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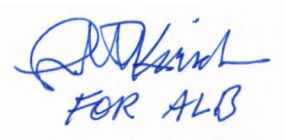
MEMORANDUM February 9, 2017

SUBJECT: Questions relating to 1st Amendment rights and CSSB 5( ) (Work Order No. 30-LS0112\O)

TO: Senator Kevin Meyer
Attn: Edra Morledge

FROM: Alpheus Bullard
Legislative Counsel



Ms. Morledge asked that I address several questions relating to CSSB 5( ) (Work Order No. 30-LS0112\O) (SB 5). The questions and my answers follow. Please note that some of the questions are paraphrased for clarity.

Does the bill raise 1st Amendment issues? Does the bill limit an individual's constitutional right to support a political candidate or issue?

The bill restricts the political speech of certain groups and lobbyists.[1] It prohibits a group controlled by a legislator from soliciting and accepting, or making a contribution or expenditure, for the purpose of influencing a state or local election held under AS 15.13 during a legislative session. It also prohibits an individual registered as a lobbyist, at any time the individual is subject to the registration requirements of AS 24.45 (and for one year after the date of the individual's initial registration or renewal), from making a contribution to a group that is controlled by a legislator or candidate for legislative office that makes expenditures or receives contributions to influence the outcome of a state or local election held under AS 15.13.

While the bill restricts certain 1st Amendment rights of lobbyists and groups controlled by legislators, the pertinent question is whether these restrictions are constitutionally permissible. While the right to make political contributions (and expenditures) is protected by the First Amendment, the right is not absolute. *Buckley v. Valeo*, 424 U.S. 1, 26 - 27 (1976). However, any statutory effort to restrict or burden the exercise of a First Amendment right must be "narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611 - 612 (1973) (citations omitted).

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[1] The 1st Amendment protects freedom of speech and freedom of association. Political campaign contributions and expenditures are forms of speech protected by the 1st Amendment, *Beckley v. Valeo*. 424 U.S, (1976).

The United States Supreme Court has provided that there is only one legitimate governmental interest for restricting campaign contributions: preventing corruption or the appearance of corruption. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Accordingly, the bill's restrictions on lobbyists and groups controlled by legislators or legislative candidates must be narrowly tailored to the state's interest in preventing corruption and the appearance of corruption.

Constitutionality of bill's effect on lobbyists

The bill expands the class of persons to whom a lobbyist may not make political contributions under state law. It prohibits contributions to groups controlled by a legislator, or candidate for the legislature, that make expenditures or receive contributions to influence elections under AS 15.13. Both conditions must be present. Therefore the bill allows a lobbyist to contribute to (1) groups that are controlled by a legislator or candidate for the legislature if the groups *do not* make expenditures or receive contributions to influence the outcome of an election under AS 15.13 and (2) groups that make expenditures and receive contributions to influence the outcome of an election under AS 15.13 if they are *not controlled* by a legislator or legislative candidate.

The state's existing prohibition on out-of-district lobbyist contributions to candidates for the legislature under AS 15.13.074(g) has been upheld as narrowly tailored to further the state's compelling interest in preventing corruption and the appearance of corruption. *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 617 - 621 (Alaska 1999), *cert. denied* 528 U.S. 1153 (2000). The bill's prohibition on contributions from a lobbyist to a group controlled by a legislator or legislative candidate is likely to be upheld as a narrowly focused measure to prevent a lobbyist from circumventing[2] the prohibition on lobbyist contributions to candidates and elected public officials outside a lobbyist's election district.[3] Because the bill does not prohibit a lobbyist from making campaign contributions to political groups generally, but is narrowly tailored to prohibit the indirect flow of campaign contributions from a lobbyist to legislators and legislative candidates

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[2] If a lobbyist may not contribute to a particular candidate, but may contribute to a group that can contribute to that candidate, the initial prohibition may not be terribly effective. *See Thompson v. Dauphinais*, 2016 U.S. Dist. LEXIS 72682 at *14 -15 (D. Alaska Apr. 25, 2016) (case No. 3:15-cv-00218-TMB) (*citing McCutcheon v. Federal Election Commission*, 134 S.Ct 1434 (2014) and *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003) (overruled on other grounds by *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)) (upholding the $500 individual-to-group limits of AS 15.13.070(b) as necessary to prevent circumvention of the individual-to-candidate contribution limits of AS 15.13.070).

[3] Note that under both current law and under the bill, a lobbyist is not prohibited from contributing to a legislator or candidate for the legislature who is running in the district in which the lobbyist is eligible to vote (*see* existing AS 15.13.074(g), and in the bill, sec. 15.13.074(j)).

who are not running in the election district in which the lobbyist resides, it is likely to survive any First Amendment challenge.

Constitutionality of bill's effect on certain groups controlled by a legislator

The bill prohibits a group controlled by a legislator from soliciting or accepting, or making, a contribution or expenditure for the purpose of influencing the outcome of an election under AS 15.13 while the legislature is convened in a regular or special session. Existing AS 15.13.072(d) prohibits legislators and legislative employees from accepting or soliciting a campaign contribution while the legislature is in session, unless the contribution is for the legislator or legislative employee's own political campaign for office, the election for that office will occur within 90 days, and the solicitation or acceptance occurs in a place other than where the legislature is in session.

In *State v. Alaska Civil Liberties Union (ACLU)*, 978 P.2d 597 (Alaska 1999), the Alaska Supreme Court invalidated two statutory provisions: a ban on non-election year contributions in AS 15.13.074(c)(1) and a bar on contributions to legislative candidates during the legislative session in AS 15.13.074(c)(2).[4] Although the court did not address the limits on candidates in AS 15.13.072 (the Court's focus being on the rights of potential contributors and not candidates),[5] the Court did find that prohibiting contributions to candidates during the legislative session interfered with a contributor's right of association with *non-incumbent candidates* without promoting the government's interest in preventing corruption or the appearance of corruption.[6] Accordingly, while

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[4] The 1996 amendment to election campaign laws enacted AS 15.13.074(c), which, at that time, limited the time when persons and groups could make contributions to candidates. (Sec. 11, Ch. 48, SLA 1996.) Under AS 15.13.074(c)(2), as it read when the *ACLU* suit was filed, contributions to legislative candidates, both incumbents and challengers, could not be made during a regular legislative session.

[5] While the Court did not expressly invalidate AS 15.13.072(d) in the *ACLU* case (which until amended by sec. 1, ch. 106, SLA 2008, prohibited non-incumbent candidates for the legislature from soliciting or accepting campaign contributions), the Alaska Public Offices Commission (APOC) ceased enforcing the statute against non-incumbent candidates for the legislature on the basis of the court's ruling.

[6] The only other statutory restriction on contributions during a legislative session, the statutory restriction on candidates for governor and lieutenant governor accepting contributions during the legislative session at AS 15.13.072(g) was added by sec. 4, ch. 74, SLA 1998), and thus was not addressed in the *ACLU* case. That subsection provides, in relevant part:

> [a] candidate or individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 for election or reelection to the office of governor or lieutenant governor may not solicit or accept a contribution in the capital city while the legislature is convened in a regular or special legislative session.

limitations on legislators solicitation and acceptance of contributions during a legislative session has not itself been specifically challenged in this state, the limitations of AS 15.13.072(d) would likely be upheld.[7]

The similar provisions of the bill that prohibit certain actions during a legislative session, namely those that prohibit a group controlled by a legislator from soliciting or accepting contributions, and from making contributions or expenditures, for the purpose of influencing the outcome of an election under AS 15.13, would also likely be upheld if challenged. If the state's interest in preventing corruption or the appearance of corruption justifies prohibiting legislators and legislative employees from accepting contributions during a legislative session, this same state interest is likely to justify, as an anti-circumvention measure, prohibiting a group controlled by a legislator from soliciting or accepting contributions, and making contributions or expenditures, for the purpose of influencing the outcome of an election under AS 15.13 during a legislative session.

Clarify whether, under the bill's provisions, an incumbent legislator, or candidate for the state legislature, may form a group that solicits and accepts, or makes, political contributions for the purpose of influencing a state or local election.

Nothing in SB 5 prohibits a state legislator, or a candidate for the state legislature, from forming a group that solicits and accepts campaign contributions and makes campaign contributions or expenditures for the purpose of influencing state and local elections.

The changes to AS 15.13 made by the bill would affect such a group only if the legislator or legislative candidate *controls* the group. If the group is controlled by a legislator or legislative candidate, a lobbyist registered under AS 24.45 is prohibited from contributing to the group under the bill. If the group formed by a legislator, or legislative candidate is controlled by a legislator, the group also may not solicit and accept a contribution, or make a contribution or expenditure, while the legislature is in session.

While the bill does not prohibit a legislator, or candidate for the legislature, from establishing a group that makes and receives contributions for the purpose of influencing the outcome of elections under AS 15.13, note that if a legislator or legislative candidate establishes such a group, the group may be subject to the requirements of

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While this section has not yet been challenged, a court would likely find it unconstitutional under the court's reasoning in *ACLU.* Note, that the Department of Law may not necessarily share this opinion, previously advising that while the Department had doubts as to the subsection's constitutionality, it "cannot conclude that it is unconstitutional." *See* Inf. Op. Att'y Gen. 661-99-0513 (June 22, 1999) at 8.

[7] Note that, according to the National Conference of State Legislatures, 29 states place restrictions on making and accepting campaign contributions during the legislative session. See http://www.ncsl.org/research/elections-and-campaigns/limits-on-contributions-during-session.aspx (available on February 7, 2017).

AS 15.13.050(b)[8] and (c)[9] and AS 15.13.400(8)(B).[10] Similarly, there is the possibility that the group's actions could be attributed to the legislator's or legislative candidate's

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[8] AS 15.13.050(b) provides:

> (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).

[9] AS 15.13.050(c) provides:

> (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 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.

[10] AS 15.13.400(8)(B) provides in relevant part:

> (8) . . . 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 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[.]

campaign under AS 15.13.400(1)(B)(v), which provides that for the purposes of AS 15.13, "candidate" includes

> 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[.]

While the Alaska Public Offices Commission (APOC) recently held that the definition of "candidate" at AS 15.13.400(1)(B)(v) is not applicable to a group formed and controlled by an incumbent candidate running for reelection if the group has not made contributions to that legislator and its purpose is not to reelect that legislator,[11] caution is warranted.

In its recent Order, APOC provided that its interpretation of AS 15.13.400(1)(B)(v) is based on its own precedent in enforcing the statute, and that it will read the applicable portion of the provision to provide that "a group that makes expenditures or receives contributions in support of the candidate's election should be considered synonymous with the candidate under AS 15.13."[12] However, given that the plain language of AS 15.13.400(1)(B)(v) lacks the language which APOC reads into the statute, if APOC's interpretation is challenged, there is the possibility a court might not defer to APOC's conclusion that AS 15.13.400(1)(b)(v) does not apply to other groups that receive contributions and are under the control of a candidate.

Clarify whether the language relating to groups "controlled by a candidate" in the definition of "group" at AS 15.13.400(8)[13] will guide the Alaska Public Office Commission or a court in interpreting whether a group is "controlled by" a legislator under the bill's sec. 15.13.072(i).

Section 1 of the SB 5 prohibits a group controlled by a legislator from soliciting or accepting a contribution for the purpose of influencing an election under AS 15.13 while the legislature is in session. Section 2 prohibits certain lobbyists from making campaign contributions to a group controlled by a legislator or legislative candidate. Section 6 of the bill prohibits a group controlled by a legislator from making a contribution or expenditure during a legislative session for the to influence the outcome of an election under AS 15.13. At present, none of these provisions include standards to clarify when a group is "controlled by" a legislator or legislative candidate. Ms. Morledge asked whether existing language in the definition of "group" at AS 15.13.400(8) will affect how APOC will determine when a group is "controlled by" a legislator or legislative candidate under these provisions.

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[11] See *Alaska Democratic Party v. Gabby's Tuesday PAC and Gabrielle LeDoux*, Case No. 16-04-CD, October 19, 2016.

[12] *Id.* at 3 (emphasis in original).

[13] At footnote 8.

AS 15.13.400(8) includes three substantive statements relating to when certain groups will be considered to be controlled by a candidate.[14] Because these statements appear in a definition, it is difficult to say with certainty how APOC or a court might interpret them. These provisions are intended to prohibit circumvention of the limit on contributions to an individual candidate under AS 15.13.070 and 15.13.074. The statements exist so that APOC may aggregate, for the purposes of AS 15.13.070 (limitations on amount of political contributions), contributions made to a candidate and contributions made to a group, or groups, controlled by that candidate.[15] The statements address only groups controlled by candidates. While two of these provisions may be interpreted to relate to the sections of law added by SB 5, the other provision is not likely to be interpreted to apply. For the purposes of this memorandum, it is helpful to examine each of the statements within AS 15.13.400(8) separately.

The first statement provides:

> . . . 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[.]

This language requires APOC to interpret "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" as being controlled by that candidate. While the plain language of the statement does not require APOC to similarly interpret that a group making expenditures or receiving contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a *legislator* is controlled by that legislator, it is likely that APOC would (due to equal protection and due process concerns). This first "controlled by" statement of AS 15.13.400(8) is not inconsistent with the provisions of SB 5.

The second statement reads:

> . . . 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

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[14] While these statements are contained within the definition of "group," instead of within the delineated provisions of AS 15.13, they are substantive law and should be placed in a substantive law section like AS 15.13.070 or 15.13.074. The legislative drafting manual cautions against the inclusion of substantive provisions of law in a definition because it may be easily lost or overlooked.

[15] For an example of a similar regulatory measure used to prevent circumvention of the contribution limits of AS 15.13.070, see 2 AAC 50.324(d), which provides that an expenditure made by a group on behalf of another group that is controlled by a candidate is a contribution, and may not exceed $1,000 as provided in AS 15.13.070.

> 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 . . .

I'm not sure how APOC could apply the direction provided by this language to the provisions added by SB 5. This statement's "controlled by" language is a poor fit with the provisions added by SB 5 (relating to groups controlled by a legislator or legislative candidate). This language allows for the possibility that a group that expends, or intends to expend, more than 50 percent of its money on a single candidate, *without* any authorization or consent from that candidate, could be considered to be *controlled by* the candidate (unless the candidate files an affidavit with APOC). While this language may be intended to ensure that money contributed to a controlled group is properly deemed a contribution to the candidate under AS 15.13.070 and AS 15.13.400(1)(B)(v), it could lead to unintended and inappropriate results in application to the provisions of SB 5.

The third statement provides:

> . . . 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 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[c],[16] whether or not control of the group has been disclaimed by the candidate . . .

I don't think that APOC can extend the direction provided by this language to the provisions of SB 5. The statement's language clearly indicates that this instance of "controlled by" relates only to the purposes of AS 15.13.070. Consequently, it is likely that this language would have no effect on the manner in which APOC or a court might determine whether a group is controlled by a legislator or legislative candidate for the purposes of SB 5.

If you have questions, please do not hesitate to contact me.

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[16] AS 15.13.070(c) limits a group (that is not a political party) to no more than $1000 in contributions per candidate, group, or nongroup entity. For discussion of the importance of this subsection's contribution limits, see Inf. Op. Att'y Gen. 661-87-0537 (June 15, 1987) (discussing how APOC has interpreted the language of AS 15.13.400(8)(B) (formerly "sec. 15.13.130(4)) to mean that money contributed to a group controlled by a candidate is deemed to be a contribution to that candidate).