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MEMORANDUM March 17, 2010

SUBJECT: Committee questions of March 15, 2010 (CSSB 284(JUD))
(Work order No. 26-LS1448\E)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Alpheus Bullard
Legislative Counsel

As part of a legislative response to the United States Supreme Court's ruling in Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. ___ (January 21, 2010), you requested a legal opinion as to whether the state could prohibit independent expenditures made in connection with a state election, by (1) foreign nationals, (2) American subsidiaries of foreign nationals, (3) domestic corporations owned in part by foreign nationals, and (4) domestic corporations or entities not domiciled in Alaska.

Any statute prohibiting a person from making an independent expenditure in connection with a state election is likely to be challenged on First Amendment grounds. A state prohibition against independent expenditures made by foreign nationals, who are already prohibited from making contributions or expenditures in connection with federal, state, or local elections under federal law, raises federal preemption issues. Prohibiting independent expenditures by domestic subsidiaries of foreign corporations, domestic corporations owned in part by foreign nationals, and domestic corporations or entities not domiciled in Alaska raise additional constitutional issues.

First Amendment

The First Amendment of the Constitution of the United States protects freedom of speech and freedom of association.[1] Independent expenditures made in connection with state elections are protected speech under the First Amendment. See Randall v. Sorrell, 548 U.S. 230 (2006), and Buckley v. Valeo, 424 U.S. 1 (1976).

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[1] Note that the freedom of speech provision in article I, section 5 of the Constitution of the State of Alaska is more protective of speech than the United States Constitution's First Amendment. Mickens v. City of Kodiak, 640 P.2d 818, 820 (Alaska 1982); Messerli v. State, 626 P.2d 81, 83 (Alaska 1980).

An attempt to prohibit independent expenditures by any class or category of persons is likely to encounter constitutional problems associated with First Amendment protections of the rights of association and expression.

> The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources," and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Buckley, 424 U.S. at 48 - 49 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964) (citations omitted)). In State v. Alaska Civil Liberties Union, 978 P.2d 597 (1999), the Alaska Supreme Court observed that existing campaign finance jurisprudence was based on the threat of corruption. Id. at 606 - 607. The Supreme Court has recently concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. ___, Slip op. at 42 (January 21, 2010).

Given that independent expenditures have not been found to present a risk of corruption or the appearance of corruption, a state effort to prohibit independent expenditures from any source may face significant First Amendment hurdles.

The state's interest in prohibiting independent expenditures made by nonresidents or persons domiciled outside the state

I am not aware of any applicable judicial decision holding that protecting state residents from nonresident domination or enhancing voter participation is a compelling state interest. See Alaska Civil Liberties Union, 978 P.2d at 615. Instructive, however, is VanNatta v. Keisling, 151 F.3d 1215 (9th Cir. 1998), in which the Ninth Circuit invalidated a geographically based restriction on political contributions enacted by initiative in Oregon. The court found:

> Measure 6 bans all out-of-district donations, regardless of size or any other factor that would tend to indicate corruption. Appellants are unable to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in Buckley. . . . Measure 6 is not closely drawn to advance the goal of preventing corruption and under this analysis fails to pass muster under the First Amendment.

Id. at 1221. The proponents of the initiated law in VanNatta also offered an alternate justification for the measure, apart from the corruption rationale. They argued that the measure protected the state's interest in the integrity of republican government by, in the

court's words, "assuring that representatives are truly selected by their own constituents." Id. However, the court rejected this justification, observing that "[t]he right to a republican form of government has never been recognized as a sufficiently important state interest." Id., citing Whitmore v. Federal Election Comm'n, 68 F.3d 1212 (9th Cir.1995) (rejecting the same argument as a justification for a ban on out-of-state contributions in Alaska). A state law prohibiting independent expenditures made by persons who are citizens of, or who are domiciled in, other states would be similarly evaluated by a court, and absent some evidence showing the corrupting influence of non-resident expenditures, would be struck down by a court.

Privileges and immunities

Prohibiting independent expenditures from non-residents would also be subject to challenge under the privileges and immunities clause. The federal privileges and immunities clause restricts the state's ability to interfere with the fundamental rights of non-residents. See Robison v. Francis, 713 P.2d 259, 263 (Alaska 1986). The Alaska Supreme Court has summarized the effect of the privileges and immunities clause as follows:

> Article IV, section 2 prohibits discrimination against nonresidents "where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states." No "substantial reason" will be found absent some showing that nonresidents are "a peculiar source of the evil" which the state's action is meant to remedy. In addition, the discrimination worked upon nonresidents must "bear a substantial relationship to the particular 'evil' they are said to present." Only if the challenged discriminatory action surmounts both of these hurdles will it survive privileges and immunities clause scrutiny.

Noll v. Alaska Bar Association, 649 P.2d 241, 244 (Alaska 1982) (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948), and Hicklin v. Orbeck, 437 L.Ed.2d 397, 404 (1978); citations omitted). So, in addition to having to provide a "compelling justification" for the measure to satisfy the First Amendment, you would also need to show a "substantial reason" why a prohibition against independent expenditures should apply only to non-residents in order to withstand a privileges and immunities clause challenge.

Equal protection

If the state were to prohibit domestic subsidiaries of foreign corporations, domestic corporations owned in part by foreign nationals, or domestic corporations or other organizations not domiciled in the state from making independent expenditures in connection with a state election, the prohibition would likely also face an equal protection challenge. "The common question in addressing equal protection cases is whether two groups of people who are treated differently are similarly situated and thus entitled to

equal treatment."[2] In order for a classification to be valid under the state's equal protection test, it must be reasonable, not arbitrary, and must bear a fair and substantial relation to a legitimate governmental objective. Wilson v. Municipality of Anchorage, 669 P.2d 569, 572 (Alaska 1983). Alaska evaluates equal protection claims using a sliding scale.[3] There are several steps involved. First, the court determines the importance of the interest impaired by the challenged statute. Then the court looks at the purposes served by the statute. Finally, the court looks at how well the statutory means fits the purpose.

Because federal law prohibits foreign nations from making contributions or expenditures, directly or indirectly, in connection with a state election, it is not clear to me what state purpose any of these possible prohibitions would serve. Consequently, I do not know how a court would evaluate the state's interest in prohibiting domestic subsidiaries of foreign corporations, domestic corporations owned in part by foreign nationals, or domestic corporations or other organizations not domiciled in the state from exercising their First Amendment right recognized in Citizens United to make independent expenditures.

Preemption

In Citizens United, the Supreme Court neither considered nor overruled the existing federal law that prohibits a "foreign national" from making a direct or indirect expenditure in connection with a federal, state, or local election. The Federal Election Campaign Act (FECA) prohibits any foreign national from contributing, donating, or spending funds in connection with any federal, state, or local election in the United States, either directly or indirectly.[4] Because 2 U.S.C. § 441e already clearly prohibits foreign nationals from making campaign contributions, expenditures, and independent expenditures in federal, state, and local elections, a state effort to legislate in this area may face a preemption challenge.

The Supremacy Clause, Art. VI, cl. 2 of the Constitution of the United States, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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[2] Anderson v. State, 78 P.3d 710, 718 (Alaska 2003).

[3] Matanuska-Susitna Borough School v. State, 931 P.2d 391, 396 (Alaska 1997).

[4] See 2 U.S.C. § 441e, 22 U.S.C. § 611(b), and 11 C.F.R. 110.4.

The Alaska Supreme Court has noted that "[u]nder the Supremacy Clause of the federal constitution, state laws that interfere with federal laws are invalid." Allen v. State, 203 P.3d 1155, 1161, n. 12 (Alaska 2009), quoting State v. Dupier, 118 P.3d 1039, 1049 (Alaska 2005). The court recently summarized federal preemption law as follows:

> There is a presumption against federal preemption of state law, and preemption doctrine "enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." Additionally, "[w]here co-ordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes," . . . "the case for federal pre-emption becomes a less persuasive one." But where state law comes into conflict with federal law, the Supremacy Clause of the United States Constitution dictates that state law must always yield.
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> There are three major types of federal preemption of state law: "express," "field," and "conflict" preemption. Express preemption occurs when Congress explicitly declares an intent to preempt state law in a particular area. . . .
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> Field preemption is the term used when the federal law governing a particular area is so comprehensive and so complete that Congress is said to have completely occupied a field, leaving no room for state law. We "will not infer an intent to occupy the field where Congress has left some room for state involvement." . . .
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> Conflict preemption occurs when a state law and a federal law are in conflict, either because compliance with both state and federal law is impossible or because the state law "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." . . .

Allen v. State, 203 P.3d 1155, 1160 - 1161 (Alaska 2009) (citations and footnotes omitted).

The state clearly does not have authority to regulate contributions and expenditures in campaigns for federal office; that has been expressly preempted by federal law. 2 U.S.C. § 453 (specifying that the provisions of the federal election campaigns act "supersede and preempt any provision of state law with respect to election to federal office"); 11 C.F.R. 108.7(b)(3) (federal law "supersedes state law concerning the . . . [l]imitation on contributions and expenditures regarding Federal candidates and political committees.").

Whether the state may prohibit independent expenditures from foreign nationals in campaigns for state office is less clear. I am not aware of any federal statute or regulation which expressly preempts state regulation of foreign expenditures in campaigns for state

office. However, field preemption may come into play here. To the extent a court found that the federal law governing contributions and expenditures by foreign nationals is so comprehensive and complete as to "occupy the field," it could invalidate state law attempting to cover the same ground. To the extent that the state and federal laws conflict, conflict preemption is also a possibility.

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

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