections Initiative ("Ballot Measure 2"). Huber formalized his ongoing opposition on August 11, 2020, when he resigned from the Governor's office to work full-time for the campaign against Ballot Measure 2.<sup>1</sup> Huber claims to be operating this campaign.<sup>2</sup>

Protect My Ballot ("PMB") is a nationwide group openly campaigning against election reform measures, such as Ballot Measure 2, in multiple states. PMB's website not only generally campaigns against election reform measures, it also posts explicit materials advocating a "no" vote on measures in several states, including explicitly advocating a "no" vote on Ballot Measure 2.<sup>3</sup>

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<sup>1</sup> <https://www.adn.com/politics/2020/08/11/former-dunleavy-campaign-manager-leaves-administration-to-campaign-against-ranked-choice-voting/> [hereinafter Huber Article].

<sup>2</sup> *See id.*

<sup>3</sup> One page includes a piece titled "Ranked-Choice Voting and Ballot Measure 2 Should be Voted Down." <https://protectmyballot.com/ranked-choice-voting-and-ballot-measure-2-should-be-voted-down/>. Another page advocating a "no" vote is titled "Alaska's Election Initiative is Rank." <https://protectmyballot.com/alaskas-election-initiative-is-rank/>. Yet another piece opposes ranked choice voting generally, but includes a dateline from "Anchorage, Alaska" and leads with quotes from Bethany Marcum of the Alaska Policy Forum referring to Alaskans voting on this issue "in November," leading to the only reasonable conclusion that it is yet another piece in opposition to Ballot Measure 2. <https://protectmyballot.com/protect-my-ballot-new-campaign-exposes-flaws-in-ranked-choice-voting/>. All of these pieces are prominently linked on PMB's homepage. <http://protectmyballot.com/>.

The Alaska Policy Forum (“APF”) is a think-tank that visions itself as a protector of individual freedoms.<sup>4</sup> On July 24, APF announced itself as the leader of a “coalition” of state think tanks launching a “new campaign” opposed to ranked choice voting (“RCV”), a key element of Ballot Measure 2.<sup>5</sup> APF has provided material support to PMB, including: (1) promoting its explicit messages including specifically warning “Alaskans tak[ing] to the polls in November” against RCV;<sup>6</sup> (2) posting videos characterizing the reforms in Ballot Measure 2 as “threatening our democracy”;<sup>7</sup> (3) openly promoting links for, and driving traffic to [ProtectMyBallot.com](https://ProtectMyBallot.com);<sup>8</sup> and (4) given the amount of materials on the topic—and the explicit claim that the anti- Ballot Measure 2 coalition is “led by” APF—it is further believed that APF is providing in-kind staff time from Executive Director Bethany Marcum through time spent expending APF resources in targeted digital communications signed by her.<sup>9</sup>

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<sup>4</sup> See <https://alaskapolicyforum.org/aboutus/vision-mission/>.

<sup>5</sup> <https://alaskapolicyforum.org/2020/07/pr-exposing-flaws-rcv/> [hereinafter APF Press Release]. The title of this press release was “Protect My Ballot: New Campaign Exposes Flaws in Ranked Choice Voting. Coalition of state think thanks, led by Alaska Policy Forum, educates on pitfalls of this convoluted voting scheme.” *Id.* (emphasis added).

<sup>6</sup> *Id.*

<sup>7</sup> <https://alaskapolicyforum.org/2020/07/video-rcv-explained/>.

<sup>8</sup> See APF Press Release (specifically stating “[t]o learn more, visit [ProtectMyBallot.com](https://ProtectMyBallot.com)” (emphasis in original)).

<sup>9</sup> A sample 3-page email from July 24 is included as supporting documentation.



Collectively, Huber,<sup>10</sup> PMB,<sup>11</sup> and APF<sup>12</sup> are referred to herein as the “Respondents.”

### **Violations of Campaign Disclosure Law**

Respondents have engaged in the extensive campaign activities described above, including but not limited to video production, web registration and design, staff time for writing, press releases promoting the “launch” of this “new campaign”, salary or wages for Huber, and links promoting a “no” vote on Ballot Measure 2. But despite these wide-ranging activities, none of the Respondents have registered as a group with APOC, nor have they reported any of the donations received or expenditures made in opposition to Ballot Measure 2.

Because many of Respondents’ materials openly call for a “no” vote on Ballot Measure 2, and because the rest of their communications cannot be reasonably interpreted as anything but an exhortation to vote against the measure, they are all campaign activities and communications triggering registration and reporting with APOC.<sup>13</sup>

The scope of Respondents failure to report activities related to their self- described

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<sup>10</sup> Brett Huber Sr.’s contact information, required for the APOC complaint, is as follows:

Address: 2617 Shepherdia Drive Anchorage, AK 99508

Phone: 907-269-0084

Email: [brett.huber@gmail.com](mailto:brett.huber@gmail.com)

<sup>11</sup> As explained below, PMB appears to be a non-existent entity, which may in and of itself be a campaign law violation. Because Bethany Marcum is acting as the effective leader of PMB’s campaign-related activity on Ballot Measure 2 in Alaska, her contact information is used for purposes of the APOC complaint:

Bethany Marcum

Address: 7463 White Hawk Drive Anchorage, AK 99507

Phone: 907-334-5853

Email: [Bethany@AlaskaPolicyForum.org](mailto:Bethany@AlaskaPolicyForum.org)

<sup>12</sup> AFP’s contact information is as follows:

Address: 7926 Old Seward Highway, Suite A6 Anchorage, AK 99518

Phone: 907-334-5853

Email: [info@alaskapolicyforum.org](mailto:info@alaskapolicyforum.org)

<sup>13</sup> See AS 15.13.400(7) (defining “express communications”).

“new campaign” is unknown. But the website ProtectMyBallot.com was registered on November 6, 2019, and this registration was updated on July 13, 2020.<sup>14</sup> Therefore, at a minimum, Respondents have been making expenditures and failing to report them for over nine months.

APOC’s database was reviewed on August 31, 2020, and as of that date neither APF or PMB have registered as a group, entity, or campaign, nor have the entities reported any expenditures or donations related to the ongoing campaign activities described above. There are also no reports of any “in kind” staff time, nor any salary or debt under a contract to pay Huber.<sup>15</sup>

Alaska Statute 15.13.050(a) requires groups to register with APOC before making an expenditure in support or against a ballot measure. Alaska Statute 15.13.052 requires a group to establish a political activities account before making such an expenditure. Alaska Statute 15.13.110(g) requires periodic reports of all contributions received and expenditures made. Alaska Statute 15.13.110(h) requires all independent expenditures be reported within 10 days. Respondents have failed to comply with these statutes and, as APOC staff may determine, potentially others. In addition to daily fines accumulating for failing to register and report, APF and PMB must immediately identify all of their donors and the amounts donated.

Another related issue that has arisen is that PMB appears to be a non-existent entity (or be a fictional name for a collection of entities).<sup>16</sup> To the extent APF attempts to push its liability for reporting contributions and expenditures onto PMB, they could be violating

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<sup>14</sup> See <https://www.whois.com/whois/protectmyballot.com>.

<sup>15</sup> The article on Huber’s involvement running the campaign against Ballot Measure 2 strongly implied that he would be paid to work on the campaign “full time,” and that he would not be involved as a volunteer. See Huber Article.

<sup>16</sup> There is no such entity listed as “Protect My Ballot” according to the Alaska Department of Commerce, Community, and Economic Development. See <https://www.commerce.alaska.gov/cbp/main/search/entities> (last searched Aug. 31, 2020). Similarly, the IRS has no record of a non-profit entity by that name. See <https://www.commerce.alaska.gov/cbp/main/search/entities> (last searched Aug. 31, 2020).



AS 15.13.084(2) by trying to falsely report using a fictitious name or the name of another. APF appears to be the nexus of logistical, material, and financial support for the campaign against Ballot Measure 2 and must therefore report as such.

### **Violation of Lobbying Regulations**

In the process of assembling this complaint, it was discovered that APF has also apparently violated the APOC's regulations requiring reporting of expenses related to lobbying.

APF has never registered with APOC as a lobbying entity in Alaska.<sup>17</sup> In 2014, APF defended itself against accusations of improper lobbying, claiming that it does “not actively lobby.”<sup>18</sup> This claim is at odds with APF's 2018 990-EZ tax filing with the IRS that reported \$4,027 on “direct lobbying” of a legislative body.<sup>19</sup> This failure to report appears to violate AS 24.45 and following code sections.

Violations of AS 24.45 can lead to a \$10 fine per day for each day APF has been out of compliance.<sup>20</sup> Knowing violations (or knowingly aiding or abetting the violation of these statutes) can expose individuals to criminal penalties of up to \$1,000 and imprisonment of not more than one year—and it can expose entities involved in such conduct to fines up to \$10,000.<sup>21</sup>

### **The Alaska Policy Forum Obscures its Finances and is Run Primarily with “Dark Money”**

One of the reforms contained in Ballot Measure 2 is to require reporting of the “True Source” of donations to entities that make expenditures to impact candidate campaigns, thereby eliminating the existence of campaign spending for which the actual donor is

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<sup>17</sup> APOC's lobbying database was last accessed on August 31, 2020.

<sup>18</sup> See Letter to the Editor, Alaska Dispatch News, (Mar. 31, 2014) (authored by David Boyle, APF's then-Executive Director).

<sup>19</sup> [https://projects.propublica.org/nonprofits/display\\_990/264380206/08\\_2019\\_prefixes\\_26-26%2F264380206\\_201812\\_990EZ\\_2019082716600171](https://projects.propublica.org/nonprofits/display_990/264380206/08_2019_prefixes_26-26%2F264380206_201812_990EZ_2019082716600171).

<sup>20</sup> See AS 24.25.141.

<sup>21</sup> See AS 24.45.151.

unknown (commonly referred to as “Dark Money”). Respondents do not attack Ballot Measure 2 on this particular policy, yet it may be a motivating factor in their opposition, since APF does not disclose their donors.

Ironically, APF claims transparency is a core value—that they “highly value government and campaign transparency”<sup>22</sup>—yet they fail to live up to this ideal. As a 2014 Anchorage Daily News profile noted, “one of the values of the Alaska Policy Forum is not disclosing [their own] donors.”<sup>23</sup>

APF keeps its finances almost entirely secret. However, through extensive research of other non-profits’ tax filings who have donated to APF, sources were identified for half the funds that have gone to APF from 2009 - 2018. But as can be seen from the below research, the source of over \$400,000 of APF’s funds remains unknown:

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<sup>22</sup> <https://alaskapolicyforum.org/2018/10/outsidemoney-influencing-alaskas-november-election/>.

<sup>23</sup> <https://www.adn.com/politics/article/little-known-think-tank-shapes-public-policy-discussion/2014/09/15/>.

<b>Year</b>	<b>Total Contrib. To APF<sup>24</sup></b>	<b>Total Contrib. Identified<sup>25</sup></b>	<b>Total Contrib. Dark<sup>26</sup></b>	<b>Dark Money %<sup>27</sup></b>
2018	\$149,708.00	\$106,800.00	\$42,908.00	29%
2017	\$13,928.00	\$1,000.00	\$12,928.00	93%
2016	\$23,916.00	\$7,900.00	\$16,016.00	67%
2015	\$26,478.00	\$7,800.00	\$18,678.00	71%
2014	\$70,161.00	\$0.00	\$70,161.00	100%
2013	\$119,400.00	\$78,000.00	\$41,400.00	35%
2012	\$56,386.00	\$36,000.00	\$20,386.00	36%
2011	\$36,064.00	\$10,000.00	\$26,064.00	72%
2010	\$291,683.00	\$148,580.00	\$143,103.00	49%
2009	\$63,405.00	\$50,000.00	\$13,405.00	21%
<b>Total</b>	<b>\$851,129.00</b>	<b>\$446,080.00</b>	<b>\$405,049.00</b>	<b>48%</b>

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<sup>24</sup> “Total Contrib. to APF” is the amount of contributions APF reported receiving in that year.

<sup>25</sup> “Total Contrib. Identified” is the amount of contributions from that year that research has connected to a source of the contribution.

<sup>26</sup> “Total Contrib. Dark” is the amount of APF contributions that do not have an identified donor source.

<sup>27</sup> “Dark Money %” is the percent of dark funding in the total contributions to APF.



**Confirmed Contributions To Alaska Policy Forum**

<b>Year</b>	<b>Group</b>	<b>Location</b>	<b>Amount</b>	<b>Source</b>
2019	Lynde And Harry Bradley Foundation	Milwaukee, WI	\$70,000.00	<u>Bradley Foundation 2019 Annual Report</u>
2018	Donors Trust	Alexandria, VA	\$100,300.00	<u>Donors Trust 2018 Form 990</u>
2018	Nicole Laurel Cuddy Foundation	Anchorage, AK	\$6,500.00	<u>Nicole Laurel Cuddy Foundation 2018 Form 990</u>
2017	Nicole Laurel Cuddy Foundation	Anchorage, AK	\$1,000.00	<u>Nicole Laurel Cuddy Foundation 2017 Form 990</u>
2016	Nicole Laurel Cuddy Foundation	Anchorage, AK	\$7,900.00	<u>Nicole Laurel Cuddy Foundation 2016 Form 990</u>
2015	Nicole Laurel Cuddy Foundation	Anchorage, AK	\$7,800.00	<u>Nicole Laurel Cuddy Foundation 2015 Form 990</u>
2010	Atlas Economic Research Foundation	Washington, DC	\$6,580.00	<u>Atlas Economic Research Foundation 2010 Form 990</u>
2009	Donors Capital Fund	Alexandria, VA	\$50,000.00	<u>Donors Capital Fund 2009 Form 990</u>
<b>Total</b>			<b>\$516,080.00</b>	

Because APF obscures its finances from public view, it is especially important that APOC act to compel disclosure of the sources funding their campaign against Ballot Measure 2.

**Conclusion**

This complaint establishes that Respondents have collectively been preparing and making expenditures in support of a campaign against Ballot Measure 2 since at least November 2019. More recently, in July 2020, Respondents formally “launched” their “new campaign” against the measure. Yet despite this formal launch, Respondents continue to flout Alaska’s campaign finance and lobbying disclosure laws.

Although an expedited proceeding is not requested, it is of the utmost importance that the Commission take action and address these issues well in advance of the November 3 general election, when the fate of Ballot Measure 2 will be decided.

**From:** Bethany Marcum <bethany@alaskapolicyforum.org>

**Date:** July 24, 2020 at 05:45:12 AKDT

**To:** [REDACTED]

**Subject:** Begich, Parnell Co-Sign Wall Street Journal Op-Ed Against Ranked Choice Voting

Hi [REDACTED],

Today, Alaska Policy Forum, in partnership with other state-based think tanks, is launching a national educational campaign, Protect My Ballot, to inform the public on the harms of Ranked Choice Voting (RCV).

The campaign includes a website, [ProtectMyBallot.com](https://ProtectMyBallot.com), highlighting bipartisan opposition to Ranked Choice Voting, and an explainer video that details how the electoral scheme works and why it disenfranchises voters and decreases voter turnout.

You can visit the campaign website [here](#), and watch the video [here](#).

Today, *The Wall Street Journal* ran an [op-ed](#) by Mark Begich, the former Democratic Senator from Alaska, and Sean Parnell, the former Republican Governor of Alaska, on the dangers of Ranked Choice Voting.

A full press release is below. If you would like more details about Ranked Choice Voting or the campaign, please don't hesitate to reach out.

Thank you,

Bethany

--

Bethany Marcum

Executive Director

Alaska Policy Forum

(907) 440-7000

**FOR IMMEDIATE RELEASE**

## **Protect My Ballot: New Campaign Exposes Flaws in Ranked Choice Voting**

*Coalition of state think tanks, led by Alaska Policy Forum, educates on pitfalls of this convoluted voting scheme*

SEP 08 2020



**Anchorage, Alaska (Friday, July 24, 2020)**—Today, a coalition of state-based think tanks, led by Alaska Policy Forum, launched the national education campaign Protect My Ballot. The campaign details the harmful consequences of an electoral scheme known as Ranked Choice Voting (RCV).

The campaign highlights bipartisan opposition to RCV—ranging from California Governor Gavin Newsom, to Alaska's former Democratic Senator Mark Begich, to members of the NAACP New York State Conference—along with a list of localities that have repealed RCV.

View the campaign website at [ProtectMyBallot.com](https://ProtectMyBallot.com). View a brief explainer video on Ranked Choice Voting [here](#).

Unlike a traditional election where voters select one candidate and the candidate with the most votes wins, under RCV, voters are expected to rank candidates. If no candidate receives a majority of votes in the first round of counting, the candidate with the fewest votes is eliminated. The process repeats until a remaining candidate receives a majority of votes.

This confusing process leads to many unintended consequences. For instance, if a voter misunderstands the process or chooses not to rank all candidates, her ballot could be eliminated from consideration. It's as though she never showed up on election day. That may explain why a handful of jurisdictions that previously adopted and tested RCV, have since repealed it.

Research also casts doubt on proponents' claims about the benefits of RCV. According to [research](#) from Jason McDaniel, an associate professor of political science at San Francisco State University, voter turnout decreased (three to five percentage points on average) in cities where RCV was used.

Coalition members released the following statements:

Bethany Marcum, Executive Director at Alaska Policy Forum:

“As Alaskans take to the polls in November, history should provide a warning for what Ranked Choice Voting would lead to. Not only can Ranked Choice Voting cause votes to be discarded, research shows it also decreases voter turnout. We need to encourage Americans of all backgrounds to visit the polls, not give them another reason to avoid casting a ballot.”

Annette Meeks, Founder and CEO of the Freedom Foundation of Minnesota:

“Public participation in elections is vital for a democracy to work. Discouraging and complicating the system threatens the people's voice. That's why a bipartisan coalition of citizens and legislators wants to ban ranked choice voting in Minnesota.”

Trent England, Executive Vice President of the Oklahoma Council of Public Affairs:

“Ranked Choice Voting is not the solution for election reform. In Oklahoma, our Chief Election Official has opposed this system. Not only does it disenfranchise voters, but implementing it in Oklahoma would be a logistical nightmare.”

SEP 12 2020

**AFFIDAVIT - RETURN OF SERVICE**

**FILE STAMP**

YES FOR 2 FOR BETTER ELECTIONS

Plaintiff(s),

vs.

BRETT HUBER, PROTECT MY BALLOT FORUM, ALASKA POLICY FORUM

Defendant(s).

I solemnly swear or affirm that on 9/1/2020, at 7:39 PM, I served the following documents:

ALASKA PUBLIC OFFICES COMISSION COMPLAINT, ATTACHMENTS

upon the therein named BETHANY MARCUM FOR PROTECT MY BALLOT FORUM at 7463 WHITE HAWK DRIVE, ANCHORAGE, ALASKA 99507, by handing and leaving a true and correct copy with BETHANY MARCUM.

Process Server Notes:

RUSH

*Terrence Glaze*  
TERRENCE GLAZE  
Civilian Process Server

SUBSCRIBED AND SWORN to or affirmed before me this September 03, 2020 in Anchorage, Alaska.

Client: HOLMES WEDDLE & BARCOTT, PC  
Client Contact: BRIAN  
File Number: 7349-32430

Notary Public in and for the State of Alaska  
My Commission Expires: 8/1/2021



**North Country Process, Inc.**  
**P.O. Box 101126**  
**Anchorage, Alaska 99510**  
**Office: (907) 274-2023**  
**Fax Line: (907) 274-2823**

[NCPI@alaska.net](mailto:NCPI@alaska.net)

Service Fee [Rule 11(a)(1)(i/ii)]: \$45.00  
Mileage Fee [Rule 11(a)(7)]: \$20.00

Return No.: 197701

**Total Recoverable Fees per Admin Rule 11: \$65.00**  
Endeavor Fee: \$15.00  
**Total Non-Recoverable Fees per Admin Rule 11: \$15.00**  
**Total Service Fees: \$80.00**

**SEP 08 2020**

# AFFIDAVIT - RETURN OF SERVICE

FILE STAMP

YES FOR 2 FOR BETTER ELECTIONS

Plaintiff(s),

vs.

BRETT HUBER, PROTECT MY BALLOT FORUM, ALASKA POLICY FORUM

Defendant(s).

I solemnly swear or affirm that on 9/2/2020, at 1:59 PM, I served the following documents:

ALASKA PUBLIC OFFICES COMISSION COMPLAINT, ATTACHMENTS

upon the therein named BRETT HUBER, SR. at 2617 SHEPHERDIA DRIVE, ANCHORAGE, ALASKA 99508, by handing and leaving a true and correct copy with BRETT HUBER, SR.

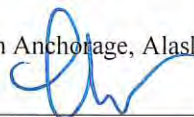
Process Server Notes:

RUSH



DOUGLAS CALLISON  
Civilian Process Server

SUBSCRIBED AND SWORN to or affirmed before me this September 03, 2020 in Anchorage, Alaska.



Notary Public in and for the State of Alaska  
My Commission Expires: 8/1/2021

Client: HOLMES WEDDLE & BARCOTT, PC

Client Contact: BRIAN

File Number: 7349-32430

**North Country Process, Inc.**  
**P.O. Box 101126**  
**Anchorage, Alaska 99510**  
**Office: (907) 274-2023**  
**Fax Line: (907) 274-2823**

[NCPI@alaska.net](mailto:NCPI@alaska.net)



Service Fee [Rule 11(a)(1)(i/ii)]: \$45.00  
Mileage Fee [Rule 11(a)(7)]: \$20.00

**Total Recoverable Fees per Admin Rule 11: \$65.00**  
Endeavor Fee: \$15.00  
**Total Non-Recoverable Fees per Admin Rule 11: \$15.00**  
**Total Service Fees: \$80.00**

Return No.: 197699

SEP 08 2020



AFFIDAVIT - RETURN OF SERVICE

FILE STAMP

YES FOR 2 FOR BETTER ELECTIONS

Plaintiff(s),

vs.

BRETT HUBER, PROTECT MY BALLOT FORUM, ALASKA POLICY FORUM

Defendant(s).

I solemnly swear or affirm that on 9/2/2020, at 1:12 PM, I served the following documents:

ALASKA PUBLIC OFFICES COMISSION COMPLAINT, ATTACHMENTS

upon the therein named ALASKA POLICY FORUM at 7926 OLD SEWARD HIGHWAY, STE. A6, ANCHORAGE, ALASKA 99518, by handing and leaving a true and correct copy with MELODIE, ASSOCIATE DIRECTOR.

Process Server Notes:

RUSH

[Signature]

DOUGLAS CALLISON
Civilian Process Server

SUBSCRIBED AND SWORN to or affirmed before me this September 03, 2020 in Anchorage, Alaska.

[Signature]

Notary Public in and for the State of Alaska
My Commission Expires: 8/1/2021

Client: HOLMES WEDDLE & BARCOTT, PC
Client Contact: BRIAN
File Number: 7349-32430



Service Fee [Rule 11(a)(1)(i/ii)]: \$45.00
Mileage Fee [Rule 11(a)(7)]: \$20.00

North Country Process, Inc.
P.O. Box 101126
Anchorage, Alaska 99510
Office: (907) 274-2023
Fax Line: (907) 274-2823

NCPI@alaska.net

Return No.: 197700

Total Recoverable Fees per Admin Rule 11: \$65.00
Endeavor Fee: \$15.00
Total Non-Recoverable Fees per Admin Rule 11: \$15.00
Total Service Fees: \$80.00

SEP 08 2020

Matthew Gagnon, CEO of Maine Policy Institute:

"Whether you examine data captured during Maine's brief experience with ranked-choice voting or the experiences of other jurisdictions, the lofty claims used to sell this voting system to the general public do not withstand factual scrutiny. Voters should be skeptical when they hear from special interest groups trying to change the way we exercise our sacred right to vote."

*Protect My Ballot coalition members include Alaska Policy Forum, Maine Policy Institute, Freedom Foundation of Minnesota, and the Oklahoma Council of Public Affairs*

*To learn more, visit [ProtectMyBallot.com](https://ProtectMyBallot.com).*

###

This email was sent to [REDACTED]

Alaska Policy Forum, 7926 Old Seward Highway, Suite A6, Anchorage, AK 99518, USA

[Unsubscribe](#)

SEP 08 2020

# **Answer by Alaska Policy Forum**

September 24, 2020

[SOA 000017-30]

**ARRIVED**

**APOC - ANCH  
PM HC FAX ELE**

September 24, 2020

TO: Alaska Public Offices Commission

From: Alaska Policy Forum

Re: Response to APOC Complaint 20-05-CD

Introduction and Overview of “Protect My Ballot”

A recent complaint to the Alaska Public Offices Commission (APOC) from the “Yes on 2 for Better Elections” ballot committee makes a series of specious and false allegations regarding the public education activities of Alaska Policy Forum (APF), a §501(c)(3) charitable nonprofit organization. APF hereby responds to the allegations, provides defenses, objects to the complaint, and provides relevant documentation.

APF has a multi-year track record of publishing educational materials on the integrity of elections—and well-established skepticism of efforts to change the status quo.<sup>1</sup> In 2016, for instance, APF wrote a detailed analysis of a voter registration scheme that could have forced the state towards universal use of mail-ballots.<sup>2</sup> (This concern turned out to be prescient in 2020, although not for reasons APF could have predicted at the time.)

Given this history, APF enthusiastically agreed in January 2020 to join as a founding member a national coalition called Protect My Ballot, which is focused on educating the public on the potential risks and consequences of a voting scheme called Ranked Choice Voting. The coalition was organized by the Washington, DC-based §501(c)(3) nonprofit Employment Policies Institute Foundation (EPIF), which owns the web domain ProtectMyBallot.com and has registered Protect My Ballot as a trade name (See Appendix A.)<sup>3</sup>

Other Protect My Ballot coalition members include nonprofits in Minnesota, Maine, Massachusetts, and Oklahoma.

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<sup>1</sup> <https://alaskapolicyforum.org/?s=elections>

<sup>2</sup> <https://alaskapolicyforum.org/2016/11/voter-registration-and-broken-promises/>

<sup>3</sup> EPIF has worked with state-based think tanks dating back to 2012.

Absent from this list of coalition participants is Mr. Brett Huber, who is also named with APF in the complaint. Neither APF, EPIF, or anyone associated with the Protect My Ballot coalition has communicated with Brett Huber regarding campaign activities against Ballot Measure 2—much less provided “salaries or wages” for Huber, as the Yes on 2 complaint alleges. (The complaint provides no evidence to support this allegation.) The Yes on 2 complaint’s allegation that “Huber claims to be operating this campaign” is false. Mr. Huber may or may not be involved in a campaign against Ballot Measure 2, but he is not associated with APF or the Protect My Ballot coalition.

The Protect My Ballot website presents detailed information on the following topics:

1. How Ranked Choice Voting works;
2. Documented consequences of Ranked Choice Voting;
3. Testimonials from elected officials in markets where Ranked Choice Voting was implemented;
4. A list of locations that have repealed Ranked Choice Voting; and
5. Common questions and answers about Ranked Choice Voting.

At the bottom of the website, a “Media and Research” section collects recent relevant news stories, op-eds and other information on Ranked Choice Voting. (Of the eight linked articles, just two concern Alaska.) A review of the website demonstrates that the Yes on 2 complaint’s allegation that Protect My Ballot is “openly campaigning against election reform measures, such as Ballot Measure 2, in multiple states” is demonstrably false. The information is clearly issue-oriented and unless a linked article references a state ballot measure, there is no mention of Ranked Choice Voting measures on any ballot, including in Alaska, or a reference to the November election.

The Protect My Ballot education campaign launched on July 24, 2020.<sup>4</sup> APF emailed a press release to a national media list, and to an Alaska-specific list. The coalition members in Maine and Minnesota emailed their own press releases to local reporters in their states.

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<sup>4</sup> On July 13th, 2020, in advance of the launch, EPIF set up the draft website at a real domain. See Appendix A.



None of the media quotations or press materials from APF or Protect My Ballot advocates for or against Ballot Measure 2. In fact, the July 24th press release does not refer to any ballot measure generally, nor does it specifically mention Ballot Measure 2.

By the Yes on 2 campaign's own description, Measure 2 is a three-part proposal of which Ranked Choice Voting is but one part.<sup>5</sup> APF has not produced educational material on two of the three pieces of Ballot Measure 2.

The preceding facts make clear that the "Yes on 2" complaint made basic faulty assumptions and conclusions in many of its allegations, which demand a dismissal of the complaint.

- Contrary to the Yes on 2 allegations, Brett Huber has had no interaction with APF, EPIF, or Protect My Ballot "concerning the formation of PMB" or "arrangements ... concerning any work to be performed in connection with APF's mission in connection with Ranked Choice Voting";
- Contrary to the Yes On 2 allegations, neither APF nor EPIF engaged in "extensive campaign activities" against Ballot Measure 2 nor do "many of Respondents' materials openly call for a 'no' vote on Ballot Measure 2." Indeed, the complaint's only cited example of said "campaign activities" are two links at the bottom of the webpage to relevant articles critical of Ranked Choice Voting in Alaska. (The "Yes on 2" complaint also incorrectly describes these articles as being linked "prominently"; a visitor who fails to scroll to the very bottom of the page would miss them.) Neither of these articles were written by APF and both were published elsewhere first. The first article cited was previously published in the *Anchorage Daily News* by a former lieutenant governor of Alaska. The second cited article is an op-ed by former Senator Mark Begich and former governor Sean Parnell which was published in the *Wall Street Journal*.
- APF has engaged in issue discussion by talking generally about Ranked Choice Voting, without reference to Measure 2. These educational materials do not turn the coalition into an "anti-Ballot Measure 2 coalition" as Yes on 2 alleges. These educational materials, which describe how Ranked Choice Voting works, voter confusion, problems resulting from Ranked Choice Voting, and jurisdictions which have tried and discarded

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<sup>5</sup> <https://alaskansforbetterelections.com/about/>

Ranked Choice Voting, are providing educational information concerning the topic of Ranked Choice Voting and therefore, is susceptible of a reasonable interpretation other than an exhortation to vote one way or the other. See AO 19-04-CD at 5.

- The Yes on 2 complaint admits that a third article (*Protect My Ballot: New Campaign Exposes Flaws in Ranked Choice Voting*) contains no advocacy regarding Measure 2, but argues that the only reasonable conclusion is “opposition to Ballot Measure 2” simply because it leads with a quote from Ms. Marcum of APF which mentions that “Alaskans take to the polls in November” and it has a dateline of “Anchorage, Alaska.” Ms. Marcum’s quote, when read as a whole and with limited reference to outside events, is susceptible of a reasonable interpretation other than an exhortation to vote against Measure 2. Ms. Marcum does not mention Measure 2 specifically but does mention what Ranked Choice Voting could lead to, including causing votes to be discarded and decreased voter turnout. While describing Ranked Choice Voting as leading to discarding of votes and decreased voter turnout might be interpreted by readers who are aware of the proposition as a message in opposition to Measure 2, it is not the only reasonable interpretation of the educational activity. See AO 19-04-CD at 4. This statement, and other portions of the press release which talk about confusion that often results, could be interpreted as urging voters to think about the history of Ranked Choice Voting and what it would mean generally. Further, like the nonprofit organization in AO 19-04-CD, APF’s press release, when taken as a whole, is susceptible of a reasonable interpretation other than to vote against Measure 2 because it provides neutral information about Ranked Choice Voting, namely that jurisdictions which have considered Ranked Choice Voting have repealed it and that it has led to voter confusion and lower voter turnout.
- Contrary to the Yes on 2 complaint, neither APF nor EPIF has been “making expenditures for over nine months.” Rather, the web domain for Protect My Ballot—a *national* Ranked Choice Voting education campaign—was registered in November 2019. APF did not even join this national education coalition—a coalition never intended to engage in state ballot measure fights—for another two months. In fact, Ranked Choice Voting is not even on the statewide ballot in half of the states of Protect My Ballot coalition members.

In conclusion, neither APF nor EPIF have registered with APOC regarding “an expenditure in support of or against a ballot proposition,” because neither organization has made such expenditures. See, e.g., Advisory Opinion 19-04-CD at 6 (APOC finding that the term contribution does not include costs that a media organization incurs in covering or carrying a news story, editorial, or commentary).

To be clear: Both APF and the Protect My Ballot coalition are directly critical of Ranked Choice Voting, which is but one component of Ballot Measure 2. But this criticism in itself does not qualify as an expenditure. APOC addressed a similar situation in a 2019 advisory opinion concerning the Section 501(c)(3) nonprofit Bags for Change:

“Bags for Change (BFC) is a Sitka, Alaska unincorporated nonprofit association that has been educating the public about the negative effects related to plastics in general and plastic bags in particular since 2016. ... On March 15, 2019, a citizen initiative for a disposable plastic shopping bag prohibition enacting a fee and fine schedule was filed with the Sitka City Clerk and approved for signature gathering on March 22, 2019. ...

BFC does not desire to form a group that will seek contributions or make expenditures supporting or opposing the Initiative, but does desire to educate the public concerning both the reasons for the Initiative and the costs to the public and merchants if the Initiative passes. ... If BFC continues to educate the public concerning the harmful effects of plastics in general and plastic bags in particular, will it trigger a registration or reporting requirement?”<sup>6</sup>

APOC’s response was a “Qualified no,” with the Commission explaining that BFC’s language must “not amount to the functional equivalent of an exhortation to vote for the Initiative.” Therefore, as long as educational efforts regarding an issue do not amount to the functional equivalent of an exhortation to vote for or against an initiative, they will not trigger a registration or reporting requirement.

### Other Allegations

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<sup>6</sup> Advisory Opinion 19-04-CD (July 1, 2019) at 1, 2.

The remainder of the “Yes on 2” complaint does not concern Ballot Measure 2, but raises several red herrings which can be quickly dismissed. The complaint cites APF’s 2018 990-EZ filing with the IRS, which shows \$4,027 in “direct lobbying expenses,” and alleges that APF should have “registered with APOC as a lobbying entity in Alaska.”

APF has a federal “h election” which allows for limited lobbying, including federal, state and local. For state lobbying activities, APF has never reached the time threshold of 10 hours in any 30-day period in a calendar year for lobbying registration. Of this \$4,027 amount, a portion of it was related to federal lobbying.

“Yes on 2” concludes its complaint with an unrelated and irrelevant attack on donor privacy. Yes on 2 cites no evidence or support for its “dark money” arguments and therefore, APF struggles to understand the relevance of these attacks as well as what law Yes on 2 believes APF has violated.<sup>7</sup> To the extent that Yes on 2 is arguing that APF’s “motive” in becoming involved in Ranked Choice Voting is to secretly defeat donor disclosure measures within Ballot Measure 2, this too is irrelevant and provides no basis upon which to investigate. Even if this were APF’s motivating factor for becoming involved in Ranked Choice Voting (which it is not), it is not illegal nor anything upon which APOC could find a violation. Indeed, were Measure 2 to pass, it would not impact APF nor require APF to disclose its donors.

Ballot Measure 2, which Yes on 2 claims would require reporting of donations to entities which make expenditures to impact candidate campaigns, is not in effect. Further, as a Section 501(c)(3) organization, APF is prohibited under the Internal Revenue Code from making expenditures “to impact candidate campaigns.” Therefore, even if Ballot Measure 2 passes, APF will not have to disclose its donors because it cannot make political expenditures. APF is a Section 501(c)(3) charitable non-profit and under federal law, the privacy of its donors is protected. Per IRS regulations, contributors’ identities are not subject to disclosure. APF is not

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<sup>7</sup> As already demonstrated above, APF has not engaged in activity which requires registration and/or reporting under Alaska law. APF’s motive for engaging in educational activities regarding Ranked Choice Voting is irrelevant.

engaged in activity triggering disclosure of its donors and therefore, Yes on 2's efforts to force disclosure of APF's donors must fail.<sup>8</sup>

### Conclusion

The "Yes on 2" complaint is a factually deficient attempt to stifle APF's freedom of speech. As established in the preceding pages, APF's participation in the Protect My Ballot national education campaign is not an "expenditure" under the state's election law. In fact, a prior Advisory Opinion from APOC addressed a similar situation to the present one, and determined that such activity does not require registration. The Yes on 2 complaint must be dismissed without further action.

In the appendices, APF has attached the additional documents requested by APOC.

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<sup>8</sup> Yes on 2 conflates arguments about transparency. Transparency as to *campaigns and governments* has been upheld by various courts, including the Supreme Court, but is almost always found unconstitutional as to non-profit organizations like APF, which do not engage in activities for which there is a constitutional basis upon which to require donor disclosure.

Note: EPIF is managed by the firm Berman and Company.

Initial File #: 942083

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS  
CORPORATIONS DIVISION



**C E R T I F I C A T E**

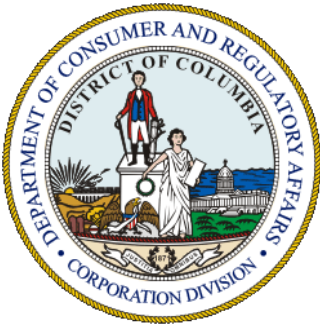
**THIS IS TO CERTIFY** that all applicable Trade Name requirements of the Omnibus Regulatory Reform Act of 1998 have been complied with and accordingly, this **CERTIFICATE OF TRADE NAME REGISTRATION** is hereby issued to:

EMPLOYMENT POLICIES INSTITUTE FOUNDATION

**Trade Name:** Protect My Ballot

**IN TESTIMONY WHEREOF I** have hereunto set my hand and caused the seal of this office to be affixed as of 8/9/2020 11:35 PM

Business and Professional Licensing Administration



*Josef G. Gasimov*

JOSEF G. GASIMOV  
Superintendent of Corporations,  
Corporations Division

Muriel Bowser  
Mayor

Tracking #: cFQSVGS4

# protectmyballot.com

is set to automatically renew in **52 days**

Domain Protection Plan: Full Protection [Manage](#) ▾

## Contact Information

[Edit](#)

Updating this contact info won't expose it as long as privacy is on.

Company: Berman and Company  
[Employee name redacted for personal privacy.]  
Address: 1090 Vermont Ave NW  
Suite 800  
Washington, District of Columbia  
us 20005  
Telephone: 2024637100  
Email: webmaster@bermanco.com

Date ▾	Action	User	Domain	
Jul 13, 2020	Speed change setting	webmaster@bermanco.com	protectmyballot.com	▶
Jul 13, 2020	Speed change setting	webmaster@bermanco.com	protectmyballot.com	▶
Jul 13, 2020	Crypto change setting	webmaster@bermanco.com	protectmyballot.com	▶
Jul 13, 2020	Nameservers confirmed	webmaster@bermanco.com	protectmyballot.com	▶
Jul 13, 2020	Crypto change setting	webmaster@bermanco.com	protectmyballot.com	▶
Jul 13, 2020	Rec add	webmaster@bermanco.com	protectmyballot.com	▶
Jul 13, 2020	Rec add	webmaster@bermanco.com	protectmyballot.com	▶
Jul 13, 2020	Rec add	webmaster@bermanco.com	protectmyballot.com	▶
Jul 13, 2020	Tls settings deployed	Cloudflare	protectmyballot.com	▶
Jul 13, 2020	Pending	webmaster@bermanco.com	protectmyballot.com	▶
Jul 13, 2020	Network change setting	webmaster@bermanco.com	protectmyballot.com	▶
Jul 13, 2020	Add	webmaster@bermanco.com	protectmyballot.com	▶
Jul 13, 2020	Login	webmaster@bermanco.com	Account	▶

## Appendix B: Responses to APOC Document Requests

1. Please describe in detail, the organizational structure of APF. This description should include any officers or directors or other persons/organizations performing a similar function to an officer or director of a corporation.
  - a. APF is a Section 501(c)(3) nonprofit. Attached as Appendix C is our IRS recognition letter and a document listing our board members and officers.
2. Please produce all correspondence between Huber, PMB and APF concerning the formation of PMB from September 1, 2019 through September 8, 2020. For purposes of this request, all correspondence includes correspondence by any means including electronic mail and social media platforms.
  - a. There is no correspondence to produce. APF was contacted by phone by EPIF in January 2020 regarding a coalition of organizations that would provide education on election process issues. We affirmed our interest and explained at that time that we are a Section 501(c)(3) and thus would only participate in educational efforts. It was confirmed that the coalition would only be doing educational work.
3. Please produce all correspondence between APF and the constituent members of PMB concerning the formation of PMB from September 1, 2019 through September 8, 2020. For purposes of this request, correspondence includes correspondence by any means including electronic mail and social media platforms.
  - a. There is no correspondence to produce. Bethany Marcum made phone calls to other non-profit organization CEOs with whom she was familiar and explained the educational efforts that would ensue, and invited them to participate.
4. Please identify the owner of the PMB web domain purchased on November 6, 2019; and any rules for public access to domain ownership details.
  - a. See Appendix A.
5. Please describe in detail the changes made in the PMB web domain on July 13, 2020; any changes in ownership that may have occurred at that time; and any changes to the rules set up for public access to domain details.
  - a. See Appendix A. On July 13th, 2020, in advance of the launch, EPIF set up the draft website at a real domain.
6. Please provide any written agreements between Huber and PMB concerning any work to be performed in connection with PMB's mission in connection with ranked choice voting.
  - a. APF has never had any agreements (written or verbal) nor associations of any kind with Huber, nor any written agreement with PMB.
7. Please describe in detail any oral arrangements between Huber and APF concerning any work to be performed in connection with APF's mission in connection with ranked choice voting.
  - a. APF does not have, nor has it ever had any agreements (written or verbal) nor associations of any kind with Huber. Mr. Huber does not perform any work for APF concerning Ranked Choice Voting.
8. Please provide a list of all purchases, transfers 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 furthering APF's mission in connection with ranked choice



voting from September 1, 2019 through September 8, 2020. For each, provide the value and a description of the transaction.

- a. By responding to this request, APF does not admit that its disbursements for furthering its educational mission in connection with Ranked Choice Voting constitute reportable expenditures. APF believes that these disbursements are not relevant because they are not expenditures and therefore not required to be disclosed. Without conceding the foregoing, APF states that it has disbursements in the form of staff time to review educational content, send out press releases, etc. for three employees, at 25 hours, for a cost of \$643.20.

Appendix C: APF Board, IRS Approval



Board of Directors

*As of June 2020*

Seat Number	Filled	Term & Year	Election Schedule	Next Election	Currently Held By
Seat #1	2019	Term 1, Year 1	Odd Years	2021	Nick Begich, III
Seat #2	NA	Term 1, Year 3	Odd Years	2022	VACANT
Seat #3	2018	Term 3, Year 2	Even Years	2020	Paula Easley
Seat #4	2018	Term 1, Year 2	Even Years	2020	Jodi Taylor
Seat #5	2019	Term 3, Year 1	Odd Years	2021	Bob Griffin
Seat #6	2018	Term 1, Year 2	Even Years	2020	Ann Brown
Seat #7	2018	Term 1, Year 2	Even Years	2020	Jess Ellis
Seat #8: Non-Anchorage	2019	Term 1, Year 1	Odd Years	2021	Win Gruening
Seat #9: Non-Anchorage	2020	Term 1, Year 1	Even Years	2022	Walter Campbell

Officer	Held By
President	Nick Begich
Vice President	Ann Brown
Secretary	Bethany Marcum
Treasurer	Melodie Wilterdink
Other: Governance Cmte Chair	Ann Brown

INTERNAL REVENUE SERVICE  
P. O. BOX 2508  
CINCINNATI, OH 45201

DEPARTMENT OF THE TREASURY

Date **SEP 03 2009**

ALASKA POLICY FORUM INC  
201 BARROW ST BOX 8 STE 101  
ANCHORAGE, AK 99501-2429

Employer Identification Number:  
26-4380206  
DLN:  
17053208339009  
Contact Person:  
WINNIE W LEE ID# 31208  
Contact Telephone Number:  
(877) 829-5500  
Accounting Period Ending:  
December 31  
Public Charity Status:  
170(b)(1)(A)(vi)  
Form 990 Required:  
Yes  
Effective Date of Exemption:  
April 14, 2009  
Contribution Deductibility:  
Yes  
Addendum Applies:  
No

Dear Applicant:

We are pleased to inform you that upon review of your application for tax exempt status we have determined that you are exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code. Contributions to you are deductible under section 170 of the Code. You are also qualified to receive tax deductible bequests, devises, transfers or gifts under section 2055, 2106 or 2522 of the Code. Because this letter could help resolve any questions regarding your exempt status, you should keep it in your permanent records.

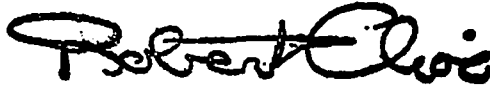
Organizations exempt under section 501(c)(3) of the Code are further classified as either public charities or private foundations. We determined that you are a public charity under the Code section(s) listed in the heading of this letter.

Please see enclosed Publication 4221-PC, Compliance Guide for 501(c)(3) Public Charities, for some helpful information about your responsibilities as an exempt organization.

Letter 947 (DO/CG)

ALASKA POLICY FORUM INC

Sincerely,

A handwritten signature in black ink that reads "Robert Choi". The signature is written in a cursive style with a large, looping initial "R".

Robert Choi  
Director, Exempt Organizations  
Rulings and Agreements

Enclosures: Publication 4221-PC

Letter 947 (DO/CG)

# **Reply by Yes on 2**

October 1, 2020

[SOA 000031-35]

ARRIVED

APOC - ANCH  
PM HC FAX **FILE**

October 1, 2020

To: Alaska Public Offices Commission  
From: Yes on 2 for Better Elections

Re: Response to APOC Complaint Against Brett Huber, Alaska Policy Forum, and Protect My Ballot

### **Introduction**

On September 25, 2020, APOC provided Yes on 2 for Better Elections (“Yes on 2”) the Alaska Policy Forum’s (“APF”) response to Yes on 2’s complaint against Brett Huber, APF, and Protect My Ballot (“PMB”). APOC also provided Yes on 2 2018 tax filings from the Employment Policies Institute Foundation (“EPIF”) on September 29, which were provided by Bethany Marcum, as well as Brett Huber’s response (dated September 28) on October 1.<sup>1</sup>

After reviewing these responses, the question APOC must decide is clear: have APF and PMB (collectively “Respondents”) engaged in “express communication[s]” against the Better Elections initiative (“Ballot Measure 2”), thereby triggering APOC’s campaign disclosure and reporting requirements? And a review of Respondents’ communications—especially in comparison to a recent advisory opinion cited by APF itself—shows that Respondents have indeed engaged in express communications, and are therefore subject to APOC’s disclosure and reporting requirements.

### **APF and PMB Have Engaged In Express Communications.**

Alaska Statute 15.13.400(7) defines “express communication” as “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

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<sup>1</sup> Yes on 2 has nothing further to add to its complaint with respect to Mr. Huber’s involvement with either APF or PMB. For the remainder of this response, “Respondents” refers to APF and PMB collectively.

candidate.”<sup>2</sup> APOC has reasonably interpreted this definition to include communications for or against a specific initiative.<sup>3</sup>

APF relies heavily on a recent APOC advisory opinion (AO 19-04-CD) to argue that Respondents’ communications are not “express” under AS 15.13.400(7), but are instead public-education oriented, thereby falling outside of APOC’s registration and reporting requirements. But that advisory opinion actually shows how distinguishable Respondents’ communications are, and why their communications are “express” under the law.

In advisory opinion 19-04-CD, a local nonprofit—which had been “educating the public about the negative effects related to plastics in general and plastic bags in particular since 2016”—wanted to know whether they could continue doing educational outreach without having to report to APOC after a citizen initiative relating to disposable plastic shopping bags was scheduled for a vote in 2019.<sup>4</sup> The local nonprofit also provided a specific proposed brochure for APOC’s review, which included information about the date of the election, the official language of the initiative, and some of the fines and additional fees that the initiative would create if enacted.<sup>5</sup>

APOC determined that, so long as the cost of the brochure did not exceed \$500, and there was no substantial deviation from the organization’s proposed outreach efforts, the nonprofit would not be subject to APOC’s disclosure and reporting requirements.<sup>6</sup> This was due to: (1) the neutral content of the proposed outreach; (2) the substantial length of time (years) the nonprofit had been engaging in public outreach efforts *before* the citizen initiative; and (3) other communication and organizational goals beyond plastic bags.<sup>7</sup>

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<sup>2</sup> AS 15.13.400(7).

<sup>3</sup> See AO 19-04-CD at 3-4 (revised Sept. 18, 2019) [hereinafter AO].

<sup>4</sup> AO at 1-2.

<sup>5</sup> AO at 5-6.

<sup>6</sup> AO at 4-6.

<sup>7</sup> See generally AO.

Respondents' communications are different in nearly every way. A group of citizens first filed a petition for what would later become Ballot Measure 2 in July 2019, obtained petition booklets in October 2019, and filed those signed petition booklets with the Division of Elections on January 9, 2020.<sup>8</sup> By APF's own admission, PMB was not formed until November 2019—*after* Ballot Measure 2's sponsors were already gathering signatures—and APF appears to have only joined PMB's coalition *after* signatures for Ballot Measure 2 were collected.<sup>9</sup> The timing of Respondents' early actions can only be seen as direct reactions and responses to the existence of Ballot Measure 2, which is very different from the nonprofit at issue in APOC's recent advisory opinion.

Similarly, none of Respondents' communications can be interpreted as being content neutral. Although PMB does cite published opinion pieces, only one side of opinion pieces—those explicitly opposed to Ballot Measure 2—are included.<sup>10</sup> Nowhere on PMB's website lists or makes available the actual language of Ballot Measure 2. And the videos posted and promoted by PMB clearly indicate an opposition to ranked choice voting, which is a component of Ballot Measure 2.<sup>11</sup> Furthermore, the specific States PMB targets all have one thing in common: they either have some form of ranked choice

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<sup>8</sup> <https://www.elections.alaska.gov/Core/initiativepetitionlist.php> (referencing "19AKBE").

<sup>9</sup> The exact timing is unknown since APF's response only refers to "January 2020."

<sup>10</sup> All of these links were provided in Yes on 2's complaint at footnote 3, and remain on PMB's website today. This includes a link entitled "Ranked-choice voting and *Ballot Measure 2* should be voted down" (emphasis added), which provides the text from an opinion piece which explicitly discusses "Ballot Measure 2" and "urg[es] Alaskans to vote this proposition down." <https://protectmyballot.com/ranked-choice-voting-and-ballot-measure-2-should-be-voted-down/>. It also includes a link entitled "Alaska's *Election Initiative* Is Rank." (emphasis added), which also provides language from an opinion piece stating "that the Better Elections initiative would be bad for our state." <https://protectmyballot.com/alaskas-election-initiative-is-rank/>.

<sup>11</sup> This video remains prominently posted at the top of PMB's website today. In addition to promoting a one-sided view of ranked choice voting, it also explicitly shows a sign which says "say no to Ranked Choice Voting." See <https://youtu.be/K7BVPFtvSNE> (at 1:11).



voting,<sup>12</sup> or it is on the ballot in November.<sup>13</sup> Additionally, PMB’s mission strays far from its lead organization’s (EPIF) mission as reported to the IRS.<sup>14</sup> The goal of PMB’s communications cannot reasonably be viewed as a neutral public education campaign; PMB has sought to persuade voters to vote against ranked choice voting initiatives nationally, including in Alaska only *after* petition booklets were filed for Ballot Measure 2.

APF’s communication crosses the line into “express communication” even further. APF, in its communication and in its response, clearly targets *voters* for the upcoming general election.<sup>15</sup> APF’s communications: (1) expressed displeasure with ranked choice voting; (2) included links to opinion pieces opposing Ballot Measure 2; (3) included links to a national organization opposed to ranked choice voting; (4) included a link to the one-sided video opposing ranked choice voting; and (5) emphasized that Alaskans would vote in November. APF’s communications are an exhortation to vote against Ballot Measure 2; there is no other reasonable interpretation of its timing or content.

Whether Respondents intended for their communications to fall outside the scope of APOC’s disclosure and reporting requirements is immaterial. What matters is whether their communications have been made in opposition to Ballot Measure 2. And since Respondents only: (1) present information opposing Ballot Measure 2; (2) formed a

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<sup>12</sup> Maine uses ranked choice voting statewide, as does Oklahoma for primary elections. A few large cities in Minnesota also use ranked choice voting.

<sup>13</sup> Voters in Alaska and Massachusetts will vote on ranked choice voting this general election.

<sup>14</sup> See EPIF’s 2018 Form 990 Tax filings at 2 (Nov. 8, 2019) (“[EPIF’s] mission is to educate policymakers and the general public with respect to the economic and social effects of employment, financial, and government spending policies, and to conduct research with respect to (continued) employment, financial, and government spending policies and disseminate the results of such research.”); see also *id.* at 1 (stating that EPIF’s mission is “studying public policy issues surrounding employment growth with significant focus on issues that affect entry-level employment”).

<sup>15</sup> See APF’s Response to APOC Complaint 20-05-CD at 4 (Sept. 24, 2020) (arguing that APF’s communications “could be interpreted as urging *voters* to think about the history of Ranked Choice Voting and what it would mean generally” (emphasis added)); Email and Press Release by APF (included in Yes on 2’s Complaint) (repeatedly referring to a “campaign” “to inform the public on the *harms* of Ranked Choice Voting,” and noting that “Alaskans take to the polls in November” (emphasis added)).

“campaign” coalition after the existence of the initiative; and (3) highlight the upcoming general election vote, the answer is clear: Respondents must comply with APOC’s disclosure and regulation requirements for their “express communication[s]” against Ballot Measure 2.

**No Further Information About Lobbying.**

APF responds, without support, that they have not violated Alaska’s lobbying requirements based on the number of hours they have spent lobbying in any given month. Yes on 2 cannot assess the validity of APF’s assertion, has nothing more to say on this point, and will defer to APOC.

**Conclusion**

Alaska’s campaign finance laws exist for a reason; to ensure that any person “express[ly] communicat[ing]” with the public about an upcoming election meets minimal disclosure and reporting requirements, so that voters can know who is spending what to influence their votes. PMB and APF only teamed up in opposition to Ballot Measure 2 after enough signatures had been gathered for Ballot Measure 2 to make it on the ballot in November. And their self-described “campaign” only expresses reasons to vote against Ballot Measure 2; there are no neutral communications on ranked choice voting or Ballot Measure 2 from either organization. Because the timing and content of Respondents’ communications cannot be seen as anything other than an exhortation to vote against Ballot Measure 2, APOC should find that they have violated Alaska’s campaign finance laws and require immediate disclosure and reporting.

# **Staff Report (selections)**

(October 15, 2020)

[SOA 000036-53, 108-13, 123, 152-55]



**TO:** APOC Commissioners  
**DATE:** October 15, 2020  
**FROM:** Thomas R. Lucas, Campaign Disclosure coordinator  
**SUBJECT:** Staff Report, 20-05-CD, *Yes on 2 for Better Elections v. Brett Huber, Protect My Ballot, and Alaska Policy Forum*

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**SUMMARY OF COMPLAINT**

In its Complaint filed on September 8, 2020, Yes on 2 for Better Elections (Yes on 2) alleges that Brett Huber, Protect My Ballot (PMB), and Alaska Policy forum (APF) violated AS 15.13 by making express communications opposing Ballot Measure 2 without registering and reporting contributions received or expenditures made.<sup>1</sup> Specifically, Yes on 2 contends that the Respondents engaged in extensive campaign activities including video production, web site registration and design, utilization of staff time for composing materials, press releases, paying salary or wages to Huber, and providing the public with electronic links to materials opposing ranked choice voting, one of the features of Ballot Measure 2.<sup>2</sup>

**SUMMARY OF ANSWERS TO COMPLAINT**

Huber contends that allegations concerning payments allegedly made to him are false.<sup>3</sup> APF contends that it and PMB were engaged in “issues communications” that do not trigger any registration or reporting requirements.<sup>4</sup>

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<sup>1</sup> Exhibit 1, Complaint.

<sup>2</sup> *Id.*

<sup>3</sup> Exhibit 2, Huber Response.

<sup>4</sup> Exhibit 3, APF Response; Exhibit 4, Marcum response to questions concerning PMB.

## **FACTS**

### **1. Ballot Measure 2**

The Alaska Better Elections Initiative was filed on July 3, 2019, denied on August 30, 2019, and ultimately accepted with petition booklets being issued on October 31, 2019.<sup>5</sup> The initiative is on the 2020 state general election ballot as Ballot Measure 2 and if enacted, would provide for, among other things, ranked choice voting in the state’s general elections.<sup>6</sup>

### **2. PMB**

APF states that PMB is a national coalition focused on educating the public on the risks and consequences of ranked choice voting which it considers a voting scheme.<sup>7</sup> The coalition was organized by the Employment Policies Institute Foundation (EPIF).<sup>8</sup> The coalition includes APF, the Freedom Foundation of Minnesota, the Maine Policy Institute, the Fiscal Alliance Foundation, and the Oklahoma Council of Public Affairs.<sup>9</sup>

PMB is also a trade name of EPIF which was registered with the government of the District of Columbia on August 9, 2020.<sup>10</sup> EPIF does business as the Employment Policies Institute (Institute).<sup>11</sup> According to its website, the Institute is a non-profit organization dedicated to studying public policy issues surrounding employment growth” and was founded in 1991.<sup>12</sup>

EPIF appears to have registered the web domain, “protectmyballot.com” on November 6, 2019 and updated it on July 13, 2020.<sup>13</sup>

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<sup>5</sup> Exhibit 5, Division of Elections Petition Summary.

<sup>6</sup> Exhibit 6, Letter to Sponsor.

<sup>7</sup> Ex. 3.

<sup>8</sup> *Id.*

<sup>9</sup> Exhibit 7, Excerpt from PMB Website <http://protectmyballot.com/>.

<sup>10</sup> Ex. 3.

<sup>11</sup> Exhibit 8, EPIF Tax Return.<sup>12</sup> Exhibit 9, About Section of website <https://epionline.org/aboutepi/>.

<sup>12</sup> Exhibit 9, About Section of website <https://epionline.org/aboutepi/>.

<sup>13</sup> Ex 3; Exhibit 10, Who is Report.

The PMB website is decidedly against ranked choice voting. Specifically, PMB on its website provides “[r]anked choice voting (RCV) is an electoral scheme that adds more confusion to the voting system while threatening our democracy and failing to ensure that every vote counts.”<sup>14</sup> The website contains a video that strongly suggests that ranked choice voting is a very bad thing.<sup>15</sup> The website also contains a section of quotes from politicians and business leaders all against ranked choice voting, a list of cities and states that have repealed ranked choice voting, a fact vs. fiction section decidedly against ranked choice voting, and media links all containing opinion pieces against ranked choice voting.<sup>16</sup>

Although the PMB website is undoubtedly against ranked choice voting in general, there are only two pieces on the site that mention Ballot Measure 2 and voting. One is an opinion piece by Mead Treadwell published in the Anchorage Daily News exhorting voters to vote no on the measure.<sup>17</sup> The other is an excerpt from an opinion piece by Mark Begich published in the Wall Street Journal strongly suggesting that the ballot measure would be bad for the State of Alaska.<sup>18</sup>

Although not mentioning Ballot measure 2, the PMB website also contains a press release from APF announcing the formation of the PMB coalition against ranked choice voting and referencing voting in the state general election. In the press release, Bethany Marcum, chief executive officer of APF states:

*“As Alaskans take to the polls in November, history should be a warning for what ranked choice voting would lead to. Not only can Ranked Choice Voting cause votes to be discarded, research shows it also decreases voter turnout. We need to encourage Americans of all backgrounds to visit the polls, not give them another reason to avoid casting a ballot.”<sup>19</sup>*

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<sup>14</sup> Exhibit 11, 2<sup>nd</sup> excerpt from PMB website <http://protectmyballot.com/>.

<sup>15</sup> <https://youtu.be/K7BVPFtvSNE>.

<sup>16</sup> <http://protectmyballot.com/>.

<sup>17</sup> Exhibit 12, Treadwell Opinion.

<sup>18</sup> Exhibit 13, Begich Opinion.

<sup>19</sup> Exhibit 14, APF Press Release (emphasis added).

### 3. **APF**

APF is an Alaska nonprofit corporation created on April 4, 2009.<sup>20</sup> APF is organized “solely for educational purposes, and more specifically to provide research, information and public education in support of individual rights, limited government, personal responsibility and government accountability, and to perform any and all acts consistent with this stated purpose.”<sup>21</sup>

Over the years, and currently, APF has posted materials on many subjects, including the state budget and taxes,<sup>22</sup> health care,<sup>23</sup> education,<sup>24</sup> and elections.<sup>25</sup> APF contended in a 2016 article that the PFD voter registration initiative could lead to voting by mail only, suggesting that APF has a long history of skepticism towards changes to the voting status quo.<sup>26</sup> As such, APF “enthusiastically agreed in January 2020 to join as a founding member [of PMB].”<sup>27</sup> Apparently, APF’s agreement was based on a phone call from EPIF regarding a coalition of organizations that would provide education on election process issues.<sup>28</sup>

On February 11, 2020, APF posted an opinion piece titled *Ranked-Choice Voting Fails To Deliver On Its Promises* in the Anchorage Daily News on February, 9, 2020, authored by Jacob Posik, the director of communications for the Maine Policy Institute.<sup>29</sup> The op-ed concludes with “[l]ike Alaska, we in Maine regularly deal with an onslaught of ballot initiatives because we live in a cheap media market. The system may soon be coming to your neck of the woods. Don’t be surprised when it produces the opposite result of what you were promised.”

On July 24, 2020, in Anchorage, Alaska, APF issued a press release entitled *Protect My Ballot: New Campaign Exposes Flaws in Ranked Choice Voting*.<sup>30</sup> The press release

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<sup>20</sup> Exhibit 15, APF Corporate Certificate.

<sup>21</sup> Exhibit 16, APF Articles of Incorporation.

<sup>22</sup> Exhibit 17, excerpt from taxes and budget page <https://alaskapolicyforum.org/category/state-budget-taxes/>.

<sup>23</sup> Exhibit 18, excerpt from health care page <https://alaskapolicyforum.org/category/healthcare/>.

<sup>24</sup> Exhibit 19, excerpt from education page <https://alaskapolicyforum.org/category/education/>.

<sup>25</sup> Exhibit 20, excerpt from other issues page <https://alaskapolicyforum.org/category/other-issues/>.

<sup>26</sup> Ex. 3; Exhibit 21, Voter Registration and Broken Promises.

<sup>27</sup> Ex. 3.

<sup>28</sup> Ex. 3, Appendix B.

<sup>29</sup> <https://alaskapolicyforum.org/2020/02/rcv-fails-on-promises/>.

<sup>30</sup> <https://alaskapolicyforum.org/2020/07/pr-exposing-flaws-rcv/>.



provided that a coalition of state-based think tanks led by APF had launched a national education campaign detailing the harmful consequences of an electoral scheme known as ranked choice voting. The press release provided a link to the PMB website where APF CEO Bethany Marcum was quoted as saying:

“As Alaskans take to the polls in November, history should be a warning for what ranked choice voting would lead to. Not only can Ranked Choice Voting cause votes to be discarded, research shows it also decreases voter turnout. We need to encourage Americans of all backgrounds to visit the polls, not give them another reason to avoid casting a ballot.”<sup>31</sup>

On July 31, 2020, APF posted to its website, the YouTube video titled “What is Ranked Choice Voting” from PMB’s YouTube channel.<sup>32</sup> This video describes ranked choice voting as a scheme calling it “a confusing system that could force voters to support a candidate they don’t want. Instead of giving you more choice, this system could take your choice away.”<sup>33</sup>

On October 8, 2020, APF posted its *Report: The Failed Experiment of Ranked-Choice Voting*.<sup>34</sup> As the report indicates, ranked choice voting has been used in many jurisdictions over a long period of time. It provides, for example, that San Francisco has used it since 2004 and Maine used it for the first time in 2018. Although the report addresses the arguments made by proponents of ranked choice voting, it does so only in the context of criticizing them.

On October 8, 2020, APF issued the press release, *New Study Exposes Alarming Ramifications to Ranked Choice Voting*.<sup>35</sup> The press release announced APF’s own report *The Failed Experiment of Ranked-Choice Voting*, which was issued the same day. After issuing, APF posted the press release on its website on October 9, 2020.<sup>36</sup> The new study was published in conjunction with the Maine Policy Institute and in many cases mirrors a

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<sup>31</sup> Ex. 14.

<sup>32</sup> <https://youtu.be/K7BVPFtvSNE> at 0:13-0:21.

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

<sup>34</sup> <https://alaskapolicyforum.org/2020/10/failed-experiment-rcv/>.

<sup>35</sup> Exhibit 22, New Study Press Release.

<sup>36</sup> <https://alaskapolicyforum.org/2020/10/pr-ranked-choice-voting/>.



similar report published in August 2019 by the Maine Policy Institute under the name of the Maine Heritage Policy Center, the name the organization held until it became the Maine Policy Institute on March 11, 2020.<sup>37</sup>

#### **4. Huber**

Huber denies any involvement with APF or PMB.<sup>38</sup> Staff has found no evidence to suggest that Huber is or was involved with APF or PMB in any way. And, although Yes on 2 did provide responses to staff's inquiries, it did not provide any evidence to support allegations that Huber was paid by APF or PMB for any services or that Huber was involved with APF or PMB in any way.<sup>39</sup>

#### **5. Lobbying**

Yes on 2 has alleged that APF violated AS 24.45 by engaging in lobbying activities without reporting to APOC.<sup>40</sup> The only evidence presented by Yes on 2 to support its assertion was a tax return showing \$4,027 spent on direct lobbying to a legislative body.<sup>41</sup> APF asserts that it has never reached the 10 hours in any 30 day period threshold for lobbying registration in Alaska and therefore has not registered.<sup>42</sup> Although presented with APF's response, Yes on 2 provided no further evidence to support its lobbying allegation.<sup>43</sup>

## **LAW AND ANALYSIS**

### **1. Registration and Reporting**

The primary issue in this case is whether the respondents, individually or collectively made one or more expenditures in opposition to a ballot proposition that triggered registration and reporting requirements. Given the foregoing, it is clear from their

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<sup>37</sup> Compare <https://mainepolicy.org/project/false-majority/> with <https://alaskapolicyforum.org/2020/10/failed-experiment-rcv/>.

<sup>38</sup> Ex. 2.

<sup>39</sup> Exhibit 23, Yes on 2 Response to Respondents' responses.

<sup>40</sup> Ex. 1.

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

<sup>42</sup> Ex. 3.

<sup>43</sup> Ex. 16.

posts and press releases that APF and PMB are decidedly against ranked choice voting.<sup>44</sup> Nevertheless, the issue that must be decided is whether their objection to ranked choice voting as expressed in their posts and press releases can be considered election campaign activity in the context of a ballot proposition to legalize ranked choice voting. In other words, do their posts and press releases amount to activity in opposition to Ballot Measure 2?

Alaska Statutes require that each person, other than an individual, must register with APOC before making an expenditure in support of or in opposition to, a ballot proposition.<sup>45</sup>

Expenditure is defined by statute as a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value that is incurred or made for the purpose of influencing the outcome of a ballot proposition; and includes an express communication and an electioneering communication, but not an issues communication.<sup>46</sup>

An express communication is one 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>47</sup> An electioneering communication is one that addresses an issue of political importance and attributes a position on that issue to a candidate who is directly or indirectly identified.<sup>48</sup> An issues communication is one that addresses an issue of political importance, directly or indirectly identifies a candidate, but does not support or oppose a candidate.<sup>49</sup> Although these definitions are specific to

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<sup>44</sup> Staff has not found, and Yes on 2 has provided, any evidence of Huber’s involvement in the activities of PMB or APF. Accordingly, Staff will be recommending that all allegations against Huber be dismissed.

<sup>45</sup> AS 15.13.050(a).

<sup>46</sup> AS 15.13.400(6)(A)(iv) and (B).

<sup>47</sup> AS 15.13.400(7).

<sup>48</sup> AS 15.13.400(5).

<sup>49</sup> AS 15.13.400(12).

communications regarding candidates, the distinctions also are appropriate for ballot proposition campaigns.<sup>50</sup>

In several previous cases, the commission has been called upon to determine whether an issues/educational communication has lost its non-regulated character if disseminated near the time of a ballot proposition involving a similar or the same subject. Perhaps the lead case was *Renewable Resources Coalition*, AO-08-02-CD. In that case, the Renewable Resources Coalition (RRC) had for several years opposed the Pebble Mine project using phrases such as “protect clean water and wild Alaska salmon.” During the period of such activity, two clean water initiatives reached the 2008 statewide ballot. The initiatives proposed new regulations for new large-scale mining projects in the state, which presumably would include the Pebble Mine, regarding the discharge and storage of certain toxic materials.<sup>51</sup>

RRC asked the commission for an advisory opinion as to whether it would be able to continue its education of the public concerning the potential negative impact of the proposed Pebble Mine in the same manner as it had in the past, including use of the phrase, “clean water,” without such activities being considered expenditures made to influence the outcome of a ballot proposition.<sup>52</sup> After reviewing RRC’s website, its previous advertisements, and proposed new materials it was noted that although some of RRC’s materials referenced the initiatives, there was no discussion of voting and no express advocacy supporting the initiatives.<sup>53</sup>

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<sup>50</sup> See, *McIntyre v. Ohio Elections Comm’n*, 115 S. Ct. 1511 (1995) (holding that principles regarding regulation of political speech in candidate elections extend equally to issue-based elections such as referendums); *Calif. ProLife Council, Inc., v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (holding that states may regulate express ballot measure advocacy through disclosure laws and applying analysis of “express advocacy” in candidate campaigns to ballot initiative campaigns); *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (holding that campaign communications that are susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate are the functional equivalent of express campaign communications) (*See also*, AO 08-02-CD, Timothy McKeever (Renewable Resources Coalition)).

<sup>51</sup> Exhibit 24, *Renewable Resources Coalition*, AO-08-02-CD, at p. 9.

<sup>52</sup> *Id.* at p. 10.

<sup>53</sup> *Id.* at p. 11.

Ultimately, the commission approved staff’s recommended advice after analysis of the question presented, which provided to the requester, Timothy McKeever:

...the example advertisements you provided with your request do not expressly advocate for a position on a ballot initiative or make any mention of an initiative, election or voting. Nor are they the functional equivalents of express communications because they are susceptible to reasonable interpretations other than as exhortations to vote for the initiatives. While the use of the term “clean water” might be interpreted by listeners who are aware of the initiatives as a message in support of the initiatives, it is not the only reasonable interpretation of the advertisements. As the website indicates, RRC urges numerous different kinds of opposition activity. Therefore, the advertisements do not fall within the categories of express or electioneering communications but appear to be issue communications. As such, they do not trigger the reporting requirement for independent campaign expenditures.<sup>54</sup>

In *Renewable Resources Foundation* AO 13-04-CD, the commission revisited the continuing education in the context of a ballot initiative titled *An Act Providing for Protection of Bristol Bay Wild Salmon and Waters Within or Flowing into the Existing 1972 Bristol Bay Fisheries Reserve*.<sup>55</sup> There, the requestor was a successor to the Renewable Resources Coalition discussed above. The requestor had continued its educational efforts to protect resources from the potential negative impacts of the proposed Pebble Mine project, and asked for an advisory opinion on several questions, including whether it could continue in its efforts without registration and reporting while the new initiative was active and while it openly supported the signature gathering effort.<sup>56</sup> Staff’s opinion approved by the commission first noted that the requestor could continue its purely educational activities, but warned that the context of the educational activities could trigger a reporting requirement. There, staff provided that “...changes in the number of activities, the usual locations of the activities and/or the content of the activities, when taken in

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<sup>54</sup> *Id.* at pp. 11-12.

<sup>55</sup> Exhibit 25, Renewable Resources Foundation, AO 13-04-CD.

<sup>56</sup> *Id.* at p. 1.

context of RRF’s open support of the initiative petition drive could possibly trigger a reporting requirement.”<sup>57</sup>

In both *Renewable Resources Foundation* and *Renewable Resources Coalition*, an underlying fact was that the requestor had been engaged in its educational activities long before the initiative or ballot proposition arose. Furthermore, in *Bags for Change*, AO 19-04-CD, the Commission emphasized the importance of that fact. There, the organization, Bags for Change had for many years communicated with the public concerning the harmful effects of plastics in general and plastic bags in particular. In its opinion submitted for commission approval, staff opined that a brochure that provided neutral cost information about a ballot proposition concerning the elimination of plastic bags and mentioned voting and the proposition by name nevertheless did not trigger a registration or reporting requirement because the brochure, taken as a whole, was susceptible to a reasonable interpretation other than an exhortation to vote one way or the other because it provided neutral information concerning the proposition. Upon approving the opinion by a 5-0 vote, the commission amended to the foregoing, “especially...given that [Bags for Change] has engaged in educational efforts for three years before the [i]nitiative, rather than a group that was created around the [i]nitiative.”<sup>58</sup>

#### **A. PMB**

On November 6, 2019, EPIF acquired the website protectmyballot.com. APF became a founding member of PMB in January 2020. The initiative was accepted for placement on the 2020 State General Election on March 9, 2020. The PMB ranked choice voting educational campaign was launched on July 24, 2020.

On July 13, 2020, in preparation for the launch, EPIF set up the PMB web site “at a real domain.”<sup>59</sup> Since then, the website has been used to publish its overriding message

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<sup>57</sup> *Id.* at pp. 2-3.

<sup>58</sup> *Id.* at p. 5.

<sup>59</sup> Ex. 3, Appendix B. Staff is unsure what APF means by setting up the website “at a real domain” when EPIF purchased the domain months earlier. Staff notes that EPIF made many changes to the website on July 13, 2020, as noted in Appendix B.

that ranked choice voting is a scheme that should be rejected and where utilized should be scrapped. In essence, PMB purports to be a clearinghouse run by EPIF, which is used for the posting of opinions, articles, and media that are decidedly against ranked choice voting.

Although the timing of the creation of PMB and its website may be suspicious in view of the initiative events leading to ballot measure 2, the fact that its partners all have different agendas<sup>60</sup> makes it difficult to determine that the PMB website, 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 against Ballot Measure 2. Clearly, a reasonable interpretation is that the website is a clearinghouse of information to be used opponents to ranked choice voting for a variety of purposes, including opposing its adoption in state and local elections of other jurisdictions and abolishing it where it is law. That it might also be used by an organization such as APF in connection with Ballot Measure 2 raises an entirely different issue which will be discussed below. But, because the website is susceptible to reasonable interpretations other than an exhortation to vote against Ballot Measure 2, staff recommends that the allegations of the complaint against PMB be dismissed.<sup>61</sup>

## **B. APF**

APF has been engaged in providing the public with information concerning many issues including the state budget, taxes, health care and education since 2009. But, except for a 2016 article concluding that PFD voter registration could lead to voting by mail only, APF has not shown in its response to the complaint or on its website, a “long history of skepticism towards changes to the voting status quo” as it suggests. Instead, APF has shown a demonstrable uptick in activity revolving around ranked choice voting since the initiative was cleared for signature gathering and, ultimately placed on the ballot.

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<sup>60</sup> There is no similar initiative to Alaska’s in Maine, Oklahoma, Minnesota, or Massachusetts.

<sup>61</sup> It appears that PMB was not properly served by Yes on 2. Service was on Bethany Marcum, CEO of APF, but not on any authorized representative of EPIF, which holds PMB as a registered trade name under the laws of the District of Columbia and owns the PMB web domain. Nevertheless, given staff’s recommendation to dismiss the allegations against PMB, this potential issue need not be addressed unless the commission does not accept staff’s recommendation.

Petition booklets for the initiative that became Ballot Measure 2 were issued on October 31, 2019. On November 6, 2019, EPIF acquired the PMB web domain. APF became a founding member of PMB in January 2020. On February 11, 2020, APF posted on its website the opinion piece, *Ranked Choice Voting Fails to Deliver on Its Promises*. The op-ed concludes by asserting “*Like Alaska, we in Maine regularly deal with an onslaught of ballot initiatives because we live in a cheap media market. The system may soon be coming to your neck of the woods. Don’t be surprised when it produces the opposite result of what you were promised.*”<sup>62</sup>

The initiative was accepted for placement on the 2020 state general election ballot on March 9, 2020. According to Marcum, “[t]he Protect My Ballot education campaign launched on July 24, 2020. APF emailed a press release to a national media list, and to an Alaska-specific list. The Coalition members in Maine and Minnesota emailed their own press releases to reporters in their states.”<sup>63</sup>

The press release entitled *Protect My Ballot: New Campaign Exposes Flaws in Ranked Choice Voting* provided a link to the PMB website quoted Markum:

“*As Alaskans take to the polls in November, history should be a warning for what ranked choice voting would lead to. Not only can Ranked Choice Voting cause votes to be discarded, research shows it also decreases voter turnout. We need to encourage Americans of all backgrounds to visit the polls, not give them another reason to avoid casting a ballot.*”<sup>64</sup>

On July 31, 2020, APF posted to the *What is ranked Choice Voting* video from the PMB website. This video describes ranked choice voting as a scheme that could force voters to support a candidate they do not want; and instead of giving more choice, could take your choice away.

On October 8, 2020, APF posted *Report: The Failed Experiment of Ranked-Choice Voting*. As the report indicates ranked choice voting has been used in many jurisdictions

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<sup>62</sup> <https://alaskapolicyforum.org/2020/02/rcv-fails-on-promises/> (emphasis added).

<sup>63</sup> Ex. 3.

<sup>64</sup> Ex. 14 (emphasis added).

over a long period of time. For example, the report provides that San Francisco has used it since 2004 and Maine used it for the first time in 2018.

On October 8, 2020, APF issued a press release titled *New Study Exposes Alarming Ramifications to Ranked Choice Voting*. The press release announced APF's report and was issued the same day. After issuing the press release, APF posted it on its website on October 9, 2020. On October 12, 2020 APF posted a new article entitled *Ranked-Choice Voting Disenfranchises Voters*.<sup>65</sup>

Prior to the initiative, APF had shown no interest in ranked choice voting, despite the fact that the voting method has been discussed and implemented in many jurisdictions for many years.<sup>66</sup> One of the lessons from the *Renewable Resources* cases, and as emphasized in *Bags for Change*, is that the length of time an organization has been engaged in educational activities concerning a subject is a factor in determining whether its communications on that subject may be subject to reasonable interpretations other than an exhortation to vote for or against a ballot proposition. Here, APF's objection to ranked choice voting did not begin until an initiative concerning ranked choice voting was proposed.

APF has engaged in a recent burst of activity against ranked choice voting as the November election approaches. One of the lessons of *Renewable Resources Foundation* is that changes in the number of activities and the context of the activities is also a factor in determining whether communications may be subject to reasonable interpretations other than an exhortation to vote against a ballot proposition. Here, as the election approaches, APF has ramped up its activity concerning ranked choice voting.

Based on the evidence provided, the timing of the activity alleged, and the context of APF's ranked choice voting communications, staff concludes that APF'S ranked choice communications are express communications. As such APF has violated AS 15.13 by

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<sup>65</sup> Exhibit 26, "Ranked-Choice Voting Disenfranchises Voters.

<sup>66</sup> See, for example APF's Report, The Failed Experiment of Ranked Choice Voting <https://alaskapolicyforum.org/2020/10/failed-experiment-rcv/>



failing to register as an entity and failing to file independent expenditure reports concerning its activities.<sup>67</sup>

### **C. Identification of Political Communications**

Alaska’s campaign disclosure law requires all communications to be identified using the words “paid for by” followed by the name and address of the person paying for the communication.<sup>68</sup> For a person other than an individual or candidate, the identifier must include the name and title of the person’s principal officer; and a statement from the principal officer approving the communication; and, unless the person is a political party, the name, city and state of each of the person’s top 3 contributors, if any.<sup>69</sup>

A “communication” is defined as “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).”<sup>70</sup>

A political communication is further defined to include press releases and material on an internet website.<sup>71</sup>

Here, APF’s press releases and posts concerning ranked choice voting did not include a “paid for by” identifier giving APF’s name, address, principal officer, principal officer approval and top 3 contributors, if any. Thus, staff concludes that APF violated AS 15.13.090(a) by failing to identify its communications.

### **D. Huber**

Mr. Huber denies any involvement whatsoever with APF or PMB. Staff found no evidence to suggest that Huber is or was involved with APF or PMB in any way. Yes on 2, despite being provided with Huber’s responses to Staff’s inquiries, did not provide any

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<sup>67</sup> AS 15.13.050(a) and AS 15.13.040(d), respectively.

<sup>68</sup> AS 15.13.090(a).

<sup>69</sup> AS 15.13.090(a)(2).

<sup>70</sup> AS 15.13.400(3).

<sup>71</sup> 2 AAC 50.306(e)(2)(A) and (B).

evidence to support its allegations that Huber was paid by APF or PMB for any services or that he was involved with APF or PMB in any way. Accordingly, Staff recommends that the allegations of the Complaint concerning Huber be dismissed.

#### **E. Lobbying**

A “lobbyist” is defined as a person who is employed, or contracts to communicate directly or through an agent, with a public official for the purpose of influencing legislation or administrative action for more than 10 hours in any 30-day period during a calendar year; or represents oneself as a lobbyist.<sup>72</sup>

Here, Yes on 2 has alleged that APF violated AS 24.45 by engaging in lobbying activities without reporting to APOC. The only evidence presented by Yes on 2 to support its assertion was a tax return showing \$4,027 spent on direct lobbying to a legislative body. The definition of a lobbyist does not include in it limits on or threshold amounts paid to the lobbyist for lobbying activities.

APF asserts that it has never reached the 10 hours in any 30-day period threshold for lobbying registration. Although presented with APF’s response, Yes on 2 provided no further evidence to support its lobbying allegation against APF. Because there is no evidence to suggest that any employee or agent of APF spent more than 10 hours in any 30-day period during the calendar year engaged in lobbying activities or that APF or any of its employees has represented themselves as a lobbyist Staff recommends that the lobbyist allegations of the complaint be dismissed.

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<sup>72</sup> AS 24.45.171(11).

## **CONCLUSION**

Based on the foregoing, Staff recommends that complaint against PMB and Huber; and the lobbyist complaint against APF be dismissed. Staff recommends that the commission find that APF violated AS 15.13 by failing to register<sup>73</sup> and file independent expenditure reports<sup>74</sup> concerning its activities in opposition to Ballot Measure 2; and by failing to identify its political communications.<sup>75</sup>

## **MAXIMUM CIVIL PENALTIES**

### **A. Failure to Register**

The maximum civil penalty for failure to timely register is \$50 per day for each day the violation continues.<sup>76</sup> Here, APF's first post triggering a registration and reporting requirement was its February 11, 2020, *Ranked Choice Voting Fails to Deliver on its Promises* post. Thus, the violation continued for a period of 211 days resulting in a maximum civil penalty of \$10, 550.<sup>77</sup>

### **B. Failure to file Independent Expenditure Reports**

A person making an independent expenditure must file an independent expenditure report not less than 10 days after the expenditure has been made.<sup>78</sup> The maximum civil penalty for failing to timely file a 10-day independent expenditure report is \$50 per day for each day the violation continues.<sup>79</sup> Here, an independent expenditure report was due no later than:

- February 21, 2020, for APF's first post made on February 11, 2020 (a period of 201 days prior to filing of the complaint); and
- August 3, 2020, for its July 24, 2020, and July 31, 2020 posts (a period of 37 days prior to filing of the complaint).

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<sup>73</sup> AS 15.13.050(a).

<sup>74</sup> AS 15.13.040((d)).

<sup>75</sup> AS 15.13.090(a).

<sup>76</sup> AS 15.13.390(a).

<sup>77</sup> Staff tolled the running of penalties as of September 8, 2020, the date the complaint was filed.

<sup>78</sup> AS 15.13.110(h).

<sup>79</sup> AS 15.13.390(a).

Thus, the maximum civil penalty for failing to file independent expenditure reports is \$11,900 (238 days).

### **C. Paid-for-by Identifiers**

A paid for by identifier should have been on APF's website from the time of its first ranked choice voting post on February 11, 2020, through the date the Complaint was filed – a period of 211 days. The maximum civil penalty for failing to provide a required identifier is \$50 per day for each day the violation continues.<sup>80</sup> Thus, the maximum civil penalty is \$10,550.

A paid for by identifier should have been on APF's July 24, 2020 press release. The violation continued for a period of 1 day which results in a maximum civil penalty of \$50.

### **MITIGATION AND RECOMMENDATION**

A civil penalty may be reduced by up to 50% if the person required to file is an inexperienced filer.<sup>81</sup> An inexperienced filer is one that has been subject to a reporting requirement for less than 365 days. APF has been subject to a reporting requirement for less than 365 days. Accordingly, staff recommends that the maximum civil penalty for failure to file independent expenditure reports be reduced by 50% to \$5,950.

A civil penalty may be reduced by a percentage greater than 50% or waived entirely if the penalty is significantly out of proportion to the degree of harm suffered by the public.<sup>82</sup> Here, staff recommends that the maximum civil penalties for failure to register and provide a full paid for by identifier be reduced by 90% because the maximum civil penalties are significantly out of proportion to the degree of harm suffered by the public. In making this recommendation, staff notes that APF's website fully identifies APF's physical location and all its officers and employees. Under these circumstances staff believes a substantial reduction of the registration and identifier penalties is warranted. Accordingly, staff recommends a civil penalty of \$1,055 for failure to register and \$1,060 for failing to provide full paid for by identifiers.

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<sup>80</sup> AS 15.13.390(a).

<sup>81</sup> 2 AAC 50.865(a)(1)(B).

<sup>82</sup> 2 AAC 50.865(b)(5).

Thus, staff recommends a total civil penalty of \$8,065.



What is RCV? Problems with RCV RCV Repealed  
Facts vs Fiction Media

JULY  
24  
2020

# Protect My Ballot: New Campaign Exposes Flaws in Ranked Choice Voting

Media Press Release / 0

*Coalition of state think tanks, led by Alaska Policy Forum, educates on pitfalls of this convoluted voting scheme*

**Anchorage, Alaska (Friday, July 24, 2020)**—Today, a coalition of state-based think tanks, led by Alaska Policy Forum, launched the national education campaign Protect My Ballot. The campaign details the harmful consequences of an electoral scheme known as Ranked Choice Voting (RCV).

The campaign highlights bipartisan opposition to RCV—ranging from California Governor Gavin Newsom, to Alaska’s former Democratic Senator Mark Begich, to members of the NAACP New York State Conference—along with a list of localities that have repealed RCV.

View the campaign website at [ProtectMyBallot.com](https://protectmyballot.com). View a brief explainer video on Ranked Choice Voting [here](#).

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Unlike a traditional election where voters select one candidate and the candidate with the most votes wins, under RCV, voters are expected to rank candidates. If no candidate receives a majority of votes in the first round of counting, the candidate with the fewest votes is eliminated. The process repeats until a remaining candidate receives a majority of votes.

This confusing process leads to many unintended consequences. For instance, if a voter misunderstands the process or chooses not to rank all candidates, her ballot could be eliminated from consideration. It's as though she never showed up on election day. That may explain why a handful of jurisdictions that previously adopted and tested RCV, have since repealed it.

Research also casts doubt on proponents' claims about the benefits of RCV. According to [research](#) from Jason McDaniel, an associate professor of political science at San Francisco State University, voter turnout decreased (three to five percentage points on average) in cities where RCV was used.

Coalition members released the following statements:

[Bethany Marcum](#), Executive Director at Alaska Policy Forum:

“As Alaskans take to the polls in November, history should provide a warning for what Ranked Choice Voting would lead to. Not only can Ranked Choice Voting cause votes to be discarded, research shows it also decreases voter turnout. We need to encourage Americans of all backgrounds to visit the polls, not give them another reason to avoid casting a ballot.”

[Annette Meeks](#), Founder and CEO of the Freedom Foundation of Minnesota:

“Public participation in elections is vital for a democracy to work. Discouraging and complicating the system threatens the people’s voice. That’s why a bipartisan coalition of citizens and legislators wants to ban ranked choice voting in Minnesota.”

[Trent England](#), Executive Vice President of the Oklahoma Council of Public Affairs:

“Ranked Choice Voting is not the solution for election reform. In Oklahoma, our Chief Election Official has opposed this system. Not only does it disenfranchise voters, but implementing it in Oklahoma would be a logistical nightmare.”

[Matthew Gagnon](#), CEO of Maine Policy Institute:

“Whether you examine data captured during Maine’s brief experience with ranked-choice voting or the experiences of other jurisdictions, the lofty claims used to sell this voting system to the general public do not withstand factual scrutiny. Voters should be skeptical when they hear from special interest groups trying to change the way we exercise our sacred right to vote.”

*Protect My Ballot coalition members include Alaska Policy Forum, Maine Policy Institute, Freedom Foundation of Minnesota, and the Oklahoma Council of Public Affairs.*



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For Immediate Release  
October 8, 2020

Contact: Melodie Wilterdink  
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## NEW STUDY EXPOSES ALARMING RAMIFICATIONS TO RANKED-CHOICE VOTING

**ANCHORAGE, Alaska** — Alaska Policy Forum has released a new report detailing the findings of an extensive study that exposes many flaws in ranked-choice voting (RCV), particularly how the method of determining a winner results in discarded ballots, how RCV elections do not result in a majority winner, and how it can completely change the outcome of an election.

The study analyzed data from 96 elections in which RCV necessitated additional rounds of tabulation, and the results were disturbing. In some races, nearly 18 percent of votes were not counted in the winner-determining round of tabulation. Known as ballot exhaustion, the discarding of ballots is inherent to the ranked-choice voting process.

**“A voting system that frequently results in the discarding of legally submitted ballots has no place in Alaska or anywhere else in the United States. After researching candidates, going to the polls, and voting, no Alaskan should have to worry that their ballot won’t be counted in the final tally.”**

— Melodie Wilterdink, VP of Operations & Communications at Alaska Policy Forum

The study, completed in conjunction with Maine Policy Institute, also found that RCV frequently does not result in majority winners, as proponents claim. In fact, in nearly 40 percent of the elections analyzed, the “winner” received less than 50 percent of the total votes cast.

Perhaps most importantly, the study examined how often RCV would produce a different electoral outcome, and found that in 17 percent of the elections analyzed, RCV resulted in a different outcome than a traditional plurality election would have.

The full report is available at <http://alaskapolicyforum.org/2020/10/failed-experiment-rcv/>.

####

Alaska Policy Forum (APF) is a 501(c)(3) nonprofit, nonpartisan think tank dedicated to empowering and educating Alaskans and policymakers by promoting policies that grow freedom for all. APF does not accept any form of government funding. To learn more about APF, visit [www.AlaskaPolicyForum.org](http://www.AlaskaPolicyForum.org).

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 / OCTOBER ([HTTPS://ALASKAPOLICYFORUM.ORG/2020/10/](https://alaskapolicyforum.org/2020/10/)) / RANKED-CHOICE VOTING DISENFRANCHISES VOTERS

# Ranked-Choice Voting Disenfranchises Voters

Published on **October 12, 2020** (<https://alaskapolicyforum.org/2020/10/rcv-disenfranchises-voters/>) by **Guest Author** (<https://alaskapolicyforum.org/author/infoapf/>)

## By Johan Soto

A voting trend to uproot the electoral process is sweeping the country and has made it all the way to Alaska: ranked-choice voting (RCV). While the current electoral process of one person, one vote is straightforward with little to no confusion, RCV threatens to complicate voting, ultimately disenfranchising voters and decreasing turnout.

Underlying any legitimate election is the promise of a fair and equal process for every voter.

However, RCV does not guarantee such a process.

With RCV, voters are asked to rank candidates

(<https://alaskapolicyforum.org/2020/07/video-rcv-explained/>), from their most to least favored rather than voting for one candidate who best represents their values. If no candidate receives at least 50 percent of first-preference votes, the candidate with the fewest first-preference votes is eliminated from contention. For the ballots with that candidate ranked first, the second-choice candidate is then included in the vote tabulation. This process of eliminating the least popular candidates continues until one candidate has received a majority of the remaining votes cast. Unsurprisingly, this convoluted process leads to various adverse consequences for voters.

First is the confusion (<https://mainepolicy.org/wp-content/uploads/RCV-Final-Booklet-.pdf>) RCV creates for voters. For many, RCV is a new concept, and it increases the potential for voters to make mistakes. Proponents argue that this is a temporary inconvenience and that a program to educate the public would eventually resolve this. However, as evidenced by Maine's 19-page guide (<https://www.wiscasset.org/uploads/originals/rankchoicevoting.pdf>) for RCV, these efforts may be equally confusing. Additionally, an education program only addresses the process of filling out the ballot. But a potentially more complicated and time-consuming process for voters is determining which candidates they favor the most, least, second most, and second least. Rather than supporting one candidate, they must effectively support all of them but to varying degrees. And if voters choose to abstain from supporting certain candidates, their ballots could potentially be discarded and not counted in the final tally.

The discarding of ballots, known as ballot exhaustion, is a problem inherent to RCV. As mentioned above, a voter who does not rank all of the candidates risks losing his vote to ballot exhaustion. If voters can rank up to four candidates, for example, but Mr. Smith ranks just two, both of his candidates could be eliminated through the tabulation process if they receive the fewest number of votes in the first and second rounds before one candidate receives at least 50 percent of



the remaining votes. In that case, Mr. Smith's ballot would be discarded, and he would not have a vote in the final round of tabulation, which determines the winner of the election. Also, incorrectly filled out ballots are often discarded. One [study](https://www.sciencedirect.com/science/article/pii/S0261379414001395) (https://www.sciencedirect.com/science/article/pii/S0261379414001395) of over 600,000 ballots found that ballot exhaustion in some elections reached as high as 27 percent of the total count. Ballot exhaustion such as this disenfranchises voters and would raise concerns over the legitimacy of elections in Alaska.

Other localities that have tried RCV have already experienced this disenfranchisement. After San Francisco implemented RCV, voter turnout among black voters, white voters, younger voters, and voters without a high school education decreased (<https://news.sfsu.edu/news-story/ranked-choice-voting-linked-lower-voter-turnout>). In both [Oakland](http://hawaiiifreepress.com/Portals/0/Article%20Attachments/Racial%20and%20Ethnic%20Disparities%20in%20RCV.pdf) (http://hawaiiifreepress.com/Portals/0/Article%20Attachments/Racial%20and%20Ethnic%20Disparities%20in%20RCV.pdf) and [Minneapolis](https://www.startribune.com/ranked-choice-voting-hurts-minneapolis-minorities/195463981/?refresh=true) (https://www.startribune.com/ranked-choice-voting-hurts-minneapolis-minorities/195463981/?refresh=true), voters in predominately minority precincts were less likely to fully utilize their ballots, making ballot exhaustion more likely.

It should come as no surprise that in many of the districts that have tried RCV, voters have chosen to repeal it. In Aspen, Colorado, RCV was implemented in 2009, but it proved to be an unpopular and inefficient system. Just one year later, 65 percent of Aspen voters chose to [repeal](https://www.aspendailynews.com/city-voters-repeal-irv/article_5d3a9245-bfc1-55db-947b-fefdb87031ea.html) (https://www.aspendailynews.com/city-voters-repeal-irv/article\_5d3a9245-bfc1-55db-947b-fefdb87031ea.html) the system. In Burlington, Vermont, a similar response was seen after voters [repealed](https://archive.vpr.org/vpr-news/burlington-voters-repeal-instant-runoff-voting/) (https://archive.vpr.org/vpr-news/burlington-voters-repeal-instant-runoff-voting/) RCV for mayoral elections in 2010. These frustrations can still be seen today in states such as Maine where there is an [ongoing](https://www.pbs.org/newshour/politics/ranked-voting-in-presidential-election-put-on-hold-in-maine) (https://www.pbs.org/newshour/politics/ranked-voting-in-presidential-election-put-on-hold-in-maine) effort to repeal RCV.

Ultimately, other cities and states should serve as an example of the complications that arise from implementing RCV. It is critical for our country that elections maintain their integrity, and disenfranchising voters through RCV accomplishes the opposite. All Alaskans deserve to have their votes counted. To learn more about RCV visit [ProtectMyBallot.com](https://protectmyballot.com/) (https://protectmyballot.com/).

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# **Notice of Hearing and Procedural Order**

May 20, 2021

[SOA 198-200]

**BEFORE THE ALASKA PUBLIC OFFICES COMMISSION**

Yes on 2 For Better Elections,	)	
	)	
Complainant,	)	
	)	
vs.	)	Case No. 20-05-CD
	)	
Alaska Policy Forum and Protect My Ballot,	)	
	)	
Respondents.	)	

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**NOTICE OF HEARING AND PROCEDURAL ORDER**

A hearing in this matter will take place before the Alaska Public Offices Commission at approximately 9:00 a.m. on Thursday June 10, 2021.

The Commissioners will be present via Webex and will receive evidence regarding this matter. You may attend the hearing either by telephone (1-650-479-3207, Access Code: 177 615 2876#, Meeting Password: 32889562#), in-person (2221 E. Northern Lights Blvd, Ste 128, Anchorage, Alaska, 99508), or online via Webex.<sup>1</sup> You may be, but are not required to be, represented by an attorney or agent.

**If you wish to participate by telephone and are an individual who requires a special accommodation to participate,** you must advise the Commission office on or before June 1, 2021, so that a special accommodation can be made.

**PREHEARING AND HEARING PROCEDURES**

- 1) **Parties.** The parties in this case are Commission Staff and Respondents Alaska Policy Forum and Protect My Ballot.
- 2) **Issues.** At the hearing, the Commission will consider whether the 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.
- 3) **Procedural history.** Yes on 2 For Better Elections filed the complaint against Brett Huber, Alaska Policy Forum and Protect My Ballot on September 8, 2020. Alaska Policy Forum filed an Answer

<sup>1</sup> Please contact APOC if you would like to attend using Webex. Webex meeting invitation will be sent via email.

denying the allegations of the Complaint on September 25, 2020. Staff's investigation report recommending that the allegations against Protect My Ballot and Brett Huber be dismissed; and that allegations that Alaska Policy Forum failed to register and report its activities and failed to identify its political communications, in connection with its opposition to Ballot Measure 2 be upheld was issued on October 20, 2020. Alaska Policy Forum filed a response to the staff report on October 30, 2020. On December 30, 2021, the Commission granted Alaska Policy Forum's request to continue the hearing scheduled for January 13, 2021, to a later date. On January 4, 2021, Brett Huber moved for summary judgment and on January 8, 2021, the Commission issued its Order dismissing the claims against Huber.

- 4) **Hearing procedures.** The hearing will be conducted as provided in AS 15.13.380, 2 AAC 50.891, and the Alaska Administrative Procedure Act, AS 44.62.330 – 44.62.630. All testimony must be presented or submitted under oath. A party may call witnesses, cross-examine witnesses, present and rebut evidence. If the respondent does not testify, the respondent may be called and examined as if under cross-examination.
- 5) **Evidence and exhibits.** All relevant evidence may be admissible at the hearing. In passing upon the admissibility of evidence, the Commission may consider, but is not bound to follow, the rules of evidence governing general civil proceedings in the courts of the State of Alaska. The Commission may exclude inadmissible evidence and order repetitive evidence discontinued.
- 6) **Prehearing filings.** No later than May 28, 2021, a party:
  - a) may file a list of witnesses expected to testify at the hearing;
  - b) may file copies of exhibits to be presented at the hearing that are marked and identified (for example, Resp.'s Ex. A);
  - c) may file a prehearing memorandum;
  - d) may file prehearing motions, including motions to dismiss, for summary judgment, or to exclude evidence, and
  - e) shall serve all parties and the Complainant with filings submitted.
- 7) **Response to motions and requests for subpoenas.** No later than June 4, 2021, a party
  - a) may respond to a motion; and
  - b) may request the Commission to issue subpoenas to compel the attendance of witnesses, the production of documents, or other things related to the subject of the hearing, and is responsible for serving the subpoena and paying the appropriate witness fee.

8) **Extensions of time.** Requests to extend the deadlines in this order must be in writing, filed with the Commission, served on all parties and the Complainant, and supported by good cause.


9) **Burden of proof.** The Commission staff has the burden to prove any charges by a preponderance of the evidence.

10) **Order of proceedings.** Matters considered at a hearing will ordinarily be disposed of in substantially the following order:

- a) pending motions, if any;
- b) complainant may present argument under 2 AAC 50.891(d)
- c) presentation of cases as follows, unless otherwise ordered by the Commission:
  - i) The Commission Staff’s direct case, including the investigative report, evidence, and testimony of witnesses;
  - ii) Respondent’s direct case;
  - iii) Rebuttal by the Commission Staff; and
  - iv) Closing statements, if any, by Respondent and Commission Staff.

10) **Decision and Order.** The Commission will issue an order no later than 10 days after the close of the record.

Dated: May 20, 2021

  
\_\_\_\_\_  
Heather Hebdon, Executive Director  
Alaska Public Offices Commission

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I caused a true and correct copy of the foregoing to be delivered by email and certified mail to the following:

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\_\_\_\_\_  
Signature Date

# **Motion to Dismiss by Alaska Policy Forum**

May 28, 2021

[SOA 000201-44]

**BEFORE THE ALASKA PUBLIC OFFICES COMMISSION**

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YES ON 2 FOR BETTER  
ELECTIONS,

*Complainant,*

v.

BRETT HUBER, ALASKA POLICY  
FORUM, and PROTECT MY  
BALLOT,

*Respondents.*

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No. 20-05-CD

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**MOTION TO DISMISS AND HEARING MEMORANDUM**

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*Counsel for Alaska Policy Forum*

## INTRODUCTION

Respondent Alaska Policy Forum (“APF”) moves to dismiss the complaint in the above-captioned action. The staff of the Alaska Public Offices Commission (“APOC” or “Commission”) must “prov[e] a violation by a preponderance of the evidence.” 2 AAC 50.891(d). Because the evidence compiled in the staff report cannot meet this standard, even if presumed to be true, the Commission should dismiss the action.<sup>1</sup>

The Commission’s staff charges APF with failing to register and file independent expenditure reports that are required for express communications, and with failing to include required disclaimers and on-communication disclosure on the alleged express communications. But none of the five communications identified by the staff meet the

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<sup>1</sup> Whether the Commission considers only the legal deficiencies of the four corners of the staff report, or considers evidence offered by staff and offered by APF, dismissal is warranted in either eventuality. *Richardson v. Municipality of Anchorage*, 360 P.3d 79, 84 (Alaska 2015) (noting that motions to dismiss focus on the material in the complaint); *State Farm Mut. Auto. Ins. Co. v. Lestenkof*, 155 P.3d 313, 316 (Alaska 2007) (holding that a “a pure question of law” should be reviewed “in light of precedent, reason, and policy” in the context of summary judgment under Alaska R. of Civ. P. 56). This Motion should be read as seeking relief under either standard, in the alternative.

statutory requirement that “express communications” relate to candidates. Moreover, there is no plausible interpretation of the YouTube video reposted by APF on July 31, 2020, under which it would indirectly, much less directly, identify a candidate or proposition, such that APF cannot have violated the identifier requirement as to that message. And to find that the identified messages were express communications triggering all these regulations would require reading Alaska law in an unconstitutional fashion. Accordingly, dismissal should be granted.

Furthermore, APOC cannot demonstrate that APF’s messages are “express communications” under the statutory and constitutional tests for the term. Accordingly, should the Commission not grant APF’s motion to dismiss, the Commission should still determine at the hearing that APOC has not demonstrated its case by a preponderance of the evidence.

#### STANDARD OF REVIEW

“The grant or denial of a motion to dismiss . . . depends on whether the complaint alleges a set of facts consistent with and appropriate to



The Commission also charges APF with violating Alaska’s “identifier” requirement. *See* AS 15.13.090. This requires that communications be “clearly identified by the words ‘paid for by’ followed by the name and address of the person paying for the communication”; “clearly . . . provid[e] the person’s principal officer”; “a statement from the principal officer approving the communication”; and “identification of the name and city and state or residence or principal place of business, as applicable, of each of the person’s three largest contributors . . . if any, during the 12-month period before the date of the communication.” AS 15.13.090(a).

#### ARGUMENT

##### **I. Messages referring to ballot measures are not express communications under the Commission’s authority.**

Both the Staff Report and the Notice of Hearing and Order are plain: this is a matter about whether APF made express communications. Staff Report at 1; Notice at 1. The Alaska Statutes are equally plain: an “express communication” is “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.” AS 15.13.400(8). And the law defines a candidate as “an individual who files for election,” and her agents or immediate family—not as a ballot proposition. AS 15.13.400(1).

Candidates and ballot propositions are simply not synonymous.

*Compare* AS 15.13.400(4)(A)(i) (“influencing the nomination or election of a candidate”), *with* AS 15.13.400(4)(A)(ii) (“influencing a ballot proposition or question”); AS 15.13.400(3) (“identify a candidate *or* proposition” (emphasis supplied)). Nor does any other statutory provision or any provision of the Alaska Administrative Code permit “candidate” to be read interchangeably with “ballot proposition.”

The Staff Report admits that “these definitions are specific to communications regarding candidates,” that is, that the statutory text does not cover ballot measures. Staff Report at 7-8. Nonetheless, the Commission staff tries to create a statutory offense covering ballot measure advocacy by asserting that “the distinctions also are appropriate for ballot proposition campaigns.” *Id.* at 8. But, even if these distinctions could logically extend to ballot measures, it is up to

the legislature to turn that logic into law, and to create a punishable offense.

In a *footnote*, the staff attempts to justify the administrative creation of a new statutory offense for ballot measures, but the authorities cited at best stand for the proposition that certain constitutional limits apply to both candidate elections and ballot measures. *Id.* at 8 n.50; *see Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481 (2007) (“*WRTL II*”) (Roberts, CJ, controlling op.) (holding that government could not burden speech unless it was the functional equivalent of express advocacy about a candidate); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (holding that the First Amendment did not just protect candidate campaign speech, and that “[n]o form of speech is entitled to greater constitutional protection,” than the ballot speech at issue there); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (upholding a law whose statutory text already covered ballot measures). None of those cases stand for the propositions that the terms “candidate” and “ballot measure” may be treated

interchangeably or that the legislature granted the Commission authority to create an offense for ballot measures.

Commission staff also provide a citation to Advisory Opinion 08-02-CD, Timothy McKeever (“Renewable Resources Coalition”). Staff Report at 8 n.50, 9.; Staff Report Ex. 24. That opinion notes that “express communication” is defined as “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.” Staff Report Ex. 24 at 4 (citation and internal quotation marks omitted). It also concedes that the definition of an express communication is “*specific* to communications regarding candidates.” *Id.* at 11 (emphasis added). Nevertheless, citing the same three cases discussed above, the advisory opinion asserts “the distinctions also are appropriate for ballot initiative campaigns.” *Id.* With that summary analysis, the advisory opinion similarly fails to sustain the Commission’s authority to create this new offense.

None of this gives the Commission authority to rewrite the definition of “candidate” to mean “ballot proposition,” or to otherwise

rewrite the statute to cover ballot propositions. *Parker Drilling Mgmt. Servs. v. Newton*, 139 S. Ct. 1881, 1888 (2019) (“[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” (internal quotation marks omitted)). And for the Commission to do so now would go beyond its statutory authority. *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 763 (11th Cir. 2010) (“The entire process of statutory interpretation is premised on the principle that statutory words have meaning.”); *see also City of Arlington v. Fed. Commc’ns Comm’n*, 569 U.S. 290, 297 (2013) (when agencies “act beyond their jurisdiction, what they do is ultra vires”). An administrative agency, at either the federal or state level, “may not confer power upon itself.” *La. Pub. Serv. Comm’n v. Fed. Commc’ns Comm’n*, 476 U.S. 355, 374 (1986). And that is true even if APOC is taking “action which it thinks will best effectuate a [State] policy.” *Id.*

Given that Alaska’s statute regarding express communications does not include ballot measures, and that APOC lacks the authority to make such a law itself, the Commission should dismiss all charges that APF failed to register and file independent expenditure reports. And if

APF's messages are not communications subject to the Commission's authority, then the identifier requirements at AS 15.13.090 are not applicable here, and those charges should also be dismissed.

**II. The Protect My Ballot YouTube video does not “directly or indirectly” mention Ballot Measure 2.**

The Staff Report is deficient in communicating which of “APF's press releases and posts concerning ranked choice voting” allegedly violated the identifier requirements of AS 15.13.090(a). Staff Report at 14. While the charges against all the communications should be dismissed as without statutory authority, any charge related to the YouTube video, if it is included in the Staff Report's allegations, in particular should be dismissed.

There is no “set of facts consistent with . . . [an] enforceable cause of action,” *Bachner Co.*, 387 P.3d at 20, here that the Protect My Ballot YouTube video “directly or indirectly identif[ies] a candidate or proposition,” AS 15.13.400(3). That video does not mention Alaska, or even indicate that a ballot measure on ranked choice voting was forthcoming *anywhere* in any upcoming election. The Staff Report does not allege otherwise. Staff Report at 12. Given this, there is no

reasonable interpretation of the video as identifying or opposing an Alaska ballot measure, even “indirectly.” AS 15.13.400(3); 15.13.400(6). And there is no “reasonable interpretation” that it could be an “exhortation to vote.” AS 15.13.400(8). Accordingly, the Commission should dismiss any allegations regarding the Protect My Ballot video.

### **III. The Commission should interpret the statutory requirements to avoid constitutional violations.**

While the courts must decide whether Alaska’s campaign finance laws violate the First and Fourteenth Amendments, the Commission has the discretion here to apply Alaska Statutes and the Alaska Administrative Code in a way that does not violate the United States Constitution. *See Bigley v. Alaska Psychiatric Inst.*, 208 P.3d 168, 184 (Alaska 2009) (“The canon of constitutional avoidance recommends that when the validity of an act of the [legislature] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle . . . [to] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (internal quotation marks omitted) (alterations in original)). As discussed below, and consistent with granting this motion to dismiss, APF points to ways

in which the terms “express communication” and “nongroup entity” may be used without raising constitutional doubts as to the validity of Alaska’s statutory and regulatory scheme. By contrast, adopting the Commission staff’s reading of those definitions would raise at least five constitutional violations.<sup>8</sup>

A. APOC’s interpretation would require an unconstitutional “intent-and-effect” test.

“Evidence of other . . . acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith.” Alaska R. Evid. 404; *see Berezyuk v. State*, 407 P.3d 512, 517 (Alaska Ct. App. 2017) (reversing conviction based on impermissible character and propensity evidence). But that is precisely what the Staff Report has done. It grouped multiple messages hoping that together they would hint at advocacy that was not apparent in any message individually, to then

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<sup>8</sup> Aside from counseling constitutional avoidance, APF provides the arguments in this section to preserve them, if it should prove necessary, for judicial review. By listing these five issues, APF does not concede that these are the *only* First Amendment problems raised when applying Alaska law against APF’s alleged conduct.



argue that the individual communications at issue must have been advocacy against Ballot Measure 2. Liability cannot be imposed based on such propensity evidence. *See Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1194 (Alaska 2009) (applying in civil cases).

Even if APOC somehow avoided Rule 404's prohibitions by arguing that the allegations were admissible to prove intent, the intent-based test it creates is prohibited by the First Amendment. To conclude that each of APF's five messages were express communications, APOC had to go beyond each message's content, seeking intent in APF's larger educational campaign about ranked choice voting.<sup>9</sup>

But looking beyond the messaging's four corners to divine intent is highly suspect following the Supreme Court's *WRTL II* decision. "An intent-based standard" like that used by APOC "offers no security for free discussion" and "could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while

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<sup>9</sup> In and of itself, the need to look for context beyond the four corners of APF's messaging suggests that these messages are all subject to alternative reasonable interpretations other than exhorting a vote against Ballot Measure 2.

leading to [] penalties for another.” 551 U.S. at 468 (Roberts, CJ, controlling op.). For example, it would not make sense that the same newspaper op-ed could be express advocacy when posted by one group and not by another. If the communication is express advocacy, it must be express advocacy for everyone posting it. An intent-and-effect test, however, permits and even encourages such discrepancies.

Furthermore, the process of imposing an intent-and-effect test unconstitutionally chills protected speech. Investigation and examination of “changes in the number of activities and the context of the activities” is part of APOC’s test. Staff Report at 13. But the Supreme Court’s concern about an intent test stemmed precisely from the test’s tendency toward “a burdensome, expert-driven inquiry” aimed at ferreting out the speaker’s true state of mind. *WRTL II*, 551 U.S. at 469. Because “First Amendment freedoms need breathing space to survive” and “[a]n intent test provides none,” the Court affirmed its rejection of intent-based tests for political speech. *Id.* at 468-469 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). The Commission can avoid these constitutional difficulties—arising from the use of

impermissible evidence and tests—by adopting APF’s statutory definitions and dismissing this case.

B. The republication of op-eds is protected by the First Amendment.

To avoid constitutional issues, the protections given to pieces originally published in newspapers must be extended to the reposting of those pieces. One of the messages distributed by APF was the reproduction of a newspaper opinion piece. The piece was not written by APF or an APF staff member, but by a staffer for a Maine-based nonprofit responding to an op-ed promoting ranked choice voting. But APOC is not attempting to fine the newspaper that originally published the piece, only APF for reposting it.

APOC would not pursue the *Anchorage Daily News* for publishing the piece because it has decided that communications by media organizations “enjoy[] both constitutionally protected speech protections and exclusion by APOC regulation.” AO 13-01-CD (“Walker”) at 2; *see* 2 AAC 50.990(7)(C)(i). But this media protection must extend to the communication and not just the speaker, or it would lead to absurd and unconstitutional results. It would mean that the same communication

was protected speech when uttered by a newspaper but regulated, punishable speech when shared by others. *See WRTL II*, 551 U.S. at 468. Such differential treatment would be unconstitutional speaker-based discrimination: Because “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content,” the First Amendment prohibits “restrictions distinguishing among different speakers, allowing speech by some but not others.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010).

Furthermore, APOC cannot justify the media exemption by arguing that the media industry is entitled to greater constitutional protection. “[A]s a constitutional proposition,” the “justification[] . . . that a valid distinction exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public,” is one that “can be disposed of summarily.” *Citizens United v. Gessler*, 773 F.3d 200, 212 (10th Cir. 2014); *Citizens United*, 558 U.S. at 352 (“no precedent supporting” a

“constitutional privilege” for the “institutional press”).<sup>10</sup> Thus it cannot be the case that the *Anchorage Daily News*’s initial publication of Mr. Posik’s words is shielded from regulation but that APF’s republication is not merely because the *Daily News* is a “media organization.” Walker at 2.

The only way to avoid constitutional controversy while preserving APOC’s protection for media speech is to attach that protection to the communication itself, such that reposting the communication is also protected. Under such a rule, APF’s republication of Mr. Posik’s op-ed must fall under Alaska’s regulatory exclusion for press activity.

C. The identifier regime is unconstitutional.

Alaska’s on-communication disclosure regime is unconstitutional, and even more so when triggered at such low monetary thresholds. The

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<sup>10</sup> *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (holding no “constitutional right of special access to information not available to the public generally”); *Pell v. Procunier*, 417 U.S. 817, 834 (1974); Eugene Volokh, *Freedom for the Press as an Industry or Technology? From the Framing to Today*, 160 U. Pa. L. Rev. 459, 506–09 (2012) (noting that the Supreme Court declined to grant the institutional media preferential First Amendment treatment under generally applicable antitrust, copyright, and labor laws).

Commission can avoid a constitutional challenge on this issue simply by dismissing this case as outside the statute.

In *American Civil Liberties Union of Nevada v. Heller*, the Ninth Circuit struck down a Nevada law that “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.” 378 F.3d 979, 981 (9th Cir. 2003). 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 between on-publication identity disclosure requirements and after-the-fact reporting requirements” is “constitutionally determinative.” *Id.* at 991.

Moreover, the *en banc* Ninth Circuit recently struck down a San Francisco disclaimer rule that required bulky, oversized disclaimers of a similar or even less-extensive breadth than the government-directed script provided in AS 15.13.090(a). *Am. Beverage Ass’n v. City & Cty. of S.F.*, 916 F.3d 749 (9th Cir. 2019) (*en banc*). And that ruling applied to

less protected speech under a much lower standard of scrutiny. *Id.* at 755-56 (applying *Zauderer* test).

These rulings accord with Supreme Court precedent rejecting “government-drafted script[s]” that “plainly ‘alter[] the content’ of” a person’s “speech” under the First and Fourteenth Amendments. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 795 (1988)). Alaska’s identifier law is therefore unlikely to survive constitutional review—especially given that the identifier rules apply upon the first dollar spent of a group’s messaging. Adopting APF’s reading of the statute, however, avoids any of these constitutional problems.

D. First dollar donor disclosure and reporting is not sufficiently tailored to an important governmental interest.

Those making “express communications” must also register and file independent expenditure reports with the government, detailing all expenditures and reporting the names and addresses of all its donors, even those giving *de minimis* amounts. AS 15.13.400(7)(C) (defining expenditures to include express communications); AS 15.13.400(11)

(defining independent expenditures as expenditures not coordinated with candidates); AS 15.13.040(d) and (e) (requiring disclosure for independent expenditures of all contributors). This regime of first-dollar reporting and first-dollar donor disclosure is unconstitutional.

Private groups and associations have a presumptive First Amendment right to withhold their supporters' identities from the government. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). That right can be breached only by laws and rules properly tailored to a sufficiently vital governmental interest. *See Randall v. Sorrell*, 548 U.S. 230 (2006) (holding contribution rules too low to serve significant governmental interest). With a very narrow exception, *see* AS 15.13.040(h), the statute here 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, AS 15.13.040(e)(5). In fact, the burdens multiply when a contributor's donations reach the very low threshold of \$50, requiring not just the name and address of each contributor, but also the contributor's occupation and employer. *Id.*



Reviewing a range of laws, courts have held that low thresholds are suspect. *See, e.g., Randall*, 548 U.S. at 248-62; *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 v. Buescher*, 625 F.3d 1247 (10th Cir. 2010) (holding similar). And the scrutiny only intensifies as the threshold goes to zero. *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 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). At the thresholds required here, the information given to voters is useless, telling voters little about the financial constituencies supporting a candidate. *See Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (per curiam) (defining the informational interest). And the information provided to voters becomes even more useless when all contributions

are reported, not just those earmarked to support a candidate. *See, e.g., Van Hollen v. Fed. Election Comm’n*, 811 F.3d 486, 497 (D.C. Cir. 2016) (discussing confusion that would result from general donor disclosure); *Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016) (noting importance of earmarking requirement); *Indep. Inst. v. Fed. Election Comm’n*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016) (noting that “the large-donor disclosure requirement is tailored to substantially advance [the government’s] interests” because of earmarking requirement).

The Commission can avoid the constitutional issues inherent to the low thresholds, and enforcing unconstitutional provisions on APF, simply by following the plain text of the statute and holding that APF’s messages were not express communications.

E. The Commission staff’s statutory interpretation raises vagueness questions.

Alaska law regulates speech that “indirectly” references a ballot proposition, AS 15.13.400(3), as well as efforts to “influence” the outcome of an election and excludes from regulation those entities not “influenc[ed]” by business corporations, AS 15.13.400(14). The Supreme Court has held that terms such as “influence” are unconstitutionally

vague when applied to campaign finance laws. *Buckley*, 424 U.S. at 79-81. The term “indirectly” is similarly incapable of being understood by a reasonable person and poses a classic trap for the unwary. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Given that “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,” these definitions are unconstitutionally vague, and any provisions based on them are unconstitutional. *NAACP*, 371 U.S. at 438. These constitutional issues can be avoided here, however, by adopting APF’s reading of the statute.

#### **IV. APF’s messages are not express communications under the statutory and constitutional tests.**

Even if the Commission denies the motion to dismiss, at the hearing it should conclude that none of the messages are express communications. Under the statute, a message qualifies as an express communication only when it “is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” AS 15.13.400(8). Furthermore, APOC may not cherry-pick passages to create a perception of advocacy. Nor may it clump together a bunch of cherry-picked outside evidence to make an innocuous

message look like advocacy. Rather, the communication must be “read as a whole and with limited reference to outside events” when examining whether there is any reasonable interpretation other than advocacy. *Id.*

The statutory language is consistent with the constitutional test laid out in the Chief Justice’s controlling opinion in *WRTL II*. A communication “is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” 551 U.S. at 469-70; *see Citizens United*, 558 U.S. at 324 (noting *WRTL II* controlling opinion). This “objective” test must “focus[] on the substance of the communication” rather than introducing outside material to conjecture about intent, meaning that the test “must entail minimal if any discovery.” *WRTL II*, 551 U.S. at 469. And in all this, a court or regulator “must give the benefit of any doubt to protecting rather than stifling speech.” *Id.*

The first communication asserted to be an express communication by APOC staff “lacks indicia of express advocacy,” as it does “not mention

an election” or ballot measure, much less “take a position” on a named ballot measure. *Id.* at 470. It does state that ranked choice voting could “soon be coming to your neck of the woods,” but layers of inference and outside knowledge would be required to connect that to any election or ballot measure. The inferential gap only widens given that the op-ed frames itself as a refutation of arguments from an ideological opponent in a battle in another state.

APOC turns the second communication into advocacy only by failing to examine it as a whole. The July 24, 2020 press release is an announcement of a national campaign against ranked choice voting, announcing resources to explain concerns with the method and highlighting bipartisan opposition across the country against it. The press release then includes statements from several coalition members. While the statement from APF’s executive director mentions Alaskans going to the polls in November, the statements from members in Minnesota and Oklahoma mention efforts to implement ranked choice voting in their states. Viewing the message as a whole, it is hard to see it as anything other than a description of a nationwide campaign about

an issue of public importance. It is a stretch to characterize it as “susceptible of no other reasonable interpretation but as an exhortation to vote” against Ballot Measure 2, an interpretation that is possible only if one fails to “read [the message] as a whole.” AS 15.13.400(8).

These problems are even more apparent in the staff’s allegations about the October 8, 2020 report *The Failed Experiment of Ranked-Choice Voting*. The report mentions in its introduction and conclusion that there are movements across the country, including Alaska, to use ranked choice voting. The other Alaskan references are merely to illustrate, using Alaska’s voters as an example, how elections work and what voters are like. But there is no reference to Ballot Measure 2 or the November election. Rather, it is a long, detailed discussion of ranked choice voting, the problems it causes, and efforts to pass and repeal it around the country. As with the press release, one cannot say that the report is “susceptible of no other reasonable interpretation” when reading it as a whole.

And the October 8, 2020 press release announcing the report doesn’t even assert that ranked choice could be coming to Alaska or that there

are efforts to bring it. It summarizes the harms of ranked choice voting described in the report, states that ranked choice voting has no place in Alaska or anywhere in the country, and states that Alaskans should not have to worry about their votes not being counted. The press release does not mention Ballot Measure 2 or even the November election.

Any allegations as to the reposted YouTube video utterly fail the statutory and constitutional standards. It does not mention Alaska or indicate that there are any ballot measures anywhere on ranked choice voting. The layers of supposition and allegations from outside the communication, necessary to even try to link it to Ballot Measure 2, are hardly consonant with an objective test demanding that there be “no other reasonable interpretation.”

Given the high standard imposed by the statute and the First Amendment, APOC cannot show by a preponderance of the evidence that there is no reasonable interpretation of any of the communications other than as express advocacy or its functional equivalent. Accordingly, should this case proceed to the hearing, the Commission

should hold that the messages are not express communications and thus not subject to any of the charges APOC has brought against APF.

#### CONCLUSION

For the foregoing reasons, the Commission should grant APF's motion to dismiss or hold at the hearing that the messages cannot be express communications.

Respectfully submitted,

s/ Owen Yeates

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*Counsel for Alaska Policy Forum*

Dated: May 28, 2021



# **Staff Response to Motion to Dismiss**

June 4, 2021

[SOA 000245-52]

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**BEFORE THE ALASKA PUBLIC OFFICES COMMISSION**

YES ON 2 FOR BETTER )  
 ELECTIONS )  
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 Complainant, )  
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 v. )  
 )  
 PROTECT MY BALLOT and )  
 ALASKA POLICY FORUM )  
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 Respondents. )  
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**ARRIVED**  
 JUN 4 2021  
 APOC - ANCH  
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) APOC Case No. 20-05-CD

**STAFF RESPONSE TO RESPONDENT’S MOTION TO DISMISS**

The original Staff Report issued on October 15, 2020, recommended the Alaska Public Offices Commission (Commission) find Alaska Policy Forum (APF) violated multiple provisions of AS 15.13. Specifically, the report recommended finding APF violated:

1. AS 15.13.040(d) for failing to make a full report of expenditures made;
2. AS 15.13.050(a) for failing to register with the Commission before making an expenditure in opposition to a ballot proposition; and
3. AS 15.13.090(a) for failing to identify communications with the words “paid-for-by” and providing required information in the communication, including, among other requirements, names, addresses, and specific details about the person paying for the communication.

On May 28, 2021, APF filed a motion to dismiss on the ground that none of the five communications identified by staff meet the statutory requirement that “express

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communications” relate to candidates. Further, APF argues there is no plausible interpretation of a YouTube video posted by APF on July 31, 2020, under which it would directly or indirectly identify a candidate or proposition, such that APF cannot have violated the identifier requirement as to that message. Finally, APF argues that finding the identified messages meet the definition of express communication would require reading Alaska law in an unconstitutional fashion, thus warranting dismissal of this matter.

For the following reasons, APF’s motion to dismiss should be denied.

**I. APF violated 15.13.050(a) for failing to register with the Commission before making an expenditure in opposition to a ballot proposition.**

“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.”<sup>1</sup> An expenditure is defined as “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 . . . influencing the outcome of a ballot proposition or question” and “includes an express communication and an electioneering communication, but does not include an issues communication.”<sup>2</sup>

As a preliminary matter, after review and further analysis, staff agrees with APF that the definition of express communication does not encompass

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

<sup>2</sup> AS 15.13.400(7).

communications for or against a ballot proposition. However, express and electioneering communications are not the only types of communications that qualify as expenditures.

The definition of expenditure is not written in a way that indicates communications are limited strictly to express and electioneering communications. Instead, the definition contemplates that all communications are expenditures, including express and electioneering communications, but excluding issues communications. If the legislature intended for express and electioneering communications to be the only types of communications included in the definition of expenditure, the statute would clearly set out that *only* express and electioneering communications are included as expenditures. Yet, the statute does not include such limiting language in relation to communications and should not be read that way.

Moreover, AS 15.13.010(b) provides that “[e]xcept 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.”<sup>3</sup> Therefore, communications made by APF in opposition to ranked-choice voting are communications made for the purpose of influencing the outcome of Ballot Measure 2, expenditures which before making required APF’s registration with the Commission.

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<sup>3</sup> Emphasis added.

As provided in the original Staff Report, APF has not registered as an entity with the Commission. Yet, on July 31, 2020, APF posted to its website the YouTube video titled “*What is Ranked Choice Voting*” from Protect My Ballot’s YouTube channel. This video made explicit claims in opposition to ranked choice voting, calling it “a confusing system that could force voters to support a candidate they don’t want. Instead of giving you more choice, this system could take your choice away.” Further, on October 8, 2020, APF posted the report *The Failed Experiment of Ranked Choice Voting* and the press release *New Study Exposes Alarming Ramifications to Ranked Choice Voting* alerting readers to the published report on the issue.

By July 31, 2020, Ballot Measure 2, or 19AKBE Alaska’s Better Elections Initiative, had already been deemed properly filed by Lieutenant Governor Meyer and its sponsors had been provided a ballot title and proposition for review.<sup>4</sup> Ranked-choice voting was indeed an aspect of Ballot Measure 2. Moreover, early voting in Alaska for the November 2020 election, in which Ballot Measure 2 was to be voted on by Alaskans, began on October 19, 2020, just eleven days after APF’s report and press release critical of ranked-choice voting.

When taken as a whole based on the evidence provided, including the timing and context, the YouTube video and publications on APF’s site were communications made for the purpose of influencing the outcome of a ballot proposition, specifically Ballot Measure 2, and as such meet the definition of expenditures. Yet, before making

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<sup>4</sup> See <https://www.elections.alaska.gov/petitions/19AKBE/19AKBE-LetterToSponsor.pdf> (last visited June 4, 2021).

these expenditures, APF did not register with the Commission. As such, APF violated AS 15.13.050(a) for failing to register with the Commission before making expenditures in in opposition to Ballot Measure 2.

**II. APF violated AS 15.13.040(d) for failing to report independent expenditures.**

“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.”<sup>5</sup> An independent expenditure is defined as “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.”<sup>6</sup> And, while the words “ballot proposition” do not appear here, “[a]n independent expenditure for or against a ballot proposition or question shall be reported in accordance with AS 15.13.040”.<sup>7</sup>

As provided above and in the original Staff Report, APF made expenditures in opposition of Ballot Measure 2. However, APF has not made a report of *any* of the expenditures it made in opposition of Ballot Measure 2. As such, APF violated AS 15.13.040(a) for failing to report its expenditures made in opposition to Ballot Measure 2. Further, while not originally charged with violating AS 15.13.140(b)(1),

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<sup>5</sup> AS 15.13.040(d).  
<sup>6</sup> AS 15.13.400(11).  
<sup>7</sup> AS 15.13.140(b)(1).

the Commission should find that APF also violated AS 15.13.140(b)(1) for the same reasons that APF violated AS 15.13.040(d).

**III. APF violated 15.13.090(a) for failing to identify its communications.**

“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.”<sup>8</sup> A communication is defined as “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).”<sup>9</sup> APF is not an individual or nongroup entity as those terms are defined under APOC statutes, so the exemption for communications placed by nongroup entities and individuals does not apply to APF. Further, APF’s criticism of ranked-choice voting in its communications can, when taken as a whole, be reasonably interpreted as an indirect identification of a ballot proposition. As such, the identification requirement provided by AS 15.13.090 applies to APF’s communications.

As provided above and in the original Staff Report, APF made communications by posting Protect My Ballot’s video on its YouTube site, by publishing the report *The Failed Experiment of Ranked Choice Voting*, and by announcing its publication of the report with the press release *New Study Exposes Alarming Ramifications to Ranked*

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<sup>8</sup> AS 15.13.090(a).

<sup>9</sup> AS 15.13.400(3).

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*Choice Voting.* None of these communications were accompanied by the paid-for-identifier required by state law. As such, APF violated AS 15.13.090(a) for failing to identify its communications.

#### **IV. Conclusion**

For the foregoing reasons and for the reasons identified in the original Staff Report, APF violated AS 15.13.050(a) for failing to make a full report of expenditures made in opposition to Ballot Measure 2. Furthermore, APF violated AS 15.13.050(a) for failing to register with the Commission before making an expenditure in opposition to Ballot Measure 2. Finally, APF violated AS 15.13.090(a) for failing to identify its communications in opposition to Ballot Measure 2 with the words “paid-for-by” and providing required information in the communication, including, among other requirements, names, addresses, and specific details about the person paying for its communications. As such, APF’s motion to dismiss should be denied.

DATED June 4, 2021.

TREG R. TAYLOR  
ATTORNEY GENERAL

By: /s/Morgan A. Griffin  
Morgan A. Griffin  
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Dated: 6/4/2021 at 4:15pm  
Staff Response To Respondent's Motion To Dismiss (8 pages)

/s/ Ivy Greever  
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# **Selections of Hearing Transcript**

June 10, 2021

BEFORE THE ALASKA PUBLIC OFFICES COMMISSION

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YES ON 2 FOR BETTER )  
 ELECTIONS, )  
 Complainant, )  
 v. )  
 ALASKA POLICY FORUM AND )  
 PROTECT MY BALLOT, )  
 Respondents. )

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APOC Case No. 20-05-CD

TRANSCRIPT OF PROCEEDINGS

June 10, 2021 - Pages 1 through 45

1 HEARING

2 HELD VIA ZOOM VIDEOCONFERENCE

3 BEFORE THE ALASKA PUBLIC OFFICES COMMISSION

4 COMMISSIONERS ANNE HELZER, VAN LAWRENCE,  
5 RICHARD STILLIE, JR., SUZANNE HANCOCK, and DAN LaSOTA

6 Juneau, Alaska  
7 June 10, 2021  
8 9:03 a.m.

9 APPEARANCES:

10 FOR THE COMPLAINANT: SAMUEL GOTTSTEIN, ESQ.  
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22 FOR APOC: TOM LUCAS, ESQ.  
23 Alaska Public Offices Commission  
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1 communicate about election methods and did so  
2 repeatedly in a one-sided, biased fashion while  
3 urging Alaskans to go to the polls in November.  
4 This is an election communication that falls under  
5 the Commission's purview because the change in the  
6 timing and content of APF's communications must  
7 matter. And because no reduction in fines is  
8 warranted, the Commission should accept and adopt  
9 the APOC staff report's recommendations and impose  
10 the maximum fines against APF.

11 I'll be available for any questions the  
12 Commission may have, but thank you all for your time  
13 this morning.

14 CHAIR HELZER: Thank you very much,  
15 Mr. Gottstein.

16 We can now have staff present their case.  
17 Is Mr. Lucas here?

18 MR. YEATES: Commissioner, one question. So  
19 is there going to be a ruling on the motion to  
20 dismiss before we actually go into the remaining  
21 charges? It would simplify matters if the  
22 Commission made a ruling on the motion to dismiss so  
23 we know what we're arguing about.

24 CHAIR HELZER: Okay. So the issue is whether  
25 the motion to dismiss should be part of this, so

1 we've got it -- you're correct. We've got to handle  
2 this first.

3 MR. YEATES: And the part of that that's  
4 important is because we need to know what the  
5 arguments are going to be, whether it's going to be  
6 about express communications or about what the staff  
7 responses attempts to change them to, to independent  
8 expenditures rather than express communications.  
9 And the staff report reduces it to three  
10 communications rather than the five mentioned in the  
11 staff report, so knowing what we're addressing would  
12 be very important.

13 CHAIR HELZER: So what we're going to do is  
14 consider the motion to dismiss along with the merits  
15 and do the whole case together, so we'll have to  
16 address all of it in this one proceeding. To  
17 separate it out at this time is not what the  
18 Commission is going to do.

19 MR. YEATES: Okay.

20 CHAIR HELZER: So at this time we're going to  
21 have staff present their case on both of those  
22 issues together.

23 MR. LUCAS: This is Tom Lucas for staff.

24 In this complaint, Yes on 2 alleged that  
25 Brett Huber, APF, and PMB violated AS 15.13 in

1 several ways in connection with the ranked-choice  
2 voting ballot initiative that was on the ballot in  
3 the 2020 general election. The allegations against  
4 Mr. Huber were dismissed by the Commission on  
5 January 8th, 2021. The investigation revealed no  
6 evidence to support the lobbying allegation in the  
7 complaint, and staff recommends that that allegation  
8 be dismissed.

9 The allegations remaining assert that APF  
10 and PMB violated the statute by making expenditures  
11 in opposition to the ranked-choice initiative  
12 without first registering with APOC, failing to file  
13 a report, and failing to identify their  
14 communications with an appropriate paid-for-by  
15 identifier. Thus the primary issue in this case is  
16 whether the activities of APF and PMB satisfy the  
17 definition of "expenditure" found at AS 15.13.400.  
18 If so, each respondent should have registered with  
19 APOC, filed reports, and identified their  
20 communications.

21 To make this determination, the  
22 Commission must determine whether the activities  
23 engaged in had the purpose of influencing the  
24 outcome of the ballot proposition. The statute  
25 provides a definition of the term "express

1 communication" and further provides that an express  
2 communication is an expenditure. Although the  
3 definition of "express communication" is specific to  
4 communications regarding candidates, the Commission  
5 has long held that the tests provided are  
6 appropriate to use to determine whether the activity  
7 satisfies the definition of "expenditure" in ballot  
8 proposition cases.

9 Based on the tests provided, staff  
10 determined that the allegations against PMB should  
11 be dismissed because its activities were susceptible  
12 to a reasonable interpretation other than an  
13 exhortation to vote against the ranked-choice ballot  
14 measure, specifically that the website created by  
15 the organization was intended as a clearinghouse of  
16 information provided for a variety of purposes,  
17 including opposing its adoption in state and local  
18 elections in other jurisdictions and abolishing it  
19 where it was law.

20 On the other hand, prior to the  
21 initiative, APF had shown no interest in  
22 ranked-choice voting issues, yet engaged in a burst  
23 of activities against ranked-choice voting as the  
24 November election approached. Based on the timing  
25 of APF's activities and the context in which they



1 occurred, staff determined that those activities  
2 satisfied the definition of "expenditure" and that  
3 APF should have registered with APOC before making  
4 the expenditure, should have filed reports with  
5 APOC, and should have placed the appropriate  
6 paid-for-by identifier on its ranked-choice  
7 communications.

8 Staff determined that the maximum civil  
9 penalty in the case would be \$10,550. In  
10 mitigation, an inexperienced filer can get a  
11 50 percent reduction. Also, a civil penalty may be  
12 reduced by a percentage greater than 50 percent if  
13 the penalty is significantly out of proportion to  
14 the degree of harm suffered by the public.

15 Staff recommended a reduction by  
16 90 percent because the civil penalties are  
17 significantly out of proportion when you take into  
18 account that APF's website, where these  
19 communications were made, fully identifies APF's  
20 physical location and all of its officers and  
21 employees. Under those circumstances, staff  
22 believed that a substantial reduction of the civil  
23 penalties concerning the failure to register and  
24 failing to provide full paid-for-by identifiers  
25 should be made.

1                   And with that, staff closes.

2                   CHAIR HELZER: Okay. Is there any evidence  
3 you have to present or any witnesses to call,  
4 Mr. Lucas?

5                   MR. LUCAS: Staff has no witnesses, and the  
6 evidence is presented in the staff report through  
7 the exhibits.

8                   CHAIR HELZER: We can now hear from Alaska  
9 Policy Forum.

10                  MR. YEATES: Thank you.

11                         Well, just to begin, going back, for the  
12 reasons stated in our motion to dismiss, the  
13 Commission should dismiss any charges related to  
14 making express communications. The staff responses  
15 admitted that there is no authority under the  
16 statute to control ballot measure opposition as an  
17 express communication, and even if this is a  
18 long-time act, if it was outside the authority of  
19 the Commission to make such a regulation or to make  
20 the advisory opinion, it's ultra vires, and any  
21 charges related to express communication should be  
22 dropped.

23                         We also object to the changing of the  
24 charges on the eve of the hearing, changing it from  
25 express communication to independent expenditures as

1 a basis for violations of the various statutory  
2 provisions. That change, making a changing target  
3 that we have to hit, is a violation of the due  
4 process clause under the 14th Amendment and the  
5 minimum due process required under Alaska's  
6 Administrative Procedure Act.

7 In particular, under Section 44.62.420,  
8 we have to be noticed of the charges that are being  
9 brought against us, and under 44.62.370 there has to  
10 be a statement of issues. With the change of  
11 charges to independent expenditures triggering all  
12 of these things, there hasn't been any of that  
13 notice or statement of issues. Also there hasn't  
14 been any probable cause finding by the staff in the  
15 staff report as to them.

16 And I'll go into more detail about some  
17 of this, but even if you do make a change to  
18 independent expenditures and don't just dismiss  
19 everything outright, then it doesn't negate the  
20 complaint against APF. And just a quick overview  
21 why Mr. -- well, Yes on 2 argued that it would  
22 actually make it easier to bring a conviction  
23 against APF, but that is not true, because the  
24 reason why express communications and election  
25 hearing communications were created in the early

1 2000s and then litigated in *McConnell v. FEC* and  
2 *Citizens United v. FEC* is because the standard to  
3 say that something is an independent expenditure is  
4 so very high, going back specifically in 1976.

5 So under the standard which I'll lay out  
6 for that, the communications here can't be express  
7 advocacy or their functional equivalent, which is  
8 what is required under the First Amendment to say  
9 that something is an independent expenditure. And  
10 if you take the proper view of what is an  
11 independent expenditure, all of these communications  
12 have to drop out.

13 Getting into that, so in -- and as was  
14 noted under Section 15.13.040(b), you have to make a  
15 full report of expenditures made. And this says  
16 "Every person making an independent expenditure  
17 shall make a report of expenditures made and  
18 contributions received." In 15.13.400, Subsection  
19 11, it defines an "independent expenditure" as an  
20 expenditure made without the direct or indirect  
21 consultation or cooperation with or at the  
22 suggestion of or prior consent of candidates."

23 Going to Subsection 7, an "expenditure"  
24 is defined as "a purchase or transfer of money or  
25 anything of value for the purpose of influencing the

1 outcome of a ballot proposition or question."

2 Now, that language, for the purpose of  
3 influencing, is what triggered all of the  
4 restrictions on what can be considered an  
5 independent expenditure. In Buckley v. Valeo, 424  
6 US 1 (1976), in a per curiam decision by the U.S.  
7 Supreme Court they held that the language -- that  
8 the phrase "for the purpose of influencing" is  
9 unconstitutionally vague because the language will  
10 bring in issue advocacy as well as advocacy for a  
11 candidate or later a proposition that can be  
12 properly regulated.

13 So the Supreme Court held that when you  
14 define something as for the purpose of influencing,  
15 which is a vague term according to the court, it had  
16 to be restricted or regulated down to express  
17 advocacy. And the Supreme Court laid out what was  
18 later called the "magic words test," that advocacy  
19 had to be words like "vote for this candidate,"  
20 "vote for" or "against this candidate." And courts  
21 later restricted it to that, those magic words, as  
22 it was called.

23 Now, if we fast-forward it to the 1990s  
24 and then the early 2000s, the courts were  
25 concerned -- well, Congress was concerned that too

1 much speech, too much pure advocacy for candidates  
2 was flipping around the magic words test, so they  
3 created electioneering communications, which were  
4 not vague. Electioneering communications said "Any  
5 mention of a candidate within 60 days," and it had  
6 to be to the relevant electorate.

7 The Supreme Court, later in the  
8 *McConnell*, said, "Well, that can only be if it's the  
9 functional equivalent of express advocacy," and then  
10 later in *Wisconsin Right to Life v. Federal Election*  
11 *Commission* they defined -- the chief justice, Chief  
12 Justice Roberts, defined what is the functional  
13 equivalent of express advocacy.

14 And courts have since widened the reach  
15 of independent expenditures being not just the magic  
16 words but the functional equivalent of express  
17 advocacy. But the standard for functional  
18 equivalent is also very strict. It says that there  
19 can be no reasonable interpretation of the  
20 communication other than as advocacy for or against  
21 a candidate, or in this respect, a ballot measure.

22 So Yes on 2 is not correct in saying that  
23 this is an easier standard to meet. Express  
24 communications would actually be the easiest  
25 standard to meet because to say that something is an

1 independent expenditure, there has to be no  
2 reasonable interpretation other than. And as Chief  
3 Justice Roberts talked about, this has to be an  
4 objective test, and this is where a lot of the  
5 evidence that Yes on 2 and the staff failed because  
6 it cannot be an intent and effect test.

7 In Wisconsin Right to Life 2, Chief  
8 Justice Roberts specifically said there cannot be an  
9 intent and effect test for independent expenditures  
10 and electioneering communications because it would  
11 make it so that the same communication could express  
12 advocacy when made by one party and not express  
13 advocacy when made by another.

14 And the prime example is here in this  
15 case. The first exhibit, the Alaska Daily News  
16 op-ed -- there has been no charge against the Alaska  
17 Daily News for running that op-ed. There's been no  
18 charge against Mr. Posik for writing that op-ed.  
19 There's only been a charge against APF for  
20 re-posting that op-ed, which turns this into a  
21 situation where a speaker's intent changes whether  
22 or not his communication is express advocacy.  
23 That's unconstitutional. It has to be either  
24 express advocacy or not, based on the four corners  
25 of the ad.

1           And all of the communications that we  
2 have at issue here, when you look at them within  
3 their four corners, they can't be that. I would  
4 have liked to have had a member of the staff -- I  
5 had expected that the staff would actually have to  
6 enter into evidence and read and go through these  
7 communications in part because I would like to point  
8 out that three of the five communications are not  
9 even in the exhibits. There is no text for the  
10 Anchorage Daily News piece in the staff report.  
11 There is no transcript of the reposted video, and  
12 there's no text for the October 8th report.

13           So I'm not certain how the commissioners  
14 can actually evaluate and look at these as evidence  
15 when they're not even in the record, and much less  
16 if appealed to a court how they're going to say that  
17 there is a record of these things. So I would argue  
18 that any of these charges related to those three  
19 communications be dropped and dismissed because, as  
20 a matter of law, the Commission hasn't met its case  
21 as to them.

22           But going through them one by one, the  
23 Anchorage Daily News piece, it nowhere talks about  
24 Ballot Measure 2. It nowhere mentions the November  
25 election. To even come to the idea that it mentions



1 an election, you have to infer from outside things,  
2 outside the communication. And based on the  
3 standards that you have in Wisconsin Right to Life,  
4 someone reading that, a reasonable person reading  
5 the Anchorage Daily News op-ed could think that it  
6 was -- well, they could think that it was about any  
7 other kinds of things. They could think that there  
8 might be a municipal election going on. They could  
9 think that this was something being considered by  
10 the State Legislature. They could think that this  
11 was something being considered by a county board.

12 It takes some inference and outside  
13 knowledge to be able to say that that op-ed was  
14 about Ballot Measure 2, and that's the other thing  
15 that's forbidden under Wisconsin Right to Life under  
16 the functional equivalent of express advocacy test,  
17 that you can't require extensive discovery to get to  
18 that, and it can't bring in outside knowledge to get  
19 to that.

20 And I also would object to this op-ed --  
21 and the other reason why it highlights the problem  
22 with saying that a communication could be express  
23 advocacy for one party and not for another comes up  
24 to the fact that this op-ed was written by someone  
25 other than APF, and I would like to know how on earth

1 APF -- I mean, fitting to the identifiers  
2 requirement, how on earth APF could identify the  
3 op-ed as its communication. I mean, that would be  
4 plagiarism or a copyright violation to say that that  
5 was their communication and that they had funded it.  
6 Putting their identifier on it could get them in all  
7 kinds of other trouble legally.

8           Going on to the press release about  
9 joining the coalition, this, again, was announcing a  
10 national campaign. It concerns a national  
11 coalition. It begins by talking about a bipartisan  
12 opposition. It talks about leaders from across the  
13 country. It mentions that they're from  
14 San Francisco and Maine and other states. It then  
15 goes on and talks about a national education  
16 campaign -- not a campaign in Alaska, but a national  
17 education campaign.

18           It then quotes from two other people  
19 besides Ms. Marcum. They nowhere address Alaska.  
20 They're talking about issues in their states and  
21 their areas. And Ms. Marcum doesn't say  
22 "Ballot Measure 2." Again, the only way to link  
23 this press release from July 24th, 2020, to  
24 Ballot Measure 2 is by inferring that there is an  
25 outside election and bringing in your own thoughts.

1 There is a reasonable interpretation that this press  
2 release was about the national campaign, and since  
3 there is another reasonable interpretation, it fails  
4 the test for the functional equivalent of express  
5 advocacy.

6           Going on to the YouTube video, it nowhere  
7 even mentions Alaska, much less Ballot Measure 2.  
8 It doesn't mention a November election. It doesn't  
9 talk about Alaska in any way. So, again, the only  
10 way to link that video to Ballot Measure 2 is by  
11 outside inferences, going outside the four corners  
12 of the communication. And a reasonable person,  
13 looking at that, could think that it's discussing  
14 major issues in political science literature. It's  
15 talking about a nationwide campaign. It could be  
16 about campaigns in other states.

17           And, again, this has the problem of  
18 identification. How can APF put its identifier in a  
19 video that was produced and made by someone else?  
20 There is no way for them to do it, and it would be,  
21 again, either plagiarism -- there could be  
22 accusations of plagiarism or copyright violations.

23           Going on to the ranked-choice voting  
24 report from October 8th, 2020, it, again, talks  
25 about movements across the country. There's no

1 mention of Ballot Measure 2, no mention of a  
2 November election. It is many pages long, and,  
3 again, I would point out that neither the video nor  
4 this report are in the record. But it's many pages  
5 long. It talks about -- it begins by talking about  
6 things going on in other states, movements across  
7 the country -- San Francisco, Maine -- and it only  
8 mentions Alaska anywhere in the report to use  
9 Alaska's elections and Alaska's voters as examples  
10 of what happens in elections in general and why  
11 ranked-choice voting would be bad. So, again, the  
12 only way to link this to Ballot Measure 2 is through  
13 outside -- inferences based on outside evidence.

14 And going to the press release from  
15 October 8th about the report, again, it doesn't even  
16 assert that ranked-choice voting would be coming to  
17 Alaska. It summarizes the harms about ranked-choice  
18 voting. There's no mention about Ballot Measure 2  
19 and no mention of a November election.

20 So not only does this altogether violate  
21 the functional equivalent of express advocacy test  
22 that's in Wisconsin Right to Life -- and I'll read a  
23 line from Wisconsin Right to Life at 551 US 473 to  
24 474. "Contextual factors of the sort invoked by  
25 appellants should seldom play a significant role in

1 an inquiry." And, sorry, there's some other  
2 quotations that would be useful here.

3 Again, at 469, the Court says that "The  
4 tests must be objective, focusing on the substance  
5 of the communication rather than amorphous  
6 considerations of intent and effect. It must entail  
7 minimal, if any, discovery." So, again, not getting  
8 into outside factors. "It must give the benefit" --  
9 going on towards the bottom of 469, "It must give  
10 the benefit of the doubt to protecting rather than  
11 stifling speech."

12 And he's the test as it crosses from 469  
13 to 470. "A Court should find that an ad is the  
14 functional equivalent of express advocacy only if  
15 the ad is susceptible to no reasonable  
16 interpretation other than as an appeal to vote for  
17 or against a specific candidate." So the ads here,  
18 based on that test, cannot be considered express  
19 advocacy.

20 And so going to the first of the charges  
21 that would be brought against our client under  
22 40(d), 15.13.040(d), this can't be an expenditure.  
23 It can't -- under the requirements that anything  
24 that's defined as for the purpose of influencing has  
25 to be restricted to express advocacy or a functional

1 equivalent, it can't meet that.

2 And the staff response added  
3 15.13.140(b), but that, again, depends on it being  
4 an expenditure in the first place, and thus that it  
5 has to meet the functional equivalent of express  
6 advocacy test.

7 Going to the failure to register under  
8 15.13.050(a), it says, "Before making an expenditure  
9 in support of or in opposition to a ballot  
10 proposition or question, you shall register." But  
11 the liability under that section is, again,  
12 predicated on it being an expenditure. And as we  
13 just went through the history of Buckley and WRTL2,  
14 it can't be an expenditure. None of these  
15 communications can be.

16 Going on to the last point that "If it's  
17 an express communication or an independent  
18 expenditure, liability for failing to identify,"  
19 we've already discussed how there's an impossibility  
20 to identify several of these communications because  
21 they belong to other people. But the statute says  
22 in subparagraph (a) that this refers to all  
23 communications. It says, "All communications shall  
24 be clearly identified by the words 'paid for by,'  
25 followed by the name and address and then other

1 information."

2 Now, if the Alaska Legislature truly  
3 meant here all communications, then this section is  
4 blatantly unconstitutional because if it's really  
5 all communications, that doesn't mean just a  
6 communication that mentions a candidate or that  
7 mentions a ballot opposition; it means that every  
8 communication out there, every single article in a  
9 newspaper has to comply with Section 15.13.090(a),  
10 and that just can't be.

11 It wouldn't be -- again, as you talk --  
12 as you go through Buckley, and as you go through --  
13 all the way to Citizens United, this is called, in  
14 the parlance of the -- federal courts have used  
15 this -- it's called a disclaimer, that you're saying  
16 whether or not it was funded by the candidate or by  
17 the proponents of a ballot opposition, so it's  
18 disclaiming any -- it's disclaiming any affiliation  
19 with the candidate and saying who did it.

20 The Supreme Court in Citizens United  
21 emphasized -- and in Buckley emphasized that  
22 disclaimers have to be tailored to the informational  
23 interest, and as discussed in Buckley -- and I can  
24 give the citation if you would like it -- the  
25 informational interest has to -- it has to be tied

1 to information about the funding sources, the money  
2 sources that are supporting a candidate or a ballot  
3 proposition. And if 15.13.090 requires all  
4 registration of all communications, even something  
5 about, I don't know, a town fair or a county fair or  
6 something like that, there's no tie to the  
7 informational interest. It's not giving voters any  
8 information whatsoever about people who are  
9 supporting candidates. But even more than that,  
10 it's unconstitutionally overbroad.

11 And in the First Amendment context, after  
12 the Supreme Court decision in Grayned -- Grayned is  
13 cited in our motion to dismiss, but it's the test  
14 for unconstitutional overbreadth in the First  
15 Amendment context. So overbreadth in general means  
16 that there can be -- someone claiming that a law is  
17 overbroad has to prove that there's no set of  
18 circumstances, no situation in which it is  
19 constitutional. In the First Amendment context,  
20 however, all a challenger has to show is that the  
21 law's breadth goes beyond its plainly legitimate  
22 sweep. And if this subsection truly says "all  
23 communications," then it vastly goes beyond what the  
24 government has an interest in, in covering all  
25 communications.



1           So to avoid these -- I know that the  
2 Commission isn't allowed to opine or invalidate a  
3 statute based on its constitutionality, but what you  
4 can do is limit your authority and your actions to  
5 what would be constitutional. And to avoid any  
6 constitutional problems, you should limit the  
7 breadth of Section 15.13.090 to communications that  
8 APOC has truly been given power over, and that would  
9 be express communications and independent  
10 expenditures. And as I just went through, these  
11 communications cannot be independent expenditures.

12           And I should say that restricting the  
13 definition of communications in this way is  
14 supported by text in the statute. If you go to  
15 15.13.010(b), it says -- and I should state that the  
16 staff response to our motion to dismiss quotes this  
17 section. It says, "Except as otherwise provided,  
18 this chapter applies to communications made for the  
19 purpose of influencing the outcome of a ballot  
20 proposition." So by the text of that statutory  
21 provision, this has to be limited to express  
22 communications or independent expenditures, and none  
23 of these things can be either.

24           Just a couple of other things, and I'll  
25 preserve for appeal, if necessary, objections,

1 again, that it violates due process to change this  
2 hearing to discuss independent expenditures at this  
3 late point. Also, that the reporting triggers for  
4 expenditures and for communications are  
5 unconstitutional. The reporting threshold tiers  
6 start at less than a dollar, and that has never been  
7 approved by the United States Supreme Court. For  
8 one thing, it can't meet the informational interest  
9 because, as multiple courts have said, when you  
10 start reporting on teeny amounts of money, it  
11 doesn't really give anybody an idea of who the  
12 financial supporters are for a candidate or a ballot  
13 proposition.

14 Also, as we mentioned in our motion to  
15 dismiss, the Supreme Court has repeatedly said that  
16 lengthy disclaimers are not permitted. In *ACLU v.*  
17 *Heller* -- and I believe that we have that quoted --  
18 they expressly said that expanded disclaimers, where  
19 you have to start listing top donors on the face of  
20 your communications -- that that's unconstitutional  
21 compelled speech. And most recently in *American*  
22 *Beverage*, the Court, even under a lower standard of  
23 speech for commercial speech, they said that really  
24 lengthy disclaimers are unconstitutional. So the  
25 disclaimers that are being required here are

1       unconstititutional.

2                   Again, given the fact that there is no  
3 evidence in the record for the reposting of the  
4 op-ed, for the video, and for the report, I would  
5 ask there be a directed verdict or judgment as a  
6 matter of law that the Commission hasn't met its  
7 burden there, hasn't introduced them into evidence,  
8 and there can't be any review on appeal.

9                   And lastly, in addition to the reasons  
10 that Mr. Lucas gave for reducing the fine, I would  
11 ask for a reduced fine because, one, this is not a  
12 repeat violation, and there are legitimate reasons  
13 for thinking that there should not be reporting for  
14 reporting registration or identifiers, any of these  
15 communications. It was inadvertent. They never  
16 thought that it would lead to a violation of the  
17 code to publish what was, in essence, a white paper,  
18 an academic-linked paper on other sources, and that  
19 there could be liability for reposting other things  
20 that haven't been charged with violating the  
21 campaign finance statute.

22                   And, again, one of the other things that  
23 has to be considered under 15.13.390(e) -- one, that  
24 some of the factors that are considered is it is not  
25 repeat violation, but also this had no adverse

1 effect on Yes on 2. Yes on 2 passed. It went into  
2 effect, so there was no adverse effect on their  
3 campaign here. There's just unhappiness that there  
4 was someone who talked about the problems with  
5 ranked-choice voting.

6 And as to what Yes on 2 said at the  
7 beginning, that our fighting this shows that we're  
8 not penitent and that there shouldn't be any  
9 reduction in fines -- that would also -- that kind  
10 of a consideration would be unconstitutional. To  
11 punish someone for taking advantage of their right  
12 to go to court and to protect their rights would  
13 itself be a violation of the Constitution.

14 Yes on 2 also said that this was out of  
15 character for APF, but it's important to note, as we  
16 said in our motion to dismiss, that APF has long  
17 communicated information to Alaskans about electoral  
18 reform. And he also claimed that there had been  
19 nothing after the election, but he didn't provide  
20 any evidence that there was nothing after the  
21 election. And so it's hard to rebut a negative,  
22 but if you go to Alaska Policy Forum's website, you  
23 could see that there was an article on November 9th,  
24 2020, that talked about political parties being  
25 skeptical of ranked-choice voting, and APF has

1 multiple Facebook posts talking about ranked-choice  
2 voting -- on November 19th, 2020, December 7th,  
3 2020, December 15th, 2020, December 25th, 2020,  
4 March 3rd, 2021, April 1st, 2021, and May 3rd, 2021.

5 Now, again, going to these things and  
6 considering them would be going to an intent,  
7 effectiveness test, which is unconstitutional, but  
8 there is evidence that this is something that is a  
9 longstanding -- a longstanding and continuing  
10 interest to APF.

11 So unless there are any questions from  
12 the Commission, I'll stop speaking there, but I  
13 would ask that the Commission dismiss the charges  
14 against them, both as to express communications and  
15 that it refuses to violate due process by creating  
16 new charges at this late hour; but that if it does  
17 go forward into the analysis, that based on the  
18 tests that are required for express advocacy, either  
19 for express communications or independent  
20 expenditures, that under the objective tests  
21 required that you find that these communications  
22 were not express advocacy, not independent  
23 expenditures, and thus not subject to any of the  
24 reporting, registration, or identifier requirements.

25 Thank you.

1 CHAIR HELZER: Thank you very much, Attorney  
2 Yeates.

3 Do any of the commissioners have any  
4 questions for Mr. Yeates?

5 Okay. You've brought up a number of  
6 issues. What we're going to do is we're going to  
7 hear from everybody, and then we're going to have  
8 our deliberations. And then we will make all of  
9 those decisions at that time. Is that acceptable to  
10 you, Attorney -- okay.

11 MR. YEATES: Yes.

12 CHAIR HELZER: Mr. Thorsness -- thank you.

13 Mr. Thorsness, are you prepared to  
14 present anything as well here for Alaska Policy  
15 Forum? I'm sorry. You're on mute.

16 MR. THORSNESS: I apologize. No, thank you.

17 CHAIR HELZER: Thank you.

18 MR. THORSNESS: Okay.

19 CHAIR HELZER: So how about from Protect My  
20 Ballot? I know Attorney Amodio was on the line.

21 MR. AMODIO: Yes. Good morning, Madam Chair,  
22 and thank you. Good morning to you all, and I'll  
23 just make a brief statement on behalf of my client,  
24 Protect My Ballot.

25 And Protect My Ballot agrees with that

1 portion of staff's recommendation relating to it,  
2 that the complaint against Protect My Ballot should  
3 be dismissed in its entirety. PMB, as it's known,  
4 also agrees with staff's recommendation that Protect  
5 My Ballot was never properly served with the  
6 complaint, and, therefore, it fails as a matter of  
7 law as well, but that the Commission does not need  
8 to address that issue and should follow staff's  
9 recommendation to dismiss the complaint.

10 We also note that Yes on 2 has agreed  
11 with, apparently, at least in their presentation to  
12 the Commission -- agrees with that portion of  
13 staff's recommendation to dismiss Protect My Ballot,  
14 since they directed the entirety of their opening  
15 against Alaska Policy Forum.

16 PMB takes no position with regard to the  
17 rest of staff's report and the recommendations  
18 relating to Alaska Policy Forum. It does not  
19 involve PMB, so it's completely neutral on that, but  
20 it takes no position one way or the other.

21 So we endorse staff's recommendation and  
22 request that the Commission dismiss all claims  
23 against Protect My Ballot, and that's it.

24 Thank you very much.

25 CHAIR HELZER: Okay. Thank you.

1           Do any of the commissioners have any  
2 questions for Attorney Amodio? Okay. I'm not  
3 hearing any requests.

4           Mr. Lucas, do you want to have an  
5 opportunity to address some of the issues raised by  
6 Attorney Yeates?

7           MR. LUCAS: Yes, ma'am.

8           CHAIR HELZER: You can proceed with that,  
9 then.

10          MR. LUCAS: The first thing I would like to  
11 address is whether or not there was evidence of all  
12 five communications in staff's report. I will note  
13 that for each of those five, there was a footnote.  
14 And in the footnote sometimes it went to an exact  
15 exhibit, and sometimes it went to a link to the  
16 website of Protect My Ballot. And those things  
17 exist on that website and can be viewed on that  
18 website by simply clicking that link.

19          The other thing I would like to address  
20 is the contention that there is some kind of change  
21 here in terms of what was being alleged. From the  
22 beginning the allegation involved communications,  
23 and these communications were posted on APF's  
24 website. The paid-for-by identifier would not be  
25 on, for example, the web -- I'm sorry -- on the



1 opinion piece; rather, the paid-for-by identifier  
2 would be on the post that was contained on the  
3 website. I'm going through my notes.

4 The violation here is not that there  
5 should have been a paid-for-by identifier on, for  
6 example, the op-ed, but rather there should have  
7 been -- when it was reposted, that there should have  
8 been a paid-for-by identifier on the post or, as is  
9 allowed, a paid-for-by identifier on the website  
10 itself that would cover all of the posts.

11 Finally, I would like to address -- it  
12 was somewhat confusing to me the position of APF on  
13 the issue of express communications, communication,  
14 and independent expenditures. APF contends that  
15 this cannot be an express communication because  
16 there's no candidate involved, but then they also  
17 say it cannot be a communication at all because the  
18 definition of communication is overly broad.

19 Here, the Commission must have a test of  
20 some kind to determine whether or not this meets the  
21 definition of an expenditure. What the Commission  
22 has done in the past is utilized the test provided  
23 in the definition of an express communication.

24 The feel one gets from APF's presentation  
25 is that you must show that there is a violation of a

1 definition before you can move forward, but that's  
2 all it is, is a definition. The violation is not  
3 that this wasn't an express communication or was an  
4 express communication; the violation is whether it  
5 meets the definition of an expenditure, and  
6 therefore registration must have been required and  
7 reporting required. And if it does meet the  
8 definition of an expenditure, it would, without  
9 being overly broad, meet the constitutional  
10 requirements of a communication and, therefore,  
11 require for a paid-for-by identifier.

12 And those are my only comments at this  
13 time.

14 CHAIR HELZER: Thank you, Mr. Lucas.

15 Do any of the commissioners have any  
16 questions for Mr. Lucas? Okay. Do any of the  
17 commissioners have any follow-up questions for  
18 Attorney Yeates?

19 COMMISSIONER LAWRENCE: Madam Chair, will we  
20 be hearing from Mr. Gottstein again?

21 CHAIR HELZER: Mr. Gottstein is not presenting  
22 any evidence.

23 COMMISSIONER LAWRENCE: I mean, his response  
24 to the motion to dismiss? And -- well, and to the  
25 argument from APF, you know, from APF's attorney?

# **Final Order on Reconsideration**

July 12, 2021

[SOA 000268-77]

**BEFORE THE ALASKA PUBLIC OFFICES COMMISSION**

YES ON 2 FOR BETTER ELECTIONS, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 ALASKA POLICY FORUM AND )  
 PROTECT MY BALLOT, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

**APOC Case No. 20-05-CD**

**FINAL ORDER ON RECONSIDERATION**

Yes on 2 for Better Elections alleged that Alaska Policy Forum and Protect My Ballot made expenditures opposing Ballot Measure 2 without registering and reporting the expenditures and identifying who paid for the communications. Ballot Measure 2, which the voters approved in the November 2020 election, provides for ranked-choice voting in the state’s elections, among other changes to election and campaign laws. The respondents argued their activities opposing ranked-choice voting in general were not directed at Ballot Measure 2, and so did not trigger the registration, reporting, and paid-for-by requirements. After an investigation, the Alaska Public Offices Commission staff agreed that AS 15.13 did not apply to Protect My Ballot’s activities but found that Alaska Policy Forum engaged in election-related communications that required it to comply with AS 15.13. After a hearing on June 10, 2021, the Commission adopts staff’s conclusions on the merits for both respondents but does not impose a penalty for Alaska Policy Forum’s violations.

**I. The Commission concludes that Alaska Policy Forum’s communications opposed Ballot Measure 2 and so triggered requirements to register, report expenditures, and provide paid-for-by identifiers on the communications.**

The Commission concludes that Alaska Policy Forum’s communications on ranked-choice voting were expenditures and communications that triggered requirements to register before making expenditures, report expenditures, and identify who paid for the communications.<sup>1</sup> Alaska Policy Forum, which had no prior history of communicating about ranked-choice voting or other election methods, opposed ranked-choice voting on its website with press releases and an article, a republished opinion piece, and a video leading up to the election on the ballot measure. Although the materials did not mention the ballot measure by name, all of the communications were decidedly against the ranked-choice voting that Ballot Measure 2 would establish and so they were “susceptible of no other reasonable interpretation but as an exhortation to vote” against the measure.<sup>2</sup> Thus, the AS 15.13 requirements applied to Alaska Policy Forum’s communications.

The Commission uses the definitions of express and issues communications to inform its analysis of whether Alaska Policy Forum’s activities fall within the scope of election-related communications and expenditures such that AS 15.13 requirements apply. Covered expenditures include express, but not issues, communications.<sup>3</sup> Alaska Policy Forum argues that the plain statutory language defining “express communication”

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<sup>1</sup> AS 15.13.050(a), AS 15.13.040(d), AS 15.13.090, AS 15.13.140(b).

<sup>2</sup> AS 15.13.400(7) (eff. 2014).

<sup>3</sup> AS 15.13.400(6)(C) (eff. 2014).

and “issues communication” refers exclusively to candidate elections, not ballot measures.<sup>4</sup> This is true. But AS 15.13 may still apply to Alaska Policy Forum’s activities because the definitions of “expenditure” and “communication” are not so limited. In addition to express communication, covered expenditures include those “incurred or made for the purpose of . . . influencing the outcome of a *ballot proposition or question*,”<sup>5</sup> covered communications “directly or indirectly identify a candidate or *proposition*,”<sup>6</sup> and “independent expenditures for or against a ballot proposition or question shall be reported” in accordance with AS 15.13 requirements.<sup>7</sup> To decide whether Alaska Policy Forum’s activities fit within election-related expenditures and communications to which AS 15.13 applies, the definitions of express and issues communications offer a useful framework even though they do not strictly apply.

Using this framework, the Commission concludes that Alaska Policy Forum’s communications were made to influence the vote on the ballot measure and so were covered expenditures and communications.<sup>8</sup> An “express communication,” which is a covered expenditure,<sup>9</sup> is one that “when read as a whole and with limited reference to

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<sup>4</sup> See AS 15.13.400(7), (12) (eff. 2014).

<sup>5</sup> AS 15.13.400(6)(A)(iv) (eff. 2014) (emphasis added).

<sup>6</sup> AS 15.13.400(3) (eff. 2014) (emphasis added).

<sup>7</sup> AS 15.13.140(b)(1).

<sup>8</sup> The Commission does not address Alaska Policy Forum’s constitutional arguments because “[a]dministrative agencies do not have jurisdiction to decide issues of constitutional law.” *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 36 (Alaska 2007).

<sup>9</sup> AS 15.13.400(6)(C) (eff. 2014).

outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against” a ballot measure.<sup>10</sup> An “issue communication,” which is excluded as a covered expenditure,<sup>11</sup> addresses an issue of political importance and directly or indirectly identifies a ballot measure without supporting or opposing it.<sup>12</sup> In previous advisory opinions addressing whether an entity’s communications disseminated near an election with a ballot measure on the same subject require compliance with AS 15.13, the Commission has considered the entity’s history of communicating about the topic and the substance of the communications at issue, including the extent to which the communications were neutral and whether they identified the ballot measure.<sup>13</sup>

As staff’s investigation report describes, Alaska Policy Forum had no longstanding history of communicating about elections in general or ranked-choice voting in particular, and its communications were not neutral. Alaska Policy Forum’s communications about ranked-choice voting began when the elections initiative was proposed. In November 2019, petition booklets began circulating to gather enough signatures to put the initiative before the voters. Over the next few months, Alaska Policy

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<sup>10</sup> AS 15.13.400(7) (eff. 2014).

<sup>11</sup> AS 15.13.400(6)(C) (eff. 2014).

<sup>12</sup> AS 15.13.400(12) (eff. 2014).

<sup>13</sup> *Bags for Change*, AO 19-04-CD (approved Sept. 18, 2019) (available at <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=21018>); *Renewable Renewable Resources Foundation*, AO 13-04 CD (approved June 6, 2013) (available at <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=8475>); *Resources Coalition*, AO 08-02-CD (approved June 11, 2008) (available at <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=4878>).

Forum founded Protect My Ballot, a national coalition against ranked-choice voting, and republished on its website a Maine coalition member’s opinion piece directed toward Alaska’s signature-gathering for the initiative. The piece, “Ranked Choice Voting Fails to Deliver on its Promises,” ended with a warning: “Like Alaska, we in Maine regularly deal with an onslaught of ballot initiatives because we live in a cheap media market. The system may soon be coming to your neck of the woods. Don’t be surprised when it produces the opposite result of what you were promised.”

A month or so after the opinion post, the lieutenant governor reviewed the gathered signatures and accepted the elections initiative for placement on the ballot in the November 2020 election.<sup>14</sup> In a July press release, Alaska Policy Forum announced the launch of Protect My Ballot, touting that the national campaign “exposes flaws in ranked choice voting.” Alaska Policy Forum’s chief executive officer warned in a link from the press release, “As Alaskans take to the polls in November, history should be a warning for what ranked choice voting would lead to.” That same month, Alaska Policy Forum posted a Protect My Ballot video disparaging ranked-choice voting.

Finally, in October—shortly before early voting began for the November election—Alaska Policy Forum published a report that called ranked-choice voting a “failed experiment” and a press release characterizing the report as revealing the “alarming ramifications” of ranked-choice voting. Alaska Policy Forum and another

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<sup>14</sup> March 9, 2020, letter from Lt. Gov. Kevin Meyer re: 19AKBE Alaska’s Better Elections Initiative, (available at <https://www.elections.alaska.gov/petitions/19AKBE/19AKBE-LetterToSponsor.pdf>).



entity in the Protect My Ballot coalition co-wrote the report. A few days later, Alaska Policy Forum published an article, “Ranked-Choice Voting Disenfranchises Voters.” The article described that the “trend” of ranked-choice voting “has made it all the way to Alaska,” criticized ranked-choice voting, and warned that the vote-counting method disenfranchises voters when “[a]ll Alaskans deserve to have their votes counted.”

Even though Ballot Measure 2 was never mentioned by name, there is no other reasonable interpretation of these communications but as an exhortation to vote against implementing ranked-choice voting, a key component of the initiative. Thus, Alaska Policy Forum’s communications at least as of its July press release were election-related expenditures and communications requiring compliance with AS 15.13. Alaska Policy Forum violated AS 15.13.050(a) by not registering before making expenditures opposing a ballot measure, AS 15.13.040(d) and AS 15.13.140(b) by not filing reports on its expenditures, and AS 15.13.090 by not including a paid-for-by identifier on its communications.

The Commission waives imposition of civil penalties from the date the violations began to the date the complaint was filed, which tolled the accrual of penalties. Staff calculated the maximum penalties, which accrued at a rate of \$50 per day for each day the violations continued,<sup>15</sup> but recommended a reduction. Staff’s recommended reduction

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<sup>15</sup> AS 15.13.390(a) (providing that a civil penalty for these violations is “not more than \$50 a day for each day the violation continues”).

was based on Alaska Policy Forum’s inexperienced filer status<sup>16</sup> and because the maximum penalties were significantly out of proportion to the degree of public harm.<sup>17</sup> Alaska Policy Forum reported spending \$643.20 on preparing ranked-choice voting materials during the period that penalties were accruing for the violations.<sup>18</sup> Staff’s recommended reduced penalty of \$8,065 still “exceeds the value of the transactions that were not reported”—\$643.20 for the unreported expenditures and no monetary value for entity information that should have been provided on the registration and paid-for-by identifiers.<sup>19</sup> Thus, the Commission declines to impose the recommended penalty and waives the penalty altogether because it is “significantly out of proportion to the degree of harm to the public for not having the information.”<sup>20</sup>

**II. The Commission decides Protect My Ballot was not engaged in activities requiring it to comply with campaign disclosure laws.**

The Commission concludes that Protect My Ballot’s website against ranked-choice voting is susceptible of other reasonable interpretations than as an exhortation to vote against Ballot Measure 2 for the reasons explained in staff’s report.<sup>21</sup> In particular, Protect My Ballot had partners in other states with no pending ballot initiatives

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<sup>16</sup> 2 AAC 50.865(a)(1)(B).

<sup>17</sup> 2 AAC 50.865(b)(5).

<sup>18</sup> Staff exhibit 3 at pgs. 10-11. Staff ended the accrual of the daily penalties with the filing of the complaint.

<sup>19</sup> 2 AAC 50.865(b)(5). The entity information was available on Alaska Policy Forum’s website.

<sup>20</sup> 2 AAC 50.865(b)(5).

<sup>21</sup> See AS 15.13.400(7) (eff. 2014) (defining an “express communication”).

addressing ranked-choice voting and with different agendas, and the vast majority of the materials on its website opposed ranked-choice voting as a general matter. Only two pieces mentioned Ballot Measure 2 and voting—links to opinion pieces published elsewhere. Thus, the Commission dismisses the complaint against Protect My Ballot.

**III. The Commission dismisses the allegation against Alaska Policy Forum that it failed to comply with the laws regulating lobbying.**

The Commission adopts staff’s recommendation and dismisses the allegation that Alaska Policy Forum violated the lobbying laws in AS 24.45. A “lobbyist” is a paid employee or contractor who communicates with public officials “for the purpose of influencing legislation or administrative action for more than 10 hours in any 30-day period in one calendar year” or represents oneself as a lobbyist.<sup>22</sup> Alaska Policy Forum explained that its employees’ lobbying activities did not meet the threshold number of hours and none of its employees represented themselves as lobbyists. Staff uncovered no evidence to the contrary. A tax return showing that Alaska Policy Forum spent \$4,027 on lobbying offers no information on the number of hours spent lobbying in any 30-day period in one calendar year.

**IV. CONCLUSION**

The Commission denies Alaska Policy Forum’s motion to dismiss the election-related allegations. The Commission concludes that Alaska Policy Forum’s communications were intended to influence the election on Ballot Measure 2 and

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<sup>22</sup> AS 24.45.171(11).

necessitated that it comply with the requirements to register before making expenditures,<sup>23</sup> report independent expenditures,<sup>24</sup> and identify who paid for communications.<sup>25</sup> The Commission orders Alaska Policy Forum to comply with these requirements within 30 days and does not impose a penalty for Alaska Policy Forum's violations of the requirements from the date the violations began to the date the complaint was filed, which tolled the accrual of penalties. The Commission agrees with staff that no evidence supported that AS 24.45 applies to any lobbying activities of Alaska Policy Forum and dismisses that allegation.

The Commission concludes that Protect My Ballot's website opposing ranked-choice voting did not trigger the registration, reporting, and paid-for-by identifier requirements, and dismisses the complaint against it.

This is a final Commission order. It may be appealed to the superior court within 30 days from the date of this order.<sup>26</sup> A request for the Commission to reconsider this order must be filed within 15 days from the date this order is delivered or mailed.<sup>27</sup>

Dated: July 12, 2021

BY ORDER OF THE ALASKA PUBLIC OFFICES COMMISSION<sup>28</sup>

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<sup>23</sup> AS 15.13.050(a).

<sup>24</sup> AS 15.13.040(d), AS 15.13.140(b).

<sup>25</sup> AS 15.13.090.

<sup>26</sup> AS 15.13.380(g), AS 44.62.560, Alaska R. App. P. 602.

<sup>27</sup> 2 AAC 50.891(g).

<sup>28</sup> Commissioners Suzanne Hancock, Dan LaSota, and Van Lawrence voted to approve this order. Commissioners Anne Helzer and Richard Stillie dissented.

**Certificate of Service:**

I hereby certify that on this date, I served, by **certified mail and email** a true and correct copy of the foregoing in this proceeding on the following:

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