

No. 26-\_\_\_\_\_

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In The  
**Supreme Court of the United States**

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ALASKA POLICY FORUM,  
*Petitioner,*

*v.*

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

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*On Petition for a Writ of Certiorari to the  
Alaska Supreme Court*

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**PETITION FOR A WRIT OF CERTIORARI**

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OWEN YEATES  
*Counsel of Record*  
INSTITUTE FOR FREE SPEECH  
1150 Connecticut Ave. NW  
Suite 801  
Washington, D.C. 20036  
oyeates@ifs.org  
(202) 301-3300

July 13, 2026

*Counsel for Petitioner*

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## QUESTIONS PRESENTED

Alaska Policy Forum, a 501(c)(3) nonprofit organization, engages in policy debates but does not advocate for the election or defeat of any measure or candidate.

Alaska's Supreme Court nonetheless upheld the state's demand that the Forum disclose its donors, register with the state's campaign finance authority, and add state-mandated language to its speech, because the group took a position on a public issue, and continued expressing its policy positions even after the issue became a subject of a ballot measure.

The questions presented are:

1. Whether the government has an informational interest in donor disclosure that defeats First Amendment associational interests, when a speaker engages in issue speech relevant to an election but does not discuss the election;
2. Whether Alaska's test for distinguishing issue speech from express advocacy is unconstitutionally vague; and
3. Whether requiring that speakers disclose their donors on the face of their communications advances a compelling or sufficiently important interest.

## **PARTIES TO THE PROCEEDING**

Petitioner Alaska Policy Forum was the appellant in the court below.

Respondents Alaska Public Offices Commission, Yes on 2 for Better Elections, and Protect My Ballot were the appellees in the court below.

## **CORPORATE DISCLOSURE STATEMENT**

Petitioner Alaska Policy Forum has no parent corporation and no publicly held corporation owns 10% or more of its stock.

## RELATED PROCEEDINGS

The following proceedings are directly related to this case, within the meaning of Rule 14.1(b)(iii):

United States Supreme Court:

*Alaska Policy Forum v. Alaska Public Offices Commission; Yes on 2 for Better Elections; and Protect My Ballot*, No. 25A-1031 (application granted by Justice Kagan extending the time to file petition for certiorari to July 13, 2026, order entered March 23, 2026).

Alaska Supreme Court:

*Alaska Policy Forum v. Alaska Public Offices Commission; Yes on 2 for Better Elections; and Protect My Ballot*, No. S-18533 (judgment entered February 13, 2026).

Superior Court for the State of Alaska,  
Third Judicial District at Anchorage:

*Alaska Policy Forum v. Alaska Public Offices Commission; Yes on 2 for Better Elections; and Protect My Ballot*, No. 3AN-21-007137CI (judgment entered August 16, 2022).

Alaska Public Offices Commission:

*Yes on 2 for Better Elections v. Alaska Policy Forum and Protect My Ballot*, APOC Case No. 20-05-CD (Final Order, June 21, 2021; Final Order on Reconsideration, July 12, 2021).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Alaska Policy Forum respectfully petitions for a writ of certiorari to review the judgment of the Alaska Supreme Court in this case.

### INTRODUCTION

Alaskans have lost their First Amendment right of associational privacy whenever state regulators determine that their speech addresses issues that are the subject of a ballot measure—even if that speech does not mention the measure, let alone advocate for its passage or defeat. Embedding someone else’s YouTube video on one’s website suffices to trigger registration, disclosure, and compelled speech requirements, if the video discusses a topic addressed by a ballot measure. In America’s largest state, the line between issue advocacy and campaign speech has been blurred beyond recognition.

Indeed, the Alaska Supreme Court’s nebulous vision of the First Amendment produced precisely the “bizarre result” against which this Court has warned: “identical ads aired at the same time could be protected speech for one speaker, while leading to . . . penalties for another.” *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (“*WRTL II*”) (Roberts, C.J., controlling op.). Protect My Ballot’s out-of-state website was free to speak. But for reproducing that speech, Alaska Policy Forum (APF) was ordered to comply with registration, disclosure, and compelled speech mandates.

APF, a nonprofit organization that educates about issues affecting individual opportunities and freedom,

joined a national coalition to educate Americans about the shortcomings of ranked-choice voting. It posted an *Anchorage Daily News* opinion piece critical of ranked-choice voting on its website, and shared the national coalition's press release and video on ranked-choice voting. It then posted a jointly authored white paper about ranked-choice voting, a press release publicizing the white paper, and a short article of its own about the topic. After the communications began, a ballot measure proposing several changes to the state's election and campaign finance system—including the adoption of ranked-choice voting—qualified for an upcoming election, and the measure's proponent filed a complaint against APF and the coalition.

APF never mentioned the measure. Some of its speech did not even mention Alaska. Yet the Alaska Public Offices Commission (APOC) concluded that APF had violated state laws requiring registration and donor reporting for advocating against the measure, and the law requiring that APF put its name and donors on its communications. The Commission concluded, however, that the national coalition had neither engaged in advocacy nor violated the registration, reporting, and disclaimer laws.

The Alaska Supreme Court's decision affirming this result breaks from several of this Court's established doctrines and conflicts with decisions by other appellate courts. To determine which political speech counts as election advocacy subject to regulation, it applied an intent-and-effect test based on an obsolete Ninth Circuit decision that long predates *WRTL II*, and that lacks the protections

against ambiguity required by the ruling. Alaska's Supreme Court thus allows speakers to stumble into trouble without knowing that they are anywhere near the danger zone. And once they are there, the regulation of their speech survives the court's version of exacting scrutiny only because it is fundamentally flawed, based on a non-existent informational interest triggered at the first dollar. Speakers may only keep their associational privacy by remaining silent about the most important issues of the day.

The decision below, in conflict with this Court's precedent and that of various courts of appeals, undermines the protection of core First Amendment freedoms. It merits this Court's review.

### **OPINIONS AND ORDERS BELOW**

The Alaska Supreme Court's opinion, App.1a-91a, is reported at 583 P.3d 701. The opinion of the Alaska Superior Court, Third Judicial District, App.92a-153a, is not reported. The final order on reconsideration of the Alaska Public Offices Commission, App.154a-164a, is not reported. The initial final order of the Alaska Public Offices Commission, App.165a-175a, is not reported.

### **JURISDICTION**

The Alaska Supreme Court issued its opinion on February 13, 2026. On March 23, 2026, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 13, 2026. No. 25A1031. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix, at App.203a-236a.

### STATEMENT OF THE CASE

1. With few exceptions, Alaska generally requires that all expenditures made to influence the outcome of a ballot proposition be reported to the Alaska Public Offices Commission (“APOC”). AS §§ 15.13.040(d) and (h), App.207a, 209a-210a; 15.13.140(b), App.228a. Such a report must identify the person making the report, including the person’s address, occupation, and employer; name the proposition and whether the expenditure was made to support or oppose the proposition; and list all donations the person may have received “for the purpose of influencing the outcome of the election.” *Id.* § 15.13.040(e), App.207a-208a. A reporting corporation or group must identify “the name and address of each officer and director.” *Id.* § 15.13.040(e)(4), App.208a.

Groups must register with APOC before spending money in relation to a ballot proposition. *Id.* § 15.13.050, App.217a. And election-related “communications,” including announcements posted on the internet, must disclose the name and address of the person paying for the communication. *Id.* §§ 15.13.090(a), App.219a; 15.13.400(3), App.230a. If the communication is made by a group, it must identify the group’s principal officer and include that officer’s statement approving the communication, and identify, by name and state of residence or principal place of business, the group’s top three donors during

the preceding 12 months. *Id.* § 15.13.090(a)(2), App.219a.

2. Petitioner Alaska Policy Forum (“APF”) is a 501(c)(3) nonprofit established “to provide research, information and public education in support of individual rights, limited government, personal responsibility and government accountability.” App.6a (quotation marks omitted). APF agreed in January 2020 to join a national coalition called “Protect My Ballot” (“PMB”), “formed to educate the public about the risks of ranked-choice voting.” App.7a.

On February 11, 2020, APF reposted on its website an *Anchorage Daily News* opinion piece critical of ranked-choice voting. *Id.* & n.18; App.237a-240a. A month later, Alaska’s lieutenant governor accepted a signature petition to put Measure 2 on the November 2020 ballot. App.7a. Among other matters, Measure 2 proposed to adopt ranked-choice voting in Alaska’s general elections. App.6a-7a.

APF never discussed Measure 2, but it continued offering its opinions about ranked-choice voting, consistent with its membership in the PMB coalition. APF emailed PMB’s July 24, 2020 press release announcing the coalition’s “national education campaign” to both a national and an Alaska-specific media list. App.7a, 182a, 241a-243a. On July 31, 2020, APF created a blog post that embedded PMB’s

YouTube video on ranked-choice voting. App.8a, 244a-245a.<sup>1</sup>

On October 8, 2020, APF issued a press release describing and linking to a white paper jointly written by APF and another coalition member, describing an analysis of 96 elections in ranked-choice voting jurisdictions. App.9a, 246a-247a (press release), 248a-299a (paper). And on October 12, 2020, APF published a two-page article on its website titled “Ranked-Choice Voting Disenfranchises Voters.” App.9a-10a, 300a-303a. The article explained the mechanics of ranked-choice voting and possible flaws in its operation, citing examples from various jurisdictions. *Id.*

3. Although APF’s communications never mentioned Measure 2, the measure’s proponent, Yes on 2 for Better Elections, filed a complaint against APF and Protect My Ballot with APOC in September 2020, alleging that the groups had failed to comply with registration, reporting, and identification requirements triggered by advocacy against the ballot measure. App.10a. APF responded to the complaint and filed a motion to dismiss, arguing that the requirements violated the First Amendment. App.101a-102a.

The Commission issued a Final Order on June 21, 2021, App.165a-175, and a Final Order on Reconsideration on July 12, 2021, App.154a-164a.

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<sup>1</sup> *Video: Ranked Choice Voting, Explained*, Alaska Policy Forum (July 31, 2020), <https://perma.cc/4PH3-Z9VW>.

The Commission concluded that Protect My Ballot's communications did not trigger the requirements and dismissed the complaint against it. App.161a-162a. The Commission nonetheless held that APF's communications triggered the requirements. App.158a-160a. The Commission declined to address APF's constitutional arguments, stating that it lacked "jurisdiction to decide issues of constitutional law." App.157a n.8. Upon Yes on 2's motion for reconsideration, the Commission issued the Final Order on Reconsideration, requiring that APF comply with the registration, reporting, and disclaimer requirements within 30 days. *Compare* App.163a, *with* App.174a.

APF appealed to the Alaska Superior Court, arguing that the Commission's decision was not adequately supported by written findings and by the evidentiary record, and that the Commission acted ultra vires in applying statutes about candidates to ballot measures. And again, APF raised its First and Fourteenth Amendment defenses: that the statutory provisions required a limiting construction because of unconstitutional vagueness; that under that construction, APF's communications could not be considered the functional equivalent of express advocacy; that the provisions failed exacting scrutiny; and that the on-communication disclosure provision failed tailoring. App.14a; App.117a, 122a, 126a, 130a, 133a, 150a.

The court concluded that APOC "did not explicitly adopt staff's conclusion that the" first communication, the "February op-ed[,] was an expenditure or communication." App.118a. But the court rejected

APF's arguments and affirmed the Commission's decision as to the other communications, App.152a.

APF raised the same arguments on appeal to the Alaska Supreme Court. That court held that the superior court had erred in applying a deferential reasonableness standard. App.24a. But the supreme court held that it was not error to apply the test for express advocacy from *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), App.20a, 26a, rather than applying the *WRTL II* standard, as the latter was allegedly "not squarely on point," App.37a. And based on the *Furgatch* standard, as incorporated into state law, App.26a & n.63, the court rejected APF's arguments that the Commission relied too much on contextual evidence. While it declined to read all of APF's publications together, the court stated that even a party's other "speech may be a permissible contextual factor" in determining whether a communication is advocacy. App.31a.

Based on the *Furgatch* standard, the court held that emailing PMB's press release, posting PMB's YouTube video, issuing the October 8, 2020 press release about APF's white paper, and publishing the October 12, 2020 article, could not be interpreted as anything other than as advocacy against the measure. App.39a, 44a-46a.

Having concluded that APF's communications were express advocacy ("express communications," App.25a), the court rejected APF's arguments that the registration, reporting, and disclaimer requirements fail exacting scrutiny and are insufficiently tailored, App.60a-82a. In particular, it held that Alaska's

requirements survive exacting scrutiny even though they are triggered by the first dollar contributed, App.63a-72a; and that compelling disclosure of APF's donors on the face of its communications does not violate narrow tailoring, App.76a-82a.

## REASONS FOR GRANTING THE PETITION

### **I. The Alaska Supreme Court incorrectly treats issue speech as advocacy because it adopted a standard in conflict with *WRTL II*.**

1. The Alaska Supreme Court treated APF's issue speech about ranked choice voting as express advocacy about a ballot measure because it applied the wrong standard—a test allowing the government to delve into the intent of the speaker and a communication's effect on the audience to determine whether a communication is advocacy—a standard derived from *Furgatch*, rather than the test for the functional equivalent of express advocacy from *WRTL II*.

The Alaska Supreme Court felt emboldened to reject the protections for issue speech in place since *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), because this Court has said that there is no “rigid barrier” between issue speech and express advocacy, *McConnell v. FEC*, 540 U.S. 93, 193 (2003), and then declined to limit the disclosure and disclaimer requirements for electioneering communications to speech that is the functional equivalent of express advocacy, *Citizens United v. FEC*, 558 U.S. 310, 368-69 (2010). See App.23a n.56, *id.* 37a-38a.

Other courts have splintered about the effect of *McConnell* and *Citizens United* on speech other than electioneering communications, with some hewing to *Buckley*'s strict protections for issue speech and others seeking a new line between issue speech and advocacy. Compare, e.g., *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1257 (Colo. 2012) (declining to loosen the standard), with *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 551-52 (4th Cir. 2012) (applying similar test to the functional equivalent of express advocacy standard). And the courts seeking a new line between issue speech and political advocacy have splintered on the proper line to draw, with some applying the functional equivalent of express advocacy standard and others—like Alaska—applying another. Compare *Real Truth*, 681 F.3d at 551-52, with App.23a n.56, 27a-29a, and with *Rio Grande Found. v. Oliver*, 154 F.4th 1213, 1223 (10th Cir. 2025) (“reasonably be interpreted to have a political purpose”).

But the laws at issue here do not target electioneering communications, but rather “express communications” and other forms of “independent expenditures,” App.12a, 105a, 156a-157a, and that is a significant difference. This Court loosened the protections for issue speech with regard to electioneering communications—which are defined as “communication[s] that refer[] to a clearly identified candidate . . . made within 30 days of a primary or 60 days of a general election,” *Citizens United*, 558 U.S. at 321 (quotation marks omitted)—because the statutes defining electioneering communications lack the ambiguity afflicting the definitions used for independent expenditures and similar speech

regulations, *McConnell*, 540 U.S. at 194, and because most communications meeting the definition could be assumed to be the functional equivalent of express advocacy, *id.* at 206.

*McConnell* and *Citizens United* did not purport to eliminate the protections for issue speech in other situations, particularly when dealing with independent expenditures or other vague laws used to control election advocacy. *Buckley* required that the regulation of independent expenditures—communications to support or oppose candidates made independently from those candidates—be limited to what it defined as express advocacy, because vague definitions “could be interpreted to reach groups engaged purely in issue discussion.” 424 U.S. at 42-45, 76-82. And nothing in *McConnell* or *Citizens United* decreased the need for protection from vague regulations.

Alaska’s statutes even use some of the language declared unconstitutionally vague in *Buckley*. Compare AS 15.13.010(b), App.205a (“purpose of influencing”), 15.13.040(e)(5), App.208a (same), 15.13.400(4), App.230a (same), 15.13.400(6), App.232a (same), with *Buckley*, 424 U.S. at 77 (“for the purpose of . . . influencing”). And the court even admitted to vagueness in Alaska’s laws. App. 49a-51a. It therefore had no excuse for failing to limit the scope of its statute to the express advocacy defined in *Buckley*. 424 U.S. at 43-44 & 44 n.52.

The Alaska Supreme Court, however, chose to join those courts seeking some line other than *Buckley*’s express advocacy as the limit of regulation and control



over election and ballot advocacy. *See, e.g., Real Truth About Abortion*, 681 F.3d at 551 (allowing FEC to use the “functional equivalent test in defining ‘express advocacy’”). But the line the court chose extends the government’s grasp over issue speech beyond what this Court’s decisions will allow.

This Court has repeatedly rejected any attempt to divide protected from unprotected speech based on intent and effect. It did so all the way back in *Buckley*, stating that such a test “offers no security for free discussion.” 424 U.S. at 43 (quotation marks omitted). And the controlling opinion in *WRTL II*—when deciding the standard for determining what speech counts as the functional equivalent of express advocacy—reemphasized that looking to intent and effect was impermissible. 551 U.S. at 466-70, 474 n.7.<sup>2</sup>

The Alaska Supreme Court, however, decided to distinguish *WRTL II* on its facts, App.37a, rather than apply the criteria that *WRTL II* held are necessary to avoid “impermissibl[e] vague[ness]” in determining whether a communication is advocacy or issue speech, *WRTL II*, 551 U.S. at 474 n.7. It instead chose to apply *Furgatch*’s deficient standard, which the other circuits long ago rejected for relying on “the unpredictability of audience interpretation.” *Chamber of Com. of the U.S. v. Moore*, 288 F.3d 187, 194 (5th Cir. 2002). Because the *Furgatch* test delves into intent and effect and lacks the protections required by *WRTL II*, the court unconstitutionally

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<sup>2</sup> Unless otherwise noted, references to *WRTL II* are to the Chief Justice’s controlling opinion.

allowed the state to regulate APF's issue speech as express advocacy.

2. "Discussion of public issues" is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. Thus, when the government enacts vague laws that "fail[] to clearly mark the boundary between permissible and impermissible speech," *id.* at 41, courts must "construe the statute . . . to avoid the shoals of vagueness," *id.* at 77-78.

When this Court turned to defining a test for "the 'functional equivalent' of express advocacy," *WRTL II*, 551 U.S. at 466, it emphasized that the test could not depend on the speaker's intent or the effect on the listener, as any such test would "unquestionably chill a substantial amount of political speech," *id.* at 469.

Further, because "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election," *id.* at 474, and the line between issue speech and advocacy is so difficult to discern, the test itself had to be free of any vagueness. But even limiting the functional equivalent of express advocacy to communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," does not sufficiently protect against impermissible vagueness. *Id.* at 474 n.7 (emphasis removed). Indeed, even though *Furgatch* employs some of the language commonly used in "articulations of the 'express advocacy' standard," other courts rejected its approach because it "introduce[d]" other elements into the determination, including contextual factors

that “shift[] the determination of what is ‘express advocacy’ away from the words ‘in and of themselves’ to ‘the unpredictability of audience interpretation.’” *Chamber of Commerce*, 288 F.3d at 193-94 (quotation marks omitted) (examining cases).

To avoid “impermissibl[e] vague[ness],” there must truly be “*no reasonable interpretation* other than as an appeal to vote.” *WRTL II*, 551 U.S. at 474 n.7 (emphasis in original). And four other considerations—criteria in contravention to *Furgatch*’s innovations—must further guide the test’s application. *Id.* First, the functional equivalent standard cannot involve any “free-ranging intent-and-effect test”; second, it generally prohibits “discovery or inquiry into” contextual factors; third, the government cannot ban “discussion of issues . . . merely because the issues might be relevant to an election”; and fourth, the tie in any debatable case must be “resolved in favor of protecting speech.” *Id.*

Allowing the government to look at the speaker’s intent and the speech’s effect on the listener deprives any speaker of the “safe harbor for . . . First Amendment rights” that the standard should provide. *Id.* at 467. It “shifts the determination of what is express advocacy away from the words in and of themselves to the unpredictability of audience interpretation.” *Chamber of Commerce*, 288 F.3d at 194 (quotation marks omitted). The effect on any listener depends on that person’s knowledge, memory, and ability to piece different information together—on how much attention she has paid to current events to know the candidates and measures on the ballot and the issues they have made

prominent. In examining intent, anything that a speaker has ever said or done on “the general subject” may “be understood by some as an invitation” to vote in a certain way. *Buckley*, 424 U.S. at 43. And putting intent and effect together, the speaker realizes he is “wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.” *Id.*

Second, the government must show care in the considerations used to determine whether a communication is issue speech or advocacy. It may examine the communication’s content to determine whether it is “consistent with that of a genuine issue ad” or has “indicia of express advocacy.” *WRTL II*, 551 U.S. at 470. For example, do the communications “mention an election, candidacy, political party, or challenger”? *Id.* Or do they merely “convey[] information and educate[],” leaving it to the voter to connect the information to an election? *Id.*

On the other hand, *WRTL II* rejected attempts to “look[] beyond the content” of the message to contextual factors, such as whether the speaker has otherwise advocated for or against a given candidate or measure, because a speaker “does not forfeit its right to speak on issues simply because in other aspects of its work it” engages in advocacy. *Id.* at 472. Nor does speaking close to an election indicate advocacy: a speaker has the right “to run an issue ad to coincide with public interest.” *Id.* at 473.

To the extent that *WRTL II* approves contextual factors, it is as a ratchet for protecting speech. The legislature’s examination of an issue, for example, *id.*

at 474, indicates that speech addresses a current issue rather than an election.

3. The Alaska Supreme Court declined to apply the principles propounded in *WRTL II*, stating that it was “skeptical that the ‘express advocacy’ line” should limit Alaska’s statutes since the *Citizens United* Court declined to apply the functional equivalent test to electioneering communications. App.37a-38a.

The court erred in two critical aspects. First, as discussed above, Alaska’s laws triggered the registration, reporting, and disclaimer requirements for communications using the vague terms and definitions for independent expenditures and express advocacy. And the Alaska Supreme Court even admitted that some of the statutory provisions at issue needed a narrowing construction to avoid unconstitutional vagueness. App.48a. *Buckley*’s line drawing thus squarely applies, and the reach of Alaska’s requirements should have been limited to *Buckley*’s express words of advocacy, 424 U.S. at 44 n.52, or at least to its functional equivalent.

Second, in applying *Furgatch*, the Alaska Supreme Court plunged headlong into an intent-and-effects test. The court refused to say whether APOC had erred or “was correct,” App.31a, in “look[ing] beyond the content of” each ad at issue, *WRTL II*, 551 U.S. at 472, to “consider[] [APF’s] history of communicating about the topic,” App.158a. But this was because the court wanted further evidence of intent and effect. App.31a. It held that whether the state could analyze all the communications together depended on the speaker’s knowledge. If there was

evidence that “publications would have been read or seen together,” such that the “average reader or listener” would “know whether the speaker has spoken on the subject before,” then it would be permissible to combine the communications. App.30a-31a. Thus, contrary to *WRTL II*, Alaska would have a speaker “forfeit its right to speak on issues” if it has otherwise advocated about a candidate or measure. 551 U.S. at 472.

In approving the use of timing to determine whether a communication is advocacy, the Alaska Supreme Court also adopted *Furgatch*’s reasoning “that timing the appearance of the advertisement less than a week before the election left no doubt” that a communication was advocacy. App.29a-30a (quotation marks omitted). The court thus denies a speaker’s right “to run an issue ad to coincide with public interest.” *WRLT II*, 551 U.S. at 473.

4. And Alaska’s use of an intent-and-effect test led to exactly “the bizarre result” predicted in *WRLT II*, “that identical ads aired at the same time could be protected speech for one speaker, while leading to . . . penalties for another.” *Id.* at 468. APF shared PMB’s press release with its contacts and reposted PMB’s YouTube video on its website, App.241a-245a, and APOC held that APF had engaged in advocacy that triggered the registration, reporting, and disclaimer requirements, but that PMB had not. App.160a-162a.

This bizarre result happened only because APOC and the court, using *Furgatch*, adhered to an intent-and-effects test. The video, for example, did not mention Measure 2, the November 2020 election, or

even Alaska. App.244a-245a.<sup>3</sup> While embedding the video on its page caused APF's name to appear, App.244a, it is clear from the video that it was made by PMB, App.245a. The only way to turn this video into advocacy against Measure 2 is to take PMB's call to "SAY NO TO RANKED CHOICE VOTING," App.42a, and say that it would be recognized as a call to oppose Measure 2 by "Alaskans who are presumably the main audience for the message," App.42a-43a, especially "[i]n the context of an upcoming election," App.43a. In this the court assumes that voters were paying attention to ranked choice voting, and not the other changes contemplated by Measure 2. But these are precisely the considerations that *WRTL II* prohibits, relying on the knowledge of and effect on the audience, as well as timing close to an election, to determine whether speech is election advocacy.

And while the October white paper, its press release, and the October article do not share the strange result of being advocacy for one party and not for another, all these communications can be regarded as advocacy only through impermissible intent-and-effect considerations.

5. In applying the *Furgatch* test and declining to apply the principles and requirements of *WRTL II*'s functional equivalent of express advocacy standard, the Alaska Supreme Court's decision deprived APF of fundamental First Amendment protections secured by this Court's precedent. This Court should grant

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<sup>3</sup> See *Video*, <https://perma.cc/4PH3-Z9VW>.

certiorari to clarify that the functional equivalent of express advocacy standard is required to distinguish issue speech from advocacy when applying registration, reporting, and disclaimer laws that are infected with vagueness, as here, and that courts must apply the test in an objective way using the criteria emphasized in *WRTL II*.

**II. The Alaska Supreme Court's improper interpretation of the informational interest led it to erroneously conclude that Alaska's laws survive exacting scrutiny.**

1. Just as it failed to apply the correct standard for distinguishing issue speech and express advocacy, Alaska's high court failed to apply the correct scrutiny to laws that regulate express advocacy. That is, even if APF's communications were express advocacy or its functional equivalent, Alaska's registration, reporting, and disclaimer requirements would fail exacting scrutiny. Such scrutiny depends on a sufficiently important governmental interest, and the Alaska Supreme Court rendered any such interest worthless. It improperly held that the informational interest used to justify disclosure requirements covers both small donations—contrary to decisions by this Court and the Tenth Circuit—and donations that are not properly earmarked—contrary to decisions by this Court and by the Second, Tenth, and D.C. Circuits. Including small, non-earmarked donations deprives the informational interest of any value, and Alaska's requirements thus bear no substantial relation to a sufficiently important interest, facially or as applied to APF's communications.



2. Even when the government applies registration, reporting, and disclaimer provisions to speech that undoubtedly qualifies as express advocacy, those provisions must still face scrutiny as to whether they “impermissibly burden[] the constitutional right of free expression.” *Buckley*, 424 U.S. at 44. And under the exacting scrutiny generally applied to campaign finance registration, reporting, and disclaimer requirements, the government must demonstrate “a substantial relation between the . . . requirement[s] and a sufficiently important governmental interest, and that the . . . requirement[s] [are] narrowly tailored to the interest” they claim to promote. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 611 (2021) (“*AFPF*”) (citations and quotation marks omitted).

The *Buckley* Court identified limited interests that might justify disclosure, including the anti-corruption and informational interests. The interest in deterring corruption and its appearance “by exposing large contributions and expenditures to the light of publicity,” *Buckley*, 424 U.S. at 67, however, cannot apply in the ballot context. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 352 n.15 (1995) (risk “not present”). But even where the anti-corruption interest does not apply, there may remain an interest in how large contributions may “allow[] voters to place each candidate in the political spectrum more precisely,” and in alerting “voter[s] to the interests to which a candidate is most likely to be responsive” because of those large contributions. *Buckley*, 424 U.S. at 67; see also *id.* at 81 (“spending that is unambiguously campaign related”); *Sampson v. Buescher*, 625 F.3d 1247, 1256 (10th Cir. 2010).

(interest in knowing those “with strong financial ties to the candidate”). To the extent this informational interest exists in the ballot context, it is an “interest in knowing who is spending and receiving money to support or oppose a ballot issue.” *Sampson*, 625 F.3d at 1256.<sup>4</sup>

Understanding the financial interests to which a candidate is most likely to respond thus requires looking at large donations. And using contributions to understand who supports a candidate, to place a candidate more precisely in the political spectrum, requires that the donors give, specifically, to support that candidate. The Alaska Supreme Court has

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<sup>4</sup> As *Sampson* explained, there is reason to doubt whether even the informational interest can apply in the ballot context. When evaluating a candidate, a voter may want to know the “strong financial ties” that may influence a candidate “when he or she must decide [about] future governmental action.” 625 F.3d at 1256-57. But a law resulting from a ballot measure will not be making decisions, much less decisions that might be affected by a contribution. Moreover, far from improving public discourse, disclosure may lead to its “deterioration” by facilitating decisions based on “ad hominem arguments” rather than on “the merits of the proposition on the ballot.” *Id.* at 1257.

Furthermore, this Court’s decisions related to ballot measures—*First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978), *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290 (1981), and *Buckley v. Am. Const. Law Found.*, 525 U.S. 182 (1999)—might “be summarized as ‘such disclosure has some value, but not that much.’” *Sampson*, 625 F.3d at 1257. And the statements leading even to that conclusion “were dicta,” as this “Court has never upheld a disclosure provision for ballot-issue campaigns that has been presented to it for review.” *Id.* at 1258.

increased the circuit conflict, and broken from this Court's decisions, in allowing the government to police contributions that are both small and not earmarked.

In breaking with the courts that require larger, earmarked contributions, the Alaska Supreme Court created a valueless informational interest. And there can be no substantial relation to a sufficiently important interest—facially or as applied—if the governmental interest has no value.

**A. Zero-dollar donor disclosure creates a valueless informational interest, in conflict with this Court and deepening a circuit split.**

1. In joining the Ninth and Eleventh Circuits in allowing disclosure even for small contributions, the Alaska Supreme Court has deviated from the informational interest explained in *Buckley* and deepened the conflict with the Tenth Circuit (and sometimes the Ninth). This Court has not addressed the minimum threshold for donor reporting, and only it can resolve this split in the courts.

2. Given that disclosure is meant to alert “voter[s] to the interests to which a candidate is most likely to be responsive,” *Buckley*, 424 U.S. at 67, requiring disclosure of small donations provides little value. Accordingly, the Tenth Circuit has held that the informational “interest is significantly attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight.” *Sampson*, 625 F.3d at 1259.

And the Ninth Circuit held that “the value of this *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level.” *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (emphasis in original). Indeed, in addressing a “zero dollar” threshold like Alaska’s, the court noted that the informational interest “fades into” information about “mere sympathy,” telling voters “little about the *financial* backing of the ballot proposition.” *Id.* (emphasis in original).

Other courts, however, have declined to hold that low-value disclosure fails to fulfill the informational interest and is unconstitutional. Despite *Canyon Ferry*, the Ninth Circuit has upheld “reporting thresholds as low as \$100.” *Smith v. Helzer*, 95 F.4th 1207, 1218 (9th Cir. 2024) (citing *Nat’l Ass’n for Gun Rts., Inc. v. Mangan*, 933 F.3d 1102, 1118 (9th Cir. 2019)). The Eleventh Circuit has even gone so far as to affirm “first-dollar disclosure,” arguing that “knowing the source of even small donations is informative in the aggregate and prevents evasion of disclosure.” *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1251 (11th Cir. 2013). And the First Circuit, although it found the disclosure unconstitutional under the facts of the case there, has held “that first dollar disclosure is not, in all cases, constitutionally proscribed.” *Vote Choice v. DiStefano*, 4 F.3d 26, 33 (1st Cir. 1993).

*Buckley* emphasized the role of large contributions in upholding disclosure requirements, but it did not address the contribution reporting threshold for those

making independent expenditures. The parties did challenge a \$100 reporting threshold for contributions to *political committees*, which are subject to more burdensome reporting requirements because their major purpose is candidate advocacy. 424 U.S. at 82. But even for these the Court felt no need to determine a threshold. After noting that a \$100 threshold for contributions to political committees was “indeed low” and that Congress could “hardly . . . have intended” to “discourage participation” by those “sensitive to recording or disclosure of their political preferences,” the Court concluded that there was “no warrant for assuming that” the government would want “public disclosure of contributions between \$10 and \$100.” *Buckley*, 424 U.S. at 83-84.

In this assumption, the *Buckley* Court ignored that the zeal for campaign regulation carries with it little concern about silencing constitutionally protected speech. The Court assumed the government would not put a threshold between \$10 and \$100 in 1976, between \$60 and \$600 today,<sup>5</sup> but Alaska has driven the threshold to the lowest it could possibly be, to the first cent paid.

Such disclosure does very little to inform voters about those to whom a candidate will be most responsive once in office. *Id.* at 67. And given that it tells voters at most about “mere sympathy” for a

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<sup>5</sup> See *CPI Inflation Calculator*, U.S. Bureau of Labor Statistics (visited June 29, 2026), <https://perma.cc/6TA8-8QNZ> (comparing \$100 in January 1976 to the same buying power in May 2026).

candidate or ballot issue, *Canyon Ferry*, 556 F.3d at 1033, it does little to help voters place a candidate or measure on the political spectrum. And it certainly tells voters little about who might benefit most from the measure. Concern about donors evading disclosure at such low thresholds is at best “yet another in a long line of ‘prophylaxis-upon-prophylaxis approach[es]’ to regulating campaign finance.” *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 306 (2022). And, either facially or as applied, a law can have no substantial relation to a sufficiently important interest when the asserted interest lacks any value.

Furthermore, as applied to APF, the state failed to demonstrate that APF had spent more than \$643.20 across all its communications, much less on a single one. App.161a. Those are hardly large expenditures. But rather than force the state to meet its burden to show that its disclosure requirements are constitutional under heightened scrutiny, particularly in a quasi-criminal administrative enforcement hearing, the Alaska Supreme Court faulted APF for not providing information about its spending, App 69a, and engaged in hypotheticals about what APF must have spent, App 70a-71a.

3. In upholding zero-dollar reporting, the Alaska Supreme Court has put itself in conflict with *Buckley*’s rationale and the Tenth Circuit. And it has pushed disclosure to the point where the informational interest has lost all value. After fifty years, it has become necessary for this Court to “reach the question whether information concerning gifts of this size can be made available to the public without

trespassing impermissibly on First Amendment rights.” *Buckley*, 424 U.S. at 84.

**B. Mandating disclosure without regard to earmarking tells voters nothing about who supports candidates or ballot measures, and conflicts with decisions by this Court and three federal courts of appeals.**

1. The Alaska Supreme Court’s failure to limit the state’s donor disclosure requirements to donors who contributed to support advocacy against Measure 2 conflicts with decisions from this Court, and it creates a split with the Second, Tenth, and D.C. Circuits. When the state requires disclosure of donors who did not give to support the advocacy—when it does not require earmarking—the disclosure misleads voters and thus undermines the informational interest. To the extent that this Court wishes the informational interest to remain a valid governmental interest, it should resolve this circuit split and make clear that disclosure applies only to earmarked contributions.

2. The government has no valid interest in informing the public about whatever might strike its or the public’s fancy. The informational interest is not one in knowing who has “mere sympathy” for a candidate or ballot measure. *Canyon Ferry*, 556 F.3d at 1033. It is an interest in knowing those who financially support a candidate, as “[t]he sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future

performance in office.” *Buckley*, 424 U.S. at 67. Or, in the ballot context, it is a “public interest in knowing who is spending and receiving money to support or oppose a ballot issue.” *Sampson*, 625 F.3d at 1256.

By “shed[ding] the light of publicity on spending that is unambiguously campaign related,” disclosure may “help[] voters to define more of the” constituencies supporting or opposing a candidate or ballot measure. *Buckley*, 424 U.S. at 81. But to keep such disclosure within constitutional bounds, *Buckley* limited disclosure of contributions given to organizations like APF—those that are not parties or PACs—to that narrow informational interest, requiring disclosure only for contributions “earmarked for political purposes.” *Id.* at 78; *accord id.* at 80.

The Second Circuit noted the limited meaning of such earmarking, concluding that “[t]he only contributions ‘earmarked for political purposes’ with which the *Buckley* Court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA.” *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995). It accordingly limited the disclaimer provisions for solicitations under 52 U.S.C. § 30120(a) to solicitations to fund express advocacy, those “clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office.” *Id.*

Other courts have tied the informational interest’s validity to earmarking. Disclosure not limited to support for the communication at issue, or to the



candidate or measure discussed, will “mislead voters as to who really supports the communications.” *Van Hollen v. FEC*, 811 F.3d 486, 497 (D.C. Cir. 2016). Thus, in upholding an FEC rule limiting disclosure to earmarked donations, the D.C. Circuit noted that it is “fairly intuitive” “that some number of a corporation’s investors, a nonprofit’s donors, or a union’s members may generally support the entity but not its” election advocacy. *Id.* at 497.

The Tenth Circuit similarly held that there was a substantial relation between a Colorado disclosure law and the informational interest in part because it required disclosure “only [of] those donors who have specifically earmarked their contributions” for election advocacy. *Indep. Inst. v. Williams*, 812 F.3d 787, 796 (10th Cir. 2016). Other courts have agreed. See *Lakewood Citizens Watchdog Grp. v. City of Lakewood*, No. 21-cv-01488-PAB, 2021 U.S. Dist. LX 168731, at \*33-36 (D. Colo. Sep. 7, 2021) (noting importance of earmarking); *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016) (three judge panel) (law tailored to donors giving “for the specific purpose of supporting the advertisement”).

3. APF argued below that the disclosure reporting laws at AS 15.13.040(d) and AS 15.13.140(b) and the on-communication disclosure at AS 15.13.090 were unconstitutional because the disclosure reporting did not require earmarking. See App.76a.<sup>6</sup>

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<sup>6</sup> APF argued that the disclosure laws in general were undermined by the lack of earmarking, as the informational interest requires knowing who financially supports a candidate

The Alaska Supreme Court rejected APF's arguments for two reasons. First, quoting *Citizens United*'s holding as to electioneering communications for candidates, it said that disclosure requirements are already "a less restrictive alternative to more comprehensive regulations of speech." App.77a. Second, it claimed that the Commission already interprets the disclosure requirements to have an earmarking requirement built in, as a "contribution" is "defined as a donation 'made for the purpose of . . . influencing the nomination or election of a candidate . . . [or] influencing a ballot proposition or question.'" App.78a.

The court's first argument fails for several reasons. Disclosure regarding ballot measures is not a less restrictive alternative to more comprehensive regulations of speech, as there is no possibility of a more comprehensive regulation of speech where ballot measures are concerned. There can be no risk of corruption with regard to ballot measures, *McIntyre*, 514 U.S. at 352 n.15, and consequently there can be no contribution limits that disclosure requirements might replace.

But even if disclosure were a less restrictive alternative to a more burdensome regime, that alone does not absolve the state of its burden to "demonstrate its need for [non-earmarked disclosure] in light of any less intrusive alternatives." *AFPP*, 594 U.S. at 613. "In the First Amendment context, fit

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or measure, App.306a-307a, but the court addressed only the earmarking argument as to on-communication disclosure.

matters,” *id.* at 609 (quotation marks omitted), and the court erred in not requiring proof that the government needs broader disclosure.

Second, the Commission convinced the court that the statutes contain an earmarking requirement. But it provided no examples of any guidance or opinion where it told speakers—non-attorneys and non-specialists who would logically believe that a contributor is anyone giving to a speaker—that they only needed to report contributors who made earmarked donations.<sup>7</sup>

The Commission has likewise failed, in the three years since its arguments to the court, to educate speakers about the alleged earmarking requirements. Indeed, the Commission’s recent training on independent expenditure reporting nowhere tells speakers that they need only report earmarked donations. *See* Alaska Public Offices Commission, *TRAINING: Independent Expenditure Ballot Group, 2024 Elections* (visited June 26, 2026), <https://perma.cc/DMY6-FJJY>. To the contrary, for the on-communication disclosure statement under AS 15.13.090, it requires that a speaker name “the top 3 contributors of (group),” not the top 3 contributors for the communication, or the top 3 contributors funding advocacy against a given measure. *Id.* at 21.

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<sup>7</sup> The court cites to a program at AS 15.13.052 and 2 AAC 50.270(e), App.79a, but that program does not require disclosure only of earmarked donations; rather, it allows speakers to opt into a separate, more burdensome campaign finance regime.

And it seems unlikely that the Commission will ever tell speakers that they need only report earmarked contributions, because changes in Alaska law assume that anyone who gives money is a “true source” and that a “contributor” means the true source” of the money used. *Id.* at 68, 72, 104. An earmarking requirement has no meaning if the Commission considers all donations to be earmarked.

4. But even if some form of earmarking exists in Alaska, the earmarking the Alaska Supreme Court claims to require conflicts with that discussed by the Second, Tenth, and D.C. Circuits. It does not inform the public about who is spending or receiving money about a particular candidate or ballot measure, by disclosing only those contributions “targeted to the election or defeat of a clearly identified candidate” or ballot measure, *Survival Educ. Fund*, 65 F.3d at 295. To the extent they limit any disclosure, Alaska’s statutes do not limit it to disclosure targeted to a particular candidate or measure, but instead cover any money given to “influenc[e] the outcome of an election.” AS 15.13.040(e)(5), App.208a; *see also* 2 AAC 50.270(e) (“be used for political activities”).

Earmarking that encompasses any donation for any form of advocacy does not educate voters about those supporting a particular candidate or measure. It does nothing to “more precisely” place a candidate in the “political spectrum” on a given issue if the donor was giving to advocate about an entirely different issue. *Buckley*, 424 U.S. at 67. And voters will be misled, as they will justifiably expect that a donor supported the particular candidate or ballot measure triggering the reporting. Any disclosure that

may be required under Alaska law thus falls short of what is required to sustain the informational interest discussed in *Buckley* and the earmarking emphasized by the Second, Tenth, and D.C. Circuits.

**III. In affirming on-communication donor disclosure, as the First and Ninth Circuits have done, the Alaska Supreme Court put itself in conflict with this Court’s decisions on compelled speech, narrow tailoring for disclosure, and a claimed governmental interest in efficiency.**

1. The Alaska Supreme Court followed several circuit courts in upholding a new chimera of disclosure and disclaimer, requiring that speakers include donor information on the face of their communications. *See Gaspee Project v. Mederos*, 13 F.4th 79, 95-96 (1st Cir. 2021); *No on E v. Chiu*, 85 F.4th 493, 497 (9th Cir. 2023). But in joining them, the Alaska Supreme Court slips into a cascade of conflict with decisions by this Court: requiring greater scrutiny for compelled speech, requiring that the government demonstrate the need for extra disclosure when there are less intrusive alternatives, and rejecting a governmental interest in efficiency.

The on-communication disclosure precipitating this conflict is one of the latest trends in campaign finance regulation. The issues caused by this more burdensome form of disclosure will continue to come before this Court until it confirms—as argued by the nine judges dissenting from denial of rehearing en banc in *No on E*—that decisions like that of the Alaska Supreme Court fall short of “the exacting

scrutiny” required by *AFPP. No on E*, 85 F.4th at 518 (VanDyke, J., dissenting from denial of reh’g en banc).

2. This Court has held that “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.” *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 795 (1988). This is true whether the compelled speech is disclosure of fundraising information to potential donors, *id.*, or is simply a message about government services, *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 775 (2018) (“*NIFLA*”). This Court “therefore consider[s]” a law that compels particular statements as part of a speaker’s message to be “a content-based regulation of speech.” *Riley*, 487 U.S. at 795; *accord Chiles v. Salazar*, 146 S. Ct. 1010, 1022 (2026).

Alaska’s on-communication disclosure requirement “target[s] speech based on its communicative content” in two ways. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). It “singles out specific subject matter for differential treatment,” *id.* at 169, targeting speech about candidates or ballot issues. And it “alter[s] the content of their speech” by “compelling individuals to speak a particular message,” the names of top donors. *NIFLA*, 585 U.S. at 766 (cleaned up).

Furthermore, the on-communication disclosure requirement is a particularly pernicious form of compelled speech, as it encourages listeners to reject a communication without even engaging with the speaker’s message. The Alaska Supreme Court said that on-communication disclosure “provide[s] an instantaneous heuristic by which to evaluate” the

messages. App.80a. It thus helps voters accept or reject a communication without needing to think about the message’s merits. Even if the listener finds this information to be “relevant,” compelling a speaker to include information that leads listeners to immediately reject the message “would clearly and substantially burden the protected speech.” *Riley*, 487 U.S. at 798.

Because it is content based, the compelled speech requirement is “presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests.” *Reed*, 576 U.S. at 163. It may escape such scrutiny only if some exception exists, such as for laws that “are traditional, widespread, and not thought to raise a significant First Amendment issue.” *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 485 (2025).

3. The Alaska Supreme Court held that compelling a speaker to include information about its three largest donors in its messages was not compelled speech subject to strict scrutiny because it merely mandated disclosure. App.61a. But “state labels cannot be dispositive of . . . First Amendment protection,” *Riley*, 487 U.S. at 796 (quoting *Bigelow v. Va.*, 421 U.S. 809, 826 (1975)), and compelling donor information is neither disclosure nor disclaimer under this Court’s precedent. *See also Chiles*, 146 S. Ct. at 1023 (rights cannot be “nullified by mere labels” (quotation marks omitted)).

Cases sustaining limited disclosure for candidate- and ballot-related communications have given it one meaning: donor reporting to the state. *See, e.g.,*

*Buckley*, 424 U.S. at 61 (“names of . . . contributors”); *id.* at 62-63 (“contributors of \$100 or more”); *Citizens United*, 558 U.S. at 366 (“names of certain contributors”). And the contronym “disclaimer” has a similarly limited meaning in that context: claiming ownership over and responsibility for a communication. See 52 U.S.C. § 30120(d)(1)(B) (requiring that candidate communications include a “statement that identifies the candidate and” that the candidate “approved the communication”); *Citizens United*, 558 U.S. at 366 (requiring that non-candidate communications state “the name . . . of the person or group that funded the advertisement” and that it was “not authorized by any candidate” (quotation marks omitted)). On-communication disclosure fits neither of these definitions, and it therefore lacks a traditional, widespread exception to the strict scrutiny required for compelled speech.

4. But even if Alaska’s requirement is properly understood as disclosure or disclaimer, Alaska must still meet the exacting scrutiny required for such impositions on protected speech. And whether under strict or exacting scrutiny, “fit matters.” *AFPP*, 594 U.S. at 609 (quotation marks omitted). Alaska’s compelled speech requirement must therefore be “narrowly tailored to the interest it promotes.” *Id.* at 610; see also *Riley*, 487 U.S. at 800 (“precisely tailored” under strict scrutiny). Narrow tailoring requires that Alaska “demonstrate [the] need for” the on-communication disclosure requirement “in light of any less intrusive alternatives.” *AFPP*, 594 U.S. at 613.



APF thus argued that the Commission needed to “demonstrate its need” for on-communication disclosure “in light of . . . less intrusive alternatives,” *id.*, namely disclosure reports filed with the state and earmarking, App.76a. The Alaska Supreme Court rejected the state’s need to do so, however, reasoning that on-communication disclosure is “more likely to effectuate the purpose of an informed electorate” than the government publishing the information on its own. App.80a. In embracing efficiency as a governmental interest, the decision below yet again conflicts with this Court’s repeated holdings that efficiency is not a valid interest. In *Riley* this Court “reaffirm[ed] simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.” *Riley*, 487 U.S. at 795. And, quoting still another case, this Court in *AFPF* reaffirmed that “the prime objective of the First Amendment is not efficiency.” *AFPF*, 594 U.S. at 614-15 (quoting *McCullen v. Coakley*, 573 U.S. 464, 495 (2014)); *see also NIFLA*, 585 U.S. at 775 (“‘tepid response’ does not prove that an advertising campaign is not a sufficient alternative”).

5. In upholding Alaska’s compelled speech requirement, the Alaska Supreme Court has therefore deviated from this Court’s decisions in multiple ways. This Court should grant certiorari to make clear that on-communication disclosure is a new form of compelled speech, not subject to any exception from strict scrutiny, *see NIFLA*, 585 U.S. at 766-67; that the state must “demonstrate its need” for on-communication disclosure “in light of any less intrusive alternatives,” *AFPF*, 594 U.S. at 613; and

that efficiency is not a sufficient interest to justify violating the First Amendment, *id.* at 614-15.

**IV. This case presents an excellent vehicle for the questions presented.**

This case is an excellent vehicle to resolve the questions presented because the issues are cleanly presented. The First Amendment challenges have been raised at every stage—before the state agency, the reviewing trial court, and the state supreme court. And there are no factual issues that need to be addressed before the outcome can be determined. All that is necessary to resolve this case is that this Court clarify the standards for controlling issue speech.

There are no procedural obstacles to resolution—no issues with mootness, jurisdiction, or forfeiture. The case is final, and the record has been fully developed.

The Court will have a range of options to resolve the questions presented. Petitioner has pressed its facial and as-applied challenges at every stage. While the Court could decide to revisit previous decisions about issue speech, the Court could merely clarify the standards it has announced in those cases.

Certiorari has been sought repeatedly on many of the issues raised here. This has allowed the parties and potential amici to fully understand the issues and to be prepared to raise them for the Court’s resolution. There is nothing to be gained from any further percolation, which would come at the significant expense of indefinitely violating the fundamental First Amendment political speech and associational

rights of millions. Finally addressing the issues will conserve resources—those of this Court, lower courts, and potential parties. By speaking clearly, the Court can restore protection for core First Amendment freedoms.

For these reasons, this petition presents an excellent vehicle with which to resolve important questions of First Amendment law.

### CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

OWEN YEATES  
*Counsel of Record*  
 INSTITUTE FOR FREE SPEECH  
 1150 Connecticut Ave. NW  
 Suite 801  
 Washington, D.C. 20036  
 oyeates@ifs.org  
 (202) 301-3300

*Counsel for Petitioner*

JULY 13, 2026

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**APPENDIX A — OPINION OF THE SUPREME  
COURT OF THE STATE OF ALASKA,  
FILED FEBRUARY 13, 2026**

THE SUPREME COURT OF THE  
STATE OF ALASKA

Supreme Court No. S-18533  
Superior Court No. 3AN-21-07137 CI

ALASKA POLICY FORUM,

*Appellant,*

v.

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

*Appellees.*

No. 7801 – February 13, 2026

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

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

BORGHESAN, Justice.



*Appendix A***OPINION****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.”<sup>1</sup>

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.

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

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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 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.<sup>2</sup> The Alaska Public Offices Commission (the Commission) is the state agency that applies and enforces these campaign finance laws.<sup>3</sup> These laws impose three basic requirements on those who spend money to influence elections: reporting, registration, and disclosures.<sup>4</sup>

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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).

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First, expenditures made to influence the outcome of a ballot proposition must be reported to the Commission.<sup>5</sup> Every person making an expenditure for this purpose must “make a full report of expenditures made and contributions received, . . . unless exempt from reporting.”<sup>6</sup> 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 an election.”<sup>7</sup> 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.”<sup>8</sup> 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.<sup>9</sup>

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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).

7. AS 15.13.040(e).

8. AS 15.13.040(e)(4).

9. AS 15.13.040(h).

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

Third, certain election-related “communications” must include a disclosure identifying the person who paid for the communication.<sup>12</sup> 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.”<sup>13</sup> 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.”<sup>14</sup> 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 the communication.”<sup>15</sup> If the communication is made by an entity other than an individual or a candidate, the

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10. AS 15.13.050(a).

11. *Id.*

12. AS 15.13.090(a).

13. AS 15.13.400(3) (2020).

14. *Id.*

15. AS 15.13.090(a).

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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.”<sup>16</sup>

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.<sup>17</sup> This initiative, called “Alaska’s Better

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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”).

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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.

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.<sup>18</sup>

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

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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.

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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 voting system while threatening our democracy and failing to ensure that every vote counts.”<sup>19</sup> 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.<sup>20</sup> The final moments of the video show animated hands holding signs reading:

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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.*

*Appendix A***“PROTECT MY VOTE” and “SAY NO TO RANKED CHOICE VOTING.”<sup>21</sup>**

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.<sup>22</sup> The post began: “A voting trend to uproot the electoral process is sweeping the country and has made it all the way to Alaska:

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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>).



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ranked-choice voting.”<sup>23</sup> The piece described problems with 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.”<sup>24</sup> The post then directed readers to the Protect My Ballot website.<sup>25</sup>

**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

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23. *Id.*

24. *Id.*

25. *Id.*

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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 communication.”<sup>26</sup> 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.”<sup>27</sup> 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.”<sup>28</sup> The staff acknowledged that these definitions were specific to candidate elections, not ballot propositions. But staff, citing federal court decisions, reasoned that the definitions

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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).

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provided a useful framework for regulation of spending on ballot propositions.<sup>29</sup>

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,<sup>30</sup> staff highlighted APF’s “recent burst of activity against ranked choice voting as the November election approach[ed]” and reasoned that APF’s activities around ranked-choice voting were express 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

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29. The report cited *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (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>).

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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

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“significantly out of proportion to the degree of harm to the public for not having the information.”<sup>31</sup> 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.<sup>32</sup> In addressing APF’s statutory construction

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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

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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” requires “limited reference to outside events,”<sup>33</sup> 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”<sup>34</sup>—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*

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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.

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”).

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*v. Miles*,<sup>35</sup> 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.<sup>36</sup> It rejected APF’s argument that Alaska’s “first-dollar” registration and reporting requirements were unconstitutional.<sup>37</sup> And it rejected APF’s argument that the reporting and disclosure laws were not narrowly tailored.

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

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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, 141 S.Ct. 2373, 210 L.Ed.2d 716 (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.

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administrative board’s decision.”<sup>38</sup> Different standards apply depending on the subject of review.<sup>39</sup>

“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.”<sup>40</sup>

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.”<sup>41</sup>

“We apply our independent judgment to questions of constitutional law and review de novo the construction of the . . . federal Constitution[.]”<sup>42</sup>

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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)).



*Appendix A***IV. DISCUSSION**

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.

*Appendix A***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.<sup>43</sup> The legislature defined “expenditures” in a way that narrows the term when applied to speech related to candidate elections.<sup>44</sup>

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 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.<sup>45</sup> The Court construed the statute to cover only “funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.”<sup>46</sup> After Congress amended FECA accordingly, the Ninth Circuit, in *Federal Election*

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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).

45. 424 U.S. 1, 76-82, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

46. *Id.* at 80, 96 S.Ct. 612 (footnote omitted).

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*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.”<sup>47</sup>

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

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

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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).

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reported.<sup>52</sup> 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.<sup>53</sup> 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

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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, 115 S.Ct. 1511, 131 L.Ed.2d 426 (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, 127 S.Ct. 2652, 168 L.Ed.2d 329 (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.”

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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 proposition or question.”<sup>54</sup> 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.<sup>55</sup> 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,

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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”).

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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.<sup>56</sup> The Commission did not err by limiting its enforcement of Alaska’s campaign finance statutes in this way.

**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.

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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, 124 S.Ct. 619, 157 L.Ed.2d 491 (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, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989))).

*Appendix A***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.<sup>57</sup>

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.<sup>58</sup> 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* susceptible

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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).

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to a different interpretation.<sup>59</sup> To apply this standard, we must use our independent judgment.<sup>60</sup>

**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.<sup>61</sup> 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”<sup>62</sup> ballot initiative. The latter term includes the former, so

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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).



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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*,<sup>63</sup> which followed the U.S. Supreme Court’s seminal campaign finance decision in *Buckley v. Valeo*,<sup>64</sup> we look to those cases for guidance on what the legislature intended.

In *Buckley* the Court considered the constitutionality of various provisions of FECA.<sup>65</sup> 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.”<sup>66</sup> The Court held that in light of FECA’s significant criminal penalties, this definition had to be narrowly construed to avoid constitutional vagueness problems.<sup>67</sup> The Court was particularly concerned that the provision, without a narrowing construction, “could be interpreted to reach groups engaged purely in

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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*).

64. 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

65. *Id.*

66. *Id.* at 77, 96 S.Ct. 612 (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, 96 S.Ct. 612.

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issue discussion,” rather than only those advocating an electoral result.<sup>68</sup> 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.”<sup>69</sup> Congress amended FECA accordingly.<sup>70</sup>

In *Furgatch* the Ninth Circuit considered the newly revised provision of FECA and expanded upon the “express advocacy” test the Supreme Court had articulated in *Buckley*.<sup>71</sup> 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.’”<sup>72</sup> 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.”<sup>73</sup>

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68. *Id.* at 79, 96 S.Ct. 612.

69. *Id.* at 80, 96 S.Ct. 612 (footnote omitted).

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

71. *Id.* at 864; *see also Buckley*, 424 U.S. at 44, 96 S.Ct. 612 (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, 96 S.Ct. 612.

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

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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.”<sup>74</sup>

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.”<sup>75</sup> Yet the court cautioned that “context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words.”<sup>76</sup>

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.”<sup>77</sup> Second, the speech must contain “a clear plea for action” and not be “merely informative.”<sup>78</sup> 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

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74. *Id.* at 864.

75. *Id.* at 863-64.

76. *Id.* at 864.

77. *Id.*

78. *Id.*

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vote for or against a candidate or encourages the reader to take some other kind of action.”<sup>79</sup> 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.<sup>80</sup> The ad began with the words, “DON’T LET HIM DO IT,” then described actions the president had done or would

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79. *Id.*

80. *Id.* at 865.

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do, then concluded again: “DON’T LET HIM DO IT.”<sup>81</sup> The court reasoned that “[t]iming the appearance of the advertisement less than a week before the election left no doubt of the action proposed.”<sup>82</sup> The advertisement at issue in *Furgatch* never explicitly mentioned the upcoming presidential election,<sup>83</sup> 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.’”<sup>84</sup> 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.<sup>85</sup> The average reader or

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81. *Id.* at 858.

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

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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.”<sup>86</sup>

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 objective reader’s interpretation of the others.<sup>87</sup> 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.

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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).

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.

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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."<sup>88</sup> 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 lead to. Not only can Ranked Choice Voting cause votes to be

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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.

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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.<sup>89</sup> 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

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89. AS 15.13.400(3).



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indirectly identify” standard.<sup>90</sup> 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.<sup>91</sup> 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 practice in Oregon; another proposed ad warned that assisted suicide “turns doctors into killers.”<sup>92</sup> 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.”<sup>93</sup> The Ninth Circuit was unpersuaded by that argument.<sup>94</sup> 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.”<sup>95</sup> The court reasoned that the “detailed language and unique timing” of the communications rendered them “susceptible of no reasonable interpretation other than

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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.

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

93. *Id.* at 1014.

94. *Id.* at 1015-16.

95. *Id.* at 1015.

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as an urgent appeal to vote down the measure.”<sup>96</sup> The court reached this conclusion in rejecting a constitutional challenge to the statute, rather than in interpreting the statutory standard.<sup>97</sup> 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.

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.*<sup>98</sup> 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

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96. *Id.* at 1015-16.

97. *Id.* at 1014-16.

98. 551 U.S. 449, 470, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (Roberts, C.J.).

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advertisements.<sup>99</sup> 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.”<sup>100</sup> The Court, in a split opinion, ruled that federal law was unconstitutional as applied to the ads.<sup>101</sup> The principal opinion reasoned that prohibition on corporations paying for political advertisements could be upheld if the ads amounted to express advocacy.<sup>102</sup> But it concluded that the ads were not express advocacy

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99. *Id.* at 464, 127 S.Ct. 2652.

100. *Id.* at 458-59, 127 S.Ct. 2652.

101. *Id.* at 481, 127 S.Ct. 2652.

102. *Id.* at 465, 127 S.Ct. 2652 (Roberts, C.J.) (citing *McConnell v. FEC*, 540 U.S. 93, 206, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003)). The principal opinion was joined by one other justice who also separately concurred. *Id.* at 482, 127 S.Ct. 2652 (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, 127 S.Ct. 2652 (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, 127 S.Ct. 2652 (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, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)). The narrowest opinion supporting the judgment in *Wisconsin Right To Life* is the principal opinion.

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because they “[did] not mention an election, candidacy, political party, or challenger” and did not “take a position on a candidate’s character, qualifications, or fitness for office.”<sup>103</sup> 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.”<sup>104</sup>

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.<sup>105</sup> 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.<sup>106</sup> 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

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103. *Wis. Right to Life, Inc.*, 551 U.S. at 470, 127 S.Ct. 2652 (Roberts, C.J.).

104. *Id.*

105. *Id.* at 455, 127 S.Ct. 2652 (citing 2 U.S.C. § 441b(b)(2) (2000 ed., Supp. IV)).

106. *Id.* at 457, 127 S.Ct. 2652; *id.* at 483, 127 S.Ct. 2652 (Scalia, J., concurring in judgment).

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speech.”<sup>107</sup> 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.<sup>108</sup> 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.”<sup>109</sup>

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

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107. *Citizens United v. FEC*, 558 U.S. 310, 369, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

108. *Wis. Right to Life, Inc.*, 551 U.S. at 458-59, 127 S.Ct. 2652.

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

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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.<sup>110</sup>

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,”<sup>111</sup> 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 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

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

111. 807 F.2d at 858.

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plea to action”:<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> 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.”<sup>115</sup>

APF maintains that because ranked-choice voting was only one of three components of the Initiative, its publications criticizing ranked-choice voting do not

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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.

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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 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.<sup>116</sup> The video begins by describing how traditional voting works, then states: “Now, some wealthy interest groups are pushing for ranked-choice voting.”<sup>117</sup> 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

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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.*



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more.<sup>118</sup> The last frame of the video features animated hands holding up signs that read “PROTECT MY VOTE” and “SAY NO TO RANKED CHOICE VOTING.”<sup>119</sup> When a cursor is moved over the video, it displays a header with APF’s logo next to the title.<sup>120</sup> 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.”<sup>121</sup> At the top of the web page is a banner with APF’s name, logo, and vision statement: “an Alaska that continuously grows prosperity by maximizing individual opportunities and freedom.”<sup>122</sup>

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

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

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audience for the message. The video urges viewers to “SAY NO TO RANKED CHOICE VOTING.”<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> The ads did not expressly reference the initiative, but pointedly criticized assisted suicide.<sup>126</sup> For example, one of the proposed radio ads referenced the Hippocratic Oath, then stated that assisted suicide undermines the trust the oath promotes by “turn[ing] doctors into killers. That’s dangerous.”<sup>127</sup> Compared to that ad, the ranked-choice

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123. *Id.*

124. 551 U.S. 449, 458-59, 470, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007).

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

126. *Id.* at 995-96.

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).

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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-

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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 as a plea to vote against the ballot measure that would bring ranked-choice voting to Alaska.<sup>128</sup>

**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

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

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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.”<sup>129</sup> So too with the closing pitch that “[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

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

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what is prohibited” and to “provide explicit standards for those who apply them.”<sup>130</sup> “When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.”<sup>131</sup> Even so, “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity”<sup>132</sup> because “we can never expect mathematical certainty from our language.”<sup>133</sup>

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, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

131. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012); *see also Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (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, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

133. *Grayned*, 408 U.S. at 110, 92 S.Ct. 2294.

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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.<sup>134</sup> 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

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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).

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this interpretation, we do not believe the definition of “communication” is void for vagueness.<sup>135</sup>

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.<sup>136</sup> But this decision is not directly on 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.

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135. *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (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).



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One of the Commission's past advisory opinions illustrates this dynamic.<sup>137</sup> At the time, two ballot propositions concerning regulations for large mines were set to come before the voters at the next election.<sup>138</sup> 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."<sup>139</sup> 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.<sup>140</sup> 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.

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

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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.

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to “hedge and trim”<sup>141</sup> to avoid their speech being misinterpreted as urging an electoral result.<sup>142</sup> 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.

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141. *Buckley v. Valeo*, 424 U.S. 1, 43, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535, 65 S.Ct. 315, 89 L.Ed. 430 (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.”).

*Appendix A***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 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.

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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”<sup>143</sup>—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

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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. . . .”).

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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.<sup>144</sup> By contrast, an ad expressing opposition to a policy while referring to a ballot proposition about that policy does not have the same ambiguity.<sup>145</sup> 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

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144. 551 U.S. 449, 459, 127 S.Ct. 2652, 168 L.Ed.2d 329 (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)).

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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 “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.<sup>146</sup> 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<sup>147</sup> or the subject of an application filed with the lieutenant governor as part

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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”).

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of that process.<sup>148</sup> 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.<sup>149</sup> We also note that a person may request an advisory opinion from the Commission on whether planned messages would be subject to regulation.<sup>150</sup> Therefore, we do not believe the reporting and disclosure statutes are unconstitutionally vague.<sup>151</sup>

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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, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010). APF made the four 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, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality opinion). “It is a basic principle of due process that an enactment is void for vagueness

*Appendix A***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.<sup>152</sup> 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.

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

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if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). But “[a] clear and precise enactment may nevertheless be ‘overbroad’ if in its reach it prohibits constitutionally protected conduct.” *Id.* at 114, 92 S.Ct. 2294 (citing *Zwickler v. Koota*, 389 U.S. 241, 249-50, 88 S.Ct. 391, 19 L.Ed.2d 444 (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.



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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.”<sup>153</sup> 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”

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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>).

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in the advisory opinion discussed earlier,<sup>154</sup> 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.”<sup>155</sup> 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.

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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](https://www.elections.alaska.gov/petitions/19AKBE/19AKBE%20-%20Ballot%20Language%20Summary.pdf) (archived at <https://perma.cc/L7DN-2MEK>).

*Appendix A***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.<sup>156</sup> Exacting scrutiny requires “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.”<sup>157</sup> 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.”<sup>158</sup>

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

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156. *Citizens United v. FEC*, 558 U.S. 310, 366-67, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

157. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)) (internal quotation marks omitted).

158. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 609-10, 141 S.Ct. 2373, 210 L.Ed.2d 716 (2021).

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if is the least restrictive means of achieving a compelling state interest.<sup>159</sup> 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.<sup>160</sup>

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.”<sup>161</sup> 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.’”<sup>162</sup> We therefore review APF’s challenge to both the reporting and disclosure requirements using exacting scrutiny.

Exacting scrutiny requires “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently

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159. *McCullen v. Coakley*, 573 U.S. 464, 478, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014).

160. 585 U.S. 755, 773-74, 138 S.Ct. 2361, 201 L.Ed.2d 835 (2018).

161. *Id.* at 766, 138 S.Ct. 2361 (alteration in original) (quoting *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (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, 130 S.Ct. 876 (applying exacting scrutiny to disclosures); *Buckley*, 424 U.S. at 64-66, 96 S.Ct. 612 (same).

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important’ governmental interest.”<sup>163</sup> 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.”<sup>164</sup>

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.<sup>165</sup> 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.”<sup>166</sup> 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.”<sup>167</sup> 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.”<sup>168</sup>

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163. *Citizens United*, 558 U.S. at 366-67, 130 S.Ct. 876 (quoting *Buckley*, 424 U.S. at 64, 66, 96 S.Ct. 612).

164. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 609-10, 141 S.Ct. 2373, 210 L.Ed.2d 716 (2021).

165. *Citizens United*, 558 U.S. at 367, 130 S.Ct. 876 (citing *Buckley*, 424 U.S. at 66, 96 S.Ct. 612).

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).

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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.

**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.<sup>169</sup> Political groups and nonprofits (but not individuals) must also register before making such expenditures.<sup>170</sup> 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

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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).

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be reported if they total less than \$500 annually.<sup>171</sup> 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.<sup>172</sup> This means that even low-cost communications by groups, for-profit entities, and labor unions must contain a disclosure.

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

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171. AS 15.13.040(h).

172. AS 15.13.090 (disclosure requirement applicable to “communications”); AS 15.13.400(3) (defining “communication”).

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expenditures in candidate elections.<sup>173</sup> 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.”<sup>174</sup> 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.”<sup>175</sup> 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.”<sup>176</sup>

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 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.<sup>177</sup> The church’s

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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, 96 S.Ct. 612, 46 L.Ed.2d 659 (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.

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



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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.<sup>178</sup> 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."<sup>179</sup>

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.<sup>180</sup> 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.<sup>181</sup>

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178. *Id.* at 1024-25.

179. *Id.* at 1034.

180. 548 U.S. 230, 249-50, 262, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (plurality opinion); *see also id.* at 264-65, 126 S.Ct. 2479 (Kennedy, J., concurring in judgment) (agreeing that Vermont's contribution limits violated First Amendment); *id.* at 265-73, 126 S.Ct. 2479 (Thomas, J., concurring in judgment) (same).

181. *Citizens United v. FEC*, 558 U.S. 310, 369, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

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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 relied heavily on the particular burdens of Colorado’s disclosure regime.<sup>182</sup> 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.<sup>183</sup> But the court did not conclude that the

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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”).

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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.”<sup>184</sup>

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 [constitutional] challenge requires evaluation of the facts of the particular case in which the challenge arises.”<sup>185</sup>

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.

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184. *Id.* at 36.

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)).

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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*.<sup>186</sup> 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.<sup>187</sup>

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 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.<sup>188</sup>

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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).

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.

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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.<sup>189</sup> 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*.<sup>190</sup> Although “expending a few moments of a[n employee’s] time” to repost a video to a business’s social media page might present a different case,<sup>191</sup> APF’s

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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).

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).

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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.”<sup>192</sup> 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.<sup>193</sup>

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.”<sup>194</sup>

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192. *Citizens United v. FEC*, 558 U.S. 310, 371, 130 S.Ct. 876, 175 L.Ed.2d 753 (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, 141 S.Ct. 2373, 210 L.Ed.2d 716 (2021) (quoting *United States*

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APF does not even recite this standard, let alone attempt to explain why it is met. It makes no attempt to explain 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.”<sup>195</sup> 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

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*v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)); *see also Parker v. Levy*, 417 U.S. 733, 760, 94 S.Ct. 2547, 41 L.Ed.2d 439 (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, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973))).

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

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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. 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.<sup>196</sup> 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.<sup>197</sup> Therefore, we do not agree that

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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>).



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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.<sup>198</sup>

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 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 . . .

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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).

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video component.”<sup>199</sup> 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)).<sup>[200]</sup>

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.

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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.

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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 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,<sup>201</sup> 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

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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).

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to the interest served.”<sup>202</sup> 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.”<sup>203</sup> Narrow tailoring does not, however, require that a legislature choose the least restrictive means of achieving its ends.<sup>204</sup>

The Supreme Court upheld disclosure requirements in *Citizens United*, observing that they represent “a less restrictive alternative to more comprehensive regulations of speech.”<sup>205</sup> And Alaska’s reporting statute carves out some common 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.<sup>206</sup> 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.<sup>207</sup> As for reporting of expenditures, individual spending of up

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202. *McCutcheon v. FEC*, 572 U.S. 185, 218, 134 S.Ct. 1434, 188 L.Ed.2d 468 (2014) (plurality opinion) (quoting *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)).

203. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 613, 141 S.Ct. 2373, 210 L.Ed.2d 716 (2021) (emphasis in original).

204. *Id.* at 608, 141 S.Ct. 2373.

205. *Citizens United v. FEC*, 558 U.S. 310, 369, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

206. AS 15.13.400(3).

207. AS 15.13.090(b).

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to \$500 on printed materials related to ballot propositions is exempt from reporting.<sup>208</sup> 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.”<sup>209</sup> 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.<sup>210</sup> 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.”<sup>211</sup> So not all donations to the entity qualify as “contributions” that require the donor be disclosed.

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

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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).

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to segregate donations earmarked for election activity in a separate account for reporting purposes to avoid reporting donations not intended for such purposes.<sup>212</sup> 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.<sup>213</sup>

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*<sup>214</sup> and the Supreme Court's

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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).

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decision in *National Institute of Family & Life Advocates v. Becerra*.<sup>215</sup>

To the extent that the *Heller* decision held that an on-message disclosure is compelled speech that violates the First Amendment,<sup>216</sup> it was undercut by the 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.<sup>217</sup> 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.<sup>218</sup> 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.”<sup>219</sup> 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

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215. 585 U.S. 755, 138 S.Ct. 2361, 201 L.Ed.2d 835 (2018).

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

217. *Citizens United v. FEC*, 558 U.S. 310, 366-67, 130 S.Ct. 876, 175 L.Ed.2d 753 (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)).

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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.”<sup>220</sup> The asserted government interest for the notice requirement was “providing low-income women with information about state-sponsored services.”<sup>221</sup> The Court struck down the notice requirement, reasoning that it was not closely tailored to the asserted interest because the government “could inform the women itself with a public-information campaign.”<sup>222</sup>

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

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220. *Nat’l Ins. of Fam. & Life Advoc.*, 585 U.S. at 766, 138 S.Ct. 2361.

221. *Id.* at 773, 138 S.Ct. 2361.

222. *Id.* at 773, 775, 138 S.Ct. 2361.



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backing the speaker.”<sup>223</sup> 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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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).

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**APPENDIX**

**JULY 24 2020 PRESS RELEASE**

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

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

**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**.

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

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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.”

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

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

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

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

**Matthew Gagnon**, CEO of Maine Policy Institute:

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

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

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ALASKA POLICY FORUM

For Immediate Release      Contact: Melodie Wilterdink  
October 8, 2020                      (410) 725-9079  
Melodie@AlaskaPolicyForum.org

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

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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](http://www.AlaskaPolicyForum.org).

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OUR VISION IS AN ALASKA THAT  
CONTINUOUSLY GROWS PROSPERITY  
BY MAXIMIZING INDIVIDUAL  
OPPORTUNITIES AND FREEDOM

**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

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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.



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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://hawaiiifreepress.com/Portals/0/Article%20Attachments/Racial%20and%20Ethnic%20Disparities%20in%20RCV.pdf>) and Minneapolis (<https://www.startribune.com/ranked-choice-voting-hurts-minneapolis-minorities/195463981/?refresh=true>), 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/>

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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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Johan Soto is the Fall 2020 Policy Analysis Intern at Alaska Policy Forum. He is currently studying nuclear science and engineering at the Massachusetts Institute of Technology.

**APPENDIX B — DECISION AND ORDER OF THE  
SUPERIOR COURT FOR THE STATE OF ALASKA,  
THIRD JUDICIAL DISTRICT AT ANCHORAGE,  
FILED AUGUST 16, 2022**

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

No. 3AN-21-007137CI  
APOC No. 20-05-CD

ALASKA POLICY FORUM,

*Appellant,*

vs.

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

*Appellees.*

Filed August 16, 2022

**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

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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.”<sup>1</sup> 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.

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1. SOA 000115.

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In July, 2019, a group of Alaska residents filed an initiative called “Alaska’s Better Elections Initiative,” with an abbreviated title of “19AKBE.”<sup>2</sup> 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.”<sup>3</sup> 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 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

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2. SOA 000088.

3. SOA 000089.

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pamphlets and polling places; and amending the definition of “political party.”<sup>4</sup>

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”).<sup>5</sup> 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 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

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

5. SOA 000017.

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may soon be coming to your neck of the woods. Don't be surprised when it produces the opposite result of what you were promised.”<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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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/rev-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.

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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.

On July 31, 2020, APF created a blog post containing an embedded YouTube video describing RCV.<sup>9</sup> 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.<sup>10</sup> 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.”<sup>11</sup> APF responded

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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.



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to the complaint on September 24, 2020, by denying any campaign finance law violations.<sup>12</sup> 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 cost of \$643.20” between September 1, 2019, and September 8, 2020.<sup>13</sup> Yes on 2 filed its reply on October 1, 2020.<sup>14</sup> Yes on 2 never supplemented its complaint.

On October 8, 2020, APF published a report on its website critical of RCV.<sup>15</sup> 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.<sup>16</sup> 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

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12. SOA 000017-23.

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.

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RCV. APF also issued a press release that same day announcing the report's publication.<sup>17</sup> 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."<sup>18</sup> The post noted that RCV was "sweeping the country and has made it all the way to Alaska."<sup>19</sup> 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.<sup>20</sup> 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

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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/rev-disenfranchises-voters/> (last visited May 19, 2022).

19. SOA 000153.

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

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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.<sup>21</sup> Staff acknowledged that only two reposted op-eds on PMB’s website actually referenced 19AKBE, neither of which were attributed to APF.<sup>22</sup> 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.”<sup>23</sup> Focusing on the “the timing of the activity alleged, and the context of APF’s [RCV] communications,” staff reasoned that APF’s activities opposing RCV “are express communications.”<sup>24</sup> Staff thus concluded that APF violated AS 15.13.040(d), .050(a), and .090(a).<sup>25</sup> Staff recommended a reduced civil penalty of \$8,065 in light of APF’s status as an inexperienced filer.<sup>26</sup> The report also recommended dismissal of the allegations against PMB, by explaining that “a reasonable interpretation is that the website is a clearinghouse of

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21. SOA 000048.

22. SOA 000038.

23. SOA 000046.

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.

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information to be used *[sic]* opponents to [RCV] for a variety of purposes.”<sup>27</sup> 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.<sup>28</sup> APF attached an exhibit detailing its long history of educating the public on election reforms although none of those election reforms dealt with RCV.<sup>29</sup> APF also sought further mitigation of any civil penalties as disproportionate to the \$643.20 in staff time APF actually expended.<sup>30</sup>

After several continuances, APF filed a motion to dismiss and a hearing memorandum on May 28, 2021.<sup>31</sup> The filing repeated APF’s prior arguments and raised additional claims that Alaska’s campaign finance laws violated the First Amendment.<sup>32</sup> APF asserted that,

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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.

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.

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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.<sup>33</sup> APF also argued that Evidence Rule 404 prohibited APOC from relying on "propensity evidence" to establish liability.<sup>34</sup> 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)."<sup>35</sup>

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 under AS 15.13.140(b)(1) as a violation of due process.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

On June 21, 2021, APOC issued a final order on the matter. The final order mostly adopted the staff report's

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33. SOA 000225-26.

34. SOA 000228.

35. SOA 000250.

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).

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conclusions on the merits.<sup>39</sup> 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.”<sup>40</sup> 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.<sup>41</sup> Although APOC found that APF had violated four statutory provisions,<sup>42</sup> APOC declined to impose any civil penalties.<sup>43</sup> On July 12, 2021, in response to Yes on 2’s request for clarification,<sup>44</sup> APOC amended its final order to require APF “to comply with [reporting and disclosure] requirements within 30 days.”<sup>45</sup>

APF appealed APOC’s decision to the superior court.

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39. SOA 000268.

40. SOA 000269.

41. SOA 000273.

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).

*Appendix B***III. STANDARD OF REVIEW**

Appeals from administrative agency decisions to the superior court are reviewed under a variable standard.<sup>46</sup> Constitutional issues and questions of law where no agency expertise is involved are reviewed de novo.<sup>47</sup> But for questions of law that involve “agency expertise or the determination of fundamental policies within the scope of the agency’s statutory functions,”<sup>48</sup> courts apply the “reasonable basis test,” which asks “whether the agency’s decision is supported by the facts and has a reasonable basis in law.”<sup>49</sup> More deference is afforded “to agency interpretations that are ‘longstanding and continuous.’”<sup>50</sup> 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.”<sup>51</sup>

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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)).

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)).

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The reviewing court only determines whether substantial evidence exists, it does not choose between competing inferences from the facts.<sup>52</sup> Likewise, the reviewing court does not evaluate the strength of the substantial evidence, but merely notes its presence.<sup>53</sup>

**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."<sup>54</sup> This is accomplished primarily through a regime of mandatory reporting, registration, and disclosure of independent expenditures and campaign-related communications.<sup>55</sup> Whether one must comply

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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).

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)



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with those requirements thus depends on whether the activity meets the definitions of “expenditure” and “communication.”<sup>56</sup>

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.”<sup>57</sup> This definition “includes an express communication and an electioneering communication, but does not include an issues

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(“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.

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communication.”<sup>58</sup> 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.”<sup>59</sup> 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.”<sup>60</sup> 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.”<sup>61</sup>

**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

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58. AS 15.13.400(7)(C).

59. AS 15.13.400(8).

60. AS 15.13.400(13).

61. AS 15.13.400(3).

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(“RRC”).<sup>62</sup> RRC was a nonprofit organization organized for the purposes of promoting “public policies that uphold responsible access and maximization of hunting and fishing resources.”<sup>63</sup> 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 through 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.”<sup>64</sup> 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

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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.

63. *RRCAO*, *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).

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directly in campaigning activities.”<sup>65</sup> 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.<sup>66</sup> Some of RRC’s advertisements explicitly encouraged readers to “Protect clean water” and “Oppose the Pebble Mine.”<sup>67</sup> RRC also made stickers listing RRC’s website alongside the phrase “clean water.”<sup>68</sup> 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.”<sup>69</sup> Applying the test for candidate “express communication,” APOC determined that RRC’s sample advertisements were not expenditures because they

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65. *RRCAO*, *supra* note 62, at 9-10.

66. *Id.* at 10.

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

68. *d.* 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)).

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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.<sup>70</sup>

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.”<sup>71</sup>

RRC also asked whether the “dissemination and promotion of an electronic newsletter or web site, that discusses the Pebble Mine controversy, constitute[s] a reportable expenditure?”<sup>72</sup> 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

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70. *Id.* at 11-12.

71. *Id.* at 12.

72. *Id.* at 13.

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of the State of Alaska, either by legislation or by ballot initiative.”<sup>73</sup> 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.”<sup>74</sup>

## 2. Renewable Resources Foundation

APOC revisited the issue of ballot measure expenditures in 2013 with Renewable Resources Foundation (“RRF”).<sup>75</sup> 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.”<sup>76</sup> APOC observed that RRF’s website was “openly against the project going forward.”<sup>77</sup> 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 mining operations, including Pebble Mine.<sup>78</sup>

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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.*

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).

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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.<sup>79</sup> APOC also noted some crossover between RRF and the ballot group as several officers served on both organizations.<sup>80</sup>

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?”<sup>81</sup> 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

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

80. *Id.* at 2.

81. *Id.*

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RRF employee's time and the costs associated with the party are reportable to APOC.<sup>82</sup>

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

### 3. Bags for Change

APOC's most recent guidance on this issue is the 2019 advisory opinion requested by Bags for Change ("BFC").<sup>84</sup> BFC was formed in 2016 as an unincorporated nonprofit association that engaged in educating the public about the harmful effects of plastics.<sup>85</sup> BFC unsuccessfully petitioned the Sitka Assembly to enact a fee on plastic bags in 2018.<sup>86</sup> The following year, some members of BFC separately sponsored a citizen initiative to enact

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

83. *Id.*

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.*



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an ordinance prohibiting plastic bags.<sup>87</sup> BFC wanted to continue its educational efforts while not directly supporting the initiative, and thus sought advice.<sup>88</sup>

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.<sup>89</sup> BFC provided several examples of its past educational efforts, including flyers and community projects.<sup>90</sup> The examples were decidedly against plastic bags, including one flyer titled “Single Use Plastic Bags = BAD.”<sup>91</sup> Other examples directly referenced BFC’s own efforts to “decrease the use of disposable bags in Sitka by implementing a bag fee.”<sup>92</sup> 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.”<sup>93</sup> APOC reasoned that, even though BFC’s activities “might be interpreted by listeners who are aware of the

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87. *Id.* at 1-2.

88. *Id.* at 2.

89. *Id.* at 2.

90. *Id.* at 1.

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

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

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

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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.”<sup>94</sup>

BFC also requested guidance on a new brochure it sought to distribute that directly identified the initiative.<sup>95</sup> 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.<sup>96</sup> APOC observed that, unlike BFC’s other communications or those at issue in the RRC and RRF advisory opinions, BFC’s proposed brochure “identifies the proposition and voting in its brochure.”<sup>97</sup> 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.”<sup>98</sup> 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.<sup>99</sup> Although that meant the brochure did not trigger the registration and reporting requirements,

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94. *Id.* at 4.

95. *Id.* at 2.

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

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

98. *Id.*

99. *Id.* at 5-6.

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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.”<sup>100</sup>

**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.”<sup>101</sup> These commands additionally apply to the states through the Fourteenth Amendment’s Due Process Clause.<sup>102</sup> The right to freedom of speech includes the right to make political statements opposing or supporting candidates or policies.<sup>103</sup> Independent expenditures of money are also the equivalent of speech.<sup>104</sup>

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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).

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

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Freedom of assembly includes the right to associate without fear of reprisal from compelled disclosure.<sup>105</sup> But neither right is absolute and must be balanced against competing rights and interests.<sup>106</sup>

**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.<sup>107</sup> APF does not argue that it is prejudiced by these omissions. Appellees APOC and Yes on 2 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.<sup>108</sup>

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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 staffs recommendations, it adopted staffs analyses as well.

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

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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.”<sup>109</sup> 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<sup>110</sup>—does not, without more, become a communication or expenditure.<sup>111</sup> 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,

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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).

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and a typed transcript of the record of proceedings before the agency.”<sup>112</sup> 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.”<sup>113</sup> Additionally, the record on appeal from an agency decision “properly consists of evidence that was either ‘submitted to’ or ‘considered by’ the administrative board.”<sup>114</sup> 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.<sup>115</sup> 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”

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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)).

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APOC,<sup>116</sup> whether APF received adequate notice of and an opportunity to respond to that evidence,<sup>117</sup> and whether the record is sufficient to facilitate appellate review.<sup>118</sup> 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.<sup>119</sup> The staff report then provided still-active links to both the July video and the October report, and staff described the relevant portions thereof.<sup>120</sup> APF’s motion to dismiss likewise included shortened URLs directing to both

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

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.

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webpages.<sup>121</sup> And in APOC's final order, its summary of the staff report plainly referenced both the July video and the October report.<sup>122</sup> It is clear to this court, just as it was clear to APF throughout the proceedings, precisely which activities are at issue.<sup>123</sup> 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,<sup>124</sup> 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.

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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.

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.



*Appendix B***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.<sup>125</sup> This is because the statutory language only refers to “candidate” communications and thus implicitly excludes ballot measure communications.<sup>126</sup> But appellees point to the RRC, RRF, and BFC opinions as evidence that this longstanding interpretation has a reasonable basis and should be afforded deference.<sup>127</sup> 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.<sup>128</sup>

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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”).

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

128. Appellee APOC’s Brief at 10-13.

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Because this question involves an agency’s interpretation of the statutory scheme it is charged with administering, this court applies the reasonable basis test.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup> 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 measure expenditures.<sup>132</sup> APOC confirmed this interpretation as recently as 2019.<sup>133</sup> Contrary to APF’s arguments, applying the definition of “express communication” does not expand the scope

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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. *RRCAO*, *supra* note 62, at 11.

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.

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of reportable ballot measure expenditures-without this limitation, AS 15.13.400(7)(A)(iv) encompasses *all* paid communications.<sup>134</sup> Not only is APOC's interpretation reasonably based on federal case law, but also it is longstanding and consistent with statute.<sup>135</sup> 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."<sup>136</sup> 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 proposition."<sup>137</sup> But this

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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.

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

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language is indistinguishable from the statutory definition of “express communication.”<sup>138</sup> APF even relies on the same case APOC cited to support its interpretation.<sup>139</sup> 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.”<sup>140</sup>

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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 staffs 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.

*Appendix B***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.<sup>141</sup> Alaska Statute 15.13.400(3) broadly defines "communication" as "an announcement or 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."<sup>142</sup> 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

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

142. SOA 000273.

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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 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).<sup>143</sup> 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.<sup>144</sup>

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143. Appellee APOC's Brief at 30.

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

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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.<sup>145</sup> 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.<sup>146</sup> But the Ninth Circuit rejected that argument, reasoning that “[t]he federal and the Alaska definitions operate in the same way.”<sup>147</sup> 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.”<sup>148</sup> The Ninth Circuit thus interpreted Alaska’s definition as coextensive with the federal definitions.<sup>149</sup>

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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).

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.

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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.”<sup>150</sup> Whereas under federal law, the definition of “electioneering communication” requires “a *clearly identified* candidate.”<sup>151</sup> 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*.”<sup>152</sup> In other 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, in 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

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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).



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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.”<sup>153</sup> 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.”<sup>154</sup> In other words, APOC could reasonably conclude that APF was clearly urging voters to oppose RCV by defeating 19AKBE.

**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].”<sup>155</sup> 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

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153. SOA 000153.

154. SOA 000153-54.

155. AS 15.13.400(8) (emphasis added).

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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.”<sup>156</sup> 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.”<sup>157</sup>

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 observing that RRC had previously engaged in educational activities for several years.<sup>158</sup> The BFC opinion likewise noted in its analysis that “BFC urges numerous different kinds of opposition activity” rather than just banning plastic bags.<sup>159</sup> 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*.”<sup>160</sup> Here, much like RRC and BFC,

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156. SOA 000048.

157. SOA 000271.

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

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

160. *Id.* at 5.

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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.”<sup>161</sup> Here APOC staff reasonably concluded that “APF has engaged in a recent burst of activity against [RCV] as the November election approaches” in part based on three alleged communications in October, 2020.<sup>162</sup> 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

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

162. SOA 000048.

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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.<sup>163</sup>

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

### **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 respond that the Ninth Circuit has already rejected an identical challenge in *Alaska Right to Life*

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163. SOA 000109, 272.

164. SOA 000110.

165. SOA 000273.

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*Committee v. Miles*.<sup>166</sup> 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.”<sup>167</sup> 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.”<sup>168</sup> Only

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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

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a “sufficiently important” interest may outweigh any potential infringement of First Amendment rights.<sup>169</sup> 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.<sup>170</sup> 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.<sup>171</sup> In 2010, the Court stated in *Citizens United v. FEC* that exacting scrutiny applies to both “[d]isclaimer and disclosure requirements.”<sup>172</sup>

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*,<sup>173</sup> a 2004 decision from the Ninth Circuit. Utilizing the U.S. Supreme Court case of *McIntyre v. Ohio Elections Commission*,<sup>174</sup> the *Heller* court applied

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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.

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

170. *Id.* at 66-68.

171. *See John Doe No. I 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

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strict scrutiny to a Nevada statute that forced the disclosure of the identity of persons “responsible for paying for” any published election-related materials.<sup>175</sup> ACLU of Nevada brought a facial challenge to the statute as impermissibly prohibiting all anonymous political discourse, thereby chilling otherwise protected forms of political speech.<sup>176</sup> 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.”<sup>177</sup> In dicta, the *Heller* court also drew a distinction between First Amendment implications

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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.

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”).

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for an individual acting anonymously and corporations, considering “the highly-regulated corporate form.”<sup>178</sup> But applying strict scrutiny, the court struck down the statute as not narrowly tailored to the state’s interest.<sup>179</sup>

But *Heller* is distinguishable, because the issue there was whether the government could compel disclosure of otherwise protected *anonymous* speech.<sup>180</sup> 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.<sup>181</sup> Moreover, *Heller* itself recognizes that there is a distinction between

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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.”).

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.



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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.<sup>182</sup> This court accordingly rejects APF's arguments and applies exacting scrutiny to each of its constitutional challenges.

**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.

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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 Advoc. 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).

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“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.”<sup>183</sup> 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.”<sup>184</sup>

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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 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)).

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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.”<sup>185</sup> 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.<sup>186</sup> Courts cannot invalidate an otherwise properly enacted statute based on hypothetical scenarios and conjecture.<sup>187</sup>

The first case APF relies on is *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*.<sup>188</sup> In that case a Montana pastor allegedly supplied in-kind expenditures in support of a ballot measure, consisting

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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).

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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 attendees to sign the petitions during at least one Sunday service.<sup>189</sup> 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.'"<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup>

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

190. *Id.*

191. *Id.* at 1031.

192. *Id.* at 1033.

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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.”<sup>193</sup>

The second case APF relies on is *Sampson v. Buescher*.<sup>194</sup> In that case, a small group of neighbors opposing the annexation of Parker North into the town of Parker, Colorado, purchased and distributed signs and mailed a postcard to all Parker North residents.<sup>195</sup> The group collected a total of \$782.02 in nonmonetary contributions pursuant to their cause.<sup>196</sup> Rather than simply enacting campaign finance regulations by statute, Colorado has opted to codify reporting and disclosure requirements in its constitution.<sup>197</sup> 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

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193. *Id.* at 1034.

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.

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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.<sup>198</sup>

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.<sup>199</sup> The state effectively conceded that its “campaign finance laws and rules ‘are complex,’” and the state routinely advised individuals “with difficult questions to retain an attorney.”<sup>200</sup> 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

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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.

200. *Id.*

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requirements imposed on a small, unsophisticated group of neighbors.<sup>201</sup>

APF finally relies on *Coalition for Secular Government v. Williams*, once again revolving around Colorado’s unique reporting regime.<sup>202</sup> 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.<sup>203</sup> 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.<sup>204</sup> “Dr. Hsieh vividly recalled losing even \$20 contributions” as a result of potential contributors balking at having to disclose personal information.<sup>205</sup> 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

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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.

205. *Id.* at 1279.

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court granted in 2014.<sup>206</sup> On appeal, the Tenth Circuit applied the *Sampson* exacting scrutiny framework for balancing the governmental interest against the individual burdens.<sup>207</sup> 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.”<sup>208</sup>

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.”<sup>209</sup> 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 than a dollar.”<sup>210</sup> As a result, APF argues that those “requirements are insufficiently tied

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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.

210. Appellant’s Brief at 36.



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to the informational interest.”<sup>211</sup> APF raises both facial and as-applied challenges.<sup>212</sup>

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*.<sup>213</sup> Rather than introduce evidence to dispute the state’s informational interest, APF attempts to shift that burden to APOC and supplies conjecture.<sup>214</sup> But APF bears the initial burden here, and

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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.”).

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hypothetical arguments cannot 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.<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup> 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.

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### 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.”<sup>218</sup> 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.<sup>219</sup> But these arguments are cursorily raised and inadequately briefed-APF supplies no facts or legal authority to support its contentions.<sup>220</sup> 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

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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).

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to any adverse legal action from PMB for reposting a joint press release.<sup>221</sup> Nor is it obvious which is the repost in this situation.

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)."<sup>222</sup> 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.<sup>223</sup> In other words, APF's 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.

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

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>.

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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.<sup>224</sup> APF primarily relies on the plurality opinion in *Americans for Prosperity Foundation v. Bonta*, for this proposition.<sup>225</sup> In that decision, the Court confronted a state law requiring disclosure of the names and addresses of donors contributing over \$5,000 to tax-exempt charities.<sup>226</sup> Such information was not publicly disclosed, but the state argued that it was necessary to further its “interest in investigating charitable misconduct.”<sup>227</sup> 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.<sup>228</sup> The trial court granted injunctions, which the Ninth Circuit vacated.<sup>229</sup> On appeal, the Court agreed that exacting scrutiny applied, but it further refined the test:

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224. Appellant’s Brief at 40-41.

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

226. *Id.* at 2380.

227. *Id.* at 2381.

228. *Id.*

229. *Id.* at 2381-82.

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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.<sup>230</sup>

The Court explained that “narrow tailoring” required courts to determine “the extent to which the burdens are unnecessary.”<sup>231</sup> And because the collected data was rarely ever used to investigate misconduct, the Court invalidated the disclosure regime due to the “dramatic mismatch” between the state’s interest and the burdens imposed.<sup>232</sup>

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.

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

231. *Id.* at 2385.

232. *Id.* at 2386.

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Supreme Court has consistently upheld similar public disclosure requirements under the state's informational interest.<sup>233</sup> 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).<sup>234</sup> That provision only requires disclosure of the three largest donors-those donors could have each contributed \$50,000 and be 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.

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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 Advoc. 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.

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**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.

/s/ Frank A. Pfiffner  
Frank A. Pfiffner  
Superior Court Judge Pro Tempore



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**APPENDIX C — FINAL ORDER ON  
RECONSIDERATION BEFORE THE  
ALASKA PUBLIC OFFICES COMMISSION,  
DATED JULY 12, 2021**

**BEFORE THE ALASKA PUBLIC OFFICES  
COMMISSION**

**APOC Case No. 20-05-CD**

**YES ON 2 FOR BETTER ELECTIONS,**

*Complainant,*

**v.**

**ALASKA POLICY FORUM AND  
PROTECT MY BALLOT,**

*Respondents.*

**FINAL ORDER ON RECONSIDERATION**

Yes on 2 for Better Elections alleged that Alaska Policy Forum and Protect My Ballot made expenditures opposing Ballot Measure 2 without registering and reporting the expenditures and identifying who paid for the communications. Ballot Measure 2, which the voters approved in the November 2020 election, provides for ranked-choice voting in the state's elections, among other changes to election and campaign laws. The respondents argued their activities opposing ranked-choice voting in general were not directed at Ballot Measure 2, and

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so did not trigger the registration, reporting, and paid-for-by requirements. After an investigation, the Alaska Public Offices Commission staff agreed that AS 15.13 did not apply to Protect My Ballot's activities but found that Alaska Policy Forum engaged in election-related communications that required it to comply with AS 15.13. After a hearing on June 10, 2021, the Commission adopts staff's conclusions on the merits for both respondents but does not impose a penalty for Alaska Policy Forum's violations.

**I. The Commission concludes that Alaska Policy Forum's communications opposed Ballot Measure 2 and so triggered requirements to register, report expenditures, and provide paid-for-by identifiers on the communications.**

The Commission concludes that Alaska Policy Forum's communications on ranked-choice voting were expenditures and communications that triggered requirements to register before making expenditures, report expenditures, and identify who paid for the communications.<sup>1</sup> Alaska Policy Forum, which had no prior history of communicating about ranked-choice voting or other election methods, opposed ranked-choice voting on its website with press releases and an article, a republished opinion piece, and a video leading up to the election on the ballot measure. Although the materials did not mention the ballot measure by name, all of the

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1. AS 15.13.050(a), AS 15.13.040(d), AS 15.13.090, AS 15.13.140(b).

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communications were decidedly against the ranked-choice voting that Ballot Measure 2 would establish and so they were “susceptible of no other reasonable interpretation but as an exhortation to vote” against the measure.<sup>2</sup> Thus, the AS 15.13 requirements applied to Alaska Policy Forum’s communications.

The Commission uses the definitions of express and issues communications to inform its analysis of whether Alaska Policy Forum’s activities fall within the scope of election-related communications and expenditures such that AS 15.13 requirements apply. Covered expenditures include express, but not issues, communications.<sup>3</sup> Alaska Policy Forum argues that the plain statutory language defining “express communication” and “issues communication” refers exclusively to candidate elections, not ballot measures.<sup>4</sup> This is true. But AS 15.13 may still apply to Alaska Policy Forum’s activities because the definitions of “expenditure” and “communication” are not so limited. In addition to express communication, covered expenditures include those “incurred or made for the purpose of . . . influencing the outcome of a *ballot proposition or question*,”<sup>5</sup> covered communications “directly or indirectly identify a candidate or *proposition*,”<sup>6</sup>

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2. AS 15.13.400(7) (eff. 2014).

3. AS 15.13.400(6)(C) (eff. 2014).

4. *See* AS 15.13.400(7), (12) (eff. 2014).

5. AS 15. 13.400(6)(A)(iv) (eff. 2014) (emphasis added).

6. AS 15.13.400(3) (eff. 2014) (emphasis added).

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and “independent expenditures for or against a ballot proposition or question shall be reported” in accordance with AS 15.13 requirements.<sup>7</sup> To decide whether Alaska Policy Forum’s activities fit within election-related expenditures and communications to which AS 15.13 applies, the definitions of express and issues communications offer a useful framework even though they do not strictly apply.

Using this framework, the Commission concludes that Alaska Policy Forum’s communications were made to influence the vote on the ballot measure and so were covered expenditures and communications.<sup>8</sup> An “express communication,” which is a covered expenditure,<sup>9</sup> is one that “when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against” a ballot measure.<sup>10</sup> An “issue communication,” which is excluded as a covered expenditure,<sup>11</sup> addresses an issue of political importance and directly or indirectly identifies

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7. AS 15.13.140(b)(1).

8. The Commission does not address Alaska Policy Forum’s constitutional arguments because “[a]dministrative agencies do not have jurisdiction to decide issues of constitutional law.” *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 36 (Alaska 2007).

9. AS 15.13.400(6)(C) (eff. 2014).

10. AS 15.13.400(7) (eff. 2014).

11. AS 15.13.400(6)(C) (eff. 2014).

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a ballot measure without supporting or opposing it.<sup>12</sup> In previous advisory opinions addressing whether an entity's communications disseminated near an election with a ballot measure on the same subject require compliance with AS 15.13, the Commission has considered the entity's history of communicating about the topic and the substance of the communications at issue, including the extent to which the communications were neutral and whether they identified the ballot measure.<sup>13</sup>

As staff's investigation report describes, Alaska Policy Forum had no longstanding history of communicating about elections in general or ranked-choice voting in particular, and its communications were not neutral. Alaska Policy Forum's communications about ranked-choice voting began when the elections initiative was proposed. In November 2019, petition booklets began circulating to gather enough signatures to put the initiative before the voters. Over the next few months, Alaska Policy Forum founded Protect My Ballot, a national coalition against ranked-choice voting, and republished on its website a Maine coalition member's opinion piece directed toward Alaska's signature-gathering for the initiative.

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12. AS 15.13.400(12) (eff. 2014).

13. *Bags for Change*, AO 19-04-CD (approved Sept. 18, 2019) (available at <http://aws.state.ak.us/ApocReports/PaperiDownload.aspx?ID=21018>); *Renewable Renewable Resources Foundation*, AO 13-04 CD (approved June 6, 2013) (available at <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=8475>); *Resources Coalition*, AO 08-02-CD (approved June 11, 2008) (available at <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=4878>).

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The piece, “Ranked Choice Voting Fails to Deliver on its Promises,” ended with a warning: “Like Alaska, we in Maine regularly deal with an onslaught of ballot initiatives because we live in a cheap media market. The system may soon be coming to your neck of the woods. Don’t be surprised when it produces the opposite result of what you were promised.”

A month or so after the opinion post, the lieutenant governor reviewed the gathered signatures and accepted the elections initiative for placement on the ballot in the November 2020 election.<sup>14</sup> In a July press release, Alaska Policy Forum announced the launch of Protect My Ballot, touting that the national campaign “exposes flaws in ranked choice voting.” Alaska Policy Forum’s chief executive officer warned in a link from the press release, “As Alaskans take to the polls in November, history should be a warning for what ranked choice voting would lead to.” That same month, Alaska Policy Forum posted a Protect My Ballot video disparaging ranked-choice voting.

Finally, in October—shortly before early voting began for the November election—Alaska Policy Forum published a report that called ranked-choice voting a “failed experiment” and a press release characterizing the report as revealing the “alarming ramifications” of ranked-choice voting. Alaska Policy Forum and another entity in the Protect My Ballot coalition co-wrote the

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14. March 9, 2020, letter from Lt. Gov. Kevin Meyer re: 19AKBE Alaska’s Better Elections Initiative, (available at <https://www.elections.alaska.gov/petitions/19AKBE/19AKBE-LetterToSponsor.pdf>).

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report. A few days later, Alaska Policy Forum published an article, “Ranked-Choice Voting Disenfranchises Voters.” The article described that the “trend” of ranked-choice voting “has made it all the way to Alaska,” criticized ranked-choice voting, and warned that the vote-counting method disenfranchises voters when “[a]ll Alaskans deserve to have their votes counted.”

Even though Ballot Measure 2 was never mentioned by name, there is no other reasonable interpretation of these communications but as an exhortation to vote against implementing ranked-choice voting, a key component of the initiative. Thus, Alaska Policy Forum’s communications at least as of its July press release were election-related expenditures and communications requiring compliance with AS 15.13. Alaska Policy Forum violated AS 15.13.050(a) by not registering before making expenditures opposing a ballot measure, AS 15.13.040(d) and AS 15.13.140(b) by not filing reports on its expenditures, and AS 15.13.090 by not including a paid-for-by identifier on its communications.

The Commission waives imposition of civil penalties from the date the violations began to the date the complaint was filed, which tolled the accrual of penalties. Staff calculated the maximum penalties, which accrued at a rate of \$50 per day for each day the violations continued,<sup>15</sup> but recommended a reduction. Staff’s recommended reduction was based on Alaska Policy Forum’s inexperienced

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15. AS 15.13.390(a) (providing that a civil penalty for these violations is “not more than \$50 a day for each day the violation continues”).

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filer status<sup>16</sup> and because the maximum penalties were significantly out of proportion to the degree of public harm.<sup>17</sup> Alaska Policy Forum reported spending \$643.20 on preparing ranked-choice voting materials during the period that penalties were accruing for the violations.<sup>18</sup> Staff’s recommended reduced penalty of \$8,065 still “exceeds the value of the transactions that were not reported”—\$643.20 for the unreported expenditures and no monetary value for entity information that should have been provided on the registration and paid-for-by identifiers.<sup>19</sup> Thus, the Commission declines to impose the recommended penalty and waives the penalty altogether because it is “significantly out of proportion to the degree of harm to the public for not having the information.”<sup>20</sup>

**II. The Commission decides Protect My Ballot was not engaged in activities requiring it to comply with campaign disclosure laws.**

The Commission concludes that Protect My Ballot’s website against ranked-choice voting is susceptible of other reasonable interpretations than as an exhortation

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16. 2 AAC 50.865(a)(1)(B).

17. 2 AAC 50.865(b)(5).

18. Staff exhibit 3 at pgs. 10-11. Staff ended the accrual of the daily penalties with the filing of the complaint.

19. 2 AAC 50.865(b)(5). The entity information was available on Alaska Policy Forum’s website.

20. 2 AAC 50.865(b)(5).



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to vote against Ballot Measure 2 for the reasons explained in staff's report.<sup>21</sup> In particular, Protect My Ballot had partners in other states with no pending ballot initiatives addressing ranked-choice voting and with different agendas, and the vast majority of the materials on its website opposed ranked-choice voting as a general matter. Only two pieces mentioned Ballot Measure 2 and voting—links to opinion pieces published elsewhere. Thus, the Commission dismisses the complaint against Protect My Ballot.

**III. The Commission dismisses the allegation against Alaska Policy Forum that it failed to comply with the laws regulating lobbying.**

The Commission adopts staff's recommendation and dismisses the allegation that Alaska Policy Forum violated the lobbying laws in AS 24.45. A "lobbyist" is a paid employee or contractor who communicates with public officials "for the purpose of influencing legislation or administrative action for more than 10 hours in any 30-day period in one calendar year" or represents oneself as a lobbyist.<sup>22</sup> Alaska Policy Forum explained that its employees' lobbying activities did not meet the threshold number of hours and none of its employees represented themselves as lobbyists. Staff uncovered no evidence to the contrary. A tax return showing that Alaska Policy Forum spent \$4,027 on lobbying offers no information on

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21. *See* AS 15.13.400(7) (eff. 2014) (defining an "express communication").

22. AS 24.45.171(11).

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the number of hours spent lobbying in any 30-day period in one calendar year.

**IV. CONCLUSION**

The Commission denies Alaska Policy Forum's motion to dismiss the election-related allegations. The Commission concludes that Alaska Policy Forum's communications were intended to influence the election on Ballot Measure 2 and necessitated that it comply with the requirements to register before making expenditures,<sup>23</sup> report independent expenditures,<sup>24</sup> and identify who paid for communications.<sup>25</sup> The Commission orders Alaska Policy Forum to comply with these requirements within 30 days and does not impose a penalty for Alaska Policy Forum's violations of the requirements from the date the violations began to the date the complaint was filed, which tolled the accrual of penalties. The Commission agrees with staff that no evidence supported that AS 24.45 applies to any lobbying activities of Alaska Policy Forum and dismisses that allegation.

The Commission concludes that Protect My Ballot's website opposing ranked-choice voting did not trigger the registration, reporting, and paid-for-by identifier requirements, and dismisses the complaint against it.

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23. AS 15.13.050(a).

24. AS 15.13.040(d), AS 15.13.140(b).

25. AS 15.13.090.

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This is a final Commission order. It may be appealed to the superior court within 30 days from the date of this order.<sup>26</sup> A request for the Commission to reconsider this order must be filed within 15 days from the date this order is delivered or mailed.<sup>27</sup>

Dated: July 12, 2021

BY ORDER OF THE ALASKA PUBLIC OFFICES  
COMMISSION<sup>28</sup>

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26. AS 15.13.380(g), AS 44.62.560, Alaska R. App. P. 602.

27. 2 AAC 50.891(g).

28. Commissioners Suzanne Hancock, Dan LaSota, and Van Lawrence voted to approve this order. Commissioners Anne Helzer and Richard Stillie dissented.

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**APPENDIX D — FINAL ORDER BEFORE THE  
ALASKA PUBLIC OFFICES COMMISSION,  
DATED JUNE 21, 2021**

BEFORE THE ALASKA PUBLIC OFFICES  
COMMISSION

APOC Case No. 20-05-CD

YES ON 2 FOR BETTER ELECTIONS,

*Complainant,*

v.

ALASKA POLICY FORUM AND  
PROTECT MY BALLOT,

*Respondents.*

**FINAL ORDER**

Yes on 2 for Better Elections alleged that Alaska Policy Forum and Protect My Ballot made expenditures opposing Ballot Measure 2 without registering and reporting the expenditures and identifying who paid for the communications. Ballot Measure 2, which the voters approved in the November 2020 election, provides for ranked-choice voting in the state's elections, among other changes to election and campaign laws. The respondents argued their activities opposing ranked-choice voting in general were not directed at Ballot Measure 2, and so did not trigger the registration, reporting, and paid-for-by requirements. After an investigation, the Alaska

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Public Offices Commission staff agreed that AS 15.13 did not apply to Protect My Ballot's activities but found that Alaska Policy Forum engaged in election-related communications that required it to comply with AS 15.13. After a hearing on June 10, 2021, the Commission adopts staff's conclusions on the merits for both respondents but does not impose a penalty for Alaska Policy Forum's violations.

**I. The Commission concludes that Alaska Policy Forum's communications opposed Ballot Measure 2 and so triggered requirements to register, report expenditures, and provide paid-for-by identifiers on the communications.**

The Commission concludes that Alaska Policy Forum's communications on ranked-choice voting were expenditures and communications that triggered requirements to register before making expenditures, report expenditures, and identify who paid for the communications.<sup>1</sup> Alaska Policy Forum, which had no prior history of communicating about ranked-choice voting or other election methods, opposed ranked-choice voting on its website with press releases and an article, a republished opinion piece, and a video leading up to the election on the ballot measure. Although the materials did not mention the ballot measure by name, all of the communications were decidedly against the ranked-choice voting that Ballot Measure 2 would establish and so they

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1. AS 15.13.050(a), AS 15.13.040(d), AS 15.13.090, AS 15.13.140(b).

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were “susceptible of no other reasonable interpretation but as an exhortation to vote” against the measure.<sup>2</sup> Thus, the AS 15.13 requirements applied to Alaska Policy Forum’s communications.

The Commission uses the definitions of express and issues communications to inform its analysis of whether Alaska Policy Forum’s activities fall within the scope of election-related communications and expenditures such that AS 15.13 requirements apply. Covered expenditures include express, but not issues, communications.<sup>3</sup> Alaska Policy Forum argues that the plain statutory language defining “express communication” and “issues communication” refers exclusively to candidate elections, not ballot measures.<sup>4</sup> This is true. But AS 15.13 may still apply to Alaska Policy Forum’s activities because the definitions of “expenditure” and “communication” are not so limited. In addition to express communication, covered expenditures include those “incurred or made for the purpose of . . . influencing the outcome of a *ballot proposition or question*,”<sup>5</sup> covered communications “directly or indirectly identify a candidate or *proposition*,”<sup>6</sup> and “independent expenditures for or against a ballot proposition or question shall be reported” in accordance

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2. AS 15.13.400(7) (eff. 2014).

3. AS 15.13.400(6)(C) (eff. 2014).

4. *See* AS 15.13.400(7), (12) (eff. 2014).

5. AS 15.13.400(6)(A)(iv) (eff. 2014) (emphasis added).

6. AS 15.13.400(3) (eff. 2014) (emphasis added).

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with AS 15.13 requirements.<sup>7</sup> To decide whether Alaska Policy Forum’s activities fit within election-related expenditures and communications to which AS 15.13 applies, the definitions of express and issues communications offer a useful framework even though they do not strictly apply.

Using this framework, the Commission concludes that Alaska Policy Forum’s communications were made to influence the vote on the ballot measure and so were covered expenditures and communications.<sup>8</sup> An “express communication,” which is a covered expenditure,<sup>9</sup> is one that “when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against” a ballot measure.<sup>10</sup> An “issue communication,” which is excluded as a covered expenditure,<sup>11</sup> addresses an issue of political importance and directly or indirectly identifies a ballot measure without supporting or opposing it.<sup>12</sup> In previous advisory opinions addressing whether an entity’s

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7. AS 15.13.140(b)(1).

8. The Commission does not address Alaska Policy Forum’s constitutional arguments because “[a]dministrative agencies do not have jurisdiction to decide issues of constitutional law.” *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 36 (Alaska 2007).

9. AS 15.13.400(6)(C) (eff. 2014).

10. AS 15.13.400(7) (eff. 2014).

11. AS 15.13.400(6)(C) (eff. 2014).

12. AS 15.13.400(12) (eff. 2014).

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communications disseminated near an election with a ballot measure on the same subject require compliance with AS 15.13, the Commission has considered the entity's history of communicating about the topic and the substance of the communications at issue, including the extent to which the communications were neutral and whether they identified the ballot measure.<sup>13</sup>

As staff's investigation report describes, Alaska Policy Forum had no longstanding history of communicating about elections in general or ranked-choice voting in particular, and its communications were not neutral. Alaska Policy Forum's communications about ranked-choice voting began when the elections initiative was proposed. In November 2019, petition booklets began circulating to gather enough signatures to put the initiative before the voters. Over the next few months, Alaska Policy Forum founded Protect My Ballot, a national coalition against ranked-choice voting, and republished on its website a Maine coalition member's opinion piece directed toward Alaska's signature-gathering for the initiative. The piece, "Ranked Choice Voting Fails to Deliver on its Promises," ended with a warning: "Like Alaska, we in Maine regularly deal with an onslaught of ballot initiatives

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13. *Bags for Change*, AO 19-04-CD (approved Sept. 18, 2019) (available at <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=21018>); *Renewable Renewable Resources Foundation*, AO 13-04 CD (approved June 6, 2013) (available at <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=8475>); *Resources Coalition*, AO 08-02-CD (approved June 11, 2008) (available at <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=4878>).



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because we live in a cheap media market. The system may soon be coming to your neck of the woods. Don't be surprised when it produces the opposite result of what you were promised."

A month or so after the opinion post, the lieutenant governor reviewed the gathered signatures and accepted the elections initiative for placement on the ballot in the November 2020 election.<sup>14</sup> In a July press release, Alaska Policy Forum announced the launch of Protect My Ballot, touting that the national campaign "exposes flaws in ranked choice voting." Alaska Policy Forum's chief executive officer warned in a link from the press release, "As Alaskans take to the polls in November, history should be a warning for what ranked choice voting would lead to." That same month, Alaska Policy Forum posted a Protect My Ballot video disparaging ranked-choice voting.

Finally, in October—shortly before early voting began for the November election—Alaska Policy Forum published a report that called ranked-choice voting a "failed experiment" and a press release characterizing the report as revealing the "alarming ramifications" of ranked-choice voting. Alaska Policy Forum and another entity in the Protect My Ballot coalition co-wrote the report. A few days later, Alaska Policy Forum published an article, "Ranked-Choice Voting Disenfranchises Voters." The article described that the "trend" of ranked-choice

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14. March 9, 2020, letter from Lt. Gov. Kevin Meyer re: 19AKBE Alaska's Better Elections Initiative, (available at <https://www.elections.alaska.gov/petitions/19AKBE/19AKBE-LetterToSponsor.pdf>).

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voting “has made it all the way to Alaska,” criticized ranked-choice voting, and warned that the vote-counting method disenfranchises voters when “[a]ll Alaskans deserve to have their votes counted.”

Even though Ballot Measure 2 was never mentioned by name, there is no other reasonable interpretation of these communications but as an exhortation to vote against implementing ranked-choice voting, a key component of the initiative. Thus, Alaska Policy Forum’s communications at least as of its July press release were election-related expenditures and communications requiring compliance with AS 15.13. Alaska Policy Forum violated AS 15.13.050(a) by not registering before making expenditures opposing a ballot measure, AS 15.13.040(d) and AS 15.13.140(b) by not filing reports on its expenditures, and AS 15.13.090 by not including a paid-for-by identifier on its communications.

The Commission waives imposition of civil penalties for these violations. Staff calculated the maximum penalties, which accrued at a rate of \$50 per day for each day the violations continued,<sup>15</sup> but recommended a reduction. Staff’s recommended reduction was based on Alaska Policy Forum’s inexperienced filer status<sup>16</sup> and because the maximum penalties were significantly out of

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15. AS 15.13.390(a) (providing that a civil penalty for these violations is “not more than \$50 a day for each day the violation continues”).

16. 2 AAC 50.865(a)(1)(B).

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proportion to the degree of public harm.<sup>17</sup> Alaska Policy Forum reported spending \$643.20 on preparing ranked-choice voting materials during the period that penalties were accruing for the violations.<sup>18</sup> Staff’s recommended reduced penalty of \$8,065 still “exceeds the value of the transactions that were not reported”—\$643.20 for the unreported expenditures and no monetary value for entity information that should have been provided on the registration and paid-for-by identifiers.<sup>19</sup> Thus, the Commission declines to impose the recommended penalty and waives the penalty altogether because it is “significantly out of proportion to the degree of harm to the public for not having the information.”<sup>20</sup>

**II. The Commission decides Protect My Ballot was not engaged in activities requiring it to comply with campaign disclosure laws.**

The Commission concludes that Protect My Ballot’s website against ranked-choice voting is susceptible of other reasonable interpretations than as an exhortation to vote against Ballot Measure 2 for the reasons

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17. 2 AAC 50.865(b)(5).

18. Staff exhibit 3 at pgs. 10-11. Staff ended the accrual of the daily penalties with the filing of the complaint.

19. 2 AAC 50.865(b)(5). The entity information was available on Alaska Policy Forum’s website.

20. 2 AAC 50.865(b)(5).

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explained in staff's report.<sup>21</sup> In particular, Protect My Ballot had partners in other states with no pending ballot initiatives addressing ranked-choice voting and with different agendas, and the vast majority of the materials on its website opposed ranked-choice voting as a general matter. Only two pieces mentioned Ballot Measure 2 and voting—links to opinion pieces published elsewhere. Thus, the Commission dismisses the complaint against Protect My Ballot.

**III. The Commission dismisses the allegation against Alaska Policy Forum that it failed to comply with the laws regulating lobbying.**

The Commission adopts staff's recommendation and dismisses the allegation that Alaska Policy Forum violated the lobbying laws in AS 24.45. A "lobbyist" is a paid employee or contractor who communicates with public officials "for the purpose of influencing legislation or administrative action for more than 10 hours in any 30-day period in one calendar year" or represents oneself as a lobbyist.<sup>22</sup> Alaska Policy Forum explained that its employees' lobbying activities did not meet the threshold number of hours and none of its employees represented themselves as lobbyists. Staff uncovered no evidence to the contrary. A tax return showing that Alaska Policy Forum spent \$4,027 on lobbying offers no information on

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21. *See* AS 15.13.400(7) (eff. 2014) (defining an "express communication").

22. AS 24.45.171(11).

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the number of hours spent lobbying in any 30-day period in one calendar year.

**IV. CONCLUSION**

The Commission denies Alaska Policy Forum's motion to dismiss the election-related allegations. The Commission concludes that Alaska Policy Forum's communications were intended to influence the election on Ballot Measure 2 and necessitated that it comply with the requirements to register before making expenditures,<sup>23</sup> report independent expenditures,<sup>24</sup> and identify who paid for communications.<sup>25</sup> The Commission does not impose a penalty for Alaska Policy Forum's violations of these requirements. The Commission agrees with staff that no evidence supported that AS 24.45 applies to any lobbying activities of Alaska Policy Forum and dismisses that allegation.

The Commission concludes that Protect My Ballot's website opposing ranked-choice voting did not trigger the registration, reporting, and paid-for-by identifier requirements, and dismisses the complaint against it.

This is a final Commission order. It may be appealed to the superior court within 30 days from the date of this

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23. AS 15.13.050(a).

24. AS 15.13.040(d), AS 15.13.140(b).

25. AS 15.13.090.

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order.<sup>26</sup> A request for the Commission to reconsider this order must be filed within 15 days from the date this order is delivered or mailed.<sup>27</sup>

Dated: June 21, 2021.

BY ORDER OF THE ALASKA PUBLIC OFFICES  
COMMISSION<sup>28</sup>

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26. AS 15.13.380(g), AS 44.62.560, Alaska R. App. P. 602.

27. 2 AAC 50.891(g).

28. Commissioners Suzanne Hancock, Dan LaSota, and Van Lawrence voted to approve this order. Commissioners Anne Helzer and Richard Stillie dissented.

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**APPENDIX E — STAFF REPORT OF THE  
ALASKA PUBLIC OFFICES COMMISSION FOR  
THE DEPARTMENT OF ADMINISTRATION,  
DATED OCTOBER 15, 2020**

STATE OF ALASKA  
GOVERNOR MIKE DUNLEAVY

DEPARTMENT OF ADMINISTRATION  
ALASKA PUBLIC OFFICES COMMISSION

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

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**SUMMARY OF COMPLAINT**

In its Complaint filed on September 8, 2020, Yes on 2 for Better Elections (Yes on 2) alleges that Brett Huber, Protect My Ballot (PMB), and Alaska Policy forum (APF) violated AS 15.13 by making express communications opposing Ballot Measure 2 without registering and reporting contributions received or expenditures made.<sup>1</sup>

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1. Exhibit 1, Complaint.

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Specifically, Yes on 2 contends that the Respondents engaged in extensive campaign activities including video production, web site registration and design, utilization of staff time for composing materials, press releases, paying salary or wages to Huber, and providing the public with electronic links to materials opposing ranked choice voting, one of the features of Ballot Measure 2.<sup>2</sup>

**SUMMARY OF ANSWERS TO COMPLAINT**

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

**FACTS****1. Ballot Measure 2**

The Alaska Better Elections Initiative was filed on July 3, 2019, denied on August 30, 2019, and ultimately accepted with petition booklets being issued on October 31, 2019.<sup>5</sup> The initiative is on the 2020 state general election ballot as Ballot Measure 2 and if enacted, would provide

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2. *Id.*

3. Exhibit 2, Huber Response.

4. Exhibit 3, APF Response; Exhibit 4, Marcum response to questions concerning PMB.

5. Exhibit 5, Division of Elections Petition Summary.



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for, among other things, ranked choice voting in the state's general elections.<sup>6</sup>

**2. PMB**

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

PMB is also a trade name of EPIF which was registered with the government of the District of Columbia on August 9, 2020.<sup>10</sup> EPIF does business as the Employment Policies Institute (Institute).<sup>11</sup> According to its website, the Institute is a non-profit organization

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6. Exhibit 6, Letter to Sponsor.

7. Ex. 3.

8. *Id.*

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

10. Ex. 3.

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

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dedicated to studying public policy issues surrounding employment growth” and was founded in 1991.<sup>12</sup>

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

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

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

13. Ex 3; Exhibit 10, Who is Report.

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

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

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

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

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

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

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17. Exhibit 12, Treadwell Opinion.

18. Exhibit 13, Begich Opinion.

19. Exhibit 14, APF Press Release (emphasis added).

*Appendix E***3. APF**

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

Over the years, and currently, APF has posted materials on many subjects, including the state budget and taxes,<sup>22</sup> health care,<sup>23</sup> education,<sup>24</sup> and elections.<sup>25</sup> APF contended in a 2016 article that the PFD voter registration initiative could lead to voting by mail only, suggesting that APF has a long history of skepticism towards changes to the voting status quo.<sup>26</sup> As such, APF “enthusiastically

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20. Exhibit 15, APF Corporate Certificate.

21. Exhibit 16, APF Articles of Incorporation.

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

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

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

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

26. Ex. 3; Exhibit 21, Voter Registration and Broken Promises.

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agreed in January 2020 to join as a founding member [of PMB].”<sup>27</sup> Apparently, APF’s agreement was based on a phone call from EPIF regarding a coalition of organizations that would provide education on election process issues.<sup>28</sup>

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

On July 24, 2020, in Anchorage, Alaska, APF issued a press release entitled *Protect My Ballot: New Campaign Exposes Flaws in Ranked Choice Voting*.<sup>30</sup> The press release provided that a coalition of state-based think tanks led by APF had launched a national education campaign detailing the harmful consequences of an electoral scheme known as ranked choice voting. The press release provided

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27. Ex. 3.

28. Ex. 3, Appendix B.

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

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

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a link to the PMB website where APF CEO Bethany Marcum was quoted as saying:

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

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

On October 8, 2020, APF posted its *Report: The Failed Experiment of Ranked-Choice Voting*.<sup>34</sup> As the report indicates, ranked choice voting has been used in many jurisdictions over a long period of time. It provides, for example, that San Francisco has used it since 2004

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31. Ex. 14.

32. <https://youtu.be/K7BVPFtvSNEat> 0:13-0:21.

33. *Id.*

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

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and Maine used it for the first time in 2018. Although the report addresses the arguments made by proponents of ranked choice voting, it does so only in the context of criticizing them.

On October 8, 2020, APF issued the press release, *New Study Exposes Alarming Ramifications to Ranked Choice Voting*.<sup>35</sup> The press release announced APF's own report *The Failed Experiment of Ranked-Choice Voting*, which was issued the same day. After issuing, APF posted the press release on its website on October 9, 2020.<sup>36</sup> The new study was published in conjunction with the Maine Policy Institute and in many cases mirrors a similar report published in August 2019 by the Maine Policy Institute under the name of the Maine Heritage Policy Center, the name the organization held until it became the Maine Policy Institute on March 11, 2020.<sup>37</sup>

#### 4. Huber

Huber denies any involvement with APF or PMB.<sup>38</sup> Staff has found no evidence to suggest that Huber is or was involved with APF or PMB in any way. And, although Yes on 2 did provide responses to staff's inquiries, it did

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35. Exhibit 22, New Study Press Release.

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

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

38. Ex.2.

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not provide any evidence to support allegations that Huber was paid by APF or PMB for any services or that Huber was involved with APF or PMB in any way.<sup>39</sup>

**5. Lobbying**

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

**LAW AND ANALYSIS****1. Registration and Reporting**

The primary issue in this case is whether the respondents, individually or collectively made one or more expenditures in opposition to a ballot proposition

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39. Exhibit 23, Yes on 2 Response to Respondents' responses.

40. Ex. 1.

41. *Id.*

42. Ex. 3.

43. Ex. 16.



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

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

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

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

45. AS 15.13.050(a).

46. AS 15.13.400(6)(A)(iv) and (B).

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An express communication is one that “when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”<sup>47</sup> An electioneering communication is one that addresses an issue of political importance and attributes a position on that issue to a candidate who is directly or indirectly identified.<sup>48</sup> An issues communication is one that addresses an issue of political importance, directly or indirectly identifies a candidate, but does not support or oppose a candidate.<sup>49</sup> Although these definitions are specific to communications regarding candidates, the distinctions also are appropriate for ballot proposition campaigns.<sup>50</sup>

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47. AS 15.13.400(7).

48. AS 15.13.400(5).

49. AS 15.13.400(12).

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

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

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

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

52. *Id.* at p. 10.

53. *Id.* at p. 11.

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

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

In *Renewable Resources Foundation* AO 13-04-CD, the commission revisited the continuing education in the context of a ballot initiative titled *An Act Providing for Protection of Bristol Bay Wild Salmon and Waters*

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54. *Id.* at pp. 11-12.

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*Within or Flowing into the Existing 1972 Bristol Bay Fisheries Reserve.*<sup>55</sup> There, the requestor was a successor to the Renewable Resources Coalition discussed above. The requestor had continued its educational efforts to protect resources from the potential negative impacts of the proposed Pebble Mine project, and asked for an advisory opinion on several questions, including whether it could continue in its efforts without registration and reporting while the new initiative was active and while it openly supported the signature gathering effort.<sup>56</sup> Staff's opinion approved by the commission first noted that the requestor could continue its purely educational activities, but warned that the context of the educational activities could trigger a reporting requirement. There, staff provided that "... changes in the number of activities, the usual locations of the activities and/or the content of the activities, when taken in context of RRF's open support of the initiative petition drive could possibly trigger a reporting requirement."<sup>57</sup>

In both *Renewable Resources Foundation* and *Renewable Resources Coalition*, an underlying fact was that the requestor had been engaged in its educational activities long before the initiative or ballot proposition arose. Furthermore, in *Bags for Change*, AO 19-04-CD, the Commission emphasized the importance of that fact. There, the organization, Bags for Change had for many

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55. Exhibit 25, Renewable Resources Foundation, AO 13-04-CD.

56. *Id.* at p. 1.

57. *Id.* at pp. 2-3.

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years communicated with the public concerning the harmful effects of plastics in general and plastic bags in particular. In its opinion submitted for commission approval, staff opined that a brochure that provided neutral cost information about a ballot proposition concerning the elimination of plastic bags and mentioned voting and the proposition by name nevertheless did not trigger a registration or reporting requirement because the brochure, taken as a whole, was susceptible to a reasonable interpretation other than an exhortation to vote one way or the other because it provided neutral information concerning the proposition. Upon approving the opinion by a 5-0 vote, the commission amended to the foregoing, “especially . . . given that [Bags for Change] has engaged in educational efforts for three years before the [i]nitiative, rather than a group that was created around the [i]nitiative.”<sup>58</sup>

**A. PMB**

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

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58. *Id.* at p. 5.

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On July 13, 2020, in preparation for the launch, EPIF set up the PMB web site “at a real domain.”<sup>59</sup> Since then, the website has been used to publish its overriding message that ranked choice voting is a scheme that should be rejected and where utilized should be scrapped. In essence, PMB purports to be a clearinghouse run by EPIF, which is used for the posting of opinions, articles, and media that are decidedly against ranked choice voting.

Although the timing of the creation of PMB and its website may be suspicious in view of the initiative events leading to ballot measure 2, the fact that its partners all have different agendas<sup>60</sup> makes it difficult to determine that the PMB website, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote against Ballot Measure 2. Clearly, a reasonable interpretation is that the website is a clearinghouse of information to be used opponents to ranked choice voting for a variety of purposes, including opposing its adoption in state and local elections of other jurisdictions and abolishing it where it is law. That it might also be used by an organization such as APF in connection with Ballot Measure 2 raises an entirely different issue which will be discussed below. But, because the website is susceptible

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

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

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to reasonable interpretations other than an exhortation to vote against Ballot Measure 2, staff recommends that the allegations of the complaint against PMB be dismissed.<sup>61</sup>

**B. APF**

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

Petition booklets for the initiative that became Ballot Measure 2 were issued on October 31, 2019. On November 6, 2019, EPIF acquired the PMB web domain. APF became a founding member of PMB in January 2020. On February 11, 2020, APF posted on its website the opinion piece, *Ranked Choice Voting Fails to Deliver on Its*

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



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*Promises.* The op-ed concludes by asserting “*Like Alaska, we in Maine regularly deal with an onslaught of ballot initiatives because we live in a cheap media market.* The system may soon be coming to your neck of the woods. Don’t be surprised when it produces the opposite result of what you were promised.”<sup>62</sup>

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

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

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

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

63. Ex. 3.

64. Ex. 14 (emphasis added).

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

On October 8, 2020, APF posted *Report: The Failed Experiment of Ranked-Choice Voting*. As the report indicates ranked choice voting has been used in many jurisdictions over a long period of time. For example, the report provides that San Francisco has used it since 2004 and Maine used it for the first time in 2018.

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

Prior to the initiative, APF had shown no interest in ranked choice voting, despite the fact that the voting method has been discussed and implemented in many jurisdictions for many years.<sup>66</sup> One of the lessons from the *Renewable Resources* cases, and as emphasized in *Bags*

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65. Exhibit 26, "Ranked-Choice Voting Disenfranchises Voters.

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

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*for Change*, is that the length of time an organization has been engaged in educational activities concerning a subject is a factor in determining whether its communications on that subject may be subject to reasonable interpretations other than an exhortation to vote for or against a ballot proposition. Here, APF's objection to ranked choice voting did not begin until an initiative concerning ranked choice voting was proposed.

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

Based on the evidence provided, the timing of the activity alleged, and the context of APF's ranked choice voting communications, staff concludes that APF's ranked choice communications are express communications. As such APF has violated AS 15.13 by failing to register as an entity and failing to file independent expenditure reports concerning its activities.<sup>67</sup>

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67. AS 15.13.050(a) and AS 15.13.040(d), respectively.

*Appendix E***C. Identification of Political Communications**

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

A “communication” is defined as “an announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass mailing, excluding those placed by an individual or nongroup entity and costing \$500 or less and those that do not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c).”<sup>70</sup>

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

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68. AS 15.13.090(a).

69. AS 15.13.090(a)(2).

70. AS 15.13.400(3).

71. 2 AAC 50.306(e)(2)(A) and (B).

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

**D. Huber**

Mr. Huber denies any involvement whatsoever with APF or PMB. Staff found no evidence to suggest that Huber is or was involved with APF or PMB in any way. Yes on 2, despite being provided with Huber's responses to Staff's inquiries, did not provide any evidence to support its allegations that Huber was paid by APF or PMB for any services or that he was involved with APF or PMB in any way. Accordingly, Staff recommends that the allegations of the Complaint concerning Huber be dismissed.

**E. Lobbying**

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

Here, Yes on 2 has alleged that APF violated AS 24.45 by engaging in lobbying activities without reporting to

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72. AS 24.45.171(11).

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APOC. The only evidence presented by Yes on 2 to support its assertion was a tax return showing \$4,027 spent on direct lobbying to a legislative body. The definition of a lobbyist does not include in it limits on or threshold amounts paid to the lobbyist for lobbying activities.

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

**CONCLUSION**

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

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73. AS 15.13.050(a).

74. AS 15.13.040((d)).

75. AS 15.13.090(a).

*Appendix E***MAXIMUM CIVIL PENALTIES****A. Failure to Register**

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

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

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

- February 21, 2020, for APF's first post made on February 11, 2020 (a period of 201 days prior to filing of the complaint); and

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76. AS 15.13.390(a).

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

78. AS 15.13.110(h).

79. AS 15.13.390(a).

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- August 3, 2020, for its July 24, 2020, and July 31, 2020 posts (a period of 37 days prior to filing of the complaint).

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

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

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

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

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80. AS 15.13.390(a).



*Appendix E***MITIGATION AND RECOMMENDATION**

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

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

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

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81. 2 AAC 50.865(a)(1)(B).

82. 2 AAC 50.865(b)(5).

**APPENDIX F — CONSTITUTIONAL AND  
STATUTORY PROVISIONS INVOLVED**

**U.S. Const. amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. Const. amend. XIV, § 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**2020 ALASKA STAT. § 15.13.010**

**Sec. 15.13.010. Applicability.**

(a) This chapter applies

(1) in every election for governor, lieutenant governor, a member of the state legislature, a delegate to a constitutional convention, or judge seeking judicial retention;

(2) to every candidate for election to a municipal office in a municipality with a population of more than 1,000 inhabitants according to the latest United States census figures or estimates of population certified as correct for administrative purposes by the Department of Commerce, Community, and Economic Development unless the municipality has exempted itself from the provisions of this chapter; a municipality may exempt its elected municipal officers from the requirements of this chapter if a majority of the voters voting on the question at a regular election, as defined by AS 29.71.800(20), or a special municipality-wide election called for that purpose, votes to exempt its elected municipal officers from the requirements of this chapter; the question of exemption from the requirements of this chapter may be submitted by the governing body by ordinance or by initiative election.

(b) Except as otherwise provided, this chapter applies to contributions, expenditures, and communications made

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for the purpose of influencing the outcome of a ballot proposition or question as well as those made to influence the nomination or election of a candidate.

(c) This chapter does not prohibit a municipality from regulating by ordinance election campaign contributions and expenditures in municipal elections, or from regulating those campaign contributions and expenditures more strictly than provided in this chapter.

(d) This chapter does not limit the authority of a person to make contributions to influence the outcome of a voter proposition submitted to the public for a vote at a municipal election. In this subsection, in addition to its meaning under AS 15.13.065(c), “proposition” means a municipal reclassification, proposal to adopt or amend a home rule charter, a unification proposal, a boundary change proposal, or the approval of an ordinance when approval by public vote is a requirement for the ordinance.

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**2020 ALASKA STAT. § 15.13.040**

**Sec. 15.13.040. Contributions, expenditures, and supplying of services to be reported. [Effective until February 28, 2021]**

(a) Except as provided in (g) and (l) of this section, each candidate shall make a full report, upon a form prescribed by the commission,

(1) listing

(A) the date and amount of all expenditures made by the candidate;

(B) the total amount of all contributions, including all funds contributed by the candidate;

(C) the name, address, date, and amount contributed by each contributor; and

(D) for contributions in excess of \$50 in the aggregate during a calendar year, the principal occupation and employer of the contributor; and

(2) filed in accordance with AS 15.13.110 and certified correct by the candidate or campaign treasurer.

(b) Each group shall make a full report upon a form prescribed by the commission, listing

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- (1) the name and address of each officer and director;
  - (2) the aggregate amount of all contributions made to it; and, for all contributions in excess of \$100 in the aggregate a year, the name, address, principal occupation, and employer of the contributor, and the date and amount contributed by each contributor; for purposes of this paragraph, “contributor” means the true source of the funds, property, or services being contributed; and
  - (3) the date and amount of all contributions made by it and all expenditures made, incurred, or authorized by it.
- (c) The report required under (b) of this section shall be filed in accordance with AS 15.13.110 and shall be certified as correct by the group’s treasurer.
- (d) Every person making an independent expenditure shall make a full report of expenditures made and contributions received, upon a form prescribed by the commission, unless exempt from reporting.
- (e) Each person required to report under (d) of this section shall file a full report in accordance with AS 15.13.110(h) on a form prescribed by the commission. The report must contain
- (1) the name, address, principal occupation, and employer of the individual filing the report;

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(2) an itemized list of all expenditures made, incurred, or authorized by the person;

(3) the name of the candidate or the title of the ballot proposition or question supported or opposed by each expenditure and whether the expenditure is made to support or oppose the candidate or ballot proposition or question;

(4) the name and address of each officer and director, when applicable;

(5) the aggregate amount of all contributions made to the person, if any, for the purpose of influencing the outcome of an election; for all contributions, the date of the contribution and amount contributed by each contributor; and, for a contributor

(A) who is an individual, the name and address of the contributor and, for contributions in excess of \$50 in the aggregate during a calendar year, the name, address, principal occupation, and employer of the contributor; or

(B) that is not an individual, the name and address of the contributor and the name and address of each officer and director of the contributor.

(f) During each year in which an election occurs, all businesses, persons, or groups that furnish any of the

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following services, facilities, or supplies to a candidate or group shall maintain a record of each transaction: newspapers, radio, television, advertising, advertising agency services, accounting, billboards, printing, secretarial, public opinion polls, or research and professional campaign consultation or management, media production or preparation, or computer services. Records of provision of services, facilities, or supplies shall be available for inspection by the commission.

(g) The provisions of (a) and (l) of this section do not apply to a delegate to a constitutional convention, a judge seeking judicial retention, or a candidate for election to a municipal office under AS 15.13.010, if that delegate, judge, or candidate

(1) indicates, on a form prescribed by the commission, an intent not to raise and not to expend more than \$5,000 in seeking election to office, including both the primary and general elections;

(2) accepts contributions totaling not more than \$5,000 in seeking election to office, including both the primary and general elections; and

(3) makes expenditures totaling not more than \$5,000 in seeking election to office, including both the primary and general elections.

(h) The provisions of (d) of this section do not apply to one or more expenditures made by an individual acting independently of any other person if the expenditures



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(1) cumulatively do not exceed \$500 during a calendar year; and

(2) are made only for billboards, signs, or printed material concerning a ballot proposition as that term is defined by AS 15.13.065(c).

(i) The permission of the owner of real or personal property to post political signs, including bumper stickers, or to use space for an event or to store campaign-related materials is not considered to be a contribution to a candidate under this chapter unless the owner customarily charges a fee or receives payment for that activity. The fact that the owner customarily charges a fee or receives payment for posting signs that are not political signs is not determinative of whether the owner customarily does so for political signs.

(j) Except as provided in (l) of this section, each nongroup entity shall make a full report in accordance with AS 15.13.110 upon a form prescribed by the commission and certified by the nongroup entity's treasurer, listing

(1) the name and address of each officer and director of the nongroup entity;

(2) the aggregate amount of all contributions made to the nongroup entity for the purpose of influencing the outcome of an election;

(3) for all contributions described in (2) of this subsection, the name, address, date, and amount

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contributed by each contributor and, for all contributions described in (2) of this subsection in excess of \$250 in the aggregate during a calendar year, the principal occupation and employer of the contributor; and

(4) the date and amount of all contributions made by the nongroup entity, and, except as provided for certain independent expenditures in AS 15.13.135(a), all expenditures made, incurred, or authorized by the nongroup entity, for the purpose of influencing the outcome of an election; a nongroup entity shall report contributions made to a different nongroup entity for the purpose of influencing the outcome of an election and expenditures made on behalf of a different nongroup entity for the purpose of influencing the outcome of an election as soon as the total contributions and expenditures to that nongroup entity for the purpose of influencing the outcome of an election reach \$500 in a year and for all subsequent contributions and expenditures to that nongroup entity in a year whenever the total contributions and expenditures to that nongroup entity for the purpose of influencing the outcome of an election that have not been reported under this paragraph reach \$500.

(k) Every individual, person, nongroup entity, or group contributing a total of \$500 or more to a group organized for the principal purpose of influencing the outcome of a proposition, and every individual, person, nongroup entity, or group contributing a total of \$500 or more to a group

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organized for the principal purpose of filing an initiative proposal application under AS 15.45.020 or that has filed an initiative proposal application under AS 15.45.020, shall report the contribution or contributions on a form prescribed by the commission not later than 30 days after the contribution that requires the contributor to report under this subsection is made. The report must include the name, address, principal occupation, and employer of the individual filing the report and the amount of the contribution, as well as the total amount of contributions made to that group by that individual, person, nongroup entity, or group during the calendar year.

(I) Notwithstanding (a), (b), and (j) of this section, for any fund-raising activity in which contributions are in amounts or values that do not exceed \$50 a person, the candidate, group, or nongroup entity shall report contributions and expenditures and supplying of services under this subsection as follows:

- (1) a report under this subsection must
  - (A) describe the fund-raising activity;
  - (B) include the number of persons making contributions and the total proceeds from the activity;
  - (C) report all contributions made for the fund-raising activity that do not exceed \$50 a person in amount or value; if a contribution for the fund-raising activity exceeds \$50, the

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contribution shall be reported under (a), (b), and (j) of this section;

(2) for purposes of this subsection,

(A) “contribution” means a cash donation, a purchase such as the purchase of a ticket, the purchase of goods or services offered for sale at a fund-raising activity, or a donation of goods or services for the fund-raising activity;

(B) “fund-raising activity” means an activity, event, or sale of goods undertaken by a candidate, group, or nongroup entity in which contributions are \$50 a person or less in amount or value.

(m) Information required under this chapter shall be submitted to the commission electronically, except that the following information may be submitted in clear and legible black typeface or hand-printed in dark ink on paper in a format approved by the commission or on forms provided by the commission:

(1) information submitted by

(A) a candidate for election to a borough or city office of mayor, membership on a borough assembly, city council, or school board, or any state office, who

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(i) meets the requirements of (g)(1)—(3) of this section; or

(ii) does not have reasonable access to the technology necessary to file electronically; in this sub-subparagraph, a candidate is considered not to have reasonable access to the technology necessary to file electronically if the candidate does not own a personal computer or does not have broadband Internet access at the candidate's residence; in this sub-subparagraph, "broadband Internet access" means high-speed Internet access that is always on and that is faster than traditional dial-up access; or

(B) a candidate for municipal office for a municipality with a population of less than 15,000; in this subparagraph, "municipal office" means the office of an elected borough or city

(i) mayor; or

(ii) assembly, council, or school board member;

(2) any information if the commission determines that circumstances warrant an exception to the electronic submission requirement.

(n) The commission shall print the forms to be provided under this chapter so that the front and back of each page

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have the same orientation when the page is rotated on the vertical axis of the page.

(o) Information required by this chapter that is submitted to the commission on paper and not electronically shall be electronically scanned and published on the Internet by the commission, in a format accessible to the general public, within two working days after the commission receives the information.

(p) Notwithstanding the requirement in (a) of this section that a candidate shall make a full report upon a form prescribed by the commission, the commission shall accept information submitted electronically by a candidate if the information is

(1) entered onto a version of a form accessed on the Internet website of the commission; or

(2) in the form of an electronic spreadsheet or data file that contains field names and data types that conform to a standard defined by the commission.

(q) For purposes of (b), (e), and (j) of this section, “contributor” means the true source of the funds, property, or services being contributed.

(r) For purposes of (e) of this section,

(1) “director” means a member of the board of directors of a corporation or any person performing a similar function with respect to any organization;

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(2) “officer” means a president, vice-president, secretary, treasurer, principal financial officer, or comptroller of a corporation, or any person routinely performing functions similar to those of a president, vice-president, secretary, treasurer, principal financial officer, or comptroller with respect to any organization.

**2020 ALASKA STAT. § 15.13.050****Sec. 15.13.050. Registration before expenditure.**

(a) Before making an expenditure in support of or in opposition to a candidate or before making an expenditure in support of or in opposition to a ballot proposition or question or to an initiative proposal application filed with the lieutenant governor under AS 15.45.020, each person other than an individual shall register, on forms provided by the commission, with the commission.

(b) If a group intends to support only one candidate or to contribute to or expend on behalf of one candidate 33 1/3 percent or more of its funds, the name of the candidate shall be a part of the name of the group. If the group intends to oppose only one candidate or to contribute its funds in opposition to or make expenditures in opposition to a candidate, the group's name must clearly state that it opposes that candidate by using a word such as "opposes," "opposing," "in opposition to," or "against" in the group's name. Promptly upon receiving the registration, the commission shall notify the candidate of the group's organization and intent. A candidate may register more than one group to support the candidate; however, multiple groups controlled by a single candidate shall be treated as a single group for purposes of the contribution limit in AS 15.13.070(b)(1).

(c) If a group intends to make more than 50 percent of its contributions or expenditures in support of or in opposition to a single initiative on the ballot, the title or



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common name of the initiative must be a part of the name of the group. If the group intends to make more than 50 percent of its contributions or expenditures in opposition to a single initiative on the ballot, the group's name must clearly state that the group opposes that initiative by using a word such as "opposes," "opposing," "in opposition to," or "against" in the group's name.

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**2020 ALASKA STAT. § 15.13.090**

**Sec. 15.13.090. Identification of communication.  
[Effective until February 28, 2021]**

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

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

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

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

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

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

(b) The provisions of (a) of this section do not apply when the communication

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(1) is paid for by an individual acting independently of any other person;

(2) is made to influence the outcome of a ballot proposition as that term is defined by AS 15.13.065(c); and

(3) is made for

(A) a billboard or sign; or

(B) printed material other than an advertisement made in a newspaper or other periodical.

(c) To satisfy the requirements of (a)(1) of this section and, if applicable, (a)(2)(C) of this section, a communication that includes a print or video component must have the following statement or statements placed in the communication so as to be easily discernible; the second statement is not required if the person paying for the communication has no contributors or is a political party:

This communication was paid for by (person's name and city and state of principal place of business). The top contributors of (person's name) are (the name and city and state of residence or principal place of business, as applicable, of the largest contributors to the person under AS 15.13.090(a)(2)(C)).

(d) Notwithstanding the requirements of (a) of this section, in a communication transmitted through radio or

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other audio media and in a communication that includes an audio component, the following statements must be read in a manner that is easily heard; the second statement is not required if the person paying for the communication has no contributors or is a political party:

This communication was paid for by (person's name). The top contributors of (person's name) are (the name of the largest contributors to the person under AS 15.13.090(a)(2)(C)).

(e) Contributors required to be identified under (a)(2)(C) of this section must be listed in order of the amount of their contributions. If more than three of the largest contributors to a person paying for a communication contribute equal amounts, the person may select which of the contributors of equal amounts to identify under (a)(2)(C) of this section. In no case shall a person be required to identify more than three contributors under (a)(2)(C) of this section.

(f) The provisions of this subsection apply to a person who makes an independent expenditure for a communication described in (a) of this section. If the person paying for the communication is not a natural person, the provisions also apply to the responsible officer or officers of the corporation, company, partnership, firm, association, organization, labor organization, business trust, or society who approve the independent expenditure for the communication. A person who makes a communication under this subsection may not, with actual malice, include within or as a part of the communication

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a false statement of material fact about a candidate for election to public office that constitutes defamation of the candidate. For purposes of this subsection, a statement constitutes defamation of the candidate if the statement

- (1) exposes the candidate to strong disapproval, contempt, ridicule, or reproach; or
- (2) tends to deprive the candidate of the benefit of public confidence.

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**2020 ALASKA STAT. § 15.13.110**

**Sec. 15.13.110. Filing of reports. [Effective until February 28, 2021]**

(a) Each candidate, group, and nongroup entity shall make a full report in accordance with AS 15.13.040 for the period ending three days before the due date of the report and beginning on the last day covered by the most recent previous report. If the report is a first report, it must cover the period from the beginning of the campaign to the date three days before the due date of the report. If the report is a report due February 15, it must cover the period beginning on the last day covered by the most recent previous report or on the day that the campaign started, whichever is later, and ending on February 1 of that year. The report shall be filed

- (1) 30 days before the election; however, this report is not required if the deadline for filing a nominating petition or declaration of candidacy is within 30 days of the election;
- (2) one week before the election;
- (3) 105 days after a special election; and
- (4) February 15 for expenditures made and contributions received that were not reported previously, including, if applicable, all amounts expended from a public office expense term account established under AS 15.13.116(a)(8) and all amounts

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expended from a municipal office account under AS 15.13.116(a)(9), or when expenditures were not made or contributions were not received during the previous year.

(b) Each contribution that exceeds \$250 and that is made within nine days of the election shall be reported to the commission by date, amount, and contributor within 24 hours of receipt by the candidate, group, campaign treasurer, or deputy campaign treasurer. Each contribution to a nongroup entity for the purpose of influencing the outcome of an election that exceeds \$250 and that is made within nine days of the election shall be reported to the commission by date, amount, and contributor within 24 hours of receipt by the nongroup entity.

(c) All reports required by this chapter shall be filed with the commission's central office and shall be kept open to public inspection. The commission shall keep a report filed on paper under AS 15.13.040(m) open to public inspection by scanning the report and posting a copy of the scanned image on the commission's Internet website within two working days after the report is filed. The commission shall prepare a summary of each report, which shall be made available to the public at cost upon request. Each summary must use uniform categories of reporting. Summaries for reports filed

(1) electronically shall be made available within 30 days after the report is filed; and

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(2) on paper shall be made available within 30 days after each election.

(d) [Repealed, § 35 ch 126 SLA 1994.]

(e) A group formed to sponsor a referendum or a recall shall report 30 days after its first filing with the lieutenant governor. Thereafter, each group shall report within 10 days after the end of each calendar quarter on the contributions received and expenditures made during the preceding calendar quarter until reports are due under (a) of this section.

(f) During the year in which the election is scheduled, each of the following shall file the campaign disclosure reports in the manner and at the times required by this section:

(1) a person who, under the regulations adopted by the commission to implement AS 15.13.100, indicates an intention to become a candidate for elective state executive or legislative office;

(2) a person who has filed a nominating petition under AS 15.25.140—15.25.200 to become a candidate at the general election for elective state executive or legislative office;

(3) a person who campaigns as a write-in candidate for elective state executive or legislative office at the general election; and



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(4) a group or nongroup entity that receives contributions or makes expenditures on behalf of or in opposition to a person described in (1) — (3) of this subsection, except as provided for certain independent expenditures by nongroup entities in AS 15.13.135(a).

(g) An initiative committee, person, group, or nongroup entity receiving contributions exceeding \$500 or making expenditures exceeding \$500 in a calendar year in support of or in opposition to an initiative on the ballot in a statewide election or an initiative proposal application filed with the lieutenant governor under AS 15.45.020 shall file a report within 10 days after the end of each calendar quarter on the contributions received and expenditures made during the preceding calendar quarter until reports are due under (a) and (b) of this section. If the report is a first report, it must cover the period beginning on the day an initiative proposal application is filed under AS 15.45.020 and ending three days before the due date of the report.

(h) An independent expenditure report required under AS 15.13.040(e) shall be filed with the commission not later than 10 days after an independent expenditure has been made. However, an independent expenditure that exceeds \$250 and that is made within nine days of an election shall be reported to the commission not later than 24 hours after the expenditure is made.

(i) During a campaign period, the commission may not change the manner or format in which reports required

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of a candidate under this chapter must be filed. In this subsection, “campaign period” means the period beginning on the date that a candidate becomes eligible to receive campaign contributions under this chapter and ending on the date that a final report for that same campaign must be filed.

(j) Before the primary election, a candidate seeking nomination by petition under AS 15.25.140—15.25.200 for the office of governor, lieutenant governor, state senator, or state representative shall file the reports under (a)(1) and (2) of this section.

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**2020 ALASKA STAT. § 15.13.140**

**Sec. 15.13.140. Independent expenditures for or against ballot proposition or question.**

(a) [Repealed, § 19 ch 36 SLA 2010.]

(b) An independent expenditure for or against a ballot proposition or question

(1) shall be reported in accordance with AS 15.13.040 and 15.13.100—15.13.110 and other requirements of this chapter; and

(2) may not be made if the expenditure is prohibited by AS 15.13.145.

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**2019 ALASKA STAT. § 15.13.400**

**Sec. 15.13.400. Definitions.**

In this chapter,

**(1) “candidate”**

**(A)** means an individual who files for election to the state legislature, for governor, for lieutenant governor, for municipal office, for retention in judicial office, or for constitutional convention delegate, or who campaigns as a write-in candidate for any of these offices; and

**(B)** when used in a provision of this chapter that limits or prohibits the donation, solicitation, or acceptance of campaign contributions, or limits or prohibits an expenditure, includes

**(i)** a candidate’s campaign treasurer and a deputy campaign treasurer;

**(ii)** a member of the candidate’s immediate family;

**(iii)** a person acting as agent for the candidate;

**(iv)** the candidate’s campaign committee; and

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(v) a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of the candidate;

(2) “commission” means the Alaska Public Offices Commission;

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

(4) “contribution”

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

(i) influencing the nomination or election of a candidate;

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(ii) influencing a ballot proposition or question; or

(iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material

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in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee;

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party; or

(vii) an opportunity to participate in a candidate forum provided to a candidate without compensation to the candidate by another person and for which a candidate is not ordinarily charged;

(5) “electioneering communication” means a communication that

(A) directly or indirectly identifies a candidate;

(B) addresses an issue of national, state, or local political importance and attributes a position on that issue to the candidate identified; and

(C) occurs within the 30 days preceding a general or municipal election;

(6) “expenditure”

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

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(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party;

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

(v) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;

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

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



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(8) “group” means

(A) every state and regional executive committee of a political party;

(B) any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election; a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate shall be considered to be controlled by that candidate; a group whose major purpose is to further the nomination, election, or candidacy of only one individual, or intends to expend more than 50 percent of its money on a single candidate, shall be considered to be controlled by that candidate and its actions done with the candidate’s knowledge and consent unless, within 10 days from the date the candidate learns of the existence of the group the candidate files with the commission, on a form provided by the commission, an affidavit that the group is operating without the candidate’s control; a group organized for more than one year preceding an election and endorsing candidates for more than one office or more than one political party is presumed not to be controlled by a candidate; however, a group that

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contributes more than 50 percent of its money to or on behalf of one candidate shall be considered to support only one candidate for purposes of AS 15.13.070, whether or not control of the group has been disclaimed by the candidate; and

(C) any combination of two or more individuals acting jointly who organize for the principal purpose of filing an initiative proposal application under AS 15.45.020 or who file an initiative proposal application under AS 15.45.020;

(9) “immediate family” means the spouse, parent, child, including a stepchild and an adopted child, and sibling of an individual;

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

(11) “individual” means a natural person;

(12) “issues communication” means a communication that

(A) directly or indirectly identifies a candidate; and

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

(13) “nongroup entity” means a person, other than an individual, that takes action the major purpose of which is to influence the outcome of an election, and that

(A) cannot participate in business activities;

(B) does not have shareholders who have a claim on corporate earnings; and

(C) is independent from the influence of business corporations.

(14) “person” has the meaning given in AS 01.10.060, and includes a labor union, nongroup entity, and a group;

(15) “political party” means any group that is a political party under AS 15.80.010 and any subordinate unit of that group if, consistent with the rules or bylaws of the political party, the unit conducts or supports campaign operations in a municipality, neighborhood, house district, or precinct;

(16) “publicly funded entity” means a person, other than an individual, that receives half or more of the money on which it operates during a calendar year from government, including a public corporation.

## APPENDIX G — ALASKA POLICY FORUM

### ALASKA POLICY FORUM

OUR VISION IS AN ALASKA THAT  
CONTINUOUSLY GROWS PROSPERITY BY  
MAXIMIZING INDIVIDUAL OPPORTUNITIES  
AND FREEDOM

Ranked-Choice Voting Fails to Deliver on Its Promises

Published on **February 11, 2020** by **Guest Author**

**By Jacob Posik**

*This op-ed was originally published in the Anchorage Daily News on February 9, 2020.*

In 2016, Maine voters approved a ballot initiative that established the use of ranked-choice voting (RCV) in state and federal elections. In its most recent legislative session, the state also approved the use of RCV in presidential primary and general elections, though that law is now the subject of a People's Veto campaign to be permanently repealed. A thorough timeline of Maine's experience with RCV can be found here.

Election reform is not new to Maine or other jurisdictions. Reformers often make grand claims about the benefits of their preferred voting methods. But like any election system we employ, it comes with pros and cons that deserve legitimate scrutiny outside of the media soundbites and campaign slogans.

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On Jan. 23, the ADN published a commentary from Peter Brann, a Maine attorney who represented Jared Golden in 2018 after the result of our second congressional district election was challenged in court. Mr. Brann made it sound like ranked-choice voting did exactly what was promised – in fact he said it ran “quite smoothly.” This couldn’t be further from the truth.

Despite its billing as the panacea for all of our political woes, RCV fails to deliver on many of its promises to voters. After proponents made dozens of vague, unscientific claims about the benefits of RCV, we at The Maine Heritage Policy Center decided to put these claims to the test.

Unsurprisingly, the conclusions we reached counter much of the talking points voters hear about the benefits of RCV.

Perhaps the central selling point of RCV is that it produces majority winners. This is completely false.

In Maine’s 2018 Second Congressional race between incumbent Bruce Poliquin and challengers Jared Golden, Tiffany Bond and William Hoar, 289,624 votes were cast in the first round. Jared Golden was eventually declared the winner of the contest in the second round of tabulation with 142,440 votes, or 49.18% of ballots cast in the election. We waited nine days for the final election results.

How was this “majority” obtained? More than 8,000 ballots were exhausted through multiple rounds of counting, allowing the eventual winner to take the contest with less than a true majority of the votes cast.

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RCV fails to produce true majority winners is because the system exhausts voters' ballots. A ballot becomes exhausted when a voter overvotes, undervotes or exhausts their choices. For example, a voter accidentally ranks two candidates as their first choice, or only ranks one candidate who is eventually eliminated from the contest.

In these instances, the ballot becomes exhausted and no longer contributes toward the final denominator used to determine a majority winner. It's as if these voters never showed up on Election Day.

Of the 96 RCV elections examined in our research, 61% of them failed to produce a true majority winner.

Similarly, our research found that, on average, approximately 11% of ballots become exhausted in RCV elections. This is a significant portion of the electorate and illustrates exactly how the faux majority is reached – after about 10% of ballots are discarded.

Other claims related to voter turnout, negative campaigning and the influence of money in elections were similarly proven to be false. Again and again, the claims made by supporters of RCV have been debunked using hard data from the jurisdictions that enacted the system.

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.

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Jacob Posik is the Director of Communications at The Maine Heritage Policy Center, where he formerly served as a policy analyst. The Maine Heritage Policy Center is a nonprofit, nonpartisan free-market think tank based in Portland, Maine.

**APPENDIX H — JULY 24 2020 PRESS RELEASE**

**JULY 24 2020**

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

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

**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**.

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.



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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.”

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

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

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

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

**Matthew Gagnon**, CEO of Maine Policy Institute:

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

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

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## APPENDIX I — JULY POST VIDEO (BEGINNING)

Video: Ranked Choice Voting, Explained

Published on **July 31, 2020** by **Guest Author**

Ranked choice voting (RCV) is an electoral scheme that adds more confusion to the voting system while threatening our democracy and failing to ensure that every vote counts. Watch the video to learn more!



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## APPENDIX J — JULY POST VIDEO (END)

### ALASKA POLICY FORUM

OUR VISION IS AN ALASKA THAT  
CONTINUOUSLY GROWS PROSPERITY BY  
MAXIMIZING INDIVIDUAL OPPORTUNITIES  
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Video: Ranked Choice Voting, Explained

Published on **July 31, 2020** by **Guest Author**

Ranked choice voting (RCV) is an electoral scheme that adds more confusion to the voting system while threatening our democracy and failing to ensure that every vote counts. Watch the video to learn more!



For Immediate Release      Contact: Melodie Wilterdink  
October 8, 2020                  (410) 725-9079  
Melodie@AlaskaPolicyForum.org

**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**

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**voting, no Alaskan should have to worry that their  
ballot won't be counted in the final tally."**

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

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

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

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

####

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

## **APPENDIX L — CASE STUDY OF MAINE AND ANALYSIS OF 96 OTHER JURISDICTIONS**

### **The Failed Experiment of Ranked-Choice Voting**

A Case Study of Maine and Analysis of 96 Other  
Jurisdictions

October 2020

#### **Introduction**

A movement currently sparking interest across the country, including in Alaska, is called ranked-choice voting (RCV), also known as instant run-off voting (IRV). Several U.S. municipalities have experimented with ranked-choice voting for more than a decade. For example, the City of San Francisco, California has been using ranked-choice voting since 2004.<sup>1</sup> Via a 2016 ballot initiative, Maine launched a bold experiment by becoming the first state to adopt ranked-choice voting statewide. This case study has been created using data previously compiled by the Maine Policy Institute from those municipal elections and Maine. The results analyzed are from 96 elections in the U.S. that triggered ranked-choice voting. Put differently, these election results were compiled from 96 races where more than one round of tabulation occurred.

Using this data, we can examine and draw conclusions about ranked-choice voting and compare Maine's most recent experience with other jurisdictions to identify

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1. "Ranked Choice Voting in US Elections." FairVote. Accessed July 23, 2019. [https://www.fairvote.org/ranked\\_choice\\_voting\\_is\\_a\\_victory\\_for\\_san\\_francisco\\_voters](https://www.fairvote.org/ranked_choice_voting_is_a_victory_for_san_francisco_voters).

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patterns. The goal of this report is to analyze the history, claims, and mechanisms of ranked-choice voting in an attempt to understand how the system works, its merits and shortcomings, and how it compares to plurality elections and other voting systems.

**How Does Ranked-Choice Voting Work?**

In contrast to plurality elections where voters select a single candidate and the candidate with the most votes wins, ranked-choice voting gives voters the option to rank-order candidates on their ballots. For example, voters may have the choice to rank up to four candidates on their ballots.

| <b>Alaska Governor</b>               | <i>1st Choice</i>        | <i>2nd Choice</i>        | <i>3rd Choice</i>        | <i>4th Choice</i>        | <i>5th Choice</i>        |
|--------------------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| <b>Smith, Janie</b><br>Juneau        | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <b>Jones, Aaron</b><br>Anchorage     | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <b>Williams, Polly</b><br>Palmer     | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <b>Johnson, Freddie</b><br>Fairbanks | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <b>Write-in</b>                      | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

If a candidate receives more than 50 percent of first-place votes, they are declared the winner of the election.



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However, oftentimes one candidate does not receive a majority of the votes cast on Election Day. When this occurs, the candidate(s) who do not stand a mathematical chance of winning are eliminated from contention, and additional rounds of tabulation occur until a candidate receives a majority of the remaining votes. If Janie Smith was eliminated from contention after the first round of tabulation, then the ballots that listed her as a voter's first choice are then awarded to the candidate listed as the voter's next choice. This recurs until one candidate receives over 50 percent of the leftover, non-exhausted ballots. In some races, it may only take one or two rounds of tabulation to declare a winner. However, races with a large field of candidates can require many rounds of tabulation. Regardless, most ranked-choice voting elections that have more than one round of tabulation produce exhausted ballots.

**What Is an Exhausted Ballot?**

An exhausted ballot occurs when a voter overvotes, undervotes, or ranks only candidates that are eliminated from contention. Because these votes are not tabulated in the final round, that ballot does not influence the election after it becomes exhausted. For example, if a ballot becomes exhausted in round four of an election that necessitates 20 rounds of tabulation, the voter's ballot is not included in the final tally; it is as if they never showed up on Election Day. Below are definitions for each type of exhausted ballot:

*Appendix L***Overvote**

An overvote occurs when a voter marks two candidates in a single column/rank. For example, if a voter marked both Janie Smith and Aaron Jones as his first choice, his ballot would not count in the election. Likewise, if a voter correctly ranked his first choice but marked two candidates in the following column, only the first choice would be tabulated.

| <b>Alaska Governor</b>               | <i>1st Choice</i>                   | <i>2nd Choice</i>        | <i>3rd Choice</i>        | <i>4th Choice</i>        | <i>5th Choice</i>        |
|--------------------------------------|-------------------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| <b>Smith, Janie</b><br>Juneau        | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <b>Jones, Aaron</b><br>Anchorage     | <input type="checkbox"/>            | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <b>Williams, Polly</b><br>Palmer     | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <b>Johnson, Freddie</b><br>Fairbanks | <input type="checkbox"/>            | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <b>Write-in</b>                      | <input type="checkbox"/>            | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

**Undervote**

An undervote occurs when a voter skips two or more columns or rankings. For example, if a voter picked Janie Smith as his first choice, skipped his second and third choice and selected another candidate as his fourth

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choice, his ballot would not count in the election after the first round.

| <b>Alaska Governor</b>               | <i>1st Choice</i>                   | <i>2nd Choice</i>        | <i>3rd Choice</i>        | <i>4th Choice</i>                   | <i>5th Choice</i>        |
|--------------------------------------|-------------------------------------|--------------------------|--------------------------|-------------------------------------|--------------------------|
| <b>Smith, Janie</b><br>Juneau        | <input type="checkbox"/>            | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| <b>Jones, Aaron</b><br>Anchorage     | <input type="checkbox"/>            | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| <b>Williams, Polly</b><br>Palmer     | <input type="checkbox"/>            | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| <b>Johnson, Freddie</b><br>Fairbanks | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| <b>Write-in</b>                      | <input type="checkbox"/>            | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |

**Exhausted Choices**

An exhausted choice occurs when a voter ranks only candidates that are eliminated from contention. For example, a voter may only rank Janie Smith and Polly Williams, even if they are eventually eliminated after round one of tabulation.

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| <b>Alaska Governor</b>               | <i>1st Choice</i>                   | <i>2nd Choice</i>                   | <i>3rd Choice</i>                   | <i>4th Choice</i>                   | <i>5th Choice</i>                   |
|--------------------------------------|-------------------------------------|-------------------------------------|-------------------------------------|-------------------------------------|-------------------------------------|
| <b>Smith, Janie</b><br>Juneau        | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |
| <b>Jones, Aaron</b><br>Anchorage     | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            |
| <b>Williams, Polly</b><br>Palmer     | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| <b>Johnson, Freddie</b><br>Fairbanks | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            |
| <b>Write-in</b>                      | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            |

For the purpose of this report, the distinction between exhausted ballots in the first round of tabulation and the rest of the election merits clarification. In this report, we do not consider overvotes and undervotes in the first round of tabulation as “exhausted votes” because voters could make the same mistake on a ballot in an election decided by plurality. In other words, votes that are exhausted in the second and subsequent rounds of tabulation are purely a consequence of using ranked-choice voting. Thus, this report will focus on and isolate those exhausted ballots.

### **Voter Confusion and Information Deficits**

In a plurality election, the choice facing voters is simple: Of all the candidates running, whom do you prefer?

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Ranked-choice voting entails a much more complicated—and somewhat artificial—decision. To fully participate, voters must rank-order all of the candidates. In contrast to run-off elections, voters do not get the benefit of evaluating candidates as they face-off one-on-one. In Maine, voter confusion was so pervasive that proponents of ranked-choice voting felt the need to publish a 19-page instruction manual to help voters navigate the process.<sup>2</sup>

This inherent feature of ranked-choice voting is problematic because it demands that voters have a large amount of information about candidates' differing views. The fact is that most Alaska voters, like most voters in any election, do not follow political races closely enough to meaningfully rank multiple candidates. Yet in order to avoid losing influence in a ranked-choice voting election, a voter must rank each and every candidate. A voter, even one without strong feelings for or against certain candidates, may feel pressured to rank them anyway based on little more than random chance. It is impossible to know exactly how many voters in ranked-choice elections feel this way since nothing can be inferred from how they filled out their ballots, but this phenomenon is likely common.

It is well documented that American voters often lack basic information about candidates' policy positions. A Pew Research Center survey conducted shortly before the 2016 presidential election revealed that a significant

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2. "Voting in Maine's Ranked Choice Election." Town of Wiscasset. 2018. Accessed July 23, 2019. <https://www.wiscasset.org/uploads/originals/rankchoicevoting.pdf>.

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proportion of registered voters knew little or nothing about where the two major candidates stood on key issues.<sup>3</sup> For instance, 48 percent of all voters knew a lot about Hilary Clinton's positions, 32 percent knew some, and 18 percent knew not much or nothing. Knowledge about Donald Trump's stances was even lower: 41 percent of all voters knew a lot about his positions, 27 percent knew some, and 30 percent knew little or nothing.<sup>4</sup> In 2018, a poll found that 34 percent of registered Republican voters and 32.5 percent of registered Democratic voters said they did not even know the names of their party's congressional candidates in their districts.<sup>5</sup>

In other words, tens of millions of Americans enter the voting booth knowing virtually nothing about the policy stances of the candidates. It seems unlikely that they could confidently rank multiple candidates based on a sound assessment of their platforms. A 2014 study conducted in California provides additional reasons to be skeptical that ranked-choice voting functions in practice as its

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3. Oliphant, J. Baxter. "Many Voters Don't Know Where Trump, Clinton Stand on Issues." Pew Research Center. September 23, 2016. Accessed July 24, 2019. <https://www.pewresearch.org/facttank/2016/09/23/ahead-of-debates-many-voters-dont-know-much-about-where-trump-clinton-stand-on-major-issues/>.

4. Ibid.

5. "What's in a Name? One-third of US Voters Don't Know Candidates." CNBC. October 03, 2018. Accessed July 24, 2019. <https://www.cnbc.com/2018/10/03/one-third-of-us-voters-dont-know-candidates-reutersipsos-poll.html>.

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proponents predict.<sup>6</sup> The study found voters are “largely ignorant about the ideological orientation of candidates, including moderates.”<sup>7</sup> This information deficit is already a concern in plurality contests and is greatly magnified in ranked-choice voting elections when voters are asked to rank more than a single candidate.

Less knowledgeable voters are more likely to rank fewer candidates, potentially denying them influence over the election outcome. Giving knowledgeable voters more electoral influence may be defensible as a matter of political philosophy, but it is surely not the intent behind adoption of ranked-choice voting.

The 2018 Maine Democratic gubernatorial primary provides a good example of the practical challenges this poses to voters in ranking their preference in a large field of candidates. There were seven candidates on the ballot in this race and more than seven percent of the ballots were exhausted by the end of the fourth round of tabulation.<sup>8</sup>

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6. Ahler, Douglas, Jack Citrin, and Gabriel S. Lenz. “Why Voters May Have Failed to Reward Proximate Candidates in the 2012 Top Two Primary.” *California Journal of Politics and Policy*. January 15, 2015. Accessed July 24, 2019. <https://escholarship.org/uc/item/9714j8pc>.

7. Ibid.

8. “2018 General Election Results.” Maine Secretary of State. 2018. Accessed July 23, 2019. <https://www.maine.gov/sos/cec/elec/results/results18.html#Nov6>.

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Another example is the 2011 mayoral race in Portland, where ranked-choice voting was used, and 15 candidates appeared on the ballot. In this race, voters had 15 choices, and almost 18 percent of the votes were exhausted before a winner was determined.<sup>9</sup>

When the 96 ranked-choice voting races from across the nation were analyzed, the results show an average of 10.92 percent of ballots cast are exhausted by the final round of tabulation. This phenomenon can be seen in Figure 1.

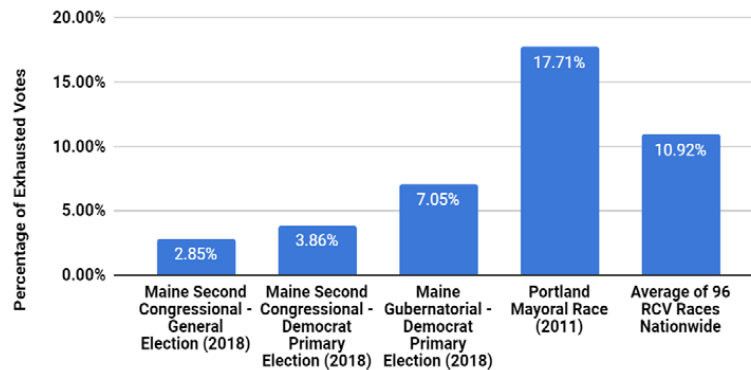
When presented with a ranked-choice voting ballot, many voters do not rank every candidate, potentially due to insufficient information about the candidates or confusion about how ranked-choice voting works. Exhausted ballots are a serious problem under ranked-choice voting, as they systematically reduce the electoral influence of certain voters. A study in 2014 reviewed more than 600,000 ballots in four municipal ranked-choice voting elections from around the country and found ballot exhaustion to be a persistent and significant feature of these elections.<sup>10</sup> The rate of ballot exhaustion in that study was high in each election, ranging from 9.6 percent to 27.1 percent.

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9. Portland, Maine 2011 Mayoral Election Results. FairVote. 2011. Accessed July 23, 2019. <https://www.slideshare.net/kkellyfv/portland-me-2011-mayoral-election-graphs-1>.

10. Burnett, Craig M., and Vladimir Kogan. "Ballot (and Voter) "exhaustion" under Instant Runoff Voting: An Examination of Four Ranked-choice Elections." *Electoral Studies*. November 18, 2014. Accessed July 24, 2019. <https://www.sciencedirect.com/science/article/pii/S0261379414001395>.



*Appendix L***Figure 1: Percentage of Exhausted Votes in Ranked-Choice Elections (Maine and Nationally)**

*Source: Maine Secretary of State; Maine Policy Institute*

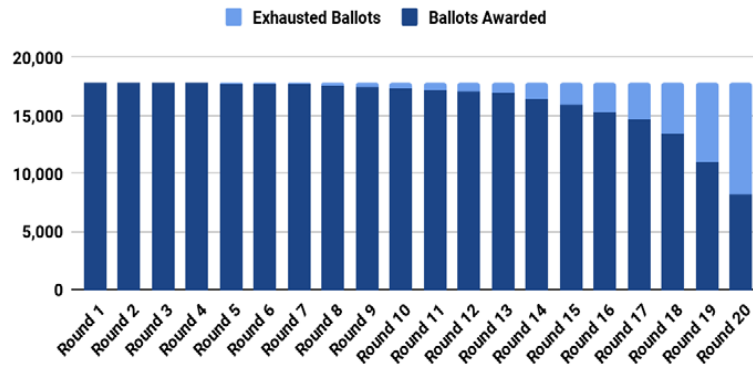
While exceedingly rare, ranked-choice voting races can create more exhausted ballots than ballots that are awarded to the winner of an election. For example, the 2010 election for San Francisco’s Board of Supervisors in District 10 resulted in 9,608 exhausted ballots whereas the prevailing candidate only received 4,321 votes.<sup>11</sup> More striking, there were 1,300 more ballots that were exhausted than were awarded to a candidate at the end of the 20th round of tabulation.<sup>12</sup> This phenomenon is illustrated in Figure 2.

11. “Official Ranked-Choice Results Report November 2, 2010 Consolidated Statewide Direct Primary Election Board of Supervisors, District 10.” City of San Francisco. 2011. Accessed July 23, 2019. <https://sfelections.org/results/20101102/data/d10.html>.

12. Ibid.

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**Figure 2: Exhausted Ballots in San Francisco's Board of Supervisors Election - District 10 (2010)**



*Source: City of San Francisco, Department of Elections*

### Voter Disenfranchisement

When voters are confused by the election process, their voices can be stifled. There is evidence that ranked-choice voting results in voter disenfranchisement.

**Those whose first language is not English are more likely to be disenfranchised with a ranked-choice voting system.**

After San Francisco's 2004 ranked-choice voting election, a study conducted by FairVote, a proponent of ranked-choice voting, found that "the prevalence of ranking three candidates was lowest among African Americans, Latinos, voters with less education, and those whose first language

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was not English.”<sup>13</sup> In the races examined in FairVote’s study, the ballots had three columns for voters to rank their candidates of choice. African Americans, Latinos, voters with less education, and those whose first language was not English disproportionately did not utilize their ballot to the fullest extent possible. More specifically, only 50 percent of African Americans and 53 percent of Latinos ranked three candidates whereas 62 percent of whites ranked a candidate in all three columns. The results of this study are of particular significance in Alaska, where it is required to provide language assistance and ballots for at least 13 other languages for those voters whose primary language is not English.<sup>14</sup>

When individuals leave columns blank on their ballots, and the candidate(s) they vote for are eliminated from contention, their ballots are not counted in the final tabulation. Therefore, if these voters only choose one candidate on their ballots, they are more likely to become exhausted, thereby giving those who fully complete their ballots more influence over the electoral process. In other words, African Americans, Latinos, voters with less education, and those whose first language is not

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13. Neely, Francis, Lisel Blash, and Corey Cook. “An Assessment of Ranked-Choice Voting in the San Francisco 2004 Election Final Report.” FairVote. May 2005. Accessed July 23, 2019. [http://archive.fairvote.org/sfrcv/SFSU-PRI\\_RCV\\_final\\_report\\_June\\_30.pdf](http://archive.fairvote.org/sfrcv/SFSU-PRI_RCV_final_report_June_30.pdf).

14. “English (About Language Assistance).” Alaska Division of Elections. Accessed August 6, 2020. <https://elections.alaska.gov/Core/EnglishLanding.php>.

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English are more likely to be disenfranchised with a ranked-choice voting system.

Further, in his analysis of San Francisco elections between 1995 and 2001, Jason McDaniel, an associate professor at San Francisco State University, found that ranked-choice voting is likely to decrease voter turnout, primarily among African Americans and white voters.<sup>15</sup> McDaniel also found that ranked-choice voting increases the disparity between “those who are already likely to vote and those who are not, including younger voters and those with lower levels of education.”<sup>16</sup> In short, the complexity of a ranked-choice ballot makes it less likely that disadvantaged voices will be fully heard in the political and electoral process.<sup>17</sup>

One key question is whether the rate of ballot exhaustion declines as ranked-choice voting becomes an accepted practice in a jurisdiction and voters become acclimated to it. Evidence suggests that, although mistake rates may decline slightly over time, ranked-choice voting produces consistently higher proportions of exhausted ballots than plurality elections. The data from races in San Francisco showed inconsistent results—some districts showed higher rates of exhausted ballots over time while others

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15. McDaniel, Jason. “Ranked Choice Voting Likely Means Lower Turnout, More Errors.” *Cato Unbound*. December 13, 2016. Accessed July 23, 2019. <https://www.cato-unbound.org/2016/12/13/jason-mcdaniel/ranked-choice-voting-likely-means-lower-turnout-more-errors>.

16. *Ibid.*

17. *Ibid.*

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realized a decline. In Australia, which has used ranked-choice voting in its legislative elections for more than a century, officials still report a much higher rate of invalid ballots than comparator countries like the United States.<sup>18</sup>

While confusion at the ballot box is difficult to quantify, the large percentage of exhausted ballots after the first round of tabulation in ranked-choice voting elections is troubling. It is clear that plurality elections do not elicit as many exhausted ballots. In addition, it is easier for voters to understand and participate in plurality elections. In short, policymakers should make voting as simple as possible and strive to increase engagement in our electoral process.

### **Claims Made by Proponents of Ranked-Choice Voting**

Too often, proponents of ballot initiatives advance lofty claims to win support at the ballot box. Below are some of the claims made by proponents of ranked-choice voting and how they measure up to the data.

#### **Claim 1: A Candidate Needs a Majority to Win**

Proponents of ranked-choice voting often claim that “in a ranked-choice election, a candidate needs to earn more than half of the votes to win.”<sup>19</sup> While this might seem

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18. “Spoilage and Error Rates with Range Voting versus Other Voting Systems.” RangeVoting.org – Experimental Ballot Spoilage Rates for Different Voting Systems. Accessed July 24, 2019. <https://rangevoting.org/SPRates.html>.

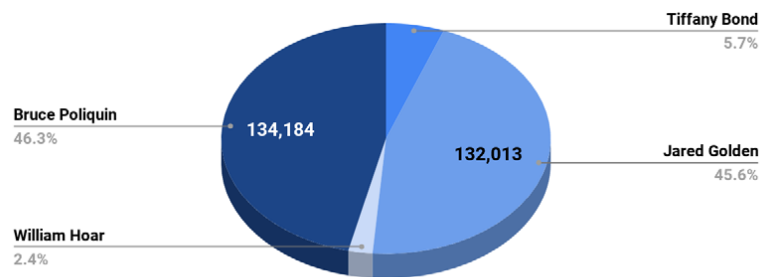
19. “Benefits of Ranked Choice Voting.” FairVote. Accessed July 24, 2019. <https://www.fairvote.org/rcvbenefits>.

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logical based on the sequence of events in a ranked-choice election, it does not always hold true. In fact, a candidate in Maine in 2018 prevailed in a ranked-choice election without receiving a true majority of the votes cast.

**Figure 3: 2nd Congressional District  
Ranked-Choice Voting (Round 1)**

Source: Maine Secretary of State



*Source: Maine Secretary of State*

In Maine’s 2018 Second Congressional District election, incumbent Bruce Poliquin won a plurality (46.33 percent) in the first round of voting. Because the election was governed by ranked-choice voting and Poliquin had not earned more than 50 percent of the votes cast, a second round of tabulation was conducted and the candidates who could not mathematically win were eliminated from contention.

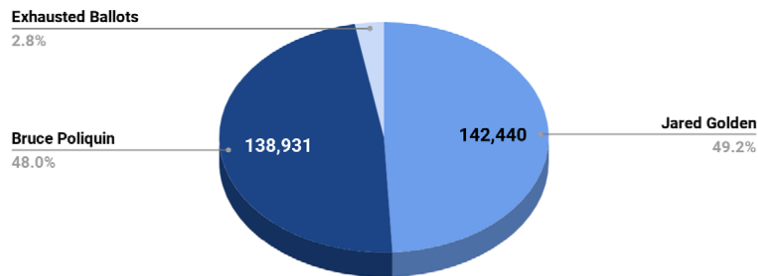
In the second round, Jared Golden secured victory after he gained enough votes from the eliminated candidates to eclipse Poliquin’s lead. However, in this case, “majority” is a misnomer. In reality, Golden prevailed with only 49.18 percent of the total votes cast in the election. This

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phenomenon is due to the number of ballots that were exhausted during the reallocation of votes from the candidates who were eliminated after the first round.

**Figure 4: 2nd Congressional District  
Ranked-Choice Voting (Round 2)**

Source: Maine Secretary of State



*Source: Maine Secretary of State*

To come to this conclusion, one must look at the total number of votes cast in the first round of the election, which was 289,624. After enough ballots were exhausted, Jared Golden was declared the winner with 142,440 votes.<sup>20</sup> However, this was only the majority of the votes tallied in the second round of tabulation, which totaled 281,375. Thus, 8,253 votes were exhausted after the first round and were not carried over into the second round. Figures 3 and 4 outline the distribution of votes in each round of tabulation.

20. "2018 Second Congressional District Election Results." Maine Secretary of State. 2018. Accessed July 23, 2019. <https://www.maine.gov/sos/cec/elec/results/2018/updated-summary-report-CD2.xls>.

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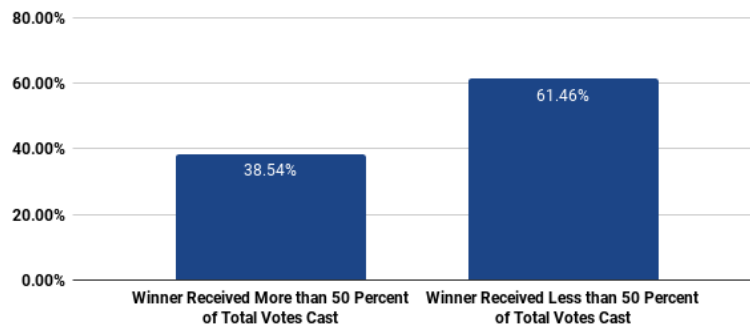
**A 2014 study, examining the results of ranked-choice elections, found that NONE of the winners garnered a majority of the votes cast.**

Further, peer-reviewed research points to the lack of a majority winner as a crucial flaw in the ranked-choice voting system. A 2014 study revealed that ranked-choice voting does not always produce a majority winner. In fact, none of the winners of the elections examined in the study won with a majority of the votes cast.<sup>21</sup> In examining 96 ranked-choice voting races from across the country where additional rounds of tabulation were necessary to declare a winner, the data shows that the eventual winner failed to receive a true majority 61 percent of the time. This can be seen in Figure 5. The most extreme example was from the 2010 San Francisco District 10 Board of Supervisors race, where the prevailing candidate received fewer than 25 percent of the votes cast.

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21. Burnett, Craig M., and Vladimir Kogan. "Ballot (and Voter) "exhaustion" under Instant Runoff Voting: An Examination of Four Ranked-choice Elections." *Electoral Studies*. November 18, 2014. Accessed July 24, 2019. <https://www.sciencedirect.com/science/article/pii/S0261379414001395>.



*Appendix L***Figure 5: Percentage Of Elections That Resulted In A Majority Winner***Source: Maine Policy Institute*

Thus, the claim that ranked-choice voting always provides a majority winner because a candidate is required to earn more than 50 percent of the vote is false and deserves further scrutiny from voters. While candidates sometimes do receive a majority of the total votes cast, a winner is often declared only after a large number of exhausted ballots have been removed from the final denominator.

**Claim 2: Ranked-Choice Voting Reduces Negative Campaigning and Mitigates the Impact of Money in Politics**

Ranked-choice voting is often presented as a solution to the bitter, divisive campaign rhetoric that has come to characterize much of politics in Alaska and the nation.<sup>22</sup>

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22. “What Data Exists to Support the Argument That Ranked Choice Voting Has Reduced Negative Campaigning in Jurisdictions Where It Has Been Adopted?” The Committee

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The argument goes like this: Since candidates hope to be the second choice of voters who prefer a rival candidate, all candidates are dissuaded from trashing their opponents and alienating potentially crucial voters.

But while this logic may discourage candidates from attacking each other directly, it may also augment the role of unaccountable third-party groups in negative campaigning. Recent analysis could not test whether the candidates themselves reduced negative campaigning because the Federal Elections Commission does not compile data related to expenditures in opposition or support of a candidate from the principal campaign committees.

As empirical evidence of the claim that ranked-choice voting makes elections more civil, advocates point to a survey of voters conducted in 2014 in several U.S. cities that used ranked-choice voting to elect city officials.<sup>23</sup> While this study does suggest that negativity declines with ranked-choice voting, it simply measures the “perception of campaign cooperation and civility” and was conducted through a telephone survey. In addition, the sample size was relatively small—measuring only 2,400 respondents

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for Ranked Choice Voting 2020. Accessed July 24, 2019. [http://www.rcvmaine.com/what\\_data\\_exists\\_to\\_support\\_the\\_argument\\_that\\_ranked\\_choice\\_voting\\_has\\_reduced\\_negative\\_campaigning\\_in\\_jurisdictions\\_where\\_it\\_has\\_been\\_adopted](http://www.rcvmaine.com/what_data_exists_to_support_the_argument_that_ranked_choice_voting_has_reduced_negative_campaigning_in_jurisdictions_where_it_has_been_adopted).

23. Tolbert, Caroline. “Experiments in Election Reform: Voter Perceptions of Campaigns Under Preferential and Plurality Voting.” University of Iowa. March 15-16, 2014. Accessed July 23, 2019. <https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/caroline-tolbert.pdf>.

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in several municipalities. The conclusion that ranked-choice voting decreases negative campaigning merits additional scrutiny.

We can test proponents' claims with campaign finance data from Maine's 2018 gubernatorial primaries and the Second Congressional District general election, two of the more recent elections that occurred via RCV. The largest limitation to this research is that independent expenditures below \$250 do not have to be reported to the Maine Ethics Commission, so some campaign spending is not captured in the analysis.<sup>24</sup>

**Maine's Gubernatorial Primaries**

In Maine's 2018 gubernatorial primaries, there was a clear increase in independent expenditures (spending by third-party groups unaffiliated with a particular candidate or party) when compared to prior gubernatorial primaries. In 2018, a total of \$207,500 was spent through independent expenditures to oppose specific candidates. Similarly, \$146,775 was spent through independent expenditures to support candidates in the 2018 gubernatorial primaries.

While this may seem insignificant for gubernatorial races, it must be pointed out that there were zero independent expenditures in opposition to specific candidates during

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24. Title 21-A, §1019-B: Reports of Independent Expenditures. Accessed July 24, 2019. <http://www.mainelegislature.org/legis/statutes/21-A/title21-Asec1019-B.html>.

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the 2006, 2010, and 2014 gubernatorial primaries.<sup>25</sup> Of these elections, the 2010 gubernatorial race most closely resembles the 2018 election because of the large field of candidates and the fact that the incumbent was term limited out of office, making it an open seat.

As outlined in Table 1, there were zero independent expenditures in opposition to a candidate in 2010 and only \$46,669 was spent in support of a candidate. In contrast, \$207,500 was spent in opposition to a candidate in 2018 and \$146,775 was spent in support. Support expenditures actually decreased by more than 40 percent from 2014 to 2018 while opposition expenditures increased from \$0 to \$207,500.

According to fundraising data from the Maine Ethics Commission, 2018 Democrat gubernatorial candidate Adam Cote had raised over \$1 million in the primary election whereas candidate Janet Mills hovered around \$792,000 before June 12, 2018. Instead of Mills' campaign attacking Cote directly, it may have been more effective for her to allow third-party groups to launch attacks against Cote to avoid tarnishing her image in the eyes of Cote supporters. That is exactly what happened—\$192,500 of the opposition spending came from Maine Women Together to attack Cote for once being a Republican and accepting corporate donations.<sup>26</sup> Since a third-party group

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25. "Candidate Elections." Maine.gov. Accessed July 24, 2019. <https://www.maine.gov/ethics/candidates/disclosure>.

26. "Independent Expenditure Reports 2018 Primary Election." Maine Commission on Ethics & Election Practices. Accessed September 21, 2020. <https://www.maine.gov/ethics/candidates/disclosure/2018primaryelection>.

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was levying attacks on Cote, it was more plausible that Mills would receive his voters' second choice votes if he was eliminated from contention than if she attacked him through her own campaign channels.

Unfortunately, this analysis is limited by the records that were available from the Maine Ethics Commission. Records for gubernatorial races prior to 2006 are unavailable.

| Table 1: Independent Expenditures by Third Parties in Maine's Gubernatorial Primaries (2006–2018) |                 |              |           |                            |
|---------------------------------------------------------------------------------------------------|-----------------|--------------|-----------|----------------------------|
|                                                                                                   | Opposition (\$) | Support (\$) | Total     | Total Number of Candidates |
| 2018                                                                                              | \$207,500       | \$162,275    | \$369,775 | 13                         |
| 2014                                                                                              | \$0             | \$274,858    | \$274,858 | 3                          |
| 2010                                                                                              | \$0             | \$46,669     | \$46,669  | 15                         |
| 2006                                                                                              | \$0             | \$1,559      | \$1,559   | 6                          |

*Source: Maine Ethics Commission*

### Maine's 2018 Second Congressional Race

A similar phenomenon occurred in Maine's 2018 Second Congressional District election, which was the first general election in Maine where RCV was law.<sup>27</sup> According to

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27. "Maine's 2nd Congressional District Election, 2018." Ballotpedia. Accessed August 10, 2020. [https://ballotpedia.org/Maine%27s\\_2nd\\_Congressional\\_District\\_election,\\_2018](https://ballotpedia.org/Maine%27s_2nd_Congressional_District_election,_2018).

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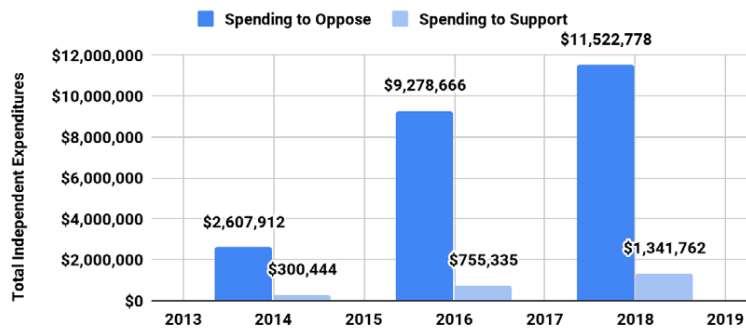
Federal Election Commission data, approximately \$11.52 million was spent through independent expenditures in opposition to a candidate in the 2018 Second Congressional District race. This was a 24 percent increase from 2016, which saw \$9.27 million spent on opposition expenditures.

When the opposition expenditures in non-presidential elections (2014 and 2018) are compared, recent analysis found that opposition expenditures increased by 341 percent. Only \$2.91 million was spent on independent expenditures to oppose a candidate in 2014. Figure 6 breaks down the amounts spent through independent expenditures in support and opposition to candidates in the Second Congressional District.

While this analysis does not provide sufficient evidence that ranked-choice voting increases negative campaigning by third-party groups, it casts doubt on the claim that ranked-choice voting improves the tone and civility of political races. This data should be interpreted as a preliminary indication that ranked-choice voting does not reduce negative campaigning.

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**Figure 6: Independent Expenditures in Maine's 2nd Congressional District (2014-2018)**



*Source: Federal Election Commission*

### **Claim 3: Ranked-Choice Voting Will Increase Voting Turnout**

A common metric used to judge the performance of a voting system—although by no means the only criterion—is its impact on voter turnout. In a democratic society, public participation in elections is critical. A voting system that, for whatever reason, discourages a large portion of eligible voters from casting a ballot could hardly claim to reflect the will of the people.

By international standards, voter turnout in the United States is low.<sup>28</sup> In the 2018 midterms, only 50.3 percent of eligible voters nationwide cast a ballot, and even that

28. DeSilver, Drew. “U.S. Voter Turnout Trails Most Developed Countries.” Pew Research Center. May 21, 2018. Accessed July 24, 2019. <https://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnouttrails-most-developed-countries/>.

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level of engagement marked a 50-year high for a midterm election.<sup>29</sup> Alaska performed better than the national average, with turnout at 54.6 percent in 2018.

Of course, the United States' comparatively low voter turnout has a multitude of causes. Cultural differences, barriers to voter registration, political party dynamics, the competitiveness of races, and other factors influence voter turnout.

Some argue that ranked-choice voting could improve America's chronically low levels of citizen participation in elections by making voters feel that their voice has a greater impact on the outcome of the election. On the other hand, ranked-choice voting might depress turnout by discouraging voters who are confused about how to vote or who don't feel knowledgeable enough to make an informed decision. By increasing the complexity of the ballot, ranked-choice voting could also make it harder for voters to understand the connection between any one vote they cast and the resulting impact on government policies.

The empirical evidence is mixed but tends to show that ranked-choice voting slightly depresses turnout relative to plurality elections. It is important to note that ranked-choice voting has been tried in a small number of jurisdictions in the U.S., which limits the sample size and reduces the power of statistical analyses. It is also

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29. "Voter Turnout in United States Elections." Ballotpedia. Accessed July 24, 2019. [https://ballotpedia.org/Voter\\_turnout\\_in\\_United\\_States\\_elections](https://ballotpedia.org/Voter_turnout_in_United_States_elections).



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exceedingly difficult to isolate other variables—such as voter enthusiasm generated by specific candidates and other concurrent election reforms—that can play a major role in voter turnout.

A study of four cities in California that adopted ranked-choice voting in the early 2000s found that “voter turnout has remained stable when compared to previous elections.”<sup>30</sup> In contrast, testimony to the Kansas Special Committee on Elections from the American Civil Liberties Union (ACLU) said:

Ranked-choice ballots have suppressed voter turnout, especially among those segments of the electorate that are already least likely to participate. Ranked-choice voting (RCV) has resulted in decreased turnouts up to 8% in non-presidential elections. Low-propensity voters are already less likely to participate in elections that do not coincide with congressional or presidential races. By adding additional steps to voting, RCV exacerbates this tendency, making it less likely that new and more casual voters will enter into the process. Moreover, RCV exacerbates economic and racial disparities in voting. Voting errors and spoiled ballots occur far more often. In Minneapolis, for example, nearly 10% of ranked choice ballots

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30. Henry, Madeline Alys. “The Implementation and Effects of Ranked Choice Voting in California Cities.” 2016. Accessed July 23, 2019. <https://csus-dspace.calstate.edu/bitstream/handle/10211.3/182785/Henry.pdf>.

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were not counted, most of these in low-income communities of color. Other municipalities have seen similar effects.<sup>31</sup>

Proponents of ranked-choice voting point to an analysis commissioned by FairVote that found ranked-choice voting is associated with a 10-point increase in voter turnout compared to primary and run-off elections, but is not associated with any change in turnout in general elections. The study was based on data from 26 American cities across 79 elections.<sup>32</sup> According to the study, this 10-point “increase” in turnout is likely due to the compression of voting and “winnowing” of candidates into one election.<sup>33</sup> Overall, the study suggested that ranked-choice voting elections have “minimal effects on rates of voter participation.”<sup>34</sup>

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31. Ganapathy, Vignesh. “Written Testimony.” October 27, 2017. Accessed July 23, 2019. [https://www.aclukansas.org/sites/default/files/field\\_documents/aclu\\_testimony\\_on\\_ranked\\_choice\\_voting.pdf](https://www.aclukansas.org/sites/default/files/field_documents/aclu_testimony_on_ranked_choice_voting.pdf).

32. Kimball, David, and Joseph Anthony. “The Adoption of Ranked Choice Voting Raised Turnout 10 Points.” FairVote. Accessed July 24, 2019. <https://d3n8a8pro7vhmx.cloudfront.net/fairvote/pages/426/attachments/original/1449182124/Kimball-and-Anthony-one-pager-27-Oct.pdf?1449182124>.

33. Kimball, David, and Joseph Anthony. “The Adoption of Ranked Choice Voting Raised Turnout 10 Points.” FairVote. Accessed July 24, 2019. <https://d3n8a8pro7vhmx.cloudfront.net/fairvote/pages/426/attachments/original/1449182124/Kimball-and-Anthony-one-pager-27-Oct.pdf?1449182124>.

34. Ibid.

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As previously mentioned, a study of San Francisco’s election data from 1995 to 2011 found that turnout declined among African American and white voters and exacerbated the disparities between voters who were already likely to vote and those who were not.<sup>35</sup> The author attributes these effects, at least in part, to the fact that ranked-choice voting increases the “information costs” of voting (i.e., the need to be familiar with how ranked-choice voting works further discourages low-propensity voters from participating in elections).<sup>36</sup> Exit polls of voters participating in ranked-choice voting bolster these findings.<sup>37</sup>

Since the answer to whether ranked-choice voting actually increases turnout when compared to plurality elections is still up for debate, it is irresponsible to make this lofty claim.

**Comparing Election Outcomes**

A relevant question in comparing plurality elections against ranked-choice voting is to ask how often the

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35. McDaniel, Jason. “Ranked Choice Voting Likely Means Lower Turnout, More Errors.” *Cato Unbound*. December 13, 2016. Accessed July 24, 2019. <https://www.cato-unbound.org/2016/12/13/jason-mcdaniel/ranked-choice-voting-likely-means-lower-turnout-more-errors>.

36. *Ibid.*

37. Neely, Francis, Lisel Blash, and Corey Cook. “An Assessment of Ranked-Choice Voting in the San Francisco 2004 Election Final Report.” *FairVote*. May 2005. Accessed July 23, 2019. [http://archive.fairvote.org/sfrcv/SFSU-PRI\\_RCV\\_final\\_report\\_June\\_30.pdf](http://archive.fairvote.org/sfrcv/SFSU-PRI_RCV_final_report_June_30.pdf).

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two voting systems would produce a different electoral outcome. Those cases are relatively sparse, occurring only when the votes cast for eliminated candidates are reallocated to a contender who came in second place or worse in the first round of tabulation, and the votes gained in subsequent rounds of tabulation exceed the gains made by the leader after the first round.

**Maine**

In 2018, only three elections in Maine had no majority winner in the first round of votes:

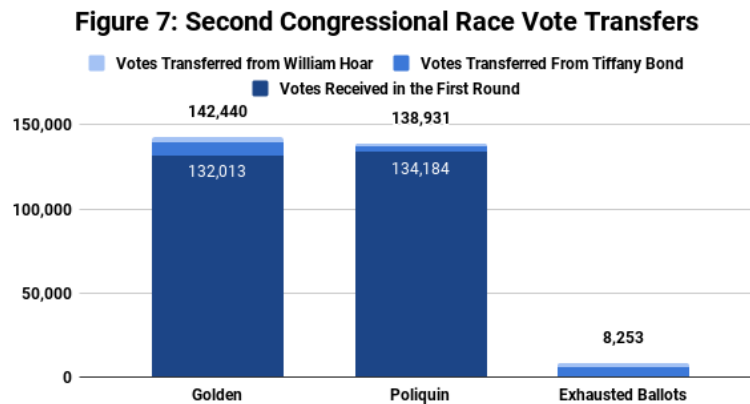
- Democrat Gubernatorial Primary
- Democrat Congressional Primary (Second Congressional District)
- General Election for the Second Congressional District

Of the elections that required additional rounds of tabulation in Maine, the general election race for the Second Congressional District was the only election that produced an outcome different than what would have occurred under a plurality election.

As previously mentioned, Poliquin initially received 134,184 votes, or 46.33 percent of the total votes cast whereas Golden received 132,013 votes, or 45.48 percent of the total votes cast. Once the second round of tabulation was completed, 4,747 votes (3,117 from Bond and 1,630 from Hoar) were allocated to Poliquin and 10,427 votes

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(7,862 from Bond and 2,565 from Hoar) were awarded to Golden. Figure 7 provides a visual breakdown of how the votes were distributed to change the outcome of the election.



*Source: Maine Secretary of State; Maine Policy Institute*

### Other Jurisdictions

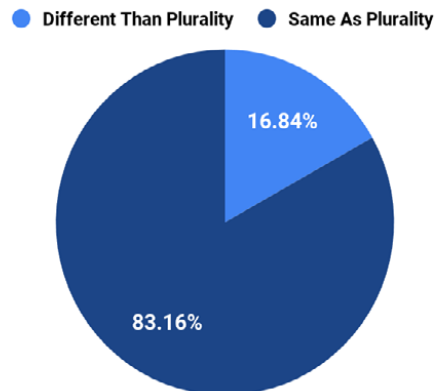
According to the election results obtained from 96 ranked-choice voting elections nationwide that triggered a second round of tabulation (excluding one that resulted in a tie in the first round of tabulation), ranked-choice voting changes the outcome of an election approximately 17 percent of the time. This is illuminated in Figure 8. If all ranked-choice voting races were examined in this analysis, including those that produced a majority winner in the first round, the percentage of races where the outcome changes would decrease.

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The frequency with which ranked-choice voting elections produce a different outcome than plurality elections is important because it allows lawmakers to weigh the benefits and consequences of a new voting system. If ranked-choice elections rarely produce a different outcome, the costs of such a system may outweigh the alleged benefits.

**Figure 8: How Often Does The Outcome Change In Ranked-Choice Elections?**

Source: The Maine Heritage Policy Center



*Source: Maine Policy Institute*

*Appendix L***Paradoxical Effects of Ranked-Choice Voting**

One of the primary arguments in favor of ranked-choice voting is that it gives voters a broader set of options and reduces political polarization. However, these claims overlook serious shortcomings of ranked-choice voting.<sup>38</sup>

Ranked-choice voting exhibits non-monotonicity, one of the fundamental metrics used by political theorists to evaluate voting systems. Monotonicity is defined as follows: “With the relative order or rating of the other candidates unchanged, voting a candidate higher should never cause the candidate to lose, nor should voting a candidate lower ever cause the candidate to win.” In other words, voting your choice should only help your candidate.

In some cases (such as a tight three-way race), ranked-choice voting violates this principle, meaning that more first-place votes can hurt, rather than help, a candidate.<sup>39</sup> To see how non-monotonicity works, consider the following example:

Suppose three candidates, Anne (A), Bob (B), and Corey (C) are running for Congress. For simplicity, assume only 100 ballots are cast. Therefore, the number of ballots needed to win is 51 (assuming no exhausted ballots). The results are shown below.

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38. Gierzynski, Anthony. “Instant Runoff Voting.” Accessed July 24, 2019. <https://www.uvm.edu/~vlrs/IRVassessment.pdf>.

39. “Monotonicity and IRV – Why the Monotonicity Criterion Is of Little Import.” FairVote. Accessed July 24, 2019. <http://archive.fairvote.org/monotonicity/>.

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| Table 2: Effects of Non-Monotonicity (Round 1) |                       |                       |                       |
|------------------------------------------------|-----------------------|-----------------------|-----------------------|
| <b>Number of votes</b>                         | <i>1st preference</i> | <i>2nd preference</i> | <i>3rd preference</i> |
| <b>39</b>                                      | Anne                  | Bob                   | Corey                 |
| <b>35</b>                                      | Bob                   | Corey                 | Anne                  |
| <b>26</b>                                      | Corey                 | Anne                  | Bob                   |

No candidate has a majority of the vote, so the last-place finisher, Corey, is eliminated. His 26 votes go to Anne, who wins in the second round with 65 of the 100 votes (her original 39 votes plus the 26 votes she gained when Corey was eliminated).

Now suppose that prior to the election, sensing that Anne was the strongest candidate, 10 of Bob's voters had shifted their first-place preference to Anne. The table below shows the distribution of ballots.

| Table 3: Effects of Non-Monotonicity (Round 2) |                       |                       |                       |
|------------------------------------------------|-----------------------|-----------------------|-----------------------|
| <b>Number of votes</b>                         | <i>1st preference</i> | <i>2nd preference</i> | <i>3rd preference</i> |
| <b>49</b>                                      | Anne                  | Bob                   | Corey                 |
| <b>25</b>                                      | Bob                   | Corey                 | Anne                  |
| <b>26</b>                                      | Corey                 | Anne                  | Bob                   |

Under this scenario, Anne falls just short of a majority in the first round. Bob finishes last, so he is eliminated; his 25 votes go to Corey, who carries the election with 51 votes (his original 26 votes plus the 25 votes he gained when Bob was eliminated). Anne received more first-place



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votes than in the first scenario, but this increase in support turned her victory into defeat.

The 2009 mayoral election in Burlington, Vermont shows that non-monotonicity is not merely a theoretical danger. The three-way race pitted Progressive Bob Kiss against Democrat Andy Montroll and Republican Kurt Wright. Bob Kiss won the election, but he could have lost if more Wright voters had ranked Kiss first, causing Montroll to come in second place in the first round. Then Montroll would have gained enough votes from Wright in the second round to defeat Kiss.<sup>40</sup>

Another important result from Burlington's 2009 mayoral election is that the candidate who was preferred over all other candidates in a head-to-head race, Andy Montroll, lost the election via ranked-choice voting. This demonstrates the issues caused by a nonmonotonic voting system.<sup>41</sup>

**Ranked-Choice Voting and Third-Party Candidates**

Alaska has always had a strong independent political streak, and encouraging third-party involvement in policymaking is a goal many Alaskans share. Plurality elections are often accused of stifling third-party candidates and shutting unorthodox voices out of the political process, forcing voters to choose between

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40. Gierzynski, Anthony. "Instant Runoff Voting." Accessed July 24, 2019. <https://www.uvm.edu/~vlrs/IRVassessment.pdf>.

41. Ibid.

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throwing away their vote on a longshot candidate or helping to elect a more viable candidate who doesn't as accurately reflect voters' preferences.

While this is certainly a weakness of plurality elections, ranked-choice voting is not an obvious improvement. In fact, ranked-choice voting can neuter third parties and help to perpetuate the two-party system that many voters dislike. Despite proponents' claims, ranked-choice voting does not solve the "spoiler" problem, where voters are reluctant to rank their favorite candidate first for fear of letting their least favorite candidate win.<sup>42</sup>

There are only two cases in which ranked-choice voting lets you rank your favorite candidate first without worrying about a spoiler effect. First, when your favorite candidate is the clear winner. Second, when your favorite candidate is clearly going to lose (and your second-choice vote for a compromise candidate will be tabulated in the second round). In between these two extremes, ranked-choice voting doesn't solve the spoiler problem.

Ranking a strong third-party candidate first, for example, may get your compromise candidate eliminated, causing your least-favorite candidate to win. In this scenario, ranking the compromise candidate first might have buttressed his support enough to win outright or survive a second-round matchup with your leastfavorite candidate.

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42. "Eliminates the Spoiler Effect." Utah Ranked Choice Voting. Accessed July 24, 2019. <http://utahrcv.com/why-ranked-choice-voting/more-choices-more-voices/>.

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In short, voters in ranked-choice voting elections still have to worry about spoiler effects and may still feel pressure not to rank their true favorite candidate first.

**Ranked-choice voting can neuter third parties and help to perpetuate the two-party system that many voters dislike.**

In addition, much of third parties' power in the U.S. derives not from the number of elected positions they hold, but from their ability to influence major party candidates to cater to "ideological minorities." Jason Sorens, a lecturer at Dartmouth College, outlines the loss of third parties' "blackmail power" as a disadvantage of instant run-off voting because it allows major party candidates to ignore third party constituencies.<sup>43</sup>

In plurality elections, Republican candidates, for example, may adopt more Libertarian positions than they would otherwise in order to buttress that small but potentially important constituency. Similarly, Democratic politicians may find it in their interest to defend more environmentally centered positions to appeal to Green Party voters. Third parties can strategically run candidates in specific districts in order to "punish" a major-party candidate. A Libertarian candidate, for example, may challenge a Republican who is viewed as too distant from Libertarian

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43. Sorens, Jason. "The False Promise of Instant Runoff Voting." Cato Unbound. December 09, 2016. Accessed July 24, 2019. <https://www.cato-unbound.org/2016/12/09/jason-sorens/false-promise-instant-runoff-voting>.

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goals, splitting the vote and causing the Republican to lose an otherwise-winnable election.<sup>44</sup>

However, under ranked-choice voting, third parties' "blackmail power" is significantly eroded, since major party candidates can usually be confident of inheriting the votes of an ideologically similar third-party challenger who is eliminated in the early rounds of tabulation.

Therefore, ranked-choice voting should not be celebrated as a victory for third-party candidates. In fact, it may hurt them because it weakens their ability to push majorparty candidates to support more moderate, or extreme, policies.

**Jurisdictions That Have Repealed Ranked-Choice Voting**

A handful of jurisdictions have adopted, tested, and subsequently repealed ranked-choice voting or instant run-off election systems. These jurisdictions are identified and described below. In addition, there have been multiple efforts in Maine to overturn or amend its ranked-choice voting system.

**Burlington, Vermont**

The City of Burlington adopted ranked-choice voting for mayoral races in 2005 and implemented the new voting

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44. Sorens, Jason. "The False Promise of Instant Runoff Voting." Cato Unbound. December 09, 2016. Accessed July 24, 2019. <https://www.cato-unbound.org/2016/12/09/jason-sorens/false-promise-instant-runoff-voting>.

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system in 2006. It was used in two mayoral elections and was subsequently repealed by nearly 52 percent of voters in 2010.<sup>45</sup> The repeal might have been due to voters' discontent with an unpopular incumbent winning reelection in 2009 with only 29 percent of first-place votes.<sup>46</sup>

**Ann Arbor, Michigan**

An initiative organized by the Human Rights Party (HRP) establishing the use of ranked-choice voting in mayoral elections was approved by Ann Arbor voters in 1974. According to an email from an election clerk in Washtenaw County, Michigan, typical elections in the city would play out like this: “the Republican candidate would get the most votes, but the Democrats and HRP would together have a majority.” Because of this dynamic, “the Democrats and the HRP worked together to create the ranked choice plan.”

After a mayoral election in 1975, Republicans started a petition drive to repeal ranked-choice voting. In 1976, 62 percent of voters cast their ballot in favor of repealing

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45. McCrea, Lynne. “Burlington Voters Repeal Instant Runoff Voting.” VPR Archive. December 12, 2016. Accessed August 07, 2019. <https://vprarchive.vpr.net/vpr-news/burlington-voters-repeal-instant-runoff-voting/>.

46. Scher, Bill. “Is Ranked-Choice Voting Transforming Our Politics?” RealClearPolitics. June 18, 2018. Accessed August 07, 2019. [https://www.realclearpolitics.com/articles/2018/06/18/is\\_ranked-choice\\_voting\\_transforming\\_our\\_politics\\_137294.html](https://www.realclearpolitics.com/articles/2018/06/18/is_ranked-choice_voting_transforming_our_politics_137294.html).

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ranked-choice voting.<sup>47</sup> Thus, Ann Arbor residents repealed the voting system after their first experiment with it.

**State of North Carolina**

The State of North Carolina adopted ranked-choice voting for judicial vacancies in 2006. In 2010, only two races, a statewide Court of Appeals and a district-wide Superior Court race, resulted in more than one round of counting that triggered ranked-choice voting. According to a local news station in North Carolina, the voting system had “mixed reviews” from voters when it was used in 2010.<sup>48</sup>

In 2013, the election system was repealed through HB 589, a voter ID bill that passed in the North Carolina General Assembly and made several changes to the state’s election law.<sup>49</sup> Therefore, the legislature decided to repeal the law three years after it was used in a statewide judicial race.

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47. Walter, Benjamin. “Instant Runoff Voting: History in Ann Arbor, Michigan.” Archive.fo. September 17, 2008. Accessed August 07, 2019. <https://archive.fo/lc5Ww>.

48. Binker, Mark. “Q&A: Changes to NC Election Laws.” WRAL.com. August 12, 2013. Accessed August 07, 2019. <https://www.wral.com/election-changes-coming-in-2014-2016/12750290/>.

49. S.L. 2013-381. Accessed August 07, 2019. <https://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2013-2014/SL2013-381.html>.

*Appendix L***Aspen, Colorado**

After Aspen used ranked-choice voting for the first time in 2009, voters rejected the voting system in 2010 with approximately 65 percent of the vote.<sup>50</sup> Curtis Wackerle, an editor for the Aspen Daily News, estimates that voters repealed ranked-choice voting because, “in the four municipal elections in which it was used, the candidate who received the most votes in the first round won the runoff every time, making the extra month of campaigning seem like a money-sucking, brain damage-inducing waste of time.”<sup>51</sup>

**Pierce County, Washington**

Voters in Pierce County Washington adopted ranked-choice voting to elect county officials in 2006, with 53 percent of voters approving the system.<sup>52</sup> Voters who participated in an auditor’s survey indicated they did not like the voting system by a 2-1 margin. According to the Washington Secretary of State, voters repealed

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50. Wackerle, Curtis. “City Voters Repeal IRV.” Aspen Daily News. December 18, 2017. Accessed August 07, 2019. [https://www.aspendailynews.com/city-voters-repeal-irv/article\\_5d3a9245-bfc1-55db-947b-fefdb87031ea.html](https://www.aspendailynews.com/city-voters-repeal-irv/article_5d3a9245-bfc1-55db-947b-fefdb87031ea.html).

51. Ibid.

52. “November 7, 2006 General Election – Final Election Results.” Pierce County, Washington. November 28, 2006. <https://www.piercecountywa.gov/DocumentCenter/View/1512/nov2006results?bidId=>.

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ranked-choice voting with 71 percent of the vote in 2009.<sup>53</sup> Elections Director Nick Handy had this to say about ranked-choice voting in Pierce County:

Just three years ago, Pierce County voters enthusiastically embraced this new idea as a replacement for the then highly unpopular Pick-a-Party primary. Pierce County did a terrific job implementing ranked choice voting, but voters flat out did not like it.

The rapid rejection of this election model that has been popular in San Francisco, but few other places, was expected, but no one really anticipated how fast the cradle to grave cycle would run. The voters wanted it. The voters got and tried it. The voters did not like it. And the voters emphatically rejected it. All in a very quick three years.

It is clear that voters in these jurisdictions felt that their traditional voting method, whatever it may have been, was superior to ranked-choice voting.

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53. Washington Secretary of State's Office. "Pierce Voters Nix 'ranked-choice Voting'." From Our Corner. November 12, 2009. Accessed August 07, 2019. <https://blogs.sos.wa.gov/FromOurCorner/index.php/2009/11/pierce-voters-nix-ranked-choice-voting/>.



*Appendix L***Potential Expansion**

While ranked-choice voting was originally used only in federal and primary elections in Maine, there are ongoing efforts for it to be used in presidential primaries and general elections as well.<sup>54</sup> There are also ongoing efforts in several other states. These include Alaska, Massachusetts, North Dakota, and Arkansas.<sup>55</sup> In addition, San Diego, the eighth largest city in the country, recently considered ranked-choice voting at the city level. However, the city council rejected the idea, arguing that instituting ranked-choice voting “would confuse voters, increase election costs, and possibly have unintended consequences.”<sup>56</sup>

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54. Maine State Legislature. “Legislative Document 1083.” January 12, 2020. <https://legislature.maine.gov/legis/bills/getPDF.asp?paper=SP0315&item=4&snum=129>.

55. “Massachusetts Question 2, Ranked-Choice Voting Initiative (2020).” Ballotpedia. Accessed August 14, 2020. [https://ballotpedia.org/Massachusetts\\_Question\\_2,\\_Ranked-Choice\\_Voting\\_Initiative\\_\(2020\)#cite\\_note-2](https://ballotpedia.org/Massachusetts_Question_2,_Ranked-Choice_Voting_Initiative_(2020)#cite_note-2).

“North Dakota Top-Four Ranked-Choice Voting, Redistricting, and Election Process Changes Initiative (2020).” Ballotpedia. Accessed August 14, 2020. [https://ballotpedia.org/North\\_Dakota\\_Top-Four\\_Ranked-Choice\\_Voting,\\_Redistricting,\\_and\\_Election\\_Process\\_Changes\\_Initiative\\_\(2020\)](https://ballotpedia.org/North_Dakota_Top-Four_Ranked-Choice_Voting,_Redistricting,_and_Election_Process_Changes_Initiative_(2020)).

“Arkansas Top-Four Ranked-Choice Voting Initiative (2020).” Ballotpedia. Accessed August 14, 2020. [https://ballotpedia.org/Arkansas\\_Top-Four\\_Ranked-Choice\\_Voting\\_Initiative\\_\(2020\)](https://ballotpedia.org/Arkansas_Top-Four_Ranked-Choice_Voting_Initiative_(2020)).

56. Garrick, David. “San Diego Voters Can Lift 30-foot Height Limit Near Sports Arena in November.” *The San Diego*

*Appendix L***Conclusion**

Democratic choice, within the confines of our constitutional republic, forms the bedrock of America's system of governance. Adopting a simple, fair, and secure voting system is fundamental to democratic elections. It is clear that plurality elections are much simpler and easier to understand than races determined by ranked-choice voting.

This analysis of 96 ranked-choice voting elections from across the country shows that the voting system produces false majorities, frequently exhausts more than 10 percent of ballots cast on Election Day, and further disenfranchises voters who are already less likely to vote.

While proponents of ranked-choice voting may claim the new voting system is a better alternative to traditional voting systems, the plurality system offers voters an easier method of selecting representatives without the false promises of ranked-choice voting.

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Union-Tribune. July 21, 2020. <https://www.sandiegouniontribune.com/news/politics/story/2020-07-21/san-diego-voters-can-lift-30-foot-height-limit-near-sports-arena-in-november>.

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| <b>Appendix</b> |                              |                                       |                                     |                                     |                         |                              |                               |                                 |                                                    |
|-----------------|------------------------------|---------------------------------------|-------------------------------------|-------------------------------------|-------------------------|------------------------------|-------------------------------|---------------------------------|----------------------------------------------------|
| <b>Year</b>     | <b>Jurisdiction</b>          | <b>Election</b>                       | <b>Total<br/>in First<br/>Round</b> | <b>Total in<br/>Final<br/>Round</b> | <b>Winner<br/>Total</b> | <b>Exhausted<br/>Ballots</b> | <b>Outcome<br/>Different?</b> | <b>% of Votes<br/>Exhausted</b> | <b>Winner<br/>Percentage<br/>of Total<br/>Vote</b> |
| 1975            | Ann Arbor, MI <sup>18</sup>  | Mayoral Race                          | 29,501                              | 29,262                              | 14,684                  | 239                          | Yes                           | 0.81%                           | 49.77%                                             |
| 2009            | Aspen, CO <sup>8</sup>       | Mayoral Race                          | 2,528                               | 2,413                               | 1,273                   | 115                          | No                            | 4.55%                           | 50.36%                                             |
| 2009            | Aspen, CO <sup>8</sup>       | City Council-Seat 1                   | 2,401                               | 2,143                               | 1,233                   | 258                          | No                            | 10.75%                          | 51.35%                                             |
| 2009            | Aspen, CO <sup>8</sup>       | City Council-Seat 2                   | 2,226                               | 2,103                               | 1,073                   | 123                          | Yes                           | 5.53%                           | 48.20%                                             |
| 2010            | Berkeley, CA <sup>13</sup>   | City Council-District 7               | 4,184                               | 4,167                               | 2,086                   | 17                           | No                            | 0.41%                           | 49.86%                                             |
| 2014            | Berkeley, CA <sup>13</sup>   | City Council-District 8               | 4,518                               | 4,128                               | 2,072                   | 390                          | No                            | 8.63%                           | 45.86%                                             |
| 2016            | Berkeley, CA <sup>13</sup>   | Mayoral Race                          | 59,144                              | 58,545                              | 29,499                  | 599                          | No                            | 1.01%                           | 49.88%                                             |
| 2016            | Berkeley, CA <sup>13</sup>   | City Council-District 2               | 7,138                               | 6,734                               | 3,451                   | 404                          | Yes                           | 5.66%                           | 48.35%                                             |
| 2018            | Berkeley, CA <sup>13</sup>   | City Council-District 1               | 7,872                               | 7,559                               | 4,120                   | 313                          | No                            | 3.98%                           | 52.34%                                             |
| 2006            | Burlington, VT <sup>6</sup>  | Mayoral Race                          | 9,711                               | 8,747                               | 4,761                   | 964                          | No                            | 9.93%                           | 49.03%                                             |
| 2009            | Burlington, VT <sup>6</sup>  | Mayoral Race                          | 8,976                               | 8,374                               | 4,313                   | 602                          | Yes                           | 6.71%                           | 48.05%                                             |
| 2007            | Cary, NC <sup>1</sup>        | Council Seat-District B               | 3,022                               | 2,754                               | 1,401                   | 268                          | No                            | 8.87%                           | 46.36%                                             |
| 2018            | State of ME <sup>5</sup>     | 2nd Congressional                     | 289,624                             | 281,371                             | 142,440                 | 8,253                        | Yes                           | 2.85%                           | 49.18%                                             |
| 2018            | State of ME <sup>5</sup>     | 2nd Congressional<br>Democrat Primary | 45,211                              | 43,464                              | 23,611                  | 1,747                        | No                            | 3.86%                           | 52.22%                                             |
| 2018            | State of ME <sup>5</sup>     | Gubernatorial Democrat<br>Primary     | 126,139                             | 117,250                             | 63,384                  | 8,889                        | No                            | 7.05%                           | 50.25%                                             |
| 2009            | Minneapolis, MN <sup>9</sup> | City Council-Ward 4                   | 3,299                               | 2,992                               | 1,740                   | 307                          | No                            | 9.31%                           | 52.74%                                             |
| 2009            | Minneapolis, MN <sup>9</sup> | City Council-Ward 5                   | 2,170                               | 2,024                               | 1,131                   | 146                          | No                            | 6.73%                           | 52.12%                                             |
| 2009            | Minneapolis, MN <sup>9</sup> | Park Board-District 5                 | 7,848                               | 6,891                               | 3,620                   | 957                          | No                            | 12.19%                          | 46.13%                                             |
| 2009            | Minneapolis, MN <sup>9</sup> | Park Board-District 6                 | 8,354                               | 7,806                               | 4,300                   | 548                          | No                            | 6.56%                           | 51.47%                                             |
| 2013            | Minneapolis, MN <sup>9</sup> | Mayoral Race                          | 79,415                              | 63,842                              | 38,870                  | 15,573                       | No                            | 19.61%                          | 48.95%                                             |
| 2013            | Minneapolis, MN <sup>9</sup> | City Council-Ward 5                   | 3,499                               | 3,236                               | 1,842                   | 263                          | No                            | 7.52%                           | 52.64%                                             |
| 2013            | Minneapolis, MN <sup>9</sup> | City Council Ward 9                   | 4,179                               | 3,745                               | 1,987                   | 434                          | No                            | 10.39%                          | 47.55%                                             |
| 2013            | Minneapolis, MN <sup>9</sup> | City Council Ward 13                  | 10,459                              | 9,764                               | 5,059                   | 695                          | No                            | 6.64%                           | 48.37%                                             |
| 2017            | Minneapolis, MN <sup>9</sup> | Mayoral Race                          | 104,522                             | 81,687                              | 46,716                  | 22,835                       | No                            | 21.85%                          | 44.69%                                             |
| 2017            | Minneapolis, MN <sup>9</sup> | City Council-Ward 1                   | 8,734                               | 8,408                               | 4,296                   | 326                          | No                            | 3.73%                           | 49.19%                                             |

*Appendix L*

|      |                                 |                                       |           |           |         |         |     |        |        |
|------|---------------------------------|---------------------------------------|-----------|-----------|---------|---------|-----|--------|--------|
| 2017 | Minneapolis, MN <sup>9</sup>    | Park Board-District 1                 | 14,303    | 13,041    | 7,210   | 1,262   | No  | 8.82%  | 50.41% |
| 2017 | Minneapolis, MN <sup>9</sup>    | City Council-Ward 3                   | 9,592     | 8,705     | 4,861   | 887     | Yes | 9.25%  | 50.68% |
| 2017 | Minneapolis, MN <sup>9</sup>    | Park Board-District 3                 | 14,630    | 13,594    | 7,753   | 1,036   | No  | 7.08%  | 52.99% |
| 2017 | Minneapolis, MN <sup>9</sup>    | City Council-District 4               | 5,263     | 5,035     | 2,605   | 228     | Yes | 4.33%  | 49.50% |
| 2017 | Minneapolis, MN <sup>9</sup>    | City Council-District 5               | 4,216     | 4,082     | 2,313   | 134     | No  | 3.18%  | 54.86% |
| 2017 | Minneapolis, MN <sup>9</sup>    | Park Board-District 6                 | 18,488    | 17,256    | 8,785   | 1,232   | No  | 6.66%  | 47.52% |
| 2017 | Minneapolis, MN <sup>9</sup>    | City Council-District 9               | 5,519     | 4,916     | 2,982   | 603     | No  | 10.93% | 54.03% |
| 2017 | Minneapolis, MN <sup>9</sup>    | City Council-District 11              | 9,160     | 8,738     | 4,757   | 422     | No  | 4.61%  | 51.93% |
| 2010 | State of NC <sup>11</sup>       | Court of Appeals-Judicial             | 1,943,771 | 1,081,305 | 543,980 | 862,446 | Yes | 44.37% | 27.99% |
| 2010 | State of NC <sup>2</sup>        | Superior Court<br>Judge-District 12 A | 18,704    | 16,472    | 8,378   | 2,232   | Yes | 11.93% | 44.79% |
| 2010 | Oakland, CA <sup>13</sup>       | Mayoral Race                          | 119,607   | 105,769   | 53,897  | 13,838  | Yes | 11.57% | 45.06% |
| 2010 | Oakland, CA <sup>13</sup>       | City Council-District 4               | 20,994    | 19,671    | 10,439  | 1,323   | No  | 6.30%  | 49.72% |
| 2012 | Oakland, CA <sup>13</sup>       | City Council-At-Large                 | 143,924   | 130,057   | 78,941  | 13,867  | No  | 9.63%  | 54.85% |
| 2012 | Oakland, CA <sup>13</sup>       | City Council-District 1               | 28,562    | 23,741    | 12,293  | 4,821   | No  | 16.88% | 43.04% |
| 2012 | Oakland, CA <sup>13</sup>       | City Council-District 3               | 21,991    | 17,427    | 9,397   | 4,564   | Yes | 20.75% | 42.73% |
| 2012 | Oakland, CA <sup>13</sup>       | City Council-District 5               | 11,245    | 10,460    | 5,716   | 785     | No  | 6.98%  | 50.83% |
| 2012 | Oakland, CA <sup>13</sup>       | School Director-District 3            | 20,580    | 19,211    | 11,725  | 1,369   | No  | 6.65%  | 56.97% |
| 2014 | Oakland, CA <sup>13</sup>       | Mayoral Race                          | 101,888   | 77,227    | 48,806  | 24,661  | No  | 24.20% | 47.90% |
| 2014 | Oakland, CA <sup>13</sup>       | City Council-District 2               | 13,555    | 12,347    | 6,547   | 1,208   | No  | 8.91%  | 48.30% |
| 2014 | Oakland, CA <sup>13</sup>       | City Council-District 6               | 11,162    | 10,376    | 5,430   | 786     | No  | 7.04%  | 48.65% |
| 2014 | Oakland, CA <sup>13</sup>       | School Director-District 4            | 16,120    | 14,886    | 7,802   | 1,234   | No  | 7.66%  | 48.40% |
| 2016 | Oakland, CA <sup>13</sup>       | School Director-District 3            | 22,351    | 20,606    | 10,796  | 1,745   | No  | 7.81%  | 48.30% |
| 2016 | Oakland, CA <sup>13</sup>       | School Director-District 5            | 13,305    | 12,286    | 6,277   | 1,019   | Yes | 7.66%  | 47.18% |
| 2018 | Oakland, CA <sup>13</sup>       | City Council District 4               | 25,219    | 21,696    | 11,736  | 3,523   | No  | 13.97% | 46.54% |
| 2018 | Oakland, CA <sup>13</sup>       | City Council District 6               | 17,845    | 15,341    | 9,858   | 2,504   | No  | 14.03% | 55.24% |
| 2008 | Pierce County, WA <sup>14</sup> | County Executive                      | 299,132   | 268,638   | 136,346 | 30,494  | Yes | 10.19% | 45.58% |
| 2008 | Pierce County, WA <sup>14</sup> | Pierce County Assessor/<br>Treasurer  | 262,447   | 189,433   | 98,366  | 73,014  | No  | 27.82% | 37.48% |
| 2008 | Pierce County, WA <sup>14</sup> | County Council-District<br>No. 2      | 40,000    | 38,142    | 21,078  | 1,858   | No  | 4.65%  | 52.70% |
| 2009 | Pierce County, WA <sup>14</sup> | Pierce County Auditor                 | 153,528   | 149,304   | 83,048  | 4,224   | No  | 2.75%  | 54.09% |

*Appendix L*

|      |                                 |                                  |         |         |         |        |     |        |        |
|------|---------------------------------|----------------------------------|---------|---------|---------|--------|-----|--------|--------|
| 2011 | Portland, ME <sup>12</sup>      | Mayoral Race                     | 19,728  | 16,234  | 9,061   | 3,494  | No  | 17.71% | 45.93% |
| 2011 | Saint Paul, MN <sup>10</sup>    | City Council-Ward 2              | 5,363   | 4,934   | 2,870   | 429    | No  | 8.00%  | 53.51% |
| 2013 | Saint Paul, MN <sup>10</sup>    | City Council-Ward 1              | 4,763   | 3,692   | 1,970   | 1,071  | No  | 22.49% | 41.36% |
| 2015 | Saint Paul, MN <sup>17</sup>    | City Council-Ward 2              | 5,734   | 5,226   | 2,782   | 508    | No  | 8.86%  | 48.52% |
| 2004 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 1  | 28,787  | 25,940  | 14,011  | 2,847  | No  | 9.89%  | 48.67% |
| 2004 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 5  | 32,643  | 26,111  | 13,211  | 6,532  | No  | 20.01% | 40.47% |
| 2004 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 7  | 31,639  | 24,325  | 13,834  | 7,314  | No  | 23.12% | 43.72% |
| 2004 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 11 | 23,176  | 18,307  | 10,679  | 4,869  | No  | 21.01% | 46.08% |
| 2005 | San Francisco, CA <sup>16</sup> | Assessor                         | 199,224 | 189,314 | 110,053 | 9,910  | No  | 4.97%  | 55.24% |
| 2006 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 4  | 19,814  | 15,975  | 8,388   | 3,839  | No  | 19.38% | 42.33% |
| 2006 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 6  | 17,941  | 17,646  | 8,968   | 295    | No  | 1.64%  | 49.99% |
| 2008 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 1  | 28,756  | 25,957  | 13,152  | 2,799  | No  | 9.73%  | 45.74% |
| 2008 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 3  | 27,198  | 22,875  | 13,582  | 4,323  | No  | 15.89% | 49.94% |
| 2008 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 9  | 26,486  | 23,474  | 12,637  | 3,012  | No  | 11.37% | 47.71% |
| 2008 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 11 | 24,673  | 19,317  | 10,225  | 5,356  | No  | 21.71% | 41.44% |
| 2010 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 2  | 24,094  | 22,594  | 11,426  | 1,500  | Yes | 6.23%  | 47.42% |
| 2010 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 6  | 21,086  | 16,393  | 8,865   | 4,693  | No  | 22.26% | 42.04% |
| 2010 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 8  | 34,950  | 32,926  | 18,239  | 2,024  | No  | 5.79%  | 52.19% |
| 2010 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 10 | 17,808  | 8,200   | 4,321   | 9,608  | Yes | 53.95% | 24.26% |
| 2011 | San Francisco, CA <sup>16</sup> | Mayoral Race                     | 194,418 | 141,617 | 84,457  | 52,801 | No  | 27.16% | 43.44% |

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|      |                                 |                                  |         |         |         |        |          |        |        |
|------|---------------------------------|----------------------------------|---------|---------|---------|--------|----------|--------|--------|
| 2011 | San Francisco, CA <sup>16</sup> | District Attorney                | 183,487 | 161,001 | 100,245 | 22,486 | No       | 12.25% | 54.63% |
| 2011 | San Francisco, CA <sup>16</sup> | Sheriff                          | 183,233 | 161,729 | 86,592  | 21,504 | No       | 11.74% | 47.26% |
| 2012 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 5  | 35,147  | 26,613  | 14,945  | 8,534  | No       | 24.28% | 42.52% |
| 2012 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 7  | 31,385  | 24,878  | 12,505  | 6,507  | No       | 20.73% | 39.84% |
| 2014 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 10 | 15,406  | 14,925  | 7,719   | 481    | No       | 3.12%  | 50.10% |
| 2016 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 1  | 31,681  | 28,496  | 15,037  | 3,185  | No       | 10.05% | 47.46% |
| 2016 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 7  | 35,274  | 30,507  | 17,692  | 4,767  | No       | 13.51% | 50.16% |
| 2016 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 11 | 25,380  | 22,031  | 11,222  | 3,349  | No       | 13.20% | 44.22% |
| 2018 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 2  | 35,312  | 33,401  | 17,340  | 1,911  | No       | 5.41%  | 49.11% |
| 2018 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 4  | 28,422  | 23,320  | 13,255  | 5,102  | No       | 17.95% | 46.64% |
| 2018 | San Francisco, CA <sup>16</sup> | Board of Supervisors-District 10 | 23,194  | 20,647  | 13,023  | 2,547  | No       | 10.98% | 56.15% |
| 2010 | San Leandro, CA <sup>13</sup>   | Mayoral Race                     | 22,484  | 20,322  | 10,277  | 2,162  | Yes      | 9.62%  | 45.71% |
| 2012 | San Leandro, CA <sup>13</sup>   | City Council-District 2          | 25,266  | 23,928  | 12,057  | 1,338  | No       | 5.30%  | 47.72% |
| 2012 | San Leandro, CA <sup>13</sup>   | City Council-District 4          | 23,090  | 21,226  | 12,945  | 1,864  | No       | 8.07%  | 56.06% |
| 2014 | San Leandro, CA <sup>13</sup>   | Mayoral Race                     | 16,209  | 15,367  | 8,801   | 842    | No       | 5.19%  | 54.30% |
| 2014 | San Leandro, CA <sup>13</sup>   | City Council-District 1          | 15,445  | 13,697  | 8,898   | 1,748  | No       | 11.32% | 57.61% |
| 2018 | Santa Fe, NM <sup>15</sup>      | City Council-District 4          | 4,899   | 4,543   | 2,565   | 356    | No       | 7.27%  | 52.36% |
| 2018 | Santa Fe, NM <sup>15</sup>      | Mayoral Race                     | 20,604  | 19,774  | 13,088  | 830    | No       | 4.03%  | 63.52% |
| 2012 | Takoma Park, MD <sup>7</sup>    | City Council-Ward 5              | 190     | 178     | 97      | 12     | No       | 6.32%  | 51.05% |
| 2014 | Takoma Park, MD <sup>7</sup>    | City Council-Ward 3              | 660     | 656     | 332     | 4      | No       | 0.61%  | 50.30% |
| 2017 | Takoma Park, MD <sup>7</sup>    | City Council-Ward 2              | 877     | 842     | 459     | 35     | No       | 3.99%  | 52.34% |
| 2015 | Telluride, CO <sup>3</sup>      | Mayoral Race                     | 1,111   | 1,102   | 583     | 9      | Tie Vote | 0.81%  | 52.48% |

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*Appendix L***About Alaska Policy Forum**

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

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**Contact**

(907) 334-5853  
[Info@AlaskaPolicyForum.org](mailto:Info@AlaskaPolicyForum.org)  
7926 Old Seward Hwy, Ste A6  
Anchorage, AK 99518

**APPENDIX M — OCTOBER 2020 ARTICLE**

**OUR VISION IS AN ALASKA THAT  
CONTINUOUSLY GROWS PROSPERITY  
BY MAXIMIZING INDIVIDUAL  
OPPORTUNITIES AND FREEDOM**

**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

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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.

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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://hawaiiexpress.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/>

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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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Johan Soto is the Fall 2020 Policy Analysis Intern at Alaska Policy Forum. He is currently studying nuclear science and engineering at the Massachusetts Institute of Technology.

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**APPENDIX N — EXCERPTS OF THE APPELLANT  
ALASKA POLICY FORUM'S OPENING BRIEF  
FOR THE ALASKA SUPREME COURT**

IN THE SUPREME COURT FOR THE  
STATE OF ALASKA

Case No. S-18533  
Superior Court No.: 3AN-21-07137CI

ALASKA POLICY FORUM,

*Appellant,*

v.

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

*Appellee.*

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

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

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

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Meredith Montgomery, Clerk  
Appellate Courts

By: /s/ Kaitlin D'Eimon  
Supreme Court Clerk

By: /s/ Stacey C. Stone  
Stacey C. Stone  
Alaska Bar No.1005030  
HOLMES WEDDLE & BARCOTT, PC  
701 West 8th Avenue, Suite 700  
Anchorage, Alaska 99501  
Phone: (907) 274-0666  
Fax: (907) 277-4657  
sstone@hwb-law.com  
*Attorneys for Alaska Policy Forum*  
By: /s/ Steve Shevorski  
Steve Shevorski (*Pro Hac Vice*)  
INSTITUTE FOR FREE SPEECH  
1150 Connecticut Ave. NW, Ste. 801  
Washington, DC 20036  
Phone: (202) 301-3300  
Fax: (202) 301-3399

\* \* \*

noted three interests that may support compelled disclosure—fighting actual or apparent corruption, combatting circumvention of contribution limits, and the informational interest,<sup>84</sup> but only the informational

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84. *Buckley*, 424 U.S. at 66-68



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interest can apply here.<sup>85</sup> And the registration, reporting, and identification requirements are not tailored to the informational interest.

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

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

Disclosure laws justified under the government’s informational interest must inform voters “concerning those who support” a candidate,<sup>89</sup> and courts “must . . .

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

86. AS 15.13.040(e)(5).

87. AS 15.13.090(a)(2)(C), (c), and (d).

88. AS 15.13.050(a).

89. *Buckley*, 424 U.S. at 81

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analyze the public interest in knowing who is spending and receiving money to support or oppose a ballot issue.”<sup>90</sup> And it is not an interest in knowing who supports the speaker, but in knowing who through the speaker financially supports a candidate or ballot measure.<sup>91</sup>

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

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

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

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

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