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**AMERICAN CIVIL
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The Honorable Wes Keller, Chair
The Honorable Bob Lynn, Vice-Chair
House Judiciary Committee
Alaska State House of Representatives
State Capitol, Room 120
Juneau, AK 99801

via email:

Rep.Wes.Keller@akleg.gov

Rep.Bob.Lynn@akleg.gov

Re: House Bill 104 – Elections Procedures
Constitutional Infirmities

Chair Keller, Vice-Chair Lynn:

Thank you for the opportunity to submit written testimony regarding the committee substitute for House Bill 104, addressing elections procedures in Alaska.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we appreciate the opportunity to provide the Committee with information highlighting constitutional infirmities with the proposed legislation.

The Requirement that Election Watchers Must Be Registered Voters Likely Violates the Constitution

The committee substitute for HB 104 includes a new requirement that election watchers at local precincts must be registered Alaska voters: "A watcher must be registered to vote in the state." Individuals from out-of-state are just as capable as Alaska residents of watching polling places for anomalies. Alaskans who choose not to register, whose registration has

temporarily lapsed, or who are ineligible to register to vote are similarly capable of responsibly observing the electoral process at work.

The legislative history from the State Affairs Committee indicates that the restriction of poll watchers was grounded in a fear that non-U.S. citizens would appear at the polls to monitor elections and “somehow interfere with elections.” Of course, excluding all those not registered to vote in Alaska excludes a far larger category of individuals than non-U.S. citizens, and the factual basis for fearing foreign observers tainting our elections lurks at the level of rumor. Laws drawing such arbitrary lines, unrelated to a legitimate state interest, tend to violate the requirements of equal protection. *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1377 (Alaska 1988) (holding that equal protection review requires, at least, that “the classification is ‘reasonable, not arbitrary’ and rests ‘upon some ground of difference having a fair and substantial relation to the object of the legislation’”).

This new provision would bar out-of-state experts, whether they are national political scientists or voting-rights lawyers, from serving as poll watchers. For campaigns of national interest, such as presidential campaigns, volunteer poll watchers may be drawn from all over the country. To the extent the provision inhibits political candidates from receiving assistance and advice from their counsel, the residency and voter-registration requirement could violate the candidate’s due process rights.

Moreover, the primary impact of the law would seem to fall on residents of other states. Laws discriminating against people from other states are typically found to violate the freedom to travel, unless they serve a compelling state interest. *Dunn v. Blumstein*, 405 U.S. 330, 339 (1972). The “right to travel” includes “the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State.” *Saenz v. Roe*, 526 U.S. 489, 500, (1999). Because those from out-of-state are equally qualified to serve as poll watchers as Alaskans, a court would have a hard time identifying in HB 104’s requirement any legitimate state interest beyond animosity towards non-Alaskans. The legislative history indicating fear, without any apparent basis in fact, that out-of-state residents might “interfere” in Alaskan elections illustrates such hostility.

States may require that voters be residents of their state, and they may require that those running for public office be residents of the state. “A State does have a recognized interest in obtaining knowledgeable and qualified candidates for high office.” *Antonio v. Kirkpatrick*, 579 F.2d 1147, 1150 (8th Cir. 1978). However, serving as an election observer is neither a high office, nor a position of public trust. It confers no official role in the election, beyond the right to be present at the polling place and observe the proceedings. It is hard to articulate how one’s residence would impact one’s ability to observe the operation of the polls. Merely being an Alaskan registered to vote does not make one an expert in election law. Since much of election law – including, for instance, the Voting Rights Act and the Help America Vote Act – is federal, expertise in appropriate conduct of elections is not limited to Alaskans. Even in relation to Alaska election law, someone who goes to the time and expense of traveling to Alaska for the purpose of

observing an election may be more likely to take the time to familiarize herself with our laws. HB 104's requirement does not appear to serve any legitimate government purpose, much less a compelling one.

The Requirement that Election Watchers Must Be Registered Voters Will Only Result in Needless Election Litigation

In most elections, there are at least two opposing parties. As we saw in the 2010 U.S. Senate election, some elections end up in protracted litigation, with a host of legal issues raised by multiple parties. The more rules and criteria created for monitoring and observing elections, the more options there are for election litigation. No one wants a litigious campaign to run to the Superior Court on election day, demanding a temporary restraining order merely to eject a campaign poll watcher from a precinct because his registration has lapsed or she is from out-of-state. Enabling such irrelevant haggling over conduct that does not impact the voting process at all serves the justice system and the electoral system poorly. This provision would allow an opportunistic, litigious candidate to score cheap political points and election day headlines by attacking the residence of an opponent's poll watcher.

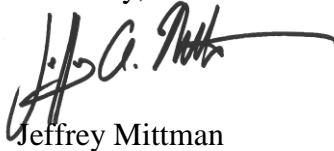
Conclusion

We hope that the House Judiciary Committee will note the constitutional problems with the restriction on poll watcher eligibility. If the legislature is concerned about interference with election processes, the legislature should decide which behaviors interfere with elections and prohibit them. However, broadly casting non-Alaskans under a pall of suspicion does not ensure the security of the voting process and will likely drag the state into needless litigation.

Please feel free to contact the undersigned should you require any additional information. Again, we are happy to reply to any questions that may arise either through written or verbal testimony, or to answer informally any questions that Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,



Jeffrey Mittman
Executive Director
ACLU of Alaska

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