App. No. 25A-____

In The

Supreme Court of the United States

ALASKA POLICY FORUM,
Petitioner,

v.

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

On Application for Extension of Time to File a Petition for a Writ of Certiorari to the Alaska Supreme Court

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PETITIONERS' APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA POLICY FORUM, Appellant, v. ALASKA PUBLIC OFFICES COMMISSION; YES ON 2 FOR BETTER ELECTIONS; and PROTECT MY BALLOT, Appellees.	Supreme Court No. S-18533 Superior Court No. 3AN-21-07137 CI O P I N I O N No. 7801 – February 13, 2026

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Frank A. Pfiffner, Judge.

Appearances: Stacey C. Stone, Holmes Weddle & Barcott, PC, Anchorage, and Steve Shevorski, Adam J. Tragone, and Charles Miller, Institute for Free Speech, Washington, DC, for Appellant. Kimberly D. Rodgers, Assistant Attorney General, Anchorage, and Treg Taylor, Attorney General, Juneau, for Appellee Alaska Public Offices Commission. Samuel G. Gottstein and Scott M. Kendall, Cashion Gilmore & Lindemuth, Anchorage, for Appellee Yes on 2 for Better Elections. No appearance by Appellee Protect My Ballot.

Before: Maassen, Chief Justice, and Carney, Borghesan, Henderson, and Pate, Justices.

BORGHESAN, Justice.

I. INTRODUCTION

"The effective functioning of our democratic form of government is premised on an informed electorate. When citizens vote on the basis of misinformation, or a lack of relevant information, the decision-making process on which our government ultimately rests suffers to that extent."[1]

To promote an informed electorate, Alaska law requires public reporting of expenditures made for the purpose of influencing the outcome of a ballot proposition, through which the voters directly exercise legislative power. Alaska law also requires that advertisements and announcements pertaining to ballot propositions state who paid for the communication. Voters can use that information to evaluate the messages they hear.

In this case a nonprofit organization disseminated materials criticizing ranked-choice voting in the months before an election that featured a ballot proposition that proposed to adopt ranked-choice voting and other significant changes to Alaska's election laws. The state agency charged with enforcing Alaska's campaign finance laws determined that the organization failed to comply with the law because it did not report its spending on these materials or place a "paid for by" disclosure on them. The organization appealed to the superior court, which affirmed the agency's decision.

The organization now appeals to us. It argues that the agency wrongly determined that its materials are subject to reporting and disclosure laws, that the legal standards applied by the agency are unconstitutionally vague, and that aspects of Alaska's reporting and disclosure laws violate the First Amendment. We uphold the agency's decision, concluding that the cited publications had to be reported and required a "paid for by" disclosure. We also hold that the statutory standards are not unconstitutionally vague because they give fair notice of what kind of speech must be

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[1] *Messerli v. State*, 626 P.2d 81, 86 (Alaska 1980).

reported and must contain a disclosure. And we conclude that the First Amendment challenges to these laws are unavailing.

II. FACTS AND PROCEEDINGS

A. Alaska Campaign Finance Law

Alaska law regulates spending on both candidate elections and ballot propositions.[2] The Alaska Public Offices Commission (the Commission) is the state agency that applies and enforces these campaign finance laws.[3] These laws impose three basic requirements on those who spend money to influence elections: reporting, registration, and disclosures.[4]

First, expenditures made to influence the outcome of a ballot proposition must be reported to the Commission.[5] Every person making an expenditure for this purpose must "make a full report of expenditures made and contributions received, . . . unless exempt from reporting."[6] The report must include the person's "name, address, principal occupation, and employer," the name of the proposition, "whether the expenditure is made to support or oppose the . . . ballot proposition," and a list of donations the person may have received "for the purpose of influencing the outcome of

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[2] *See, e.g.*, AS 15.13.010–.400.

[3] AS 15.13.020; AS 15.13.030.

[4] *See* AS 15.13.040 (reporting); AS 15.13.050 (registration); AS 15.13.090 (disclosures).

[5] AS 15.13.040; former AS 15.13.400(6)(A)(iv) (2020).

Ballot Measure 2, which took effect in February 2021, added new definitions to AS 15.13.400, resulting in the renumbering of some relevant definitions. The terms of the existing definitions were not altered. We cite to the statutory definitions as numbered when the events relevant to this dispute occurred, prior to the 2021 renumbering.

[6] AS 15.13.040(d); AS 15.13.140(b).

an election."[7] If the person is a corporation or group, rather than an individual, the report must also include "the name and address of each officer and director."[8] However, spending by individuals "acting independently of any other person" that "cumulatively do[es] not exceed $500 during a calendar year" and goes toward "billboards, signs, or other printed material concerning a ballot proposition" is exempt from reporting.[9]

Second, Alaska law requires persons to register with the Commission before making an expenditure related to a ballot proposition.[10] Individuals are exempt from this registration requirement.[11]

Third, certain election-related "communications" must include a disclosure identifying the person who paid for the communication.[12] The campaign finance statutes define 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."[13] But the definition excludes announcements and advertisements "by an individual or nongroup entity and costing $500 or less" and those that "do not directly or indirectly identify a candidate or proposition."[14] Those exempted categories of speech need not include a disclosure.

Communications that must include a disclosure must "be clearly identified by the words 'paid for by' followed by the name and address of the person paying for

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7 AS 15.13.040(e).

8 AS 15.13.040(e)(4).

9 AS 15.13.040(h).

10 AS 15.13.050(a).

11 *Id.*

12 AS 15.13.090(a).

13 AS 15.13.400(3) (2020).

14 *Id.*

the communication."[15] If the communication is made by an entity other than an individual or a candidate, the disclosure must identify the entity's principal officer, include "a statement from the principal officer approving the communication," and name the identity and state of residence or principal place of business "of each of the person's three largest contributors . . . during the 12-month period before the date of the communication."[16]

With this framework in mind, we turn to the facts of the dispute.

B. Facts

Alaska Policy Forum (APF) is a 501(c)(3) nonprofit corporation incorporated in 2009. APF's self-described mission is to "provide research, information and public education in support of individual rights, limited government, personal responsibility and government accountability."

In July 2019 some Alaska residents proposed to enact major changes to Alaska's election laws via voter initiative.[17] This initiative, called "Alaska's Better Elections Initiative" (the Initiative), proposed to (1) replace Alaska's party primary system with an open nonpartisan primary, (2) require additional disclosures from "independent expenditure" groups, and (3) establish ranked-choice voting for the general election. Proponents of this initiative began collecting signatures a few months later. The lieutenant governor accepted the petition in March 2020, scheduling the Initiative for a vote in the November 2020 election.

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[15] AS 15.13.090(a).

[16] AS 15.13.090(a)(2).

[17] Alaska Const. art. XI, § 1 ("The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum."). While the constitution uses the term "initiative," the statutes describe the proposed legislation to be voted on by the electorate as a "ballot proposition." *See* AS 15.45.180 (explaining that if petition for voter initiative is properly filed, lieutenant governor "shall prepare a ballot title and proposition"); AS 15.45.190 (directing lieutenant governor "to place the ballot title and proposition on the election ballot").

In January 2020 — before the Initiative was accepted but after its proponents began collecting signatures — APF joined nonprofit think tanks from four other states to create Protect My Ballot, a coalition formed to educate the public about the risks of ranked-choice voting. In February 2020 APF republished on its website an opinion piece by a writer from Maine, where ranked-choice voting had already been enacted. The opinion piece was critical of ranked-choice voting.[18]

Protect My Ballot launched an education campaign about ranked-choice voting on July 24, 2020. APF emailed a press release announcing the campaign to a national media list and to an Alaska-specific media list. The press release was entitled "Protect My Ballot: New Campaign Exposes Flaws in Ranked Choice Voting." Noting that the campaign was "led by Alaska Policy Forum," the press release explained that the campaign "highlights bipartisan opposition to" ranked-choice voting. The release included the following statement from APF's executive director:

> 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.

The release also quoted statements from the leaders of other state think tanks participating in the campaign and linked to a video about ranked-choice voting on Protect My Ballot's website.

A week later APF published the video on its website with the caption: "Ranked-choice voting (RCV) is an electoral scheme that adds more confusion to the

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[18] Jacob Posik, *Ranked-Choice Voting Fails to Deliver on Its Promises*, ALASKA POL'Y F. (Feb. 11, 2020), https://alaskapolicyforum.org/2020/02/rcv-fails-on-promises/ (archived at https://perma.cc/8EUP-LA4R). The opinion piece originally appeared in the Anchorage Daily News.

voting system while threatening our democracy and failing to ensure that every vote counts."[19] The video described how ranked-choice voting works in pointed language, warning of its downsides, and directed viewers to visit Protect My Ballot's website.[20] The final moments of the video show animated hands holding signs reading: "PROTECT MY VOTE" and "SAY NO TO RANKED CHOICE VOTING."[21]

In October 2020, less than a month before the election, APF published additional materials about ranked-choice voting. On October 8 APF issued a press release announcing a new report on the effects of ranked-choice voting. The press release described the results of the report, including how ranked-choice voting could change the results of elections. Highlighted in bold text in the middle of the press release was a statement by one of APF's officers:

> 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.

Finally, on October 12 APF published a short blog post entitled "Ranked-Choice Voting Disenfranchises Voters," authored by an APF intern.[22] The post began: "A voting trend to uproot the electoral process is sweeping the country and has made it all the way to Alaska: ranked-choice voting."[23] The piece described problems with

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[19] *Video: Ranked Choice Voting, Explained*, ALASKA POL'Y F. (July 31, 2020), https://alaskapolicyforum.org/2020/07/video-rcv-explained/ (archived at https://perma.cc/4PH3-Z9VW).

[20] *Id.*

[21] *Id.*

[22] Johan Soto, *Ranked-Choice Voting Disenfranchises Voters*, ALASKA POL'Y F. (Oct. 12, 2020), https://alaskapolicyforum.org/2020/10/rcv-disenfranchises-voters/ (archived at https://perma.cc/JR6C-XEB3).

[23] *Id.*

ranked-choice voting, including the experiences of other states and cities that had used it. It concluded: "[O]ther 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."[24] The post then directed readers to the Protect My Ballot website.[25]

C. Proceedings

1. Administrative Proceedings

In September 2020 Yes on 2 for Better Elections (Yes on 2), a nonprofit organization, filed a complaint with the Commission regarding APF and Protect My Ballot's activities. Yes on 2 alleged that APF and Protect My Ballot had failed to register with the Commission and to report their expenditures as required by law.

APF denied any campaign finance violations in its answer. Commission staff investigated. In response to the Commission's document requests for a list of expenditures related to ranked-choice voting, APF stated that it had spent $643.20 "in the form of staff time to review educational content, send out press releases, etc." between September 1, 2019 and September 8, 2020.

Commission staff submitted a report to the Commission recommending that it rule that APF had violated the law by failing to report expenditures made to influence the outcome of a ballot proposition, to register before making such expenditures, and to include disclosures on its communications. Staff noted that the legislature had defined the kinds of spending on election-related speech that had to be reported as expenditures. The statutory definition of expenditure "includes an express communication and an electioneering communication, but does not include an issues

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[24] *Id.*

[25] *Id.*

communication."[26] 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."[27] By contrast, an "issues communication" is defined as a communication that "directly or indirectly identifies a candidate" and "addresses an issue of national, state, or local political importance and does not support or oppose a candidate for election to public office."[28] The staff acknowledged that these definitions were specific to candidate elections, not ballot propositions. But staff, citing federal court decisions, reasoned that the definitions provided a useful framework for regulation of spending on ballot propositions.[29]

Applying this framework, staff concluded that APF's publications met the standard for "express communications" that had to be reported. Relying on previous advisory opinions applying this framework,[30] staff highlighted APF's "recent burst of activity against ranked choice voting as the November election approache[d]" and reasoned that APF's activities around ranked-choice voting were express

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[26] Former AS 15.13.400(6)(C) (2020).

[27] Former AS 15.13.400(7) (2020).

[28] Former AS 15.13.400(12) (2020).

[29] The report cited *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) and *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003).

[30] *See* AS 15.13.374(a) (providing that any person may request advisory opinion from Commission regarding chapter). The staff report relied on the following: *Renewable Res. Coal.*, AO 08-02-CD (approved June 11, 2008), https://aws.state.ak.us/apocreports/paper/download.aspx?ID=4878 (archived at https://perma.cc/4LT8-RG6P); *Renewable Res. Found.*, AO 13-04-CD (approved June 6, 2013), https://aws.state.ak.us/apocreports/paper/download.aspx?ID=8475 (archived at https://perma.cc/59CZ-8NZ8); and *Bags for Change*, AO 19-04-CD (approved as modified Sept. 18, 2019), https://aws.state.ak.us/apocreports/paper/download.aspx?ID=21018 (archived at https://perma.cc/2JW5-V674).

communications due to their content, timing, and context. Therefore, staff concluded, APF had violated three provisions of AS 15.13 by failing to (1) register with the Commission, (2) file independent expenditure reports, and (3) include "paid for by" disclosures on its communications. Staff recommended dismissing the allegations against Protect My Ballot, however, because the group's website was susceptible to interpretation as a national clearinghouse of information for those opposed to ranked-choice voting in various locales, rather than communications about the Alaska Initiative.

APF disputed the staff's conclusions. APF argued that it had not advocated against the Initiative "as a whole" because it "ha[d] not urged citizens to vote for or against ranked-choice voting" or addressed the other two changes proposed in the Initiative (changes to campaign finance laws and to primary elections). It also argued that the staff had unduly focused on the context of the communications rather than their content.

In subsequent briefing APF argued that the staff report's approach to identifying express communications violated the First Amendment. APF also argued that the Commission's interpretation of the disclosure statutes was unconstitutional because (1) they applied, with some exceptions, regardless of how little money was spent; and (2) requiring disclosures for communications that "indirectly" reference a ballot proposition is unconstitutionally vague.

After a hearing the Commission issued a final order adopting the staff report's conclusions. The Commission found that "at least as of [APF's] July press release," APF had 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" disclosure on its communications. But the Commission waived the recommended civil penalty because it was "significantly out of proportion to the degree of harm to the

public for not having the information."[31] The Commission dismissed the allegations against Protect My Ballot for the reasons explained in the staff report.

2. Superior court proceedings

APF appealed to the superior court. It argued that (1) the Commission's analysis and use of hyperlinks rather than record exhibits did not adequately support its findings; (2) the Commission had improperly applied the statutory definition of "express communication" to advocacy related to a ballot proposition when the definition applied only to candidate elections; (3) its communications did not qualify as "express communications"; (4) the statutes at issue were unconstitutionally vague; and (5) the statutes violated the First Amendment.

The superior court affirmed the Commission's order. The court rejected APF's argument that the Commission's findings were not supported by record evidence.[32] In addressing APF's statutory construction argument, the superior court applied the reasonable basis test for an agency's interpretation of statutes involving fundamental policies within an agency's purview. The court concluded that the Commission reasonably adapted the "express communication" standard to speech about ballot propositions and reasonably concluded that APF's activities satisfied this definition. Acknowledging that the statutory definition of "express communication"

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[31] *See* 2 Alaska Administrative Code (AAC) 50.865(b) ("A civil penalty determined under 2 AAC 50.855 may be . . . waived entirely based on the following factors . . . (5) the civil penalty assessment is significantly out of proportion to the degree of harm to the public for not having the information.").

[32] The record before the superior court did not include a copy of APF's video on ranked-choice voting. We invited the parties to supplement the record with the video, and they provided the video in MP4 format. Although the video is accurate, the MP4 format does not give the viewer the same experience as watching the embedded video on APF's webpage. We archived the webpage, but due to technology limitations, the video does not operate correctly on the archived page. In the future, we urge parties to introduce exhibits of internet materials into the record or to archive these materials to ensure meaningful appellate review.

requires "limited reference to outside events,"[33] the court ruled that the Commission "reasonably concluded that APF's activities amounted to an express communication that was an exhortation to vote against [the Initiative]."

The superior court then rejected APF's vagueness argument. APF had argued that the statute's definition of "communication" in the statute — covering media that "directly or indirectly identif[ies] a candidate or proposition"[34] — was unconstitutionally vague because it does not give speakers sufficient notice of when their speech will "indirectly touch[] on a proposition." Citing the Ninth Circuit's decision in *Alaska Right to Life Committee v. Miles*,[35] the superior court reasoned that requiring disclosure for communications that "indirectly reference" a ballot measure was not unconstitutionally vague. It also concluded that there was no constitutional problem in applying this standard to APF because its publications made "unambiguous reference" to the Initiative.

The court examined APF's First Amendment arguments under an exacting scrutiny framework.[36] It rejected APF's argument that Alaska's "first-dollar" registration and reporting requirements were unconstitutional.[37] And it rejected APF's argument that the reporting and disclosure laws were not narrowly tailored.

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[33] Former AS 15.13.400(7) (2020).

[34] *Id.* (defining "express communication" with reference to definition of "communication"); AS 15.13.400(3) (defining "communication" to be limited to media that "directly or indirectly identif[ies] a candidate or proposition").

[35] 441 F.3d 773, 780-86 (9th Cir. 2006).

[36] Under exacting scrutiny, courts will uphold a challenged law that is "narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 609-10 (2021).

[37] In this context, the term "first-dollar" means that the statutory requirements apply to election-related spending no matter how small the amount spent.

APF appeals.

III. STANDARD OF REVIEW

"When the superior court is acting as an intermediate court of appeal in an administrative matter, we independently review the merits of the agency or administrative board's decision."[38] Different standards apply depending on the subject of review.[39]

"We apply the reasonable basis standard, under which we give deference to the agency's interpretation so long as it is reasonable, when the interpretation at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions."[40]

By contrast, we use our independent judgment to interpret a statute when "the agency's specialized knowledge and experience would not be particularly probative on the meaning of the statute."[41]

"We apply our independent judgment to questions of constitutional law and review de novo the construction of the . . . federal Constitution[]."[42]

IV. DISCUSSION

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[38] *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 298 (Alaska 2014) (quoting *Shea v. State, Dep't of Admin., Div. of Ret. & Benefits*, 267 P.3d 624, 630 (Alaska 2011)).

[39] *Id.* at 298-99; *see also, e.g.*, *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992) (recognizing four principal standards of review of administrative decisions).

[40] *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011).

[41] *Id.* (quoting *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 175 (Alaska 1986)).

[42] *Dunleavy v. Alaska Legis. Council*, 498 P.3d 608, 612 (Alaska 2021) (quoting *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 189 (Alaska 2007)).

APF argues that the Commission's ruling that it violated Alaska's reporting, registration, and disclosure requirements for election-related spending must be reversed for three basic reasons.

First, it argues that the Commission erred in applying its governing statutes. It was error, APF contends, to adopt the "express communication" standard, which is defined in terms of candidate elections, for reportable expenditures involving ballot initiatives. It was also error, APF argues, to conclude that its speech qualified as expenditures that had to be reported and communications that required a "paid for by" disclosure.

Second, APF asserts that these standards are so vague that they do not give fair notice of what the law requires, violating the right to due process.

Third, APF argues that Alaska's reporting, registration, and disclosure requirements violate the First Amendment. APF maintains that the laws are not narrowly tailored in light of the burden they impose on election-related speech.

A. We Uphold The Commission's Ruling That APF's Communications Triggered Reporting, Registration, And Disclosure Requirements.

1. It was not error to use the "express communication" standard when applying statutory reporting requirements.

Alaska law requires reporting of expenditures made for the purpose of influencing the outcome of a candidate election or a ballot proposition.[43] The legislature defined "expenditures" in a way that narrows the term when applied to speech related to candidate elections.[44]

This narrowing reflects federal court decisions interpreting similarly worded federal campaign finance laws to avoid unconstitutional vagueness and overbreadth. In *Buckley v. Valeo* the United States Supreme Court held that the Federal

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[43] AS 15.13.040(d); AS 15.13.135(a); AS 15.13.140(b).

[44] Former AS 15.13.400(6)(C) (2020).

Election Campaign Act (FECA), which required disclosure of spending "for the purpose of . . . influencing" an election, had to be narrowly construed to avoid unconstitutional vagueness.[45] The Court construed the statute to cover only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[46] After Congress amended FECA accordingly, the Ninth Circuit, in *Federal Election Commission v. Furgatch*, interpreted this standard to mean speech that, "when read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."[47]

Alaska's legislature later enshrined the *Furgatch* standard in Alaska law.[48] Reportable expenditures are defined to include "express communications,"[49] which the legislature further defined using the language from *Furgatch* quoted above.[50] This language refers specifically to candidate elections and does not mention elections involving ballot propositions.[51]

The Commission decided to adopt a similar narrowing standard to determine when speech related to ballot propositions qualifies as an "expenditure" that

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[45] 424 U.S. 1, 76-82 (1976).

[46] *Id.* at 80 (footnote omitted).

[47] 807 F.2d 857, 864 (9th Cir. 1987).

[48] Ch. 108, § 18, SLA 2003; Minutes, S. Fin. Comm. Hearing on S.B. 119, 23rd Leg., 1st Sess. (May 14, 2003) (testimony of Brook Miles, Executive Director, Alaska Public Offices Commission); Letter from Att'y Gen. Gregg D. Renkes to Gov. Frank H. Murkowski, 2003 WL 22701382 at *4 (June 5, 2003) (explaining that law replaced previous definition of "express communication," which required "explicit words of advocacy," with standard adopted by Ninth Circuit in *Furgatch*).

[49] Former AS 15.13.400(6) (2020).

[50] *Compare* former AS 15.13.400(7) (2020), *with Furgatch*, 807 F.2d at 864.

[51] *See* former AS 15.13.400(5), (6)(C), (7), (12) (2020).

must be reported.[52] While recognizing that the statutory definition of "express communication" refers only to candidate elections, the Commission determined that the definition "offer[ed] a useful framework" for regulating ballot-related speech consistently with federal law. Accordingly, the Commission reasoned that speech related to a ballot proposition qualifies as an "expenditure" that must be reported if the speech, " '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 ballot measure."

APF argues that the Commission erred in doing so.[53] Its arguments on this point are in tension with each other. It argues that the Commission erred by disregarding the statutory language, which defines "express communication" only in terms of candidate speech. Yet APF also argues that the First Amendment requires the term "expenditure" to be construed narrowly as applied to speech about ballot propositions. We do not find this position persuasive.

First, it is important to note that the Commission's approach does not *expand* the range of speech subject to regulation. Rather, it limits the type of speech about a ballot proposition that can count as an "expenditure" that must be reported. "Expenditure" means "a purchase or a transfer of money or anything of value . . . incurred or made for the purpose of . . . influencing the outcome of a ballot

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[52] The Commission appears to have first done so in an advisory opinion published in 2008. *See Renewable Res. Coal., supra* note 30, at 11, (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003); *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449 (2007)).

[53] The statutory definition of express communication incorporates AS 15.13.400(3)'s definition of communication, which requires "an announcement or advertisement disseminated through print or broadcast media," among other requirements. *See* former AS 15.13.400(7) (2020). APF does not argue that any of its speech at issue fails to meet the communication definition because the speech was not "disseminated."

proposition or question."[54] When the legislature narrowed the reach of the term "expenditure" by further defining it to include "express communications" and "electioneering communications" but not "issues communications," those limits applied only to speech about candidates.[55] So the statutory definition of expenditure, on its face, sweeps more broadly for ballot proposition speech than for candidate speech. The Commission's use of the "express communication" standard narrows the gap, exempting some speech about ballot propositions from regulation.

Second, we do not view the Commission's use of the "express communication" standard to regulate spending on ballot measures as a usurpation of the legislative role, as APF suggests. Rather, it is an attempt to apply the agency's governing statutes within constitutional bounds, consistently with the principles of *Buckley* and subsequent federal court decisions.[56] The Commission did not err by limiting its enforcement of Alaska's campaign finance statutes in this way.

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[54] Former AS 15.13.400(6)(A)(iv) (2020).

[55] *See* former AS 15.13.400(6)(C) (2020) (providing that expenditure "*includes* an express communication and an electioneering communication, but does not include an issues communication" (emphasis added)); former AS 15.13.400(12) (2020) (defining "issues communication" as a communication that "directly or indirectly identifies a candidate" but "does not support or oppose a candidate for election to public office").

[56] *Cf. Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004) ("[W]hile the *McConnell* Court disavowed the theory that 'the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy,' it nonetheless left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest." (quoting *McConnell v. FEC*, 540 U.S. 93, 193 (2003))); *Yamada v. Snipes*, 786 F.3d 1182, 1188 (9th Cir. 2015) (holding that when evaluating vagueness challenge to campaign finance statute based on *Buckley*, court "must consider 'any limiting construction that a state court or enforcement agency has proffered' " (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989))).

2. It was not error to conclude that APF's speech triggered statutory reporting, registration, and disclosure requirements.

We must next determine whether the Commission erred by concluding that APF's speech qualified as "communications" that had to contain a "paid for by" disclosure and as "express communications" that had to be reported. We first consider how much deference to give the Commission's decision. Then we examine APF's speech.

a. Standard of review

The superior court applied the deferential reasonable basis standard to review the Commission's rulings. This is the standard that normally applies to an agency's application of a legal standard to a given set of facts when the issue involves the agency's expertise.[57]

But a deferential standard does not make sense in this particular case. That is because the "express communication" standard the Commission adopted is not susceptible to deferential review. According to the Commission, ballot speech qualifies as an express communication if, "when read as a whole and with limited reference to outside events," it "is susceptible of no other reasonable interpretation but as an exhortation to vote for or against" a specific ballot proposition.[58] The standard does not permit reasonable disagreement. We cannot say that the Commission had a reasonable basis to conclude that the speech is "susceptible of no other reasonable interpretation" than an exhortation to vote against a ballot proposition if we believe the speech *is*

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[57] *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014).

[58] Former AS 15.13.400(7) (2020); *see Renewable Res. Coal.*, *supra* note 30, at 11-12; *Bags for Change*, *supra* note 30, at 3-4 (applying the express communication framework in the ballot proposition context).

susceptible to a different interpretation.[59] To apply this standard, we must use our independent judgment.[60]

b. Application to APF's communications

We now determine whether APF's speech qualified as "communications" that had to contain a disclosure and "express communications" that had to be reported. As noted above, a "communication" means an "announcement or advertisement" that "directly or indirectly identif[ies]" a ballot proposition.[61] An "express communication," as applied by the Commission to speech about ballot initiatives, 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"[62] ballot initiative. The latter term includes the former, so we analyze the terms together when considering their application to APF's speech.

Because the "express communications" standard is derived from the Ninth Circuit's decision in *Federal Election Commission v. Furgatch*,[63] which followed the

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[59] *See FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) ("Speech cannot be 'express advocacy . . .' when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.").

[60] *See Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011) ("We apply the independent judgment standard, under which 'the court makes its own interpretation of the statute at issue, . . . where the agency's specialized knowledge and experience would not be particularly probative on the meaning of the statute.' " (alteration in original) (quoting *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 175 (Alaska 1986))).

[61] AS 15.13.400(3).

[62] Former AS 15.13.400(7) (2020).

[63] 807 F.2d 857; *see* Minutes, S. Fin. Comm. Hearing on S.B. 119, 23d Leg., 1st Sess. (May 14, 2003) (testimony of Brook Miles, Executive Director, Alaska Public Offices Commission) (referring to *Furgatch*).

U.S. Supreme Court's seminal campaign finance decision in *Buckley v. Valeo*,[64] we look to those cases for guidance on what the legislature intended.

In *Buckley* the Court considered the constitutionality of various provisions of FECA.[65] One of FECA's provisions required disclosure of election-related expenditures, defined as "the use of money or other valuable assets 'for the purpose of . . . influencing' the nomination or election of candidates for federal office."[66] The Court held that in light of FECA's significant criminal penalties, this definition had to be narrowly construed to avoid constitutional vagueness problems.[67] The Court was particularly concerned that the provision, without a narrowing construction, "could be interpreted to reach groups engaged purely in issue discussion," rather than only those advocating an electoral result.[68] It therefore held that FECA's disclosure requirement had to be narrowly interpreted to apply only to "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[69] Congress amended FECA accordingly.[70]

In *Furgatch* the Ninth Circuit considered the newly revised provision of FECA and expanded upon the "express advocacy" test the Supreme Court had

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[64] 424 U.S. 1 (1976).

[65] *Id.*

[66] *Id.* at 77 (alteration in original) (discussing 2 U.S.C. § 434(e) (1974) and quoting 2 U.S.C § 431(e), (f) (1974)).

[67] *Id.* at 76-82.

[68] *Id.* at 79.

[69] *Id.* at 80 (footnote omitted).

[70] *FEC v. Furgatch*, 807 F.2d 857, 859-60 (9th Cir. 1987) (discussing 2 U.S.C. § 431(17) (1980)).

articulated in *Buckley*.[71] In *Buckley* the Court had described express advocacy as "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.' "[72] The Ninth Circuit reasoned that "express advocacy" is "not strictly limited to communications using certain key phrases" and noted that the list of "magic words" identified in *Buckley* "does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate."[73] It therefore concluded that speech should be considered express advocacy if, "when read as a whole, and with limited reference to external events, [it is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."[74]

This analysis, according to the Ninth Circuit, permits limited consideration of the speech's context: "A consideration of the context in which speech is uttered may clarify ideas that are not perfectly articulated, or supply necessary premises that are unexpressed but widely understood by readers or viewers."[75] Yet the court cautioned that "context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words."[76]

Attempting to distill a standard from those principles, the Ninth Circuit held that express advocacy has three elements. First, the speech must be "unambiguous, suggestive of only one plausible meaning."[77] Second, the speech must contain "a clear

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[71] *Id.* at 864; *see also Buckley*, 424 U.S. at 44 (holding limitations on expenditures could only be applied to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office").

[72] *Buckley*, 424 U.S. at 44 n.52.

[73] *Furgatch*, 807 F.2d at 862-63.

[74] *Id.* at 864.

[75] *Id.* at 863-64.

[76] *Id.* at 864.

[77] *Id.*

plea for action" and not be "merely informative."[78] Third, it must be "clear what action is advocated"; speech cannot be express advocacy "when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action."[79] Because our legislature invoked the *Furgatch* decision when enacting Alaska's definition of "express communications," we interpret that standard consistently with the decision's analysis.

APF argues that the Commission misapplied the express communication standard because it relied too much on context. Specifically, APF challenges the Commission's reliance on two contextual factors: (1) the timing of APF's publications relative to the election on the Initiative and (2) the fact that APF had not published statements about ranked-choice voting prior to 2020. Although we need not defer to the Commission's decision and instead apply our independent judgment, we must decide whether these factors are proper to consider when applying the "express communication" standard directly to APF's communications.

Considering the timing of speech relative to an upcoming election is permissible. The presence of an upcoming election is relevant to determining whether speech should be interpreted as an appeal to vote for or against a candidate or proposition. In *Furgatch*, the Ninth Circuit considered whether a newspaper ad placed within a week of the presidential election qualified as "express advocacy" that had to be reported under FECA.[80] The ad began with the words, "DON'T LET HIM DO IT," then described actions the president had done or would do, then concluded again: "DON'T LET HIM DO IT."[81] The court reasoned that "[t]iming the appearance of the advertisement less than a week before the election left no doubt of the action

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78 *Id.*

79 *Id.*

80 *Id.* at 865.

81 *Id.* at 858.

proposed."[82] The advertisement at issue in *Furgatch* never explicitly mentioned the upcoming presidential election,[83] but the Ninth Circuit concluded that "[r]easonable minds could not dispute that Furgatch's advertisement urged readers to vote against Jimmy Carter" because "[t]his was the only action open to those who would not 'let him do it.' "[84] An upcoming election is the kind of information that most reasonable listeners will be aware of, and that knowledge will shape their understanding of the message.

The same cannot always be said for the speaker's history of speech on a topic.[85] The average reader or listener may not know whether the speaker has spoken on the subject before. If the reader is not aware of the prior speech, that speech cannot have an effect on how the current message is interpreted. Unless the prior speech is referenced by or displayed alongside the new speech (as on some social media platforms), it is external to the new speech. Yet the "express communication" standard requires the speech to be evaluated with "limited reference to outside events."[86]

In this case the record is not conclusive as to whether APF's publications would have been read or seen together, so that one communication would shape an

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[82] *Id.* at 865.

[83] *See id.* at 858, 865.

[84] *Id.* at 865.

[85] The Commission and Yes on 2 present scant legal authority or justification for relying on a speaker's history of speech to assess the meaning of an individual message. The Ninth Circuit's decision in *Human Life of Washington Inc. v. Brumsickle* did not directly address this question, but its analysis suggests that the speaker's prior speech is not relevant. *See* 624 F.3d 990, 1019 (9th Cir. 2010). The court reasoned that a group "may avoid disclosure requirements any time that the issue about which it is speaking is not the subject of a ballot initiative or other public vote," but once the issue becomes the subject of an initiative, its advocacy on the issue must be reported. *Id.* This reasoning indicates that a group's prior advocacy about an issue does not insulate its future advocacy from reporting requirements when the issue appears on the ballot.

[86] Former AS 15.13.400(7) (2020).

objective reader's interpretation of the others.[87] Without a clearer indication that the materials would likely be viewed together, we cannot say that the Commission was correct to consider them together when interpreting them. We do not rule out the possibility that prior speech may be a permissible contextual factor in some cases. But we decline to consider it here.

With these points in mind, we proceed to apply the statutory provisions to APF's speech.

i. July 24, 2020 press release

We first consider APF's July 24 press release announcing the launch of "the national education campaign Protect My Ballot."[88] The release states that the campaign is "led by Alaska Policy Forum" and "details the harmful consequences of an electoral scheme known as Ranked Choice Voting (RCV)." According to the press release, the campaign would "highlight[] bipartisan opposition to RCV." The release goes on to describe how ranked-choice voting works and describes perceived negative consequences of this system. The release concludes with four statements from representatives of Protect My Ballot's members. The first quote is from Alaska Policy Forum's executive director:

> As Alaskans take to the polls in November, history should provide a warning for what Ranked Choice Voting would

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[87] The October 12 blog post ("Ranked-Choice Voting Disenfranchises Voters") includes a link to the YouTube video entitled "Ranked Choice Voting, Explained," which APF published on its YouTube page on July 31, 2020. But to access the video, readers would have had to click the link to the other web page, and then click the video to play it.

[88] In its decision, the Commission also described a newspaper opinion piece republished on APF's website in February 2020. But it did not conclude that the republished opinion piece triggered reporting or disclosure requirements. Instead it concluded that APF's announcements "at least as of its July press release were election-related expenditures and communications requiring compliance with AS 15.13." No party has challenged the Commission's ruling that the opinion piece was not subject to regulation. Therefore, we do not address this article in our analysis.

> 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.

The release also quotes a representative of a Minnesota-based group stating: "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." The release ends with a statement from a Maine-based member of Protect My Ballot warning: "Voters should be skeptical when they hear from special interest groups trying to change the way we exercise our sacred right to vote."

APF first argues that this press release does not qualify as a "communication" requiring a "paid for by" disclosure because it does not "indirectly identify" the Initiative.[89] Although the press release does not identify the Initiative by name, the indirect identification of the Initiative is unambiguous. Comparison to a Ninth Circuit decision involving a Washington ballot initiative is instructive.

In *Human Life of Washington Inc. v. Brumsickle*, the Ninth Circuit considered a Washington campaign finance law using a standard similar to Alaska's "directly or indirectly identify" standard.[90] Concerned about potential enforcement of this law, an advocacy group challenged the law's application to advertisements it wished to publish in advance of the vote on a ballot initiative proposing to allow physician-assisted suicide.[91] For example, one proposed radio ad stated that "[a]ssisted suicide is back in the news" and went on to summarize results of a study about the

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[89] AS 15.13.400(3).

[90] *See Hum. Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1014 (9th Cir. 2010) (citing Wash. Rev. Code § 42.17.020(38)).

[91] *Id.* at 995-96.

practice in Oregon; another proposed ad warned that assisted suicide "turns doctors into killers."[92] The group argued that "the government may not impose disclosure requirements on advertisements that avoid references to particular ballot initiatives, and instead speak only about the issues involved in pending ballot initiatives."[93] The Ninth Circuit was unpersuaded by that argument.[94] It observed that although the communications "do not mention [the ballot initiative] by name," they "explicitly state that physician-assisted suicide has reentered the realm of public debate and that the situation demands action."[95] The court reasoned that the "detailed language and unique timing" of the communications rendered them "susceptible of no reasonable interpretation other than as an urgent appeal to vote down the measure."[96] The court reached this conclusion in rejecting a constitutional challenge to the statute, rather than in interpreting the statutory standard.[97] But its logic is persuasive here.

The references to the Initiative in APF's July 24 press release are at least as clear as the ads in *Human Life of Washington*. The press release's detailed discussion of ranked-choice voting, its reference to "voters" and "Alaskans tak[ing] to the polls in November," and its timing — less than four months before the election — "indirectly identify" the Initiative and are susceptible to no interpretation other than an appeal to vote it down. The fact that the message includes statements from people in other states criticizing and opposing ranked-choice voting does not undermine the conclusion that this press release, when referencing an upcoming Alaska election, makes clear reference to the Initiative.

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92 *Id.* at 996 (alteration in original).

93 *Id.* at 1014.

94 *Id.* at 1015-16.

95 *Id.* at 1015.

96 *Id.* at 1015-16.

97 *Id.* at 1014-16.

APF's second argument is that its speech is not an "express communication" because it is "[c]lassic issue advocacy, as opposed to express advocacy." It likens its speech to the "genuine issue ad[s]" described in *Federal Election Commission v. Wisconsin Right To Life, Inc*.[98] In that case the Court considered the constitutionality of a federal law that prohibited corporations from using general treasury funds to pay for certain kinds of radio advertisements.[99] The ads described U.S. senators "using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote"; they urged voters to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster."[100] The Court, in a split opinion, ruled that federal law was unconstitutional as applied to the ads.[101] The principal opinion reasoned that prohibition on corporations paying for political advertisements could be upheld if the ads amounted to express advocacy.[102] But it concluded that the ads were not express advocacy because they "[did] not mention an

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[98] 551 U.S. 449, 470 (2007) (Roberts, C.J.).

[99] *Id.* at 464.

[100] *Id.* at 458-59.

[101] *Id.* at 481.

[102] *Id.* at 465 (Roberts, C.J.) (citing *McConnell v. FEC*, 540 U.S. 93, 206 (2003)). The principal opinion was joined by one other justice who also separately concurred. *Id.* at 482 (Alito, J., concurring). Three justices concurred in part and in the judgment but rejected the principal opinion's reasoning; the concurrence would have overruled *McConnell* and established a "magic words" standard for constitutionally permissible limitation of corporate speech. *Id.* at 496, 500-04 (Scalia, J., concurring in judgment). Four justices dissented, contending that the principal opinion had adopted an overly broad test for "issue" communications constitutionally exempt from campaign finance restrictions. *Id.* at 526-27 (Souter, J., dissenting). "In cases with no majority, 'the position taken by those Members who concurred in the judgments on the narrowest grounds' controls." *State v. N. Pac. Fishing, Inc.*, 485 P.3d 1040, 1055 n.107 (Alaska 2021) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). The narrowest opinion supporting the judgment in *Wisconsin Right To Life* is the principal opinion.

election, candidacy, political party, or challenger" and did not "take a position on a candidate's character, qualifications, or fitness for office."[103] Instead the ads met the criteria for an "issues" communication: The ads "focus[ed] on a legislative issue, [took] a position on the issue, exhort[ed] the public to adopt that position, and urge[d] the public to contact public officials with respect to the matter."[104]

We note as a threshold matter that *Wisconsin Right to Life* is not squarely on point. In that case the federal statute under review *barred* express advocacy by certain entities.[105] The justices analyzed this prohibition under the First Amendment, and a majority held that the First Amendment did not allow Congress to prohibit such speech.[106] But the Alaska law at issue here does not prohibit speech; it requires reporting and disclosure of certain speech. And the Supreme Court has rejected the argument that statutory reporting and disclosure requirements must be limited to speech that is express advocacy because "disclosure is a less restrictive alternative to more comprehensive regulations of speech."[107] Therefore, we are skeptical that the "express advocacy" line described in *Wisconsin Right to Life*'s principal opinion should delimit the definition of "express communication" in Alaska's statutes.

In any event, APF's July 24 press release is not at all like the "issues" communications in *Wisconsin Right to Life*. The *Wisconsin Right To Life* ads could plausibly be interpreted as urging listeners to do something other than vote against the senator standing for election. The ads expressly urged listeners to take a different kind of action: to call their senators and urge them to change their minds on the filibuster.[108]

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[103] *Wis. Right to Life, Inc.*, 551 U.S. at 470 (Roberts, C.J.).

[104] *Id.*

[105] *Id.* at 455 (citing 2 U.S.C. § 441b(b)(2) (2000 ed., Supp. IV)).

[106] *Id.* at 457; *id.* at 483 (Scalia, J., concurring in judgment).

[107] *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).

[108] *Wis. Right to Life, Inc.*, 551 U.S. at 458-59.

But APF's press release suggested no such alternative action. A ballot proposition cannot be persuaded to change its mind. And the press release expressly mentioned the upcoming election. The press release's reference to "Alaskans tak[ing] to the polls" made clear how ranked-choice voting should be opposed: by voting against the Initiative. It is "clear what action is advocated."[109]

APF maintains that the July press release cannot be an "express communication" because it is instead an issues communication — it "isolates a single issue, takes a position on it, and exhorts the public to adopt the speaker's view on that issue." But APF fails to acknowledge that, in the context of ballot initiatives, referencing an upcoming election and attempting to persuade the public to oppose a discrete issue on the ballot at that election amounts to advocating an electoral result. As recognized by the Ninth Circuit in *Human Life of Washington*, "express and issue advocacy are arguably one and the same" when it comes to ballot initiatives.[110]

Therefore, the only reasonable way to interpret the July 24 press release, published by APF a few months before the election, is as an exhortation to vote against the Initiative. The indirect reference to the Initiative is unmistakable from the references to "[v]oters" and "Alaskans tak[ing] to the polls in November." Though the call to action is not as explicit as *Furgatch*'s "Don't let him do it,"[111] the plea to vote against the Initiative is clear. The release approvingly emphasizes the "bipartisan opposition to RCV" and explains why speakers from other states "want[] to ban ranked choice voting." And it offers a "warning" to "Alaskans tak[ing] to the polls in November" about what ranked-choice voting would lead to: discarding votes and decreasing turnout. It then offers a prescription about what should be done: "We need to encourage Americans of all backgrounds to visit the polls, not give them another

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[109] *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

[110] 624 F.3d 990, 1018 (9th Cir. 2010).

[111] 807 F.2d at 858.

reason to avoid casting a ballot." Given the reference to the upcoming election, the warning that ranked-choice voting will decrease turnout, and the urge to ensure the opposite result, this is a "clear plea to action":[112] Readers should vote against the ballot measure proposing ranked-choice voting. That is the only way "Alaskans tak[ing] to the polls in November" could avoid the threatened consequences.

We are unpersuaded by APF's argument that because the express communication standard requires the speech to be considered "as a whole," it is improper to highlight particular phrases or sentences. Highlighting particular sentences is an appropriate way to apply the express communication standard because particular sentences may have outsized impact on the overall meaning of a statement.[113] For example, in *Furgatch*, the sentence "don't let him do it" was key to the ad's meaning: It turned what otherwise might have been a criticism of the president's conduct into a call to action.[114] The Ninth Circuit rejected the idea that highlighting key phrases necessarily ignores a communication's broader context, emphasizing "that the whole consists of its parts in relation to each other."[115]

APF maintains that because ranked-choice voting was only one of three components of the Initiative, its publications criticizing ranked-choice voting do not amount to exhortations to vote against the Initiative as a whole. Again, we are not persuaded. The press release's statements urged an outcome: "We need to encourage Americans of all backgrounds to visit the polls, not give them another reason to avoid casting a ballot." In light of the release's assertion that ranked-choice voting would do

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[112] *Id.* at 864.

[113] *See id.* at 863 ("Comprehension often requires inferences from the relation of one part of speech to another.").

[114] *Id.* at 864 ("The words we focus on are 'don't let him.' They are simple and direct. 'Don't let him' is a command. The words 'expressly advocate' action of some kind.").

[115] *Id.* at 863.

the opposite, the only way that Alaskans "tak[ing] to the polls in November" could accomplish that outcome was to vote against the Initiative.

For these reasons, the July 24 press release qualified as both a "communication" and an "express communication" subject to disclosure and reporting requirements.

ii. July 31, 2020 ranked-choice voting video

On July 31, 2020, APF posted a video to its website and YouTube channel.[116] The video begins by describing how traditional voting works, then states: "Now, some wealthy interest groups are pushing for ranked-choice voting."[117] The video describes the various ways in which ranked-choice voting is harmful to voters' interests and directs viewers to visit Protect My Ballot's website to learn more.[118] The last frame of the video features animated hands holding up signs that read "PROTECT MY VOTE" and "SAY NO TO RANKED CHOICE VOTING."[119] When a cursor is moved over the video, it displays a header with APF's logo next to the title.[120] The video is displayed in the middle of the web page below the following caption: "Ranked choice voting (RCV) is an electoral scheme that adds more confusion to the voting system while threatening our democracy and failing to ensure every vote counts."[121] At the top of the web page is a banner with APF's name, logo, and vision statement: "an

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[116] *Video: Ranked Choice Voting, Explained*, ALASKA POL'Y F. (July 31, 2020), https://alaskapolicyforum.org/2020/07/video-rcv-explained/ (archived at https://perma.cc/4PH3-Z9VW). We note that the staff report described the video as originally being posted from Protect My Ballot's YouTube page; the embedded link on APF's website connects to APF's own YouTube channel. *See id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

Alaska that continuously grows prosperity by maximizing individual opportunities and freedom."[122]

APF argues that this video cannot qualify as a "communication" because it does not directly or indirectly identify the Initiative. The video itself does not mention Alaska, nor does it mention the Initiative by name. But it is published on the website of the Alaska Policy Forum beneath a statement of the group's vision for Alaska. Displayed in this context, the reference to a "push[]" for ranked-choice voting by "wealthy interest groups" is an unambiguous reference to the upcoming ballot proposition, especially for Alaskans who are presumably the main audience for the message. The video urges viewers to "SAY NO TO RANKED CHOICE VOTING."[123] Unlike the ads in *Federal Election Commission v. Wisconsin Right To Life, Inc.*, which urged listeners to contact legislators, the APF video's call to action is not ambiguous.[124] In the context of an upcoming election in which ranked-choice voting is on the ballot, the video's reference to a "push" by "interest groups" for ranked-choice voting and its call to "SAY NO TO RANKED CHOICE VOTING" is a clear, albeit indirect, reference to voting against the Initiative.

In this way the video is similar to the advertisements that the Ninth Circuit in *Human Life of Washington Inc. v. Brumsickle* deemed susceptible of no reasonable interpretation other than as an urgent appeal to vote against Washington's assisted suicide initiative.[125] The ads did not expressly reference the initiative, but pointedly criticized assisted suicide.[126] For example, one of the proposed radio ads referenced the Hippocratic Oath, then stated that assisted suicide undermines the trust the oath

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122 *Id.*

123 *Id.*

124 551 U.S. 449, 458-59, 470 (2007).

125 624 F.3d 990, 1015 (9th Cir. 2010).

126 *Id.* at 995-96.

promotes by "turn[ing] doctors into killers. That's dangerous."[127] Compared to that ad, the ranked-choice voting video's reference to the ballot proposition and its call to action are clearer. APF's publication of the video cannot be reasonably interpreted as anything but an exhortation to vote against the Initiative.

iii. October 8, 2020 press release and report

APF issued a press release on October 8, 2020, just weeks before the election. The press release announced that APF had issued a report exposing "alarming ramifications to ranked-choice voting," such as "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 release described the results of the report, which was hyperlinked at the end of the press release, as "disturbing." Emphasized in larger, bold font in the middle of the page was a quote from APF's Vice President of Operations & Communications:

> 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.

This press release can be reasonably interpreted only as an exhortation to vote against the Initiative. It indirectly identifies the Initiative by describing ranked-choice voting as a "voting system that . . . has no place in Alaska" and urging that "no Alaskan should have to worry that their ballot won't be counted in the final tally." The call to action is less explicit than *Furgatch*'s "Don't let him do it." But it is still unmistakable. To an objective listener, likely aware of the upcoming election, the statement that ranked-choice voting "has no place in Alaska" can only be understood

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[127] *Hum. Life of Wash. Inc. v. Brumsickle*, No. C08-0590, 2009 WL 62144, at *4-5 (W.D. Wash. Jan. 8, 2009), *aff'd*, 624 F.3d 990 (9th Cir. 2010).

as a plea to vote against the ballot measure that would bring ranked-choice voting to Alaska.[128]

iv. October 12, 2020 article

The October 12 article, authored by an APF intern and titled "Ranked-Choice Voting Disenfranchises Voters," was published less than a month before the election. The article opens by stating: "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)." As the title suggests, the piece describes the ways in which ranked-choice voting "threatens to complicate voting, ultimately disenfranchising voters and decreasing turnout." The piece contrasts ranked-choice voting with the traditional "one person, one vote" process, explains the contention that ranked-choice voting confuses voters and results in votes not being counted, and points to jurisdictions in which voters have enacted and then repealed ranked-choice voting. It concludes with the cautionary statement that "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."

This article is susceptible of only one interpretation: an appeal to vote "no" on the Initiative. First, the article's description of "[a] voting trend to uproot the electoral process" — which it identifies as ranked-choice voting — that "has made it all the way to Alaska" indirectly but clearly identifies the Initiative. Second, the article's descriptions of the harmful consequences of ranked-choice voting make its opposition to the Initiative clear. In light of the article's release mere weeks before the election, the admonition that jurisdictions that have adopted and then repealed ranked-choice voting "should serve as an example" to Alaskans can only be read as a declaration "that the situation demands action."[129] So too with the closing pitch that

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[128] *See FEC v. Furgatch*, 807 F.2d 857, 865 (9th Cir. 1987).

[129] *Hum. Life of Wash. Inc.*, 624 F.3d at 1015.

"[i]t is critical for our country that elections maintain their integrity" and that "[a]ll Alaskans deserve to have their votes counted," but ranked-choice voting "accomplishes the opposite." The only reasonable interpretation of this piece is that it exhorts readers to vote against the Initiative. Therefore, it was both a "communication" requiring a "paid for by" disclosure and an "express communication" that had to be reported.

B. APF Fails To Show That Alaska's Reporting And Disclosure Statutes Are Unconstitutionally Vague As Applied To Ballot-Related Speech.

A law is void for vagueness if it fails to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited" and to "provide explicit standards for those who apply them."[130] "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."[131] Even so, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity"[132] because "we can never expect mathematical certainty from our language."[133]

APF makes both facial and as-applied vagueness challenges to Alaska's campaign finance regime.

1. Facial challenge

APF challenges AS 15.13's framework as facially vague. It argues that the standards enshrined in statute, when applied to ballot propositions, do not provide sufficient clarity to those who wish to speak publicly about policy issues when those policies are on the ballot. It raises several concerns: the lack of standards for when

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[130] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[131] *FCC. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012); *see also Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982) ("If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.").

[132] *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

[133] *Grayned*, 408 U.S. at 110.

advocacy on a particular issue "indirectly identifies" a ballot proposition; the Commission's consideration of the speech's neutrality; the lack of clear time limits for when issue speech can be construed as identifying a ballot proposition; and the Commission's reliance on the speaker's history of speech.

We have already explained that it will often be improper to consider a speaker's history of speech when applying the "express communication" standard and have declined to consider it here. As for the other arguments, we address each in turn.

a. Whether speech "directly or indirectly identifies" a ballot proposition

As explained above, speech qualifies as a "communication" that must contain a "paid for by" disclosure if it is an advertisement or announcement disseminated through media that "directly or indirectly identifies" a ballot proposition.[134] APF argues that this standard — "directly or indirectly identifies" — is unconstitutionally vague. It appears to argue that it is not clear what it means to "indirectly identify" a ballot proposition, so a narrowing construction must be applied to this term to avoid the statute being void for vagueness. We agree for the reasons stated below. With this interpretation, we do not believe the definition of "communication" is void for vagueness.[135]

In defending against APF's vagueness argument, the Commission points out that the Ninth Circuit has already upheld the standard "directly or indirectly identify" against a facial vagueness challenge.[136] But this decision is not directly on

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[134] AS 15.13.090(a); AS 15.13.400(3) (2020). Speech by an individual or nongroup entity costing $500 or less is excluded from this definition and therefore is not required to contain a "paid for by" disclosure. AS 15.13.400(3).

[135] *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[C]larity . . . may be supplied by judicial gloss on an otherwise uncertain statute.").

[136] *See Alaska Right To Life Comm. v. Miles*, 441 F.3d 773, 782-83 (9th Cir. 2006) (holding definition of electioneering communications not unconstitutionally vague for requiring that communication directly or indirectly identifies candidate).

point because it arose in the context of candidate elections. APF asserts that it may be easier to determine whether speech indirectly identifies a candidate for office, who is a specific person, than to determine whether speech indirectly identifies a ballot proposition, which addresses a specific issue of public policy. According to APF, if speech is held to "indirectly identify" a proposition merely because the speech supports or opposes the issue that is the subject of an upcoming ballot proposition, then speakers will not know whether their speech qualifies as a regulated "communication."

APF's argument has merit. Even when an issue is soon to come before the voters on a ballot proposition, not all speech addressing the issue necessarily concerns the ballot proposition.

One of the Commission's past advisory opinions illustrates this dynamic.[137] At the time, two ballot propositions concerning regulations for large mines were set to come before the voters at the next election.[138] A nonprofit group requested an advisory opinion on whether it would be required to report ads it wished to run urging listeners to "[p]rotect clean water and wild Alaska salmon."[139] The Commission ruled that while the language might be interpreted as support for the propositions, that was not the only reasonable interpretation of the ads because there were "numerous different kinds of opposition activity" to the Pebble Mine, the apparent target of the ballot propositions.[140] In other words, because the speech could reasonably be understood to urge the listener to take some action to protect clean water and fish other than vote for the ballot propositions, it was not subject to regulation. We can envision similar instances when it may be unclear whether a speaker "indirectly identifies" a ballot proposition when an issue addressed by the speaker is on the ballot.

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[137] *Renewable Res. Coal., supra* note 30.

[138] *Id.* at 9.

[139] *Id.* at 1, 10.

[140] *Id.* at 11-12.

Consistent with *Buckley*, we must take care to ensure that speakers who wish to address policy matters not in connection with a ballot proposition are not forced to "hedge and trim"[141] to avoid their speech being misinterpreted as urging an electoral result.[142] Therefore, we hold that an indirect reference to a ballot proposition must be unambiguous in order for speech to qualify as a "communication" that must carry a "paid for by" disclosure. With such a construction, we do not believe the definition of "communication" that triggers statutory disclosures is unconstitutionally vague.

APF disagrees that its speech unambiguously identified the ballot proposition. But statements such as "Alaskans tak[ing] to the polls in November" and a "voting trend" that had "made it all the way to Alaska" were unambiguous references to the upcoming ballot proposition presenting ranked-choice voting. Because of the nature of ranked-choice voting — a change to the electoral system, which can be effectuated only through change to the law — the only reasonable way to interpret APF's speech opposing ranked-choice voting was as a reference to the upcoming ballot initiative proposing to enact ranked-choice voting.

b. Lack of neutrality

APF also challenges the Commission's interpretation of the "express communication" standard — whether speech is "susceptible of no other reasonable interpretation but as an exhortation to vote for or against" a specific ballot initiative — on vagueness grounds. APF argues that the Commission's focus on whether APF's statements were "neutral" was improper and suggests that, to the extent the "express

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[141] *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

[142] *Cf. Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004) ("[T]he *McConnell* Court . . . left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.").

communication" standard requires examining the speaker's statements for neutrality, it is unconstitutionally vague. Although the Commission's reference to neutrality may have been imprecise, applying the "express communication" standard to speech about ballot propositions necessarily entails interpreting the speaker's language, and the need to do so does not make this standard unconstitutionally vague.

The Commission's decision asserted that APF's publications were "not neutral" and went on to quote excerpts before concluding that the publications could only be interpreted as exhortations to vote against the proposition. But the Commission did not elaborate on what it meant by "neutral" or why it interpreted the publications that way. The Commission might have meant that ranked-choice voting was not presented "neutrally," a factor supporting its conclusion that the publications could be interpreted only as exhortations to vote against the Initiative. Alternatively, the Commission's statement that the publications were "not neutral" might have been a way of stating its conclusion: i.e. that the publications opposed the Initiative.

To the extent the Commission was referring to a slant in the way ranked-choice voting was discussed, we caution that slanted language is not necessarily an exhortation to vote a certain way. It can be difficult to determine whether discussion of an issue is truly "neutral." For instance, a pamphlet discussing the pros and cons of an issue may be viewed by some as neutral and by others as non-neutral depending on what facts are presented and how they are described. Pointing out the costs and benefits of a policy proposal does not necessarily amount to an appeal to vote for or against it.

But the "express communication" standard need not incorporate a "magic words" test to avoid being unconstitutionally vague. That is, we do not believe that the need to give the public fair notice of what speech is subject to regulation, and to give regulators a precise standard to apply, means that only speech containing words like "vote against" can be deemed a clear plea to vote against a ballot initiative. Rather, if the speech unambiguously identifies the ballot proposition (as required by our ruling above), it is permissible to consider statements of support for or opposition to the policy

on the ballot to conclude that the speaker is urging a vote for or against the ballot proposition. Normative language can evoke a "clear plea for action"[143] — such as what people "need" to do when they "take to the polls" or the assertion that ranked-choice voting "has no place in Alaska." Concluding that such language can meet the express communication standard does not, in our view, make the law unconstitutionally vague.

The vagueness concerns identified in *Buckley*, on which APF relies, do not apply in the same way in the context of ballot propositions. An ad expressing opposition to an issue while referring to a particular candidate may be susceptible to different interpretations. Such was the case with the ads at issue in *Wisconsin Right to Life*, which urged listeners, on the eve of an election, to call their senators about the filibuster.[144] By contrast, an ad expressing opposition to a policy while referring to a ballot proposition about that policy does not have the same ambiguity.[145] Therefore, we reject APF's argument that the express communication standard, as applied to ballot propositions, is unconstitutionally vague.

c. Timing

APF also criticizes the Commission's reliance on the timing of APF's speech relative to the placement of the issue on the ballot as "arbitrary" and providing "no guidance to the unwary as to when the relevant time period starts." But the time period during which speech can count as a reportable "expenditure" or a

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[143] *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) ("[S]peech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered . . . .").

[144] 551 U.S. 449, 459 (2007) (Roberts, C.J.).

[145] *See Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 45 (1st Cir. 2012) (explaining that need for disclosure statutes to be narrowly construed to exempt issue advocacy so as to avoid vagueness does not apply with same force in context of ballot measure speech because for "state ballot question committees, . . . only issue advocacy is involved, and there is no vagueness" (quoting *Nat'l Org. for Marriage v. McKee*, 765 F. Supp. 2d 38, 53 n.86 (D. Me. 2011)) (internal quotation marks omitted)).

"communication" requiring a disclosure is established in statute. The terms "expenditure" and "communication" are both defined by reference to ballot propositions and applications to place a proposition on the ballot.[146] Speech about an issue may be subject to the statutory reporting and disclosure requirements only while the issue is the subject of an initiative that has been placed on the ballot at an upcoming election[147] or the subject of an application filed with the lieutenant governor as part of that process.[148] That period is not as straightforward or simple to determine as a specific number of days before the election. But it is defined precisely enough in statute to give those intending to make paid speech on a policy issue a reasonable opportunity to know whether they would be subject to regulation and to minimize the risk of arbitrary enforcement.[149] We also note that a person may request an advisory opinion from the

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[146] *See* AS 15.13.400(3) (2020) (defining "communication" to exclude speech that does "not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c)"); AS 15.13.065(c) (defining "proposition" to include issue placed on ballot and initiative proposal application filed with lieutenant governor); former AS 15.13.400(6)(A)(iv)-(v) (2020) (defining "expenditure" to include money spent for purpose of "influencing the outcome of a ballot proposition or question" or for "supporting or opposing an initiative proposal application filed with the lieutenant governor"). Active petitions and ballot measures can be found on the Alaska Division of Elections' website. *See Petitions and Ballot Measures*, ALASKA DIV. OF ELECTIONS, https://www.elections.alaska.gov/petitions-and-ballot-measures/ (archived at https://perma.cc/659L-NJSG) (last visited Oct. 1, 2025).

[147] AS 15.45.190 (directing lieutenant governor to place proposition on ballot of "first statewide general, special, special primary, or primary election that is held after . . . petition has been filed, . . . a legislative session has convened and adjourned; and . . . a period of 120 days has expired since the adjournment of the legislative session").

[148] AS 15.45.020 (providing for filing application for initiative with lieutenant governor); *see also* AS 15.45.030–.140 (describing process for filing of application for initiative and obtaining signatures to have proposition placed on ballot).

[149] "[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 20 (2010). APF made the four

Commission on whether planned messages would be subject to regulation.[150] Therefore, we do not believe the reporting and disclosure statutes are unconstitutionally vague.[151]

2. As-applied challenge

APF argues that the Commission's "express communication" standard is unconstitutionally vague as applied to its publications because they addressed only one of the three major changes proposed by the Initiative. Specifically, APF argues that the definition of communication is unconstitutionally vague as applied to its own publications because it "refers to the direct or indirect identification of a ballot initiative, not to the discussion of any 'key' issue" within a ballot initiative.[152] It argues that "[n]othing about the topic of ranked-choice voting as an issue in 2020 would alert APF that opposition to ranked-choice voting necessarily meant opposition" to the Initiative.

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communications at issue well after the Better Elections Initiative qualified for the ballot. Therefore, APF cannot complain of the vagueness of the timing as applied to others' speech, such as those who might speak on an issue before it qualifies for the ballot.

[150] AS 15.13.374.

[151] Because APF has challenged the timeframes for regulation on vagueness grounds only, rather than overbreadth, we do not address the latter issue. "[I]mprecise laws can be attacked on their face under two different doctrines": overbreadth and vagueness. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (plurality opinion). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). But "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Id.* at 114 (citing *Zwickler v. Koota*, 389 U.S. 241, 249-50 (1967)).

[152] *See* AS 15.13.400(3). APF also argues in the facial challenge section of its brief that "APOC used no minimum standards to determine that [the Initiative]'s 'key issue' was ranked-choice voting." Because this argument is about the constitutionality of the law in the factual context of APF's communications, rather than a challenge to the law on its face, we only address it here in the as-applied section.

We disagree. The July 24 press release, July 31 video, October 8 press release, and October 12 opinion piece all alluded to ranked-choice voting as a policy issue facing Alaskans. And all four pieces clearly urged opposition to ranked-choice voting in Alaska. The July 24 press release included statements by the APF executive director that "[a]s Alaskans take to the polls in November, history should provide a warning for what Ranked Choice Voting would lead to," that ranked-choice voting decreases voter turnout and results in discarded votes, and that "[w]e need to encourage Americans of all backgrounds to visit the polls, not give them another reason to avoid casting a ballot." The final frame of the July 31 video posted on APF's website urged viewers to "SAY NO TO RANKED CHOICE VOTING."[153] The remaining two publications, issued within a month of the election, also straightforwardly opposed the adoption of ranked-choice voting in Alaska. The October 8 press release stated that a voting system like ranked-choice voting "has no place in Alaska." And the October 12 opinion piece framed ranked-choice voting as "[a] voting trend to uproot the electoral process" which "is sweeping the country and has made it all the way to Alaska." In the context of an upcoming election with ranked-choice voting on the ballot, the publications' call to oppose ranked-choice voting by rejecting the Initiative is, while implicit, entirely clear.

This is particularly true because, at the time, Alaskans had only one route to oppose ranked-choice voting: casting their vote against it. Unlike the ads urging listeners to "protect clean water and wild Alaska salmon" in the advisory opinion

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[153] *Video: Ranked Choice Voting, Explained*, ALASKA POL'Y F. (July 31, 2020), https://alaskapolicyforum.org/2020/07/video-rcv-explained/ (archived at https://perma.cc/4PH3-Z9VW).

discussed earlier,[154] there were not numerous different ways for Alaskans to oppose ranked-choice voting. Therefore, there is no ambiguity about the action urged.

The fact that the Initiative included other policy measures does not change that dynamic. The title of the ballot measure was "An Act Replacing the Political Party Primary with an Open Primary System and Ranked-Choice General Election, and Requiring Additional Campaign Finance Disclosures."[155] With the election just months away, it should have been clear to APF that by urging readers to oppose ranked-choice voting, it was urging them to vote against the Initiative. There was no other way for APF's listeners to "SAY NO TO RANKED CHOICE VOTING."

Therefore, application of Alaska's reporting and disclosure statutes to APF's speech was not unconstitutionally vague.

C. APF's First Amendment Challenges Are Unavailing.

APF argues that Alaska's registration, reporting, and disclosure requirements violate the First Amendment. APF acknowledges that the government has a legitimate interest in ensuring that voters receive useful information. But it contends that Alaska's laws are not substantially related or narrowly tailored to that interest and therefore unnecessarily burden protected speech.

When reporting and disclosure laws are challenged on First Amendment grounds, we subject the laws to exacting scrutiny.[156] Exacting scrutiny requires "a substantial relation between the disclosure requirement and a sufficiently important

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[154] *Cf. Renewable Res. Coal.*, *supra* note 30, at 9-12 (finding that advertisements to "protect clean water and wild Alaska salmon" were subject to reasonable interpretations other than exhortations to vote for two initiatives — both called The Alaska Clean Water Initiative — which proposed regulations for new large scale mining projects in Alaska).

[155] BALLOT MEASURE NO. 2 (2020), https://www.elections.alaska.gov/petitions/19AKBE/19AKBE%20-%20Ballot%20Language%20Summary.pdf (archived at https://perma.cc/L7DN-2MEK).

[156] *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010).

governmental interest."[157] And "the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end."[158]

Although APF acknowledges that courts have applied exacting scrutiny to disclosure requirements, it argues that requiring the speaker to describe who paid for the message amounts to compelled speech, which is subject to strict scrutiny. Under strict scrutiny a law is upheld only if is the least restrictive means of achieving a compelling state interest.[159] APF points out that in *National Institute of Family & Life Advocates v. Becerra*, the Supreme Court declined to decide whether strict or exacting scrutiny applied to statements that the State of California required crisis pregnancy centers to make about the availability of state-funded abortion services.[160]

We are not persuaded that strict scrutiny applies. The compelled speech in *National Institute of Family & Life Advocates* required the pregnancy centers to "alte[r] the content of [their] speech."[161] The "paid for by" disclosure does not alter the content of speech; it simply says who paid for it. "[R]egulations directed only at *disclosure* of political speech are subject to . . . 'exacting scrutiny.' "[162] We therefore review APF's challenge to both the reporting and disclosure requirements using exacting scrutiny.

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[157] *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976)) (internal quotation marks omitted).

[158] *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 609-10 (2021).

[159] *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

[160] 585 U.S. 755, 773-74 (2018).

[161] *Id.* at 766 (alteration in original) (quoting *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988)).

[162] *Nat'l Ass'n for Gun Rts, v. Mangan*, 933 F.3d 1102, 1112 (9th Cir. 2019) (emphasis in original); *see also Citizens United*, 558 U.S. at 366-67 (applying exacting scrutiny to disclosures); *Buckley*, 424 U.S. at 64-66 (same).

Exacting scrutiny requires "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[163] And "the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end."[164]

The interest underlying Alaska's reporting and disclosure laws is strong enough to pass exacting scrutiny. The Supreme Court has held that the government's interest in an informed electorate satisfies exacting scrutiny.[165] We too have emphasized that an informed electorate is necessary to the "effective functioning of our democratic form of government" and that this rationale "applies with full force to ballot issues."[166] Because ballot propositions are "often complex and difficult to understand," a "voter may wish to cast his ballot in accordance with his approval, or disapproval, of the sources of financial support."[167] The Ninth Circuit has reasoned that "by revealing information about the contributors to and participants in public discourse and debate, disclosure laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention."[168]

APF acknowledges the importance of this purpose but argues that the reporting and disclosure laws cannot withstand exacting scrutiny because they are not substantially related to it or narrowly tailored.

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163 *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66).

164 *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 609-10 (2021).

165 *Citizens United*, 558 U.S. at 367 (citing *Buckley*, 424 U.S. at 66).

166 *Messerli v. State*, 626 P.2d 81, 86-87 (Alaska 1980).

167 *Id.* at 87.

168 *Hum. Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010).

1. Applying the reporting and disclosure statutes to APF's speech has a substantial relation to the government's interest in an informed electorate.

APF argues that the statutes' requirements are "insufficiently tied" to the government's interest in an informed electorate because they are triggered, in some instances, no matter how little money is spent to produce the speech. APF argues that the public has little interest in knowing the identity of those funding speech that costs very little to produce.

As explained earlier, Alaska law requires that expenditures made for the purpose of influencing a ballot proposition be reported to the Commission, and such expenditures include certain kinds of speech.[169] Political groups and nonprofits (but not individuals) must also register before making such expenditures.[170] There is no general *de minimis* exception to these requirements. Expenditures by an individual "acting independently of any other person" on certain printed materials need not be reported if they total less than $500 annually.[171] But there is no low-dollar exemption for expenditures by non-individual speakers (such as nonprofits and political groups).

Similarly, a "paid for by" disclosure is required for all "announcement[s] or advertisement[s] disseminated through print or broadcast media," regardless of how much they cost to produce, except for those by "individual[s] or nongroup entit[ies]" that cost $500 or less.[172] This means that even low-cost communications by groups, for-profit entities, and labor unions must contain a disclosure.

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[169] AS 15.13.040(d) (requiring full report of expenditures made); former AS 15.13.400(6) (2020) (defining expenditures).

[170] *See* AS 15.13.050(a).

[171] AS 15.13.040(h).

[172] AS 15.13.090 (disclosure requirement applicable to "communications"); AS 15.13.400(3) (defining "communication").

APF argues that low monetary thresholds for regulation are "suspect" and that the scrutiny "only intensifies as the threshold goes to zero." Accordingly, APF argues that Alaska's campaign finance regulations are unconstitutional as applied to its own communications and expenditures, which it suggests were negligible. To evaluate this claim, we first review the law on this issue and then turn to the facts of APF's case.

The Ninth Circuit has repeatedly addressed thresholds for campaign finance regulation. In *Smith v. Helzer* the court rejected a challenge to Alaska's reporting and disclosure requirements for individual donations greater than $2,000 per year when aggregated and made to organizations that make independent expenditures in candidate elections.[173] In upholding the reporting requirements, the Ninth Circuit explained that the line at which campaign contributions must be disclosed is " 'necessarily a judgmental decision, best left' to the discretion of the legislature, here the people of Alaska."[174] The court went on to emphasize that "[b]ecause '[t]he acceptable threshold for triggering reporting requirements need not be high,' [it has] routinely upheld reporting thresholds much lower than the $2,000-per-calendar-year one here," noting that it had upheld "reporting thresholds as low as $100."[175] And in *National Association for Gun Rights, Inc. v. Mangan*, the Ninth Circuit ruled that a Montana disclosure regime applicable to organizations spending more than $250 on a single electioneering communication was "within the range of constitutionally acceptable reporting thresholds."[176]

By contrast, in *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, the Ninth Circuit held that a church's in-kind expenditures made in support

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[173] 95 F.4th 1207, 1212, 1217-18 (9th Cir. 2024).

[174] *Id.* at 1218 (quoting *Buckley v. Valeo*, 424 U.S. 1, 83 (1976)).

[175] *Id.* (second alteration in original) (quoting *Nat'l Ass'n for Gun Rts., Inc. v. Mangan*, 933 F.3d 1102, 1118 (9th Cir. 2019)).

[176] 933 F.3d at 1118.

of a petition to put a proposal on the ballot were *de minimis* and could not be constitutionally subject to Montana's (formerly) first-dollar disclosure law.[177] The church's pastor had allowed a member of the congregation to use the church's copy machine to make copies of the petition; allowed the member to place copies in the church's foyer; screened a film on the topic of the petition in connection with a regularly scheduled church service; circulated copies of the petition to those attending the service; and encouraged them to sign.[178] The Ninth Circuit concluded that "the value of public knowledge that the Church permitted a single likeminded person to use its copy machine on a single occasion . . . does not justify the burden imposed by Montana's disclosure requirements."[179]

Other cases to which APF directs our attention are less on point. In *Randall v. Sorrell* the Supreme Court held that a provision of Vermont's campaign finance statute capping direct contributions to the governor at $200 per donor each election cycle was unconstitutional.[180] But contribution limits are more closely scrutinized than disclosure requirements. In *Citizens United*, the Supreme Court explained that "disclosure is a less restrictive alternative to more comprehensive regulations of speech," like spending limits.[181]

APF also cites two Tenth Circuit decisions holding that Colorado's registration and reporting requirements were unconstitutional as applied to groups spending less than $3,500 on a ballot measure, but the court's rationale in those cases

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[177] 556 F.3d 1021, 1024, 1033-34 (9th Cir. 2009).

[178] *Id.* at 1024-25.

[179] *Id.* at 1034.

[180] 548 U.S. 230, 249-50, 262 (2006) (plurality opinion); *see also id.* at 264-65 (Kennedy, J., concurring in judgment) (agreeing that Vermont's contribution limits violated First Amendment); *id.* at 265-73 (Thomas, J., concurring in judgment) (same).

[181] *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).

relied heavily on the particular burdens of Colorado's disclosure regime.[182] APF does not address the particular burdens of Alaska's disclosure regime; it challenges only the public's interest in knowing about those making low-cost speech.

And in *Vote Choice, Inc. v. DiStefano,* the First Circuit struck down Rhode Island's disclosure law on associational grounds because its "disparity between the first dollar disclosure threshold applicable to those who choose to pool money by making contributions to [political action committees] and the $100 disclosure threshold applicable to those who choose to act alone by making direct contributions and expenditures" did not satisfy exacting scrutiny.[183] But the court did not conclude that the low thresholds were unjustified absent such a disparity. It "decline[d] to rule out categorically the legislative tool of first dollar disclosure," stating, "that tool may in certain contexts . . . serve sufficiently compelling government interests to be upheld."[184]

In APF's view, Alaska's statutes, which (with the exceptions mentioned above) are triggered by the first dollar spent, are unconstitutional as applied to its communications because its expenditures were minimal. "[A]n as-applied

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[182] *See Sampson v. Buescher,* 625 F.3d 1247, 1251, 1259-61 (10th Cir. 2010) (holding "substantial" burden that Colorado's complicated and prolific campaign disclosure laws — from varied legal sources and which "[t]he average citizen [could not] be expected to master" — imposed on neighborhood group was unconstitutional in light of interest in promoting disclosure); *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1277 (10th Cir. 2016) ("Colorado's issue-committee regulatory framework remains too burdensome for small-scale issue committees . . . .").

[183] 4 F.3d 26, 33-36 (1st Cir. 1993); *see id.* at 29 (describing Rhode Island's "first dollar disclosure" requirement as "the duty to disclose the identity of, and the amount given by, every contributor, no matter how modest the contribution").

[184] *Id.* at 36.

[constitutional] challenge requires evaluation of the facts of the particular case in which the challenge arises."[185]

The facts do not show that APF's spending was so minimal that the public had no interest in knowing who funded it. APF maintains that the Commission "failed to introduce evidence that expenditures on any communication individually was more than negligible." But the Commission found that APF spent $643.20 on unreported expenditures, and APF acknowledges this finding is based on its discovery response to Commission staff averring that APF spent $643.20 on "staff time to review educational content, send out press releases, etc." related to ranked-choice voting between September 1, 2019 and September 8, 2020.

The lack of more granular findings or evidence is not the Commission's fault. Although APF argued to the Commission that "low thresholds" are constitutionally suspect, it supplied no evidence showing that any of its expenditures were *de minimis*.[186] Instead it argued that the Commission could avoid the constitutional issues "inherent to the low thresholds" by construing its statutes in a way that did not apply to APF's speech. And APF did not attempt to present such evidence to the superior court on appeal.[187]

Based on the facts we do have, we cannot say APF's spending on speech was so minimal that the public lacked an interest in knowing who funded it. As the

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[185] *Alaska Pub. Offs. Comm'n v. Patrick*, 494 P.3d 53, 56 (Alaska 2021) (second alteration in original) (quoting *Dapo v. State, Off. of Child.'s Servs.*, 454 P.3d 171, 180 (Alaska 2019)).

[186] Commission staff had requested APF "provide a list of all purchases, transfer of money or anything of value . . . made for the purpose of furthering APF's mission in connection with ranked choice voting." APF responded by providing the lump sum figure.

[187] *See* Alaska R. App. P. 609(b)(1) (authorizing superior court to grant motion for trial de novo in whole or in part in appeal from administrative agency decision).

superior court pointed out, the time period to which the $643.20 expenditure pertained did not include the October 8 press release or the October 12 blog post.[188] Therefore, all we know is that a portion of the $643.20 in staff time was spent on the July 24 press release and the July 31 YouTube video.[189] APF invites us to assume that "reposting materials from other sources could not have incurred more than minimal costs," but that is not apparent from the record. Rather, the record indicates that APF expended almost $650 in staff time on an effort to publish materials it describes as "reposted." This sum is not all that surprising. APF did not just happen to find a video on the internet and share it on social media. APF engaged in discussions with organizations around the country to create a national coalition that developed or gathered content on ranked-choice voting and allowed APF to republish that content. Such efforts required significant time, and someone paid for that time. Alaskans have a genuine interest in knowing who.

APF's spending is not negligible, unlike the in-kind contributions made by the pastor in *Canyon Ferry Road Baptist Church*.[190] Although "expending a few moments of a[n employee's] time" to repost a video to a business's social media page

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[188] There is no finding or evidence on how much APF spent on producing the two later communications at issue in this case. We might assume that an opinion piece produced by an intern cost a negligible amount, but we do not know what staff time or other expenditures were involved. Although the first-dollar threshold for statutory reporting, registration, and disclosure requirements gives us pause (even acknowledging the exemptions for individual speakers), there is an insufficient factual predicate for us to rule that these statutes were unconstitutional as applied to this speech.

[189] Some portion was presumably also spent on "reposting" an opinion piece about ranked-choice voting in February 2020. As noted above, the Commission did not treat that as subject to regulation, and the parties' arguments do not focus on the opinion piece.

[190] *See* 556 F.3d 1021, 1033-34 (9th Cir. 2009).

might present a different case,[191] APF's expenditures were more substantial. One can readily imagine an election-related advertisement, costing an amount similar to what APF spent, going viral on social media at the height of election season. "[D]isclosure permits citizens . . . to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[192] Given the interests at stake and the record in this case, we reject APF's argument that its expenditures were so minimal that Alaska's reporting and disclosure requirements cannot constitutionally be applied to them.[193]

Finally, we note APF's assertion that Alaska's disclosure statutes are facially unconstitutional but hold that APF waived this argument with inadequate briefing. In the First Amendment context, a law burdening speech "may be invalidated as overbroad" because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[194] APF does not even recite this standard, let alone attempt to explain why it is met. It makes no attempt to explain

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[191] *Cf. id.* at 1034 (holding that "a few moments" of employee's time and "marginal" space given to ballot petition was "so lacking in economic substance" to make disclosure requirements insufficiently related to information interest).

[192] *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

[193] The Commission declined to levy a monetary penalty against APF. The Commission cited 2 AAC 50.865(b)(5), which provides that a penalty may be reduced or waived entirely if it is "significantly out of proportion to the degree of harm to the public for not having the information," which includes when the penalty "exceeds the value of the transactions that were not reported." We do not view the Commission's decision to waive the penalty in this case as a concession that the public inherently lacks an interest in disclosure of this amount of election-related spending.

[194] *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)); *see also Parker v. Levy*, 417 U.S. 733, 760 (1974) (explaining facial invalidation "inappropriate" when majority of statute covers "whole range of easily identifiable and constitutionally proscribable" conduct despite impermissibly burdening speech in "marginal applications" (quoting *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580-81 (1973))).

what the dollar threshold demarcating the statute's "plainly legitimate sweep" might be, nor does it attempt to explain why we should conclude there is a comparatively substantial number of speakers who do, or would, spend small amounts of money on ballot proposition speech but do not fall under the existing statutory exemptions. "[S]uperficial briefing and failing to cite any authority constitute abandonment of a point on appeal."[195] Given APF's deficient briefing on this point, we do not decide whether Alaska's campaign finance statutes should be struck down in their entirety because of their first-dollar thresholds.

2. Requiring APF to post disclosures on communications that included speech by others is substantially related to the government's interest in an informed electorate.

APF also argues that applying the disclosure requirement to what it describes as "reposted" materials will not promote an informed electorate but will instead mislead and confuse voters. Specifically, APF argues that applying AS 15.13.090's "paid for by" disclosure to the July 24, 2020 press release and the Protect My Ballot YouTube video would confuse voters by "forc[ing] APF to take credit for others' communications."

We question the premise that the communications APF describes are "others' communications." The press release was emailed to media contacts by APF's executive director. Its dateline announced it was sent from Anchorage. The press release describes APF as the leader of the four-group coalition launching the "Protect My Ballot" campaign and includes a quote from APF's executive director stating that "[a]s Alaskans take to the polls in November, history should provide a warning for what Ranked Choice Voting would lead to." Although the press release includes messages from other speakers, APF broadcasted it and contributed time and money to produce it.

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[195] *Wilkerson v. State, Dep't of Health & Soc. Servs., Div. of Fam. & Youth Servs.*, 993 P.2d 1018, 1021 (Alaska 1999).

As for the video, although it appears to have been first posted on the website of Protect My Ballot, APF republished the video on its website and its YouTube channel.[196] When the video is viewed on APF's website, it displays a header with APF's logo alongside the title and appears below APF's name and a statement of its vision for Alaska.[197] Therefore, we do not agree that these communications can be described as merely others' speech.

For that reason, we are not persuaded by APF's argument that the law requiring APF to add a disclosure to these communications lacks a substantial relationship with the interest in an informed electorate. Curating and broadcasting speech first produced by others may involve time, effort, and financial resources. APF's publication of the video boosted its reach and literally placed its name on the message, heightening its salience for the Alaska audience. In the same way that voters have an interest in knowing who is paying to produce speech meant to influence the outcome of an election, they have an interest in knowing who is paying to broadcast that speech to more listeners. Therefore, voters have an interest in knowing who financially supports APF's efforts to broadcast messages opposing an issue on the ballot in the upcoming election.[198]

Nor are we persuaded that the risk of confusion created by having to post a disclosure on the press release and video was so great that the requirement lacks a

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[196] Alaska Policy Forum, *Ranked Choice Voting, Explained*, YOUTUBE (July 31, 2020), https://www.youtube.com/watch?v=-JYbr-ctFds (archived at https://perma.cc/4PH3-Z9VW).

[197] *Video: Ranked Choice Voting, Explained*, ALASKA POL'Y F. (July 31, 2020), https://alaskapolicyforum.org/2020/07/video-rcv-explained/ (archived at https://perma.cc/4PH3-Z9VW).

[198] We again point out that individuals and nongroup entities who "repost" others' speech using the internet are exempt from the need to post a disclosure because the definition of a "communication" that requires a disclosure excludes speech costing less than $500 by individual and nongroup entities. AS 15.13.400(3).

substantial relationship to the government's interest in an informed electorate. The text of the disclosure statute has a specific rule for "a communication that includes a . . . video component."[199] Such a communication must display a specific message onscreen during the entirety of the communication:

> 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)).[200]

APF argues that having to post this disclosure on the page where it displayed the video would confuse voters as to who actually made the communication. We are not convinced.

The "communication" to which the disclosure applies is APF's dissemination of the video on its webpage and YouTube channel, where APF has appended its own name, logo, and commentary to the video. The fact that APF expended resources to obtain and publish the video on its website makes it accurate to say that APF paid for that communication. This is true even if someone else paid to produce the video and let APF use it without charge. Perhaps that nuance will be lost on some viewers, who may assume that the video itself was produced or paid for by APF. But the possibility of such confusion does not undermine the purpose of the disclosure statute, which is to give the public information about who is financially backing or opposing candidates and ballot initiatives. For that reason, we are not

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[199] AS 15.13.090(c).

[200] *Id.* During the hearing, the Commission's staff explained its position as to how the disclosure should be posted in the context of a newspaper opinion piece reposted on APF's website. Staff stated that the disclosure would have to appear on the web page where the opinion piece was republished, rather than on the opinion piece itself. Although staff did not address this point in relation to the video, we presume the same rule would apply.

persuaded that applying the disclosure requirement to APF's "reposted" communications lacks a substantial relationship with the State's interest in an informed electorate.

3. APF's narrow tailoring arguments are not persuasive.

APF argues that AS 15.13.090's disclosure requirement is not narrowly tailored because there are less burdensome approaches to inform the public who pays for communications. Specifically, APF argues that the State could accomplish its goals by adding an "earmarking" requirement to the statute,[201] or "keep[ing] a public database for everyone to look up the information" about a speaker's funding sources.

Narrow tailoring means "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.' "[202] The State "is not free to enforce *any* disclosure regime that furthers its interests. It must instead demonstrate its need for universal production in light of any less intrusive alternatives."[203] Narrow tailoring does not, however, require that a legislature choose the least restrictive means of achieving its ends.[204]

The Supreme Court upheld disclosure requirements in *Citizens United*, observing that they represent "a less restrictive alternative to more comprehensive regulations of speech."[205] And Alaska's reporting statute carves out some common

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[201] Earmarking requirements make disclosure necessary only for donors who have specifically designated their contributions for election-related purposes. *See Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016).

[202] *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (plurality opinion) (quoting *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

[203] *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 613 (2021) (emphasis in original).

[204] *Id.* at 608.

[205] *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).

types of paid speech from regulation. Disclosures are not required on speech disseminated through print or broadcast media if it costs $500 or less and is by a natural person or nongroup entity.[206] Nor are disclosures required on printed materials like billboards, pamphlets, or signs paid for by a natural person acting independently to influence a ballot measure election.[207] As for reporting of expenditures, individual spending of up to $500 on printed materials related to ballot propositions is exempt from reporting.[208] So some paid speech is not subject to reporting or disclosure requirements at all.

The Commission also interprets AS 15.13 as already containing an earmarking provision, although the statute does not explicitly describe it as such. Under AS 15.13.090 all "communications" must include the words " 'paid for by' followed by the name and address of the person paying for the communication."[209] If the speaker is not an individual, the disclosure must also include the "three largest contributors under AS 15.13.040(e)(5)" during the twelve-month period predating the communication.[210] Alaska Statute 15.13.040(e)(5) imposes reporting requirements for "contributions made to the person, if any, for the purpose of influencing the outcome of an election." "Contribution" is separately defined as a donation "made for the purpose of . . . influencing the nomination or election of a candidate . . . [or] influencing a ballot proposition or question."[211] So not all donations to the entity qualify as "contributions" that require the donor be disclosed.

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[206] AS 15.13.400(3).

[207] AS 15.13.090(b).

[208] AS 15.13.040(h).

[209] AS 15.13.090(a).

[210] AS 15.13.090(a)(2)(C).

[211] AS 15.13.400(4)(A)(i)-(ii).

Consistent with the Commission's position that not all donations to an entity are reportable "contributions," the Commission notes that statute and regulation allow APF to segregate donations earmarked for election activity in a separate account for reporting purposes to avoid reporting donations not intended for such purposes.[212] Under the Commission's interpretation, only donations earmarked for election-related uses must be reported; those who do not earmark donations for that purpose may avoid being identified.[213]

APF did not dispute the Commission's interpretation of its statutes or regulations or argue that this interpretation is constitutionally deficient. And we agree with the Commission's argument that the provisions in question can be interpreted as it describes. So we reject APF's argument that AS 15.13 fails exacting scrutiny for lack of earmarking. And because APF has made no argument that the particular approach to earmarking described in statute is insufficiently tailored, we do not address that precise issue.

We also reject APF's argument that requiring communications to include a disclosure is not narrowly tailored because the State could instead maintain a repository of donor information that voters can consult to discover who is funding what speech. APF relies on the Ninth Circuit's decision in *American Civil Liberties Union of Nevada v. Heller*[214] and the Supreme Court's decision in *National Institute of Family & Life Advocates v. Becerra*.[215]

To the extent that the *Heller* decision held that an on-message disclosure is compelled speech that violates the First Amendment,[216] it was undercut by the

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[212] AS 15.13.052; 2 AAC 50.270(e).

[213] 2 AAC 50.270(e).

[214] 378 F.3d 979 (9th Cir. 2004).

[215] 585 U.S. 755 (2018).

[216] *See Heller*, 378 F.3d at 988-1000.

Supreme Court in *Citizens United*, which subjected an on-message disclosure requirement to exacting scrutiny and found the requirement narrowly tailored to the government interest in promoting an informed electorate.[217] And the Ninth Circuit has since rejected an argument that an on-message disclosure requirement was not narrowly tailored because the required information could be made available in an online database.[218] In *Smith v. Helzer*, the Ninth Circuit reasoned that on-advertisement donor disclosures " 'provide[] an instantaneous heuristic by which to evaluate generic or uninformative speaker names' and therefore more effectively serve[] the government's informational interest than an online database."[219] We agree with this view. On-message disclosures are more likely to effectuate the purpose of an informed electorate than a government repository of the same information.

The *National Institute of Family & Life Advocates* decision is not on point. The government interest at stake was entirely different, making the decision's reasoning inapplicable here. In that case the Supreme Court struck down a California law requiring pro-life pregnancy centers to post government-drafted notices about the availability of state-sponsored pregnancy services, including abortion — "the very practice [the] petitioners [were] devoted to opposing."[220] The asserted government interest for the notice requirement was "providing low-income women with information about state-sponsored services."[221] The Court struck down the notice requirement,

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[217] *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010).

[218] *Smith v. Helzer*, 95 F.4th 1207, 1220 (9th Cir. 2024) (discussing *No on E v. Chiu*, 85 F.4th 493, 509 (9th Cir. 2023)).

[219] *Id.* (quoting *Gaspee Project v. Mederos*, 13 F.4th 79, 91 (1st Cir. 2021)).

[220] *Nat'l Ins. of Fam. & Life Advocs.*, 585 U.S. at 766.

[221] *Id.* at 773.

reasoning that it was not closely tailored to the asserted interest because the government "could inform the women itself with a public-information campaign."[222]

But in the case at hand, a public database of speakers and their contributors would not be as effective in promoting the government's interest in an informed electorate. Unlike in *National Institute of Family & Life Advocates*, where the interest motivating the notice requirement was in promoting information about health resources generally, here the government interest is in informing voters of the funding sources behind a particular message. On-advertisement disclosures can be "more effective in generating discourse that facilitates the ability of the public to make informed choices in the specialized electoral context" in addition to being "a more efficient tool [than public disclosure] for a member of the public who wishes to know the identity of the donors backing the speaker."[223] So a public repository of funding information is not a substitute for on-message disclosure.

Therefore, we are not persuaded by APF's tailoring arguments. Its argument that Alaska's reporting and disclosure statutes violate the First Amendment fails.

V. CONCLUSION

For the foregoing reasons we AFFIRM the judgment of the superior court.

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[222] *Id.* at 773, 775.

[223] *Gaspee Project*, 13 F.4th at 91; *see also Smith*, 95 F.4th at 1219-20 (rejecting challenge to on-message disclosure requirement when information was available online because on-message disclosures more efficiently and effectively serve government's informational interest).

PROTECT MY BALLOT

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. 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.

ALASKA POLICY FORUM

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/.

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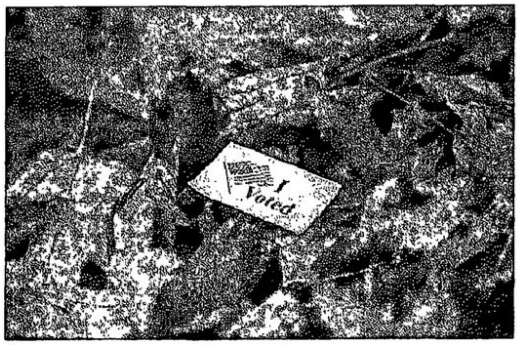
Alaska Policy Forum (APF) is a 501(c)(3) nonprofit, nonpartisan think tank dedicated to empowering and educating Alaskans and policymakers by promoting policies that grow freedom for all. APF does not accept any form of government funding. To learn more about APF, visit www.AlaskaPolicyForum.org.

Exc. 066 **SOA 000123** Exhibit 22
Page 1 of 1 000411

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) 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://hawaiifreepress.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), 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) 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/) 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) 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/).

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Blog (https://alaskapolicyforum.org/category/blog/), Front Page Slider (https://alaskapolicyforum.org/category/news/), Other Issues (https://alaskapolicyforum.org/category/other-issues/) elections (https://alaskapolicyforum.org/tag/elections/), Ranked-Choice Voting (https://alaskapolicyforum.org/tag/ranked-choice-voting/), RCV (https://alaskapolicyforum.org/tag/rcv/)

Previous
Press Release: New Study Exposes Alarming Ramifications to Ranked-Choice Voting
(https://alaskapolicyforum.org/2020/10/pr-ranked-choice-voting/)

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA POLICY FORUM, Appellant, vs. ALASKA PUBLIC OFFICES COMMISSION, YES ON 2 FOR BETTER ELECTIONS, and PROTECT MY BALLOT, Appellees.	Case No. 3AN-21-07137CI APOC No. 20-05-CD

DECISION AND ORDER

I. INTRODUCTION

In the months leading up to the November, 2020, election, the Alaska Policy Forum ("APF") published content on its website critical of ranked-choice voting ("RCV"). APF's activities coincided with an initiative effort that sought to amend Alaska's election laws to implement RCV, among other goals. The group supporting that initiative effort filed a complaint with the Alaska Public Offices Commission ("APOC"), wherein the group alleged that APF engaged in efforts to oppose the initiative without adhering to Alaska's campaign finance laws. After an investigation, APOC determined that APF made express communications opposing the initiative and ordered APF to comply with registering, reporting, and disclosure requirements. On appeal, APF argues that APOC misapplied the law, and that Alaska's election disclosure laws violate the First Amendment. APOC's decision is supported by substantial evidence and has a reasonable

basis in law. Under the circumstances of this case, Alaska's election registration, reporting, and disclosure requirements do not violate the First Amendment. This court affirms APOC's decision.

II. FACTS

APF is an Alaska-based nonprofit corporation created in 2009. APF's principal purpose is "to provide research, information and public education in support of individual rights, limited government, personal responsibility and government accountability."[1] APF has taken stances on a range of political issues over the years, including taxes, health care, education, and elections but, prior to 2020, it had never taken a stance on RCV. APF also publishes information on its website and through social media expressing its views on those issues.

In July, 2019, a group of Alaska residents filed an initiative called "Alaska's Better Elections Initiative," with an abbreviated title of "19AKBE."[2] The official ballot title for the initiative was: "An Act Replacing the Political Party Primary with an Open Primary System and Ranked-Choice General Election, and Requiring Additional Campaign Finance Disclosures."[3] But the full title of the proposed legislation was even longer:

> AN INITIATIVE Prohibiting the use of dark money by independent expenditure groups working to influence candidate elections in Alaska and requiring additional disclosures by these groups; establishing a nonpartisan

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1 SOA 000115.

2 SOA 000088.

3 SOA 000089.

> and open top four primary election system for election to state executive and state and national legislative offices; changing appointment procedures relating to precinct watchers and members of precinct election boards, election district absentee and questioned ballot counting boards, and the Alaska Public Offices Commission; *establishing a ranked-choice general election system*; supporting an amendment to the United States Constitution to allow citizens to regulate money in Alaska elections; repealing the special runoff election for the office of United States Senator and United States Representative; requiring certain written notices to appear in election pamphlets and polling places; and amending the definition of "political party."[4]

Petition booklets for the initiative were issued on October 31, 2019, and on March 9, 2020, the lieutenant governor accepted the petition signatures where the initiative was scheduled for a vote on the November, 2020, general election. This initiative came to be known as Ballot Measure No. 2.

In January, 2020, APF agreed to join alongside other nonprofit think tanks from Maine, Massachusetts, Minnesota, and Oklahoma, as a founding member of Protect My Ballot ("PMB").[5] PMB is a national coalition focused on educating the public about the risks of RCV. PMB's website contains a variety of educational materials, including links to news articles and op-eds opposing RCV around the country.

On February 11, 2020, APF republished on its website an op-ed opposed to RCV. This op-ed, written by Jacob Posik of The Maine Heritage Policy Center, was originally published in the Anchorage Daily News ("ADN") on February 9, 2020. The op-ed responded to pro-RCV commentary that ADN had published in January by describing the Maine think tank's research, which determined that "RCV fails to produce true majority

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4 2020 Alaska Laws Initiative Meas. 2 (emphasis added).

5 SOA 000017.

winners." The op-ed concluded: "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."[6] At no point did the op-ed reference 19AKBE or any initiative effort in Alaska.

On July 24, 2020, APF published a press release announcing the launch of PMB, touting APF's leadership on the matter.[7] The press release included quotes from each coalition member, including a quote from Bethany Marcum, APF's Executive Director:

> 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.[8]

Although the press release did not expressly identify or oppose 19AKBE, it clearly showed that APF, through its Executive Director, was opposed to RCV, a key component of 19AKBE.

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[6] SOA 000039; Jacob Posik, *Ranked-Choice Voting Fails to Deliver on Its Promises*, ALASKA POL'Y F. (Feb. 11, 2020), https://alaskapolicyforum.org/2020/02/rcv-fails-on-promises/ (last visited May 19, 2022).

[7] SOA 000039-40, 108-13; Press Release, *Protect My Ballot: New Campaign Exposes Flaws in Ranked Choice Voting*, PROTECT MY BALLOT (July 24, 2020), https://protectmyballot.com/protect-my-ballot-new-campaign-exposes-flaws-in-ranked-choice-voting/ (last visited May 19, 2022). Although the APOC staff report only listed a URL from PMB's website, APF's answer confirmed that it also sent out the same press release. *See* SOA 000079.

[8] SOA 000109.

On July 31, 2020, APF created a blog post containing an embedded YouTube video describing RCV.[9] The video provided a brief outline of problems with RCV and directed viewers to visit PMB's website. Other than generally opposing RCV, neither the video nor the blog post mentioned 19AKBE or any ballot initiative. However, as noted above, RCV was a key component of 19AKBE.

On September 8, 2020, Yes on 2 for Better Elections ("Yes on 2") filed a complaint with APOC regarding APF's and PMB's activities.[10] Yes on 2 alleged that, even though APF had not registered with APOC or reported any expenditures, PMB had posted materials "explicitly advocating a 'no' vote on Ballot Measure 2," and APF was "provid[ing] material support to PMB."[11] APF responded to the complaint on September 24, 2020, by denying any campaign finance law violations.[12] APF also disclosed that, in its activities opposing RCV, APF made payments "in the form of staff time to review educational content, send out press releases, etc. for three employees, at 25 hours, for a

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9 Although the staff report only referenced PMB's video as it appears on YouTube, *see* SOA 000038, the complaint also contained a URL for APF's website. SOA 000003; *Video: Ranked Choice Voting, Explained*, ALASKA POL'Y F. (July 31, 2020), https://alaskapolicyforum.org/2020/07/video-rcv-explained/ (last visited May 19, 2022).

10 SOA 000002-10.

11 SOA 000002-3. The complaint also alleged that Brett Huber, a former advisor to Governor Dunleavy, was leading the anti-19AKBE campaign, and that APF violated state lobbying regulations. SOA 000001, 6.

12 SOA 000017-23.

cost of $643.20" between September 1, 2019, and September 8, 2020.[13] Yes on 2 filed its reply on October 1, 2020.[14] Yes on 2 never supplemented its complaint.

On October 8, 2020, APF published a report on its website critical of RCV.[15] The report's contents were largely copied from a 2019 report originally published by the Maine Heritage Policy Center, but updated and reframed for Alaska.[16] The report described RCV as "[a] movement currently sparking interest across the country, including in Alaska," and detailed mixed results from elections in Maine and 96 other jurisdictions employing RCV. APF also issued a press release that same day announcing the report's publication.[17] Neither the report nor the press release referenced 19AKBE. However, RCV was only a movement sparking interest in Alaska because of 19AKBE.

Finally, on October 12, 2020, APF published a short blog post titled "Ranked-Choice Voting Disenfranchises Voters."[18] The post noted that RCV was "sweeping the

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13 SOA 000027.

14 SOA 000031-35.

15 SOA 000040; Quinn Townsend, *Report: The Failed Experiment of Ranked-Choice Voting*, ALASKA POL'Y F. (Oct. 8, 2020), https://alaskapolicyforum.org/2020/10/failed-experiment-rcv/ (last visited May 19, 2022).

16 *See* SOA 000040-41, 153; Adam Crepeau & Liam Sigaud, *A False Majority: The Failed Experiment of Ranked-Choice Voting*, ME. HERITAGE POL'Y CENTER (Aug. 2019), https://mainepolicy.org/wp-content/uploads/RCV-Final-Booklet-.pdf (last visited May 19, 2022). For example, the conclusion sections for both reports are completely identical.

17 SOA 000123.

18 SOA 000152-55; Johan Soto, *Ranked-Choice Voting Disenfranchises Voters*, ALASKA POL'Y F. (Oct. 12, 2020), https://alaskapolicyforum.org/2020/10/rcv-disenfranchises-voters/ (last visited May 19, 2022).

country and has made it all the way to Alaska."[19] After stating several policy arguments against RCV, and citing the 2019 Maine report, the post directed readers to learn more at PMB's website. Once again, 19AKBE was not mentioned but was implied because it was the mechanism for RCV being present in Alaska.

On October 20, 2020, APOC staff submitted its report based on the pleadings and its own investigation.[20] The report explained that in prior advisory opinions APOC applied the definition of "express communication" in AS 15.13.400(7) to determine whether a communication opposing a ballot measure qualified as an "expenditure." Staff also interpreted those advisory opinions as identifying "the length of time an organization has been engaged in educational activities concerning a subject" as well as "changes in the number of activities and the context of the activities" as additional factors to be considered.[21] Staff acknowledged that only two reposted op-eds on PMB's website actually referenced 19AKBE, neither of which were attributed to APF.[22] But staff argued that APF did not have a history of opposing "changes to the voting status quo," and had engaged in "a demonstrable uptick in activity revolving around [RCV] since the initiative was . . . placed on the ballot."[23] Focusing on the "the timing of the activity alleged, and the context of APF's [RCV] communications," staff reasoned that APF's activities

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19 SOA 000153.

20 SOA 000036; *see also* SOA 000157 (noting correct date).

21 SOA 000048.

22 SOA 000038.

23 SOA 000046.

opposing RCV "are express communications."[24] Staff thus concluded that APF violated AS 15.13.040(d), .050(a), and .090(a).[25] Staff recommended a reduced civil penalty of $8,065 in light of APF's status as an inexperienced filer.[26] The report also recommended dismissal of the allegations against PMB, by explaining that "a reasonable interpretation is that the website is a clearinghouse of information to be used [*sic*] opponents to [RCV] for a variety of purposes."[27] Although the staff report included URL citations for the February op-ed, the July video, and the October report, staff did not attach exhibits for those three alleged communications.

APF responded to the staff report on October 30, 2020, by arguing that APOC staff misapplied and misinterpreted the relevant legal standards.[28] APF attached an exhibit detailing its long history of educating the public on election reforms although none of those election reforms dealt with RCV.[29] APF also sought further mitigation of

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24 SOA 000048.

25 SOA 000051. These violations stem from APF failing to file expenditure reports, register with APOC, and identify funding sources on its communications.

26 SOA 000051-53. Staff also tolled the running of penalties for the time period after the complaint was filed on September 8, 2020.

27 SOA 000046. Staff also recommended dismissing the allegations against Mr. Huber as well as the lobbying allegation against APF. SOA 000049-50.

28 SOA 000159-65.

29 SOA 000167-68.

any civil penalties as disproportionate to the $643.20 in staff time APF actually expended.[30]

After several continuances, APF filed a motion to dismiss and a hearing memorandum on May 28, 2021.[31] The filing repeated APF's prior arguments and raised additional claims that Alaska's campaign finance laws violated the First Amendment.[32] APF asserted that, because the staff report never found that any of APF's activities "directly or indirectly" identified 19AKBE, the statutory definition of "communication" was not met.[33] APF also argued that Evidence Rule 404 prohibited APOC from relying on "propensity evidence" to establish liability.[34] In opposition, APOC staff reiterated most of its earlier arguments and additionally recommended that APOC "find that APF also violated AS 15.13.140(b)(1) for the same reasons that APF violated AS 15.13.040(d)."[35]

APOC held a hearing on the motion to dismiss and the underlying merits on June 10, 2021. At oral argument, APF objected to the last-minute addition of allegations

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30 SOA 000166.

31 SOA 000201.

32 SOA 000220-43. APF's briefing included abbreviated URLs linking to both the July video and the October report. SOA 000215-16.

33 SOA 000225-26.

34 SOA 000228.

35 SOA 000250.

under AS 15.13.140(b)(1) as a violation of due process.[36] APF also "point[ed] out that three of the [six] communications are not even in the exhibits," and thus there was no record for review.[37] In response, staff clarified that its report included URLs for every alleged communication, and that the additional statutory grounds did not change the underlying question of whether the communications on APF's website were expenditures.[38]

On June 21, 2021, APOC issued a final order on the matter. The final order mostly adopted the staff report's conclusions on the merits.[39] While admitting that "the materials did not mention the ballot measure by name," APOC stated that APF's "communications were decidedly against the [RCV] that [19AKBE] would establish, and so they were 'susceptible of no other reasonable interpretation but as an exhortation to vote' against the measure."[40] APOC did not enter individual findings for each communication, holding only that "at least of its July press release" APF was required to register and comply with Alaska's campaign finance laws.[41] Although APOC found that

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36 Tr. 18:23-19:6 (June 10, 2021).

37 Tr. 24:4-17 (June 10, 2021).

38 Tr. 40:10-24 (June 10, 2021).

39 SOA 000268.

40 SOA 000269.

41 SOA 000273.

APF had violated four statutory provisions,[42] APOC declined to impose any civil penalties.[43] On July 12, 2021, in response to Yes on 2's request for clarification,[44] APOC amended its final order to require APF "to comply with [reporting and disclosure] requirements within 30 days."[45]

APF appealed APOC's decision to the superior court.

III. STANDARD OF REVIEW

Appeals from administrative agency decisions to the superior court are reviewed under a variable standard.[46] Constitutional issues and questions of law where no agency expertise is involved are reviewed de novo.[47] But for questions of law that involve "agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions,"[48] courts apply the "reasonable basis test," which asks

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42 APOC found that APF "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." SOA 000273.

43 SOA 000273-74; *see also* 2 AAC 50.865(b)(5).

44 SOA 000263-65.

45 SOA 000276; *accord* SOA 000266 (order granting modification).

46 When the superior court reviews and agency decision, it sits an intermediate court of appeal. *Wilkerson v. State, Dep't of Health & Soc. Servs., Div. of Fam. & Youth Servs.*, 993 P.2d 1018, 1021 (Alaska 1999).

47 *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014).

48 *Id.* (quoting *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011)).

"whether the agency's decision is supported by the facts and has a reasonable basis in law."[49] More deference is afforded "to agency interpretations that are 'longstanding and continuous.'"[50] An agency's factual findings are reviewed for "substantial evidence," which requires that any findings are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[51] The reviewing court only determines whether substantial evidence exists, it does not choose between competing inferences from the facts.[52] Likewise, the reviewing court does not evaluate the strength of the substantial evidence, but merely notes its presence.[53]

III. APPLICABLE LAW

A. Statutes and Regulations

One purpose of Alaska's campaign finance laws is to regulate "contributions, expenditures, and communications made for the purpose of influencing the outcome of a ballot proposition."[54] This is accomplished primarily through a regime of mandatory reporting, registration, and disclosure of independent expenditures and campaign-related

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49 *Id.* (quoting *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987)).

50 *Id.* (quoting *Marathon Oil Co.*, 254 P.3d at 1082).

51 *Nicolos v. North Slope Borough*, 424 P.3d 318, 324 (Alaska 2018) (quoting *Brown v. Pers. Bd. for Kenai*, 327 P.3d 871, 874 (Alaska 2014)).

52 *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).

53 *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 179 n. 26 (Alaska 1986).

54 AS 15.13.010(b).

communications.[55] Whether one must comply with those requirements thus depends on whether the activity meets the definitions of "expenditure" and "communication."[56]

Alaska Statute 15.13.400(7)(A)(iv) defines "expenditure" as "a purchase or a transfer of money or anything of value . . . incurred or made for the purpose of . . . influencing the outcome of a ballot proposition or question."[57] This definition "includes an express communication and an electioneering communication, but does not include an issues communication."[58] An "express communication" is "a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other

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55 *See* AS 15.13.040(d) ("Every person making an independent expenditure shall make a full report of expenditures made . . . ."); AS 15.13.050(a) ("[B]efore making an expenditure in support of or in opposition to a ballot proposition . . . , each person other than an individual shall register . . . with the commission."); AS 15.13.090(a) ("All communications shall be clearly identified by the words 'paid for by' followed by the name and address of the person paying for the communication."); AS 15.13.140(b)(1) ("An independent expenditure for or against a ballot proposition or question . . . shall be reported in accordance with AS 15.13.040 . . . .").

56 *See* AS 15.13.040(d) (expenditure); AS 15.13.050(a) (same); AS 15.13.140(b)(1) (same). Although AS 15.13.090(a) arguably applies to any "communication," APOC has narrowed the scope by regulation to "a person that pays for a political communication, including a person that makes an independent expenditure." 2 AAC 50.306(a); *see also* AS 15.13.135(b) (requiring those making "independent expenditures" for any "communication that supports or opposes a candidate" to comply with AS 15.13.090(a)). *But see* AS 15.13.140(b)(1) (clarifying that every "independent expenditure for or against a ballot proposition . . . shall be reported in accordance with AS 15.13.040 . . . and other requirements of this chapter," but saying nothing as to compliance with AS 15.13.090).

57 The term "independent expenditure" then refers to expenditures made without consulting with a candidate or their agents. AS 15.13.400(11). For ease of reference, this court uses the numbering of definitions in AS 15.13.400 as they currently exist. Although 19AKBE amended this statute and other campaign finance laws when it passed, the definitions applicable here were merely reordered and not substantively altered.

58 AS 15.13.400(7)(C).

reasonable interpretation but as an exhortation to vote for or against a specific candidate."[59] Whereas an "issues communication" is one that "directly or indirectly identifies a candidate," but then "addresses an issue of national, state, or local political importance and does not support or oppose a candidate for election to public office."[60] The term "communication" is also separately defined as "an announcement or advertisement disseminated through print or broadcast media, including . . . the Internet," except for "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."[61]

B. APOC Advisory Opinions

1. *Renewable Resources Coalition*

In a series of advisory opinions, APOC has also attempted to clarify what types of communications pertaining to ballot measures also qualify as "expenditures." APOC first confronted this question in a 2008 advisory opinion requested by the Renewable Resources Coalition ("RRC").[62] RRC was a nonprofit organization organized for the

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59 AS 15.13.400(8).

60 AS 15.13.400(13).

61 AS 15.13.400(3).

62 APOC Advisory Opinion, *Renewable Resources Coalition*, AO 08-02-CD (approved June 11, 2008) [hereinafter "*RRC AO*"], https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=4878. Although only the 14-page opinion is included in the record, SOA 000129-42, the background material included in the version on APOC's website provides useful context for interpreting the opinion. *Cf. Forrer v. State*, 471 P.3d 569, 584 (Alaska 2020), *reh'g denied* (Feb. 5, 2021) (noting that judicial notice is not required for "publicly available legislative history" when used "as interpretive aids"). This court also observes that the RRC opinion predates *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), and many APOC regulations were later repealed in 2011.

purposes of promoting "public policies that uphold responsible access and maximization of hunting and fishing resources."[63] In particular, RRC opposed the Pebble Mine project near Bristol Bay and for several years had engaged in education efforts, including advertisements and online outreach though its website.

In March, 2008, the lieutenant governor certified the filing of two ballot initiatives, 07WATR and 07WTR3, both titled "The Alaska Clean Water Initiative."[64] Both initiatives proposed additional regulations on large-scale mining activities, including the proposed Pebble Mine. RRC sought to continue its educational efforts opposing Pebble Mine but at the same time did "not wish to engage directly in campaigning activities."[65] RRC therefore asked APOC for an advisory opinion on several questions to determine what types of activities it could engage in.

One area on which RRC sought advice was whether it may "continue to educate the public" on Pebble Mine and use the phrase "clean water" in advertisements.[66] Some of RRC's advertisements explicitly encouraged readers to "Protect clean water" and "Oppose the Pebble Mine."[67] RRC also made stickers listing RRC's website alongside

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63 *RRC AO*, *supra* note 62, at 9.

64 *Id.*; *see also Pebble P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1068-72 (Alaska 2009) (discussing the timeline and legal challenges to both initiatives).

65 *RRC AO*, *supra* note 62, at 9-10.

66 *Id.* at 10.

67 *Id.* at 10 & Exs. 2-4.

the phrase "clean water."[68] APOC noted that, although the statutory scheme mandated reporting for ballot measure expenditures, no statute or regulation explained what forms of "communication" constitute an "expenditure" for those purposes. APOC thus turned to the definitions of "express communication" and "electioneering communication" for candidate campaigns, reasoning that "the distinctions are also appropriate for ballot initiative campaigns."[69] Applying the test for candidate "express communication," APOC determined that RRC's sample advertisements were not expenditures because they

> 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. . . . As its 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.[70]

As for the "clean water" stickers, APOC reasoned that because the phrase "arguably refer[s] indirectly to the ballot initiatives," the stickers might constitute expenditures if "distributed in a context that can only be interpreted as ballot initiative advocacy."[71]

RRC also asked whether the "dissemination and promotion of an electronic newsletter or web site, that discusses the Pebble Mine controversy, constitute[s] a

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68 *Id.* at 12 & Ex. 20.

69 *Id.* at 11 (citing *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Calif. Pro-Life Council, Inc., v. Getman*, 328 F.3d 1088 (9th Cir. 2003)).

70 *Id.* at 11-12.

71 *Id.* at 12.

reportable expenditure?"[72] RRC's website contained a section titled "Call to Action," which explicitly listed both initiatives. That section encouraged viewers to "Act now to save Bristol Bay," including "by supporting those who would change the overly permissive mining laws of the State of Alaska, either by legislation or by ballot initiative."[73] APOC reviewed RRC's website and reasoned that, in contrast to the advertisements, the "Call to Action" section constituted "express advocacy, or its functional equivalent, on behalf of the ballot initiatives."[74]

2. Renewable Resources Foundation

APOC revisited the issue of ballot measure expenditures in 2013 with Renewable Resources Foundation ("RRF").[75] RRF was a nonprofit corporation, founded in 2006, that engaged in educational activities on various issues, including "the potential negative impacts of the proposed Pebble Mine project."[76] APOC observed that RRF's website was "openly against the project going forward."[77] In January, 2013, petition booklets were issued for an initiative known as the "Bristol Bay Forever Initiative" or "12BBAY," which sought to protect salmon by requiring legislative approval for future large-scale

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72 *Id.* at 13.

73 *Id.* at 10.

74 *Id.* at 13.

75 APOC Advisory Opinion, *Renewable Resources Foundation*, AO 13-04-CD (approved June 6, 2013) [hereinafter "*RRF AO*"], https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=8475; SOA 000143-51.

76 *RRF AO*, *supra* note 75, at 1.

77 *Id.*

mining operations, including Pebble Mine.[78] RRF sought to provide financial assistance to a separate group, Bristol Bay Forever, Inc., which had registered with APOC as an initiative proposal group to support the petition drive.[79] APOC also noted some crossover between RRF and the ballot group as several officers served on both organizations.[80]

In light of its desire to provide direct assistance to a registered initiative proposal group, RRF sought advice on whether it may "continue to educate the public regarding the renewable resources of Bristol Bay?"[81] APOC responded:

> RRF may continue to pursue its purely educational activities without triggering a reporting requirement to APOC. But, changes in the number of activities, the usual locations of the activities and/or the content of the activities, *when taken in context of RRF's open support of the initiative petition drive* could possibly trigger a reporting requirement. For instance, if the "purely educational activity" is taking place while at a party hosted by RRF at RRF Headquarters, and RRF employees are holding pens and a signature gathering booklets [*sic*] while conducting educational outreach, the Commission could reasonably conclude that the RRF employee's time and the costs associated with the party are reportable to APOC.[82]

APOC also noted that the reporting requirements could be triggered in scenarios where RRF's "educational activities are somehow tethered to signature gathering."[83]

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78 *Id.* at 2; *see also Hughes v. Treadwell*, 341 P.3d 1121, 1123-24 (Alaska 2015) (discussing the factual background of 12BBAY and subsequent legal challenges).

79 *RRF AO*, *supra* note 75, at 1-2.

80 *Id.* at 2.

81 *Id.*

82 *Id.* at 3 (emphasis added).

83 *Id.*

3. Bags for Change

APOC's most recent guidance on this issue is the 2019 advisory opinion requested by Bags for Change ("BFC").[84] BFC was formed in 2016 as an unincorporated nonprofit association that engaged in educating the public about the harmful effects of plastics.[85] BFC unsuccessfully petitioned the Sitka Assembly to enact a fee on plastic bags in 2018.[86] The following year, some members of BFC separately sponsored a citizen initiative to enact an ordinance prohibiting plastic bags.[87] BFC wanted to continue its educational efforts while not directly supporting the initiative, and thus sought advice.[88]

BFC asked whether any of its educational activities opposing plastic bags might trigger registration or reporting requirements in light of the ongoing petition-signing efforts.[89] BFC provided several examples of its past educational efforts, including flyers and community projects.[90] The examples were decidedly against plastic bags, including

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84 APOC Advisory Opinion, *Bags for Change*, AO 19-04-CD (approved as modified Sept. 18, 2019) [hereinafter "*BFC AO*"], https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=21018; Brief of Appellee Yes on 2 App. B. The unapproved advisory opinion contains the relevant exhibits. *See* APOC Unapproved Advisory Opinion, *Bags for Change*, AO 19-04-CD (issued July 1, 2019) [hereinafter "*BFC UAO*"], https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=20042.

85 *BFC AO*, *supra* note 84, at 1.

86 *Id.*

87 *Id.* at 1-2.

88 *Id.* at 2.

89 *Id.* at 2.

90 *Id.* at 1.

one flyer titled "Single Use Plastic Bags = BAD."[91] Other examples directly referenced BFC's own efforts to "decrease the use of disposable bags in Sitka by implementing a bag fee."[92] But citing those exhibits, APOC noted that BFC's communications "will not mention the proposition, voting or a position for or against the ban on plastic bags proposition," and "are susceptible to reasonable interpretations other than as exhortations to vote for the proposition," and therefore are not "the functional equivalents of express communications."[93] APOC reasoned that, even though BFC's activities "might be interpreted by listeners who are aware of the proposition as a message in support of the proposition," because "BFC urges numerous different kinds of opposition activity," its educational efforts opposing plastic bags were "at most, issue communications."[94]

BFC also requested guidance on a new brochure it sought to distribute that directly identified the initiative.[95] BFC's brochure noted "that in October 2019 Sitka's citizens will vote on a citizen initiated ballot measure," and then summarized the proposition's language and what types of shopping bags would be affected.[96] APOC observed that, unlike BFC's other communications or those at issue in the RRC and RRF advisory

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91 *BFC UAO*, *supra* note 84, at Ex. 2.

92 *Id.* at Exs. 3, 7.

93 *BFC AO*, *supra* note 84, at 4.

94 *Id.* at 4.

95 *Id.* at 2.

96 *Id.* at 5; *BFC UAO*, *supra* note 84, at Ex. 12.

opinions, BFC's proposed brochure "identifies the proposition and voting in its brochure."[97] But APOC also considered the fact "that BFC has engaged in educational efforts for three years before the Initiative, rather than a group that was created around the Initiative."[98] Because the brochure provided "neutral information concerning the proposition" and did not "advocate[] a position on the position," APOC concluded that the brochure was an issue communication.[99] Although that meant the brochure did not trigger the registration and reporting requirements, APOC cautioned that "issues communications require a paid-for-by identifier if they cost in excess of $500 to create and disseminate and are not done by an individual or nonentity [*sic*] group."[100]

C. Constitutional Provisions

The First Amendment of the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble."[101] These commands additionally apply to the states through the Fourteenth Amendment's Due Process Clause.[102] The right to freedom of speech includes the right

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97 *BFC AO*, *supra* note 84, at 5.

98 *Id.*

99 *Id.* at 5-6.

100 *Id.* at 6; *see also* AS 15.13.090(a); AS 15.13.400(3); APOC Advisory Opinion, *AlaskaWins*, AO 17-03-CD at 4-6 (approved Feb. 21, 2018), https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=15979.

101 U.S. Const. amend. I; *see also* Alaska Const. art. I, §§ 5-6. APF does not cite or rely on the Alaska Constitution for any of its arguments.

102 *See* U.S. Const. amend. XIV, § 1, cl. 3; *Virginia v. Black*, 538 U.S. 343, 358 (2003).

to make political statements opposing or supporting candidates or policies.[103] Independent expenditures of money are also the equivalent of speech.[104] Freedom of assembly includes the right to associate without fear of reprisal from compelled disclosure.[105] But neither right is absolute and must be balanced against competing rights and interests.[106]

IV. ANALYSIS

A. Substantial Evidence in the Record

APF argues that APOC's findings are not supported by substantial evidence in the record. In particular, APF notes that the February op-ed, the July video, and the October report were never submitted as exhibits and thus are technically not in the record.[107] APF does not argue that it is prejudiced by these omissions. Appellees APOC and Yes on 2

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[103] *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (outlining the First Amendment's general principles).

[104] *See id.* at 16-17; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 351 (2010) ("All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas.").

[105] *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

[106] *See Buckley*, 424 U.S. at 25.

[107] Appellant's Brief at 18-20. APF also argues that the analysis in APOC's final opinion was minimal and insufficient to facilitate appellate review. *Id.* at 20-22. But APF overlooks the staff report upon which APOC based its rulings. *See* SOA 000036-53. Where APOC adopted staff's recommendations, it adopted staff's analyses as well.

respond that staff provided still-active URLs to all three pages on APF's website, and that the record clearly supports that APOC considered those online materials.[108]

First of all, this court observes that APOC only adopted *some* of the staff report's findings, and the final opinion stated that the earliest APF was in violation of the law was "at least as of its July press release."[109] In other words, APOC did not explicitly adopt staff's conclusion that the February op-ed was an expenditure or communication. This court agrees that the mere republication on APF's website of an op-ed originally published by ADN—a communication that would otherwise arguably be exempt from campaign finance laws[110]—does not, without more, become a communication or expenditure.[111] Because APOC did not conclude that APF's republication of the February op-ed violated any statute or regulation, APF's argument on that issue is moot.

As for APF's argument that URLs are not part of the record, no rule actually commands such a result. Generally speaking, "[t]he record on appeal consists of the original papers and exhibits filed with the administrative agency, and a typed transcript of

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108 Appellee APOC's Brief at 23-29; Appellee Yes on 2's Brief at 12-16.

109 SOA 000273.

110 *See, e.g.*, 2 AAC 50.990(7)(C)(i) (exempting "costs that a media organization . . . incurs in covering or carrying a news story, editorial, or commentary" from the definition of "contribution").

111 Under different facts, this court might reach a different conclusion. But here, the February op-ed never mentioned 19AKBE or expressly advocated against its adoption, and APF's republication of the op-ed on its website did not result in any wider distribution such that the act of republication itself could be considered a "substantial activit[y] . . . likely to directly cause more than a few votes to shift." *VECO Int'l, Inc. v. Alaska Pub. Offs. Comm'n*, 753 P.2d 703, 714 (Alaska 1988).

the record of proceedings before the agency."[112] Agencies are not bound "to technical rules relating to evidence," and may consider all relevant "evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs."[113] Additionally, the record on appeal from an agency decision "properly consists of evidence that was either 'submitted to' or 'considered by' the administrative board."[114] APF supplies no rule or Alaska case law to the contrary. Instead, in its reply brief, APF cites a number of unreported decisions and other out-of-state materials that purportedly reject the use of hyperlinks.[115] But APF's argument is unpersuasive. Whether an agency's record *should* be limited to physical documents actually contained in the file is a policy decision. And until the agency, the legislature, or the Alaska Supreme Court promulgates such a rule, the three questions this court must ask are: whether the URLs were "submitted to" or "considered by" APOC,[116] whether APF received adequate notice of and an opportunity

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112 Alaska R. App. P. 604(b)(1)(A); *see also* AS 44.62.560(c).

113 AS 44.62.460(d). APF's "propensity evidence" arguments based on Evidence Rule 404(b) likewise fail for this reason.

114 *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 793 (Alaska 2015) (quoting *Alvarez v. Ketchikan Gateway Borough*, 28 P.3d 935, 939 (Alaska 2001)).

115 Appellant's Reply Brief at 11-12; *see, e.g., Romine v. The New York Public Service Comm'n*, No. 902202-19, 2020 WL 1906884, at *2 & n.8 (N.Y. Sup. Ct. Mar. 09, 2020) (interpreting regulation stating that "all *documents* must be filed electronically" as "not explicitly authoriz[ing] the use or inclusion of hyperlinks" where petitioner supplied "links to 5,067 peer-reviewed scientific medical studies" (emphasis in original)).

116 *Pacifica Marine, Inc.*, 356 P.3d at 793.

to respond to that evidence,[117] and whether the record is sufficient to facilitate appellate review.[118] As explained below, the answer to all three is "yes."

Returning to the July video and the October report, although neither was included as exhibits in the agency record, both are preserved in the record as URLs. First, Yes on 2's complaint referenced the July video and cited to the still-active page on APF's website.[119] The staff report then provided still-active links to both the July video and the October report, and staff described the relevant portions thereof.[120] APF's motion to dismiss likewise included shortened URLs directing to both webpages.[121] And in APOC's final order, its summary of the staff report plainly referenced both the July video and the October report.[122] It is clear to this court, just as it was clear to APF throughout

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117 *Cf. Patrick v. Municipality of Anchorage, Anchorage Transp. Comm'n*, 305 P.3d 292, 300 (Alaska 2013) (explaining due process necessary in license revocation hearing).

118 *See Fields v. Kodiak City Council*, 628 P.2d 927, 932 (Alaska 1981).

119 SOA 000003. APF also argues that the July press release is not in the record, because the only exhibit submitted came from PMB's website. Appellant's Reply Brief at 11; *see also* SOA 000108-13. But the complaint contains a URL to the relevant page on APF's website. SOA 000003. And attached to the staff report is an email dated July 24, 2020, from APF's Executive Director, Bethany Marcum, that also contains the full text of the July press release. SOA 000064-65. This argument is without merit.

120 SOA 000040-41, 47-48. The staff report also supplies a link to the February op-ed as republished on APF's website. SOA 000039.

121 SOA 000215-16. Because APF voluntarily supplied shortened URLs linking to the relevant websites in its motion to dismiss, APF may also be estopped from now arguing that its own URLs are not in the record.

122 SOA 000272-73.

the proceedings, precisely which activities are at issue.[123] And because the URLs contained in the record are still active, and APF does not allege that the websites now are any different from when APOC staff drafted its report, the record is more than sufficient to permit appellate review. Nonetheless, as websites are dynamic and can easily be altered or deleted,[124] this court strongly encourages APOC to attach physical exhibits in the future or at least use archived URLs when referencing content published online—particularly when said content is the subject of a complaint.

B. Statutory and Regulatory Interpretation

1. APOC's use of the definition for "express communication" to interpret and narrow the scope of relevant ballot measure expenditures has a reasonable basis in law.

APF next argues that APOC improperly interpreted and applied the relevant campaign finance laws. In particular, APF asserts that APOC acted "ultra vires" by applying the definition of "express communication" to APF's website publications.[125] This is because the statutory language only refers to "candidate" communications and thus implicitly excludes ballot measure communications.[126] But appellees point to the RRC, RRF, and BFC opinions as evidence that this longstanding interpretation has a

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123 APF does not argue that it suffered any prejudice, so even if APOC erred by not including the three publications in the record as exhibits, any error was harmless.

124 APF arguably retains sole control over the content published on its website, so any intentional alteration thereof could be considered spoliation of the evidence.

125 Appellant's Brief at 15-17.

126 *See* Appellant's Reply Brief at 16 (applying the principle of *expressio unius* to conclude that the legislature intended to exclude ballot measure communications from the definition of "express communications").

reasonable basis and should be afforded deference.[127] Appellees also cite legislative history to support the argument that applying the definition of "express communication" to ballot measures is reasonably consistent with what the legislature intended.[128]

Because this question involves an agency's interpretation of the statutory scheme it is charged with administering, this court applies the reasonable basis test.[129] Alaska Statute 15.13.400(7)(A)(iv) defines "expenditure" to include every "transfer of . . . anything of value . . . made for the purpose of . . . influencing the outcome of a ballot proposition." In contrast, in the context of candidate communications, the definition of "expenditure" is limited by statute to include express and electioneering communications but not issues communications.[130] Recognizing that such a broad definition of ballot-measure expenditures would lead to inconsistent results, APOC elected to limit the scope of AS 15.13.400(7)(A)(iv) in 2008.[131] In particular, the RRC opinion relied on federal case law to reach the conclusion that only "express advocacy" or its "functional equivalent" are subject to registration and reporting requirements in the context of ballot

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127 Appellee APOC's Brief at 6-10; Appellee Yes on 2's Brief at 25.

128 Appellee APOC's Brief at 10-13.

129 *See Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014).

130 AS 15.13.400(7)(C).

131 *RRC AO, supra* note 62, at 11.

measure expenditures.[132] APOC confirmed this interpretation as recently as 2019.[133] Contrary to APF's arguments, applying the definition of "express communication" does not expand the scope of reportable ballot measure expenditures—without this limitation, AS 15.13.400(7)(A)(iv) encompasses *all* paid communications.[134] Not only is APOC's interpretation reasonably based on federal case law, but also it is longstanding and consistent with statute.[135] This court therefore affords APOC's interpretation greater deference.

Moreover, APF does not actually dispute that its publications satisfy the broader statutory definition of ballot measure expenditures. Instead, APF argues that, under federal case law, APOC cannot impose campaign finance restrictions on APF's speech unless it amounts to "express advocacy or its functional equivalent."[136] APF explains that under the proper test APOC must show that APF's publications "are 'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific' ballot

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132 *Id.* (citing *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Calif. Pro-Life Council, Inc., v. Getman*, 328 F.3d 1088 (9th Cir. 2003)).

133 *See BFC AO*, *supra* note 84, at 3-4.

134 This is assuming that the alleged communication at issue separately meets both statutory definitions of "expenditure" and "express communication."

135 *See Davis Wright Tremaine LLP*, 324 P.3d at 301-02 (considering both the consistency of an agency's interpretation over time and its consistency with the statutory language); *Bartley v. State, Dep't of Admin., Teacher's Ret. Bd.*, 110 P.3d 1254, 1261 (Alaska 2005) (reasoning that a 1991 interpretation qualified as "longstanding" in 1998).

136 Appellant's Reply Brief at 1. APF also argues that the statutory definition is unconstitutionally vague and requires a narrowing construction. Appellant's Brief at 22.

proposition."[137] But this language is indistinguishable from the statutory definition of "express communication."[138] APF even relies on the same case APOC cited to support its interpretation.[139] In other words, APF complains that APOC applied the correct test to APF's publications but under a different name. APF thus defeats its own argument.

Accordingly, APOC had a reasonable basis in law and fact to narrow the scope of ballot measure expenditures subject to reporting and registration by applying the definition for "express communication."[140]

2. APOC had a reasonable basis to conclude or assume that APF's activities satisfied the definition of "communication."

APF argues that APOC erred when it found that APF violated several campaign finance laws even though APF never specifically mentioned ballot measure 19AKBE.[141] Alaska Statute 15.13.400(3) broadly defines "communication" as "an announcement or

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137 Appellant's Reply Brief at 2 (quoting *Wis. Right to Life, Inc.*, 551 U.S. at 470).

138 *See* AS 15.13.400(8) ("[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").

139 *Compare* Appellant's Reply Brief at 2, *with RRC AO*, *supra* note 62, at 11.

140 APF also argues that APOC staff's last-minute addition of AS 15.13.140(b) as grounds for liability violated APF's due process rights. Appellant's Brief at 17-18. But the statutes APF cites are limited to license-revocation proceedings. *See* AS 44.62.360 (specifying the contents of an accusation filed in any "hearing to determine whether a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned"); AS 44.62.370 (statement of issues). Moreover, AS 15.13.140(b) merely clarifies that those opposing a ballot proposition with independent expenditures must comply with AS 15.13.040, and the staff report already recommended a finding that APF violated AS 15.13.040(d). SOA 000051. This claim is without merit.

141 Appellee's Brief at 26-32; *see also* SOA 000225-26.

advertisement disseminated through . . . the Internet, . . . 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." This definition thus contains two express carveouts: low-cost political speech by non-corporate speakers, and pure issues speech. APF contends that its activities fall under the latter exemption. The low-cost political speech carve-out is not applicable here because APF admits that its speech activities cost it more than $500.

APOC implicitly, if not explicitly, found that APF met the definition of communication in AS 15.13.400(3) by APOC's statement in its final order that: "Even though [19AKBE] 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."[142] APOC had a reasonable basis to conclude that APF openly opposed RCV, which was "a key component of the initiative." APF's anti-RCV speech did not begin until it knew that RCV was likely going to be on the November, 2020, ballot. The July, 2020, statement by APF Executive Director Bethany Marcum made it crystal clear that citizens should vote against RCV in the upcoming election where the only ballot measure that brought RCV to the attention of voters was 19AKBE. APF continued the anti-RCV drumbeat with the July, 2020, YouTube video and the October, 2020, report, press release, and blog post.

APOC's conclusions in this case did not run contrary to its conclusions in the RRC, RRF, and BFC advisory opinions, where certain educational activities related to an

142 SOA 000273.

initiative's key components, i.e., Pebble Mine and plastic bags, did not constitute indirect references to the ballot measure. APOC had a reasonable basis to distinguish APF's situation from those of RRC, RRF, and BFC because the latter entities had longstanding educational activities relating to the subject matter of the initiative but APF did not. APF was a newcomer to the RCV opposition world in 2020. The only relevance to RCV in the 2020 Alaska election cycle was 19AKBE. Thus, APOC had a reasonable basis to conclude that opposition to RCV was opposition to 19AKBE.

APOC's briefing on appeal identifies a Ninth Circuit decision addressing the question of how APOC applies the term "communication" as defined in AS 15.13.400(3).[143] In *Alaska Right to Life Committee v. Miles*, the Ninth Circuit heard similar constitutional challenges to the scope of Alaska's campaign finance laws as now raised by APF.[144] One of the questions presented in *Miles* was whether the phrase "directly or indirectly identify" as it appears in Alaska's statutory definitions of "communication" and "electioneering communication" was overbroad and unconstitutionally vague.[145] The challengers contrasted the phrase with federal law—upheld by the U.S. Supreme Court—which required any electioneering communication to "clearly identif[y]" a candidate for office.[146] But the Ninth Circuit rejected that

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143 Appellee APOC's Brief at 30.

144 441 F.3d 773 (9th Cir. 2006).

145 *Id.* at 780-86.

146 *Id.* at 780-82; *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 194 (2003) (upholding federal definition of "electioneering communication"), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

argument, reasoning that "[t]he federal and the Alaska definitions operate in the same way."[147] The Ninth Circuit explained that the statutory definition "has the actual effect of requiring no specific method of identification, just like the federal definition," and that inclusion of the word "indirectly" was intended to avoid "the possibility that a communication identifying a candidate would have escaped regulation."[148] The Ninth Circuit thus interpreted Alaska's definition as coextensive with the federal definitions.[149]

Under the *Miles* court's interpretation, the federal definitions are instructive in construing AS 15.13.400(3). In particular, much like the definition of "communication," the definition of "electioneering communication" under Alaska law is limited to one that "directly or indirectly identifies a candidate."[150] Whereas under federal law, the definition of "electioneering communication" requires "a *clearly identified* candidate."[151] Federal law further clarifies the term "clearly identified" as meaning that: "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by *unambiguous reference*."[152] In other

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147 *Miles*, 441 F.3d at 783.

148 *Id.*; *see also id.* at 777-79 (detailing the relevant legislative history).

149 Although the *Miles* court did not observe that any narrowing instruction was necessary under the First Amendment, by tethering AS 15.13.400 to the federal definition upheld in *McConnell*, the Ninth Circuit effectively defined its scope.

150 AS 15.13.400(6)(A); *see also* AS 15.13.400(3) ("directly or indirectly identify a candidate or proposition").

151 52 U.S.C. § 30104(f)(3)(A)(i)(I) (emphasis added).

152 52 U.S.C. § 30101(18) (emphasis added).

words, under *Miles* the question is whether APF's activities made any "unambiguous reference" to 19AKBE. APOC's statement that there was no other reasonable interpretation of APF's communications other than as an exhortation to vote against RCV, a key component of 19AKBE, is supported by the record and has a reasonable basis in law.

APF set the stage for its opposition to RCV, and hence 19AKBE, it its February, 2020, republication of an ADN article critical of RCV. Executive Director Marcum's July, 2020, exhortation to November voters was clear—vote against RCV. Marcum's comments were solidified by the July YouTube video. APF's opposition to RCV (only achievable through 19AKBE) continued in its October blog post. That post begins with a broad observation: "A voting trend to uproot the electoral process is sweeping the country and has made it all the way to Alaska: ranked-choice voting."[153] After explaining how RCV works and difficulties other jurisdictions have encountered, the post concludes by directing readers to the PMB website, stating: "All Alaskans deserve to have their votes counted."[154] In other words, APOC could reasonably conclude that APF was clearly urging voters to oppose RCV by defeating 19AKBE.

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153 SOA 000153.

154 SOA 000153-54.

3. APOC had a reasonable basis for interpreting its own advisory opinions in a manner consistent with the conclusions that it reached.

APOC had a reasonable basis for applying the statutory test for "express communication" to APF's statements and it applied the test correctly. The relevant inquiry here is whether the communication, "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 [ballot measure]."[155] APOC has previously interpreted this statutory language in the RRC, RRF, and BFC advisory opinions to determine what types of "outside events" are relevant and to what extent APOC may rely on them. In this instance, staff identified two such relevant factors: (1) "the length of time an organization has been engaged in educational activities concerning a subject," and (2) "changes in the number of activities and the context of the activities."[156] APOC's final opinion then stated that APF's activities were "express communications" in part because APF "had no longstanding history of communicating about elections in general or [RCV] in particular," and APF's activities "began when the elections initiative was proposed."[157]

Regarding the first factor, APOC may consider how long a group has engaged in other educational activities. In the RRC opinion, APOC first noted this factor by

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155 AS 15.13.400(8) (emphasis added).

156 SOA 000048.

157 SOA 000271.

observing that RRC had previously engaged in educational activities for several years.[158] The BFC opinion likewise noted in its analysis that "BFC urges numerous different kinds of opposition activity" rather than just banning plastic bags.[159] That opinion further clarified why the length of an organization's prior activities is relevant: "This is especially the case given that BFC has engaged in educational efforts for three years before the Initiative, *rather than a group that was created around the Initiative*."[160] Here, much like RRC and BFC, APF engages in "numerous different kinds of opposition activity" and has done so since 2009. However, APF's opposition to RCV is different from the longstanding educational activities of RRC in advocating clean water and BFC in opposing plastic bags. APF had never opposed RCV until the election year in which it became clear that 19AKBE would be on the November ballot with RCV being a key component of the initiative. Staff reasonably applied this critical fact in urging APOC to rule as it did.

As for the second factor, changes in the number and content of activities may be relevant in certain situations. This was the case in the RRF opinion, where the organization sought to continue its educational activities while at the same time aiding a "ballot group during the signature gathering stage."[161] Here APOC staff reasonably concluded that "APF has engaged in a recent burst of activity against [RCV] as the

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158 *RRC AO*, *supra* note 62, at 9.

159 *BFC AO*, *supra* note 84, at 4.

160 *Id.* at 5.

161 *RRF AO*, *supra* note 75, at 1.

November election approaches" in part based on three alleged communications in October, 2020.[162] APOC reasonably concluded that APF's activities amounted to an express communication that was an exhortation to vote against 19AKBE which was the only initiative available to voters to choose RCV.

APF's publications, read as a whole, can also be reasonably interpreted as an exhortation to vote. APOC's final order quoted in full two of APF's statements. The first was APF's republication of the February op-ed. The second full quote came from APF's July press release, wherein APF Executive Director Bethany Marcum is quoted as saying:

> As Alaskans take to the polls in November, history should provide a warning for what [RCV] would lead to. Not only can [RCV] 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.[163]

Following that statement, the press release contained similar statements from each of the PMB coalition members.[164] APOC reasonably concluded that APF's activities "at least as of its July press release were election-related expenditures and communications."[165]

C. Constitutionality of Alaska's Campaign Finance Laws

In its appeal, APF argues that Alaska's registration, reporting, and disclosure requirements do not satisfy exacting scrutiny and are thus unconstitutional. But appellees

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162 SOA 000048.

163 SOA 000109, 272.

164 SOA 000110.

165 SOA 000273.

respond that the Ninth Circuit has already rejected an identical challenge in *Alaska Right to Life Committee v. Miles*.[166] Although *Miles* is not controlling on this court, APF supplies no counterargument as to why this court should disregard *Miles* either. Instead, APF reframes its arguments as "whether the informational interest survives for contributions and expenditures that are less than a dollar."[167] This court addresses each of APF's constitutional arguments below. At the same time, this court observes that APF has not supplied sufficient evidence to bring any constitutional case, whether its challenges are treated as facial or as-applied.

1. Exacting Scrutiny Is the Applicable Standard for All of APF's Constitutional Challenges.

As a preliminary matter, this court must clarify which standard applies in APF's First Amendment challenges. Where compelled disclosure burdens otherwise protected speech, courts generally apply "exacting scrutiny" and will only uphold the challenged statute if there is a "'substantial relation' between the governmental interest and the information required to be disclosed."[168] Only a "sufficiently important" interest may

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166 *See* 441 F.3d 773, 788-93 (9th Cir. 2006).

167 Appellant's Reply Brief at 14.

168 *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (footnote omitted) (quoting *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 546 (1963). The Court has since held that "[w]here exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021). That statement is limited to the "breadth" of any disclosure requirement, and thus the state cannot require a wide range of information completely unrelated to the state's interest. *Id.* at 2385.

outweigh any potential infringement of First Amendment rights.[169] The U.S. Supreme Court in *Buckley v. Valeo* identified three such interests: providing voters with information, deterring corruption or the appearance of corruption, and detecting substantive violations.[170] The Court has also approved of "preserving the integrity of the electoral process" as a sufficiently important interest in the context of ballot petition signers.[171] In 2010, the Court stated in *Citizens United v. FEC* that exacting scrutiny applies to both "[d]isclaimer and disclosure requirements."[172]

APF and Appellees generally agree that exacting scrutiny applies here. But APF argues that this court should apply strict scrutiny to its "paid for by" compelled speech challenge. APF relies on *ACLU of Nevada v. Heller*,[173] a 2004 decision from the Ninth Circuit. Utilizing the U.S. Supreme Court case of *McIntyre v. Ohio Elections Commission*,[174] the *Heller* court applied strict scrutiny to a Nevada statute that forced the disclosure of the identity of persons "responsible for paying for" any published election-

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169 *Buckley*, 424 U.S. at 66.

170 *Id.* at 66-68.

171 *See John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010).

172 558 U.S. 310, 366 (2010).

173 378 F.3d 979 (9th Cir. 2004).

174 514 U.S. 334 (1995). *McIntyre* involved an individual acting alone who was fined for distributing anonymous pamphlets opposing a local school tax. *Id.* at 337. The Court held "anonymous pamphleteering" is "an honorable tradition of advocacy and of dissent," because anonymity is necessary "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Id.* at 357.

related materials.[175] ACLU of Nevada brought a facial challenge to the statue as impermissibly prohibiting all anonymous political discourse, thereby chilling otherwise protected forms of political speech.[176] The Ninth Circuit distinguished between statutes requiring the speaker to disclose their identity as opposed to donors, because "even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation."[177] In dicta, the *Heller* court also drew a distinction between First Amendment implications for an individual acting anonymously and corporations, considering "the highly-regulated corporate form."[178] But applying strict scrutiny, the court struck down the statute as not narrowly tailored to the state's interest.[179]

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175 *Heller*, 378 F.3d at 981.

176 *Id.* at 983.

177 *Id.* at 992 (quoting *McIntyre*, 514 U.S. at 355); *see also Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003) (noting the "distinction between prohibiting the distribution of anonymous literature and the mandatory disclosure of campaign-related *expenditures and contributions*," reasoning that the latter "is less worthy of protection" (emphasis in original)); *cf. Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 300 (1981) (striking down strict contribution limits for ballot measure expenditures, while opining that "if it is thought wise, legislation can outlaw anonymous contributions").

178 *Heller*, 378 F.3d at 991 n.9 (questioning without deciding "whether the preclusion of anonymous political communications could be valid if limited to corporations").

179 *Id.* at 1000; *see also Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir.1998) ("[A] content-based regulation of constitutionally protected speech must use the least restrictive means to further the articulated interest.").

But *Heller* is distinguishable, because the issue there was whether the government could compel disclosure of otherwise protected *anonymous* speech.[180] APF's speech was not anonymous—all of the alleged communications are still published on APF's own website. Indeed, *McIntyre* is codified in Alaska under AS 15.13.090(b), which exempts individuals acting independently to influence ballot propositions through anonymous leaflets or signs. And far from seeking anonymity, the press release at issue here identified not only APF and PMB, but even Ms. Marcum and several other individuals who provided quotes regarding their joint opposition to RCV.[181] Moreover, *Heller* itself recognizes that there is a distinction between disclosure of speakers and that of donors, and as a highly regulated non-profit corporation, APF's interest in anonymity for itself is likely nonexistent. *Heller* and *McIntyre* are inapposite.[182] This court accordingly rejects APF's arguments and applies exacting scrutiny to each of its constitutional challenges.

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180 *Heller* also predates *Citizens United*, and at least one district court has similarly concluded that *Heller*'s rationale for applying strict scrutiny is "clearly irreconcilable" with *Citizens United*. *See Smith v. Helzer*, No. 3:22-CV-00077-SLG, 2022 WL 2757421, at *8-9 (D. Alaska July 14, 2022).

181 SOA 000108-09.

182 APF also relies on a more recent Supreme Court decision involving compelled speech by crisis pregnancy centers. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2368 (2018). But the reason why the Court struck down the state statute in that case under strict scrutiny was because it held there was no separate category for "professional speech," *id.* at 2373-74, and the only state interest asserted was "providing low-income women with information about state-sponsored services." *Id.* at 2375. Cases from outside the campaign finance context are unhelpful, as well-defined governmental interests already support disclosure requirements. *See Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976).

2. Alaska's Zero-Dollar Reporting Thresholds Are Presumptively Valid and APF's Cited Cases Do Not Hold Otherwise.

APF's first argument is that Alaska's zero-dollar registration and reporting thresholds violate the First Amendment. In particular, APF cites three circuit court cases that invalidated disclosure and reporting requirements as applied to unsophisticated actors spending small amounts. Appellees counter that reporting requirements are not subject to the same scrutiny as substantive expenditure or donation limits, and courts have repeatedly upheld similar statutes. Appellees also contend that the cases APF relies on are distinguishable upon closer examination.

"A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality."[183] The Alaska Supreme Court has explained the distinction between facial and as-applied challenges as follows:

> A litigant may challenge the constitutionality of a statute or government policy in two different ways. A facial challenge alleges that a statute or policy is unconstitutional "as enacted"; we will uphold a facially challenged statute or policy "even if it might occasionally create constitutional problems in its application, as long as it 'has a plainly legitimate sweep.'" An as-applied challenge alleges that "under the facts of the case[,] application of the statute [or policy] is unconstitutional. Under other facts, however, the same statute [or policy] may be applied without violating the constitution."[184]

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183 *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001) (quoting *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998)); *cf. United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

184 *Sagoonick v. State*, 503 P.3d 777, 796 n.96 (Alaska 2022), reh'g denied (Feb. 25, 2022) (alterations in original) (citations omitted) (first quoting *State v. Planned*

Parties may raise either challenge separately or in conjunction, but in a facial challenge the challenging party must show "that there is no set of circumstances under which the statute can be applied consistent with the requirements of the constitution."[185] And under either challenge, the burden does not shift to the government to justify its actions until the challenger first establishes a prima facie case.[186] Courts cannot invalidate an otherwise properly enacted statute based on hypothetical scenarios and conjecture.[187]

The first case APF relies on is *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*.[188] In that case a Montana pastor allegedly supplied in-kind expenditures in support of a ballot measure, consisting of: (1) allowing a church member to use the church's copy machine (but not the church's paper) to make less than 50 copies of a ballot petition, (2) placing the petitions in the church foyer, and (3) urging church

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Parenthood of the Great Nw., 436 P.3d 984, 1000 (Alaska 2019); then quoting *State v. ACLU of Alaska*, 204 P.3d 364, 372 (Alaska 2009)).

185 *ACLU of Alaska*, 204 P.3d at 372; *cf. VECO Int'l, Inc. v. Alaska Pub. Offs. Comm'n*, 753 P.2d 703, 714 (Alaska 1988) ("To the extent vagueness problems occur at all, they occur only at the periphery. That has never been grounds for facially invalidating a statute.").

186 *See Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 964 (Alaska 2005) ("[O]nce a plaintiff has made out a prima facie case of a violation of substantive constitutional rights, the burden shifts to the state to justify its conduct." (citing *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973))).

187 *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

188 556 F.3d 1021 (9th Cir. 2009).

attendees to sign the petitions during at least one Sunday service.[189] The court held that the definition of "in-kind contributions" as applied to the second and third activities was unconstitutionally vague, because where "the commercial value of a certain activity in support of a candidate or ballot issue approaches zero, it becomes increasingly difficult for the party engaging in the activity to know whether his or her activity could possibly be considered a 'service.'"[190] As for the first activity, the court applied exacting scrutiny to the pastor's "one-time in-kind *de minimis* expenditures," concluding that the state reporting requirements violate the First Amendment.[191] Focusing on Montana's zero-dollar reporting threshold, the court explained its reasoning:

> 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. As the monetary value of an expenditure in support of a ballot issue approaches zero, financial sponsorship fades into support and then into mere sympathy.[192]

But the *Canyon Ferry* court explicitly limited its holding to the facts of that case and declined "to establish a level above *de minimis* at which a disclosure requirement for in-kind expenditures for ballot issues passes constitutional muster."[193]

The second case APF relies on is *Sampson v. Buescher*.[194] In that case, a small group of neighbors opposing the annexation of Parker North into the town of Parker,

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189 *Id.* at 1024-25, 1029.

190 *Id.*

191 *Id.* at 1031.

192 *Id.* at 1033.

193 *Id.* at 1034.

Colorado, purchased and distributed signs and mailed a postcard to all Parker North residents.[195] The group collected a total of $782.02 in nonmonetary contributions pursuant to their cause.[196] Rather than simply enacting campaign finance regulations by statute, Colorado has opted to codify reporting and disclosure requirements in its constitution.[197] The court thus reviewed the stated purpose of Colorado's constitutional provisions when evaluating the state's purported informational interest:

> The people of the state of Colorado hereby find and declare . . . that *large campaign contributions* made to influence election outcomes allow *wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process*; . . . and that the interests of the public are best served by . . . providing for full and timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications, and strong enforcement of campaign finance requirements.[198]

In light of this stated interest, the court weighed the burdens placed on the small anti-annexation group, which consisted of taking time off work to attend hearings, attorney's fees, and difficulties navigating the state's reporting website and forms.[199] The state effectively conceded that its "campaign finance laws and rules 'are complex,'" and the

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194 625 F.3d 1247, 1251 (10th Cir. 2010).

195 *Id.* at 1251.

196 *Id.* at 1252. The group also collected cash contributions totaling $1,426.00, of which $1,178.82 was spent on attorney fees. *Id.* at 1260 n.5.

197 *Id.* at 1249-51.

198 *Id.* at 1261 (emphasis in original) (quoting Colo. Const. art. XXVIII, § 1). The state's appellate briefs apparently contained "no effort to explain the public interest in disclosure in this particular case." *Id.*

199 *Id.* at 1260. The group filed affidavits supporting its allegations.

state routinely advised individuals "with difficult questions to retain an attorney."[200] The court acknowledged that the expenditures exceeded those in *Canyon Ferry*, but concluded that Colorado's interest in disclosing "large campaign contributions" from "wealthy individuals, corporations, and special interest groups" did not bear a "substantial relation" to the requirements imposed on a small, unsophisticated group of neighbors.[201]

APF finally relies on *Coalition for Secular Government v. Williams*, once again revolving around Colorado's unique reporting regime.[202] The titular "coalition" was in actuality owned and operated by one individual, Dr. Diana Hsieh, who had co-authored a policy paper and circulated copies opposing a personhood amendment whenever it appeared on Colorado ballots.[203] After having attempted to comply with Colorado's reporting requirements for several years, Dr. Hsieh detailed in testimony the various burdens she endured, including a $50 fine for late filing when her house flooded.[204] "Dr. Hsieh vividly recalled losing even $20 contributions" as a result of potential contributors

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200 *Id.*

201 *Id.* at 1261. The Sampson court likewise declined "to draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures," instead opting to focus on the unique facts of that case. *Id.*

202 815 F.3d 1267, 1269-72 (10th Cir. 2016).

203 *Id.* at 1269. Dr. Hsieh never challenged whether she was actually required to register as an "issue committee" under the relevant definitions. *Id.* at 1269 n.2.

204 *Id.* at 1272-74.

balking at having to disclose personal information.[205] In 2012, Dr. Hsieh thus sought declaratory relief "that the Coalition's 'expected activity of $3,500 does not require registration as an issue committee,'" which the district court granted in 2014.[206] On appeal, the Tenth Circuit applied the *Sampson* exacting scrutiny framework for balancing the governmental interest against the individual burdens.[207] The court concluded that, although "Colorado's current issue-committee regulatory framework is much more justifiable for large-scale, bigger-money issue committees," the low "$20 threshold for contributor disclosure—coupled with other registration and reporting requirements—is too burdensome when applied to a small-scale issue committee like the Coalition."[208]

Returning to the instant case, APF asserts that these three circuit court decisions stand for the proposition that "low thresholds are suspect," and therefore Alaska's registration and reporting "requirements are facially unconstitutional."[209] APF contends that because AS 15.13.040(d), .040(e)(5), .050(a), .090(a)(2)(C), and .090(c) do not contain a minimum threshold amount, Alaska's statutory scheme compels registration, reporting, and disclosure for all expenditures and donors, even where the amount is "less

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205 *Id.* at 1279.

206 *Id.* at 1274.

207 *Id.* at 1277.

208 *Id.* at 1279-80.

209 Appellant's Brief at 38-39. As noted above, APF later disavows this facial challenge.

than a dollar."[210] As a result, APF argues that those "requirements are insufficiently tied to the informational interest."[211] APF raises both facial and as-applied challenges.[212]

But none of the cases APF relies on involved facial challenges. Instead, this court reads those three cases as instructing trial courts to take seriously any First Amendment burdens imposed on individuals and small, unsophisticated groups seeking to influence ballot measures through modest expenditures. While the evidence before this court shows that APF only spent $643.20 on RCV communications through September 8, 2020, this does not include the entire election year. Indeed, APF supplies no evidence to show that any of *its* donors supplied negligible contributions, or that any of *its* expenditures were *de minimis*.[213] Rather than introduce evidence to dispute the state's informational interest, APF attempts to shift that burden to APOC and supplies conjecture.[214] But APF bears the initial burden here, and hypothetical arguments cannot

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210 Appellant's Brief at 36.

211 *Id.*

212 *Id.* at 39.

213 Some of APF's evidentiary troubles may related to the fact that agencies do not have the capacity to decide constitutional issues. *Alaska Pub. Int. Rsch. Grp. v. State*, 167 P.3d 27, 36 (Alaska 2007). But this appears to be a tactical decision as well, as APF also attacks APOC's ruling based on the sparse evidentiary record. APF has not moved to supplement the record with additional information on appeal.

214 Appellant's Brief at 39 ("But [APOC] 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.").

establish a prima facie case of facial invalidity. This court therefore rejects any facial challenge.

And despite APF's reliance on the above as-applied challenges, each case is readily distinguishable. APF is a registered non-profit corporation with a full board of directors and five officers.[215] And while noting that "APF keeps its finances almost entirely secret," the original complaint alleged that APF received $149,708.00 in publicly disclosed contributions for 2018 alone.[216] APF does not attempt to identify any similarities between it and the pastor in *Canyon Ferry*, the neighbors in *Sampson*, or Dr. Hsieh in *Coalition for Secular Government*. Nor does APF argue that Alaska's reporting and disclosure requirements are overly burdensome or that compliance will reduce its capacity to fundraise.[217] In this court's view, APF is not a small-scale, unsophisticated, single-issue advocacy group, and any reliance on the narrow holdings from the Ninth and Tenth Circuits is unjustified. APF raises *no* argument that it would have *any* trouble dealing with whatever minor burdens Alaska's statutory scheme imposes. Nor is this court aware of what burdens might be imposed, because APF has not identified any. Accordingly, no as-applied constitutional violation is apparent here.

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[215] SOA 000026-28, 114-17. APF also owns and operates its own website, on which all of the alleged communications have been published.

[216] SOA 000007-08. APF did not refute these allegations in its response. SOA 000017-23.

[217] Nor did APOC assess any fines for APF's alleged violations.

3. The "Paid For By" Identification Requirement Is Constitutional Under Exacting Scrutiny As Applied to Online Republications.

APF next argues that the "paid for by" on-communication disclosure requirement in AS 15.13.090(a) is unconstitutional. That statute requires all communications to include "the words 'paid for by' followed by the name and address of the person paying for the communication," as well as identification "of each of the person's three largest contributors."[218] APF raises two as-applied arguments for invalidating this requirement, both premised on a lack of fit between the state's interest and the burdens imposed.

APF first argues that forcing it to include that information on reposted materials would require it to mislead readers by taking credit for others' work, thereby undercutting the state's purported informational interest. APF hypothesizes that doing so would open it to copyright suits.[219] But these arguments are cursorily raised and inadequately briefed—APF supplies no facts or legal authority to support its contentions.[220] And as applied to the July press release, it would seem highly unlikely that APF, as the entity supposedly leading the "coalition of state-based think tanks" behind PMB, would be subject to any adverse legal action from PMB for reposting a joint press release.[221] Nor is it obvious which is the repost in this situation.

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[218] AS 15.13.090(a)(2)(C).

[219] Appellant's Brief at 39-40.

[220] *See Yamada v. Snipes*, 786 F.3d 1182, 1201 (9th Cir. 2015) (declining to consider hypothetical arguments in First Amendment challenge to disclosure requirements).

[221] SOA 000108. As explained above, this court does not reach any of the other alleged communications.

Even on the merits, APF's challenge has already been preempted by regulation. In particular, 2 AAC 50.306(d) provides that any "political communication by electronic media, including a candidate's or group's website," need only "be electronically linked to information required by AS 15.13.090(a) and (c)."[222] Indeed, this regulation was adopted in response to an earlier advisory opinion, wherein APOC clarified that in the context of a candidate's Facebook and Twitter accounts, the "paid for by" disclaimers can be included on the profile page or via link to a separate page containing the necessary information.[223] In other words, APFs arguments that a "paid for by" disclaimer will result in confusion or lawsuits are tenuous at best and certainly insufficient to sustain a constitutional challenge.

APF next argues that the "paid for by" disclaimer in AS 15.13.090(a)(2)(C) is compelled speech that is unconstitutional under strict scrutiny. Even under exacting scrutiny, APF asserts that the existence of "less restrictive means than demanding on-communication disclosure" fails the narrow tailoring requirement.[224] APF primarily relies on the plurality opinion in *Americans for Prosperity Foundation v. Bonta*, for this proposition.[225] In that decision, the Court confronted a state law requiring disclosure of

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[222] In contrast, AKBE19 amended AS 15.13.090(c), which now states that "in a broadcast, cable, satellite, Internet or other digital communication, the statement must remain onscreen throughout the entirety of the communication." The constitutionality of this provision, having been adopted after APF's challenge, is not before this court.

[223] APOC Advisory Opinion, *Rep. Les Gara*, AO 10-09-CD Revised, at 5-7 (approved on July 12, 2010), https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=4844.

[224] Appellant's Brief at 40-41.

[225] 141 S. Ct. 2373 (2021).

the names and addresses of donors contributing over $5,000 to tax-exempt charities.[226] Such information was not publicly disclosed, but the state argued that it was necessary to further its "interest in investigating charitable misconduct."[227] The trial court credited testimony that donors were likely to face retaliation if their donations were leaked, that the state "was unable to ensure the confidentiality of donors' information," and the state "rarely" if ever used that information to investigate charities.[228] The trial court granted injunctions, which the Ninth Circuit vacated.[229] On appeal, the Court agreed that exacting scrutiny applied, but it further refined the test:

> A substantial relation is necessary but not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters. Where exacting scrutiny applies, the challenged requirement must be *narrowly tailored* to the interest it promotes, even if it is *not the least restrictive means* of achieving that end.[230]

The Court explained that "narrow tailoring" required courts to determine "the extent to which the burdens are unnecessary."[231] And because the collected data was rarely ever

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226 *Id.* at 2380.

227 *Id.* at 2381.

228 *Id.*

229 *Id.* at 2381-82.

230 *Id.* at 2384 (emphasis added).

231 *Id.* at 2385.

used to investigate misconduct, the Court invalidated the disclosure regime due to the "dramatic mismatch" between the state's interest and the burdens imposed.[232]

APF's reliance on *Americans for Prosperity* is misplaced. First of all, this court has already rejected APF's strict scrutiny arguments above. And the plurality decision explicitly rejects APF's argument that the "least restrictive means" is necessary under exacting scrutiny. Second, narrow tailoring requires a reasonable means-end fit, but the facts here are distinguishable. Because the state asserted no informational interest in *Americans for Prosperity*, the mismatch that failed narrow tailoring there is different from that involved here. The U.S. Supreme Court has consistently upheld similar public disclosure requirements under the state's informational interest.[233] And finally, as noted above, APF has offered *zero* evidence of any burdens it or its donors might face by having to comply with AS 15.13.090(a)(2)(C).[234] That provision only requires disclosure of the three largest donors—those donors could have each contributed $50,000 and be

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232 *Id.* at 2386.

233 *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-67 (2010) (listing cases upholding similar disclosure requirements against facial challenges).

234 *Cf. id.* at 370 (rejecting challenge to disclosure requirement where challenger "has offered no evidence that its members may face similar threats or reprisals"). Not only does APF not offer any affidavits attesting to potential burdens, but also APF does not even *hypothesize* any potential burdens. The only stated rationale for excusing noncompliance is that APF does not want to comply with the law. *See* Appellant's Brief at 42 (objecting to disclosure as imposing a burden of "unwanted speech"). *Contra Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (invalidating lengthy disclosure requirement, including a 29-word statement in 13 languages, that may effectively "drown[] out the facility's own message" while "express[ing] no view on the legality of a similar disclosure requirement that is better supported or less burdensome"). There is no evidence that complying with AS 15.13.090(a)(2)(C) will "drown out" APF's message.

perfectly fine having their names disclosed. This court has no reason to know otherwise, because APF again attempts to shift the burden completely onto APOC without first establishing a prima facie case of either facial or as-applied invalidity.

For the reasons stated above, this court rejects all of APF's First Amendment challenges, whether treated as facial or as-applied challenges.

V. CONCLUSION

As explained above, this court affirms APOC's Final Order on Reconsideration dated July 12, 2021.

Dated at Anchorage, Alaska this 16th day of August, 2022.

Frank A. Pfiffner
Superior Court Judge Pro Tempore

I certify that on 8/16/22
a copy of the above was emailed to:

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