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M E M O R A N D U M March 12, 2021

SUBJECT: Expanding disclosure requirements for certain referendum and recall related campaign finance activity - constitutionality (Work Order No. 32-LS0669\A)

TO: Representative Sara Rasmussen
Attn: Crystal Koeneman

FROM: Alpheus Bullard
Legislative Counsel

This memorandum accompanies the bill you requested relating to the Alaska Public Offices Commission (APOC), financial disclosure for certain groups, and related matters. I have one comment.

As I discussed with Ms. Koeneman,[1] the accompanying bill moves the statutory boundary for disclosing certain contributions and expenditures from those *made to influence a referendum or recall election*, to an earlier point in the statutory process for initiating a referendum or recall, requiring the disclosure of contributions and expenditures *made in support or opposition of a referendum application filed under AS 15.45.260 or a recall application under AS 15.45.480*.[2]

It requires a person, group, or nongroup entity (person) supporting or opposing a referendum or recall application to report certain campaign finance activity once an application to conduct a recall or referendum election has been filed with the lieutenant governor. An application for a recall or referendum is filed before the recall or referendum application is certified, or not certified, by the lieutenant governor and before signatures may be gathered towards qualifying a certified application for recall or referendum for placement on the ballot.[3]

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[1] Telephone conversation of March 10, 2021.

[2] Section 1 of bill also includes a change to AS 15.13.010(b) relating to initiative proposals filed with the lieutenant governor under AS 15.45.020 that is not necessitated by the substance of your bill - but conforms the subsection to relevant existing law (AS 15.13.110(g)). Please advise if you would like this language removed from the bill.

[3] Note that there is not any earlier definitive point for required reporting. It is necessary to couple contribution and expenditure disclosure requirements to some definite event or

A campaign finance reporting and disclosure requirement will be upheld against a First Amendment challenge if the requirement is "substantially related to a sufficiently important governmental interest."[4] This judicial standard is identified as "exacting scrutiny."[5] Generally, three governmental interests may support reporting and disclosure requirements: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions."[6] While courts have held that the government interest in "deterring corruption or the appearance thereof—falls out of the picture in the context of ballot initiatives, for such referenda present no risk of *quid pro quo*[,]"[7] funds spent in support or in opposition to a recall application may pose a closer issue with regard to the possibilities of *quid pro quo* corruption.

The Alaska Supreme Court has recognized the limited risk of quid pro quo corruption in the initiative context, noting in *State v. Alaska Civil Liberties Union* that "[s]peech relating to ballot initiatives (where quid pro quo corruption is not a significant danger) is

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point in time to avoid a constitutional "vagueness" concern. A statute will be deemed unconstitutional on its face if it "chills" a "substantial amount of legitimate speech." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001) ("a statute's vagueness exceeds constitutional limits if its deterrent effect on legitimate expression is . . . both real and substantial, and if the statute is [not] readily subject to a narrowing construction by the state courts.") (internal quotation marks omitted). If a statute's phrasing is "so indefinite [that it] fails to clearly mark the boundary between permissible and impermissible speech it will be found unconstitutional." *Buckley v. Valeo*, 424 U.S. 1, 13, 41 (1976) (holding that the prohibition on certain expenditures "relative to" a candidate was vague).

[4] *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1112 (quoting *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010)).

[5] "Exacting scrutiny" can be contrasted with "strict scrutiny," a higher standard of judicial review that requires a governmental requirement to be narrowly tailored and the least restrictive means to further a compelling governmental interest, and "rational basis review," a lower standard that requires only that the requirement be rationally related to a legitimate government interest.

[6] *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031 (9th Cir. 2009) (quoting *McConnell v. Fed. Elec. Comm'n*, 540 U.S. 93, 196 (2003)).

[7] *Id.* (citation omitted).

entirely protected."[8] While this broad statement seemingly precludes any restrictions on speech related to initiatives, the statement was made in the context of evaluating limitations and restrictions on contributions and expenditures (not required reporting or disclosures)[9] and applicable subsequent federal cases have relied on the electorate's information interest alone, rather than any interest in preventing corruption, to uphold reporting and disclosure requirements that apply to initiative elections.[10] This statement should not be interpreted to preclude reporting and disclosure requirements in the context of state referendum and recall applications.

The Ninth Circuit has recognized "the longstanding principle that the public has an interest in learning who supports and opposes ballot measures."[11] But reporting and disclosure requirements must be "substantially related to a sufficiently important governmental interest,"[12] that is, the strength of the informational interest "must reflect

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[8] 978 P.2d 597, 606–07 (Alaska 1999) (citing *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 298 – 300(1981); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978)).

[9] *AkCLU*, 978 P.2d at 601 – 08. Similarly, the cases that the Alaska Supreme Court relied on invalidated limits on political contributions and expenditures. *See Citizens Against Rent Control*, 454 U.S. at 292, 294 n.4, 299 – 300 (invalidating a $250 contribution limit and in dicta approvingly noting a disclosure requirement); *Bellotti*, 435 U.S. at 768 (prohibiting certain contributions and expenditures).

[10] *See Chula Vista Citizens for Job & Fair Competition v. Norris*, 782 F.3d 520, 539 (9th Cir. 2015) ("This court has upheld disclosures in the initiative context both before and after *Citizens United*, relying solely on the state's informational interest to sustain disclosures of an initiative's financial backers . . . ."); *Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012) ("We have repeatedly recognized an important (and even compelling) informational interest in requiring ballot measure committees to disclose information about contributions." (citing *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1005 – 06 (9th Cir. 2010); *Canyon Ferry Road Baptist Church of East Helena, Inc.*, 556 F.3d at 1031 – 32; *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 – 79 & n.8 (9th Cir. 2007), *abrogation on other grounds recognized in Brumsickle*, 624 F.3d at 1013; *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 – 07 (9th Cir. 2003))).

[11] *Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012) (citing *Sampson v. Buescher*, 625 F.3d 1247, 1259 (10th Cir. 2010)). *See also Brumsickle*, 624 F.3d at 1008 ("Campaign finance disclosure requirements . . . advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas.").

[12] *Family PAC*, 685 F.3d at 806 (quoting *Brumsickle*, 624 F.3d at 1005).

the seriousness of [a disclosure law's] actual burden on First Amendment rights."[13] Disclosure requirements may burden speech in two ways. First, they may "deter individuals who would prefer to stay anonymous from contributing."[14] This burden "is modest" because disclosure requirements "impose no ceiling on campaign-related activities, and do not prevent anyone from speaking."[15] Disclosure requirements may also burden speech by exposing contributors to retaliation, retribution, or harassment, but without a specific showing of such harassment this burden is also modest.[16]

The Ninth Circuit recently identified "certain broad features" of "electioneering disclosure laws that survive exacting scrutiny under the First Amendment."[17] These laws provide information that helps the electorate make informed decisions, impose varying requirements based on type and level of advocacy, tie reporting frequency to election periods or spending, impose spending thresholds for triggering reporting requirements, and impose additional requirements to help enforce more substantive requirements.[18] These features are not a minimum standard that all valid disclosure laws must meet, rather they are "markers of valid disclosure laws."[19]

It is not certain to me how a court would evaluate this bill's expansion of disclosure requirements relating to funds made in support or in opposition to a recall or referendum application. A court may interpret the government's interest in requiring disclosure in these contexts as different (if only by a matter of degrees) from the interest served by identification and disclosure requirements once a recall or referendum is on the actual ballot. However, this bill's reporting requirements relating to contributions and expenditures made in support or in opposition to recall and referendum applications are likely to be interpreted by a court to elicit information that helps the "electorate make informed decisions," "impose varying requirements based on type and level of advocacy," and otherwise embody those features that the Ninth Circuit identified in electioneering disclosure laws that survive exacting scrutiny under the First Amendment.[20]

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[13] *Id.* (quoting *Davis v. FEC*, 554 U.S. 724, 744 (2008)).

[14] *Id.* at 806 (citing *Buckley v. Valeo*, 424 U.S. 1, 68 (1976)).

[15] *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 366 (2010)).

[16] *Id.* at 808.

[17] *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1116 (9th Cir. 2019).

[18] *Id.* at 1116 – 19.

[19] *Id.* at 1119.

[20] *Id.* at 1116 – 19.

Accordingly, while it is not certain at what point an Alaska court might determine that speech relating to a recall or referendum application, for a measure that may or may not appear on the ballot, can constitutionally be required to be disclosed, this bill's expansion of disclosure requirements in the recall and referendum context will likely survive a First Amendment challenge.

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

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Attachment