BEFORE THE ALAKSA PUBLIC OFFICES COMMISSION

YES ON 2 FOR BETTER ELECTIONS, *Complainant*, *v*. BRETT HUBER, ALASKA POLICY FORUM, and PROTECT MY BALLOT, *Respondents*.	No. 20-05-CD

MOTION TO DISMISS AND HEARING MEMORANDUM

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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.[1]

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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[1] 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

some enforceable cause of action." *Bachner Co. v. State*, 387 P.3d 16, 20 (Alaska 2016).

At a hearing on a complaint or investigation report, the staff must present its investigation report and "prov[e] a violation by a preponderance of the evidence." 2 AAC 50.891(d).

PROCEDURAL HISTORY

On September 8, 2020, Yes on 2 filed a complaint against the Respondents. Notice of Hearing and Procedural Order at 1 ("Notice"), *Yes on 2 v. Huber, et al.*, Case No. 20-05-CD, (May 20, 2021). APF was noticed of the complaint, and timely answered it. Notice at 1-2; *see* 2 AAC 50.880(a)(1). Commission staff investigated and issued a staff report, which APF timely responded to. Notice at 2; *see* 2 AAC 50.880(a)(2).[2] Accordingly, APOC noticed a hearing, which was originally set for January 13, 2021, and was continued upon APF's request until June 10, 2021.

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[2] By and through this motion, APF incorporates all the arguments it made in its answer to the complaint and the Commission staff report.

BACKGROUND

I. The Commission's Facts and Charges[3]

In 2019, a statewide ballot measure petition was circulated and, although it was initially rejected by the Division of Elections, it was successfully placed on the November 2020 ballot as Ballot Measure 2. Staff Report at 1. Ballot Measure 2 was a broad electoral reform measure that included the implementation of ranked choice voting. *Id.*[4] As the Commission's report notes, 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 (quoting Comm'n Ex. 16, APF Articles of Incorporation). In January

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[3] APF does not concede that the Commission's facts, as marshaled in the staff's investigation report and discussed in this section, are true. Because this is a motion to dismiss, however, APF assumes for the purposes of this motion that they are true. *See*, *e.g.*, *Kollodge v. State*, 757 P.2d 1024, 1026 (Alaska 1988).

[4] Ballot Measure 2 was successfully approved by the people on Election Day. Alaska Div. of Elections, 2020 General Election Results 25 (Nov. 30, 2020), https://bit.ly/3bYisVs.

2020, APF continued the mission by joining a national coalition of nonprofits from Maine, Massachusetts[5], Minnesota, and Oklahoma, called "Protect My Ballot." Staff Report at 2.

Although none of the messages mention Ballot Measure 2, the Commission's staff alleges that five messages made or reposted by APF (1) "are express communications" related to Ballot Measure 2, such that APF "violated AS 15.13 by failing to register as an entity and failing to file independent expenditure reports"; and (2) "APF violated AS 15.13.090(a) by failing to identify its communications" with a "'paid for by' identifier giving APF's name, address, principal officer, principal offer approval and top 3 contributors." Staff Report at 13-14 ("Staff Report"), *Yes on 2 v. Huber, et al.*, 20-05-CD, (Oct. 15, 2020); *see also id.* at 16 (asserting violations); Notice at 1 (stating that Commission would consider whether APF "failed to comply with AS 15.13 by making express communications opposing Ballot Measure 2 without registering

[5] The Fiscal Alliance Foundation is based in Massachusetts. *See* https://bit.ly/3fnES4H.

and reporting contributions received or expenditures made and by failing to identify their communications").

1. Republication of Anchorage Daily News opinion piece by Jacob Posik

APOC staff first addresses a communication that APF reposted on February 11, 2020, "an opinion piece titled *Ranked-Choice Voting Fails To Deliver On Its Promises* in the Anchorage Daily News on February, [*sic*] 9, 2020, authored by Jacob Posik, the director of communications for the Maine Policy Institute." Staff Report at 4. The piece responds to an earlier op-ed in the *Daily News* written by a Maine attorney, which had promoted ranked-choice voting. Mr. Posik's op-ed does not mention Ballot Measure 2, but it argues that ranked-choice voting produces results contrary to its advocates' promises. The op-ed is not an original work by APF or APF staff. Rather, by the Commission's own characterization, APF merely reposted an opinion piece written by a non-Alaskan and published in the *Daily News*. Staff Report at 4, 12.

2. APF July 23rd Press Release

The Commission also relied on APF's July 24, 2020 press release, in which APF announced "a coalition of state-based think tanks led by

APF [that] had launched a national education campaign detailing the harmful consequences of . . . ranked choice voting." *Id.* The Press Release did not discuss Ballot Measure 2. 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, makes the entire press release an express communication about Ballot Measure 2. *See id.* at 5.

3. Protect My Ballot YouTube Video

Commission staff next notes that APF reposted on July 31, 2020, a "YouTube video . . . from [Protect My Ballot]'s YouTube channel." Staff Report at 5; *id.* at 32. This one minute and twenty-two second message by Protect My Ballot describes the ranked choice voting process and notes that some Republicans, some Democrats, and the NAACP oppose the practice. Protect My Ballot, "What is Ranked Choice Voting?" (July 24, 2020), https://bit.ly/3vufDTW. It does not mention Ballot Measure 2, or even Alaska itself, and it was not created by APF.

4. APF Ranked Choice Voting Report

Next, the Commission asserts that APF posted a report on October 8, 2020, titled *The Failed Experiment of Ranked-Choice Voting* ("*Failed Experiment*"). Staff Report at 5. The report is subtitled "A Case Study of Maine and Analysis of 96 Other Jurisdictions," and contains a paragraph called "Potential Expansion," noting that there are "ongoing efforts in several other states . . . includ[ing] Alaska, Massachusetts, North Dakota, and Arkansas" to implement ranked choice voting. Quinn Townsend, *Failed Experiment* (Oct. 8, 2020), https://bit.ly/3wEZStF. That paragraph also notes that the San Diego City Council considered and rejected the idea. *Id.*

5. APF October 8th Press Release

Finally, the Commission points to an October 8, 2020 press release announcing the publication of the *Failed Experiment* report. Staff Report at 5; *id.* nn. 35-36. The press release summarizes the *Failed Experiment* study and provides 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.'" Melodie Wilterdink, *Press Release* (Oct. 9, 2020), https://bit.ly/34m66Ck.

After reviewing these five messages and applying what it considered to be the relevant Alaska law, the Commission staff concluded that, "[b]ased on the evidence provided, the timing of the activity alleged, and the context of APF's ranked choice communication . . . APF'S [*sic*] ranked choice communications are express communications," and that APF violated AS 15.13 by failing to register and report these activities. Staff Report at 13-14. APOC staff next concluded that "APF's press releases and posts" should have borne the "identifier" required by AS 15.13.090(a). *Id*. at 14.

II. Statutes and Regulations

The staff's conclusions are grounded in Alaska's definition of a "communication," as "an 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).[6] This definition is cabined only by excluding "those placed by an individual or nongroup entity and costing $500 or less," or "those that do not directly or indirectly identify a candidate or proposition." *Id.*[7]

The Commission charges APF with making express communications and failing to file related independent expenditure reports. The law limits "express communication" to only those 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). The statutory language does not include ballot measures in the definition of express communications.

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[6] Although the complaint was brought prior to the renumbering of AS 15.13.400, resulting from 2020 General Ballot Measure No. 2, all citations in this brief follow the revisions that became effective on February 28, 2021.

[7] A "proposition" is a ballot measure, such as Ballot Measure 2. AS 15.13.065.

Express communications that cost money are considered "expenditures." AS 15.13.400(7)(C). An independent expenditure, in turn, 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 . . . ." AS 15.13.400(11). As with express communications, this definition does not include ballot measures. *See id.*; *see also* 2 AAC 50.405(5).

When a speaker does make an independent expenditure, it must "make a full report of expenditures made and contributions received, upon a form prescribed by the commission." AS 15.13.040(d). That report must list expenditures made, which ballot measure they supported or opposed, "the aggregate amount of all contributions made to the [speaker], if any, for the purpose of influencing the outcome of an election," and "the date of the contribution and amount contributed by each contributor." AS 15.13.040(e)(5). Those individuals giving over $50 in a calendar year must report employer information as well. AS 15.13.040(e)(5)(A). The independent expenditure reports must be filed at the times set forth at AS 15.13.100-110.

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.[8]

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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[8] 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.[9]

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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[9] 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").[10] 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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[10] *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.

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s/ Owen Yeates

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Dated: May 28, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have served all parties and the complainant a true and correct copy of the foregoing pursuant to Notice ¶ 6.

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