

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

February 16, 2011

1:30 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Joe Paskvan
Senator Lesil McGuire
Senator John Coghill

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 58

"An Act increasing the number of superior court judges designated for the third judicial district; and providing for an effective date."

- MOVED SB 58 OUT OF COMMITTEE

SENATE BILL NO. 72

"An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, distribution of indecent material to minors, and misconduct involving confidential information; relating to probation; and providing for an effective date."

- HEARD AND HELD

SENATE BILL NO. 11

"An Act relating to the commission of a crime when the defendant directed the conduct constituting the crime at the victim based on the victim's race, sex, color, creed, physical or mental disability, sexual orientation, gender identity, ancestry, or national origin."

- HEARD AND HELD

SENATE BILL NO. 39

"An Act ratifying an interstate compact to elect the President and Vice-President of the United States by national popular vote; and making related changes to statutes applicable to the selection by voters of electors for candidates for President and Vice- President of the United States and to the duties of those electors."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 58

SHORT TITLE: INCREASING NUMBER OF SUPERIOR CT JUDGES

SPONSOR(s): RULES BY REQUEST

01/21/11	(S)	READ THE FIRST TIME - REFERRALS
01/21/11	(S)	JUD, FIN
02/02/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/02/11	(S)	Heard & Held
02/02/11	(S)	MINUTE(JUD)
02/16/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 72

SHORT TITLE: CRIMES INVOLVING MINORS/STALKING/INFO

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/26/11	(S)	READ THE FIRST TIME - REFERRALS
01/26/11	(S)	JUD, FIN
02/07/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/07/11	(S)	Heard & Held
02/07/11	(S)	MINUTE(JUD)
02/16/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 11

SHORT TITLE: HATE CRIMES

SPONSOR(s): DAVIS

01/19/11	(S)	PREFILE RELEASED 1/7/11
01/19/11	(S)	READ THE FIRST TIME - REFERRALS
01/19/11	(S)	JUD, FIN
02/16/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 39

SHORT TITLE: U.S. PRESIDENTIAL ELECTION COMPACT

SPONSOR(s): FRENCH

01/19/11	(S)	PREFILE RELEASED 1/14/11
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01/19/11	(S)	READ THE FIRST TIME - REFERRALS
01/19/11	(S)	STA, JUD, FIN
02/01/11	(S)	STA AT 9:00 AM BUTROVICH 205
02/01/11	(S)	Heard & Held
02/01/11	(S)	MINUTE(STA)
02/10/11	(S)	STA AT 9:00 AM BUTROVICH 205
02/10/11	(S)	Moved SB 39 Out of Committee
02/10/11	(S)	MINUTE(STA)
02/11/11	(S)	STA RPT 1DNP 3NR
02/11/11	(S)	DNP: GIESSEL
02/11/11	(S)	NR: WIELECHOWSKI, PASKVAN, MEYER
02/16/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

ANNE CARPENETI, Assistant Attorney General
 Criminal Division
 Department of Law
 Juneau, AK

POSITION STATEMENT: Provided a continued sectional analysis of SB 72.

TONY NEWMAN, Social Services Program Officer
 Division of Juvenile Justice
 Department of Health and Social Services

POSITION STATEMENT: Testified in support of SB 72.

QUINLAN STEINER, Public Defender for the State of Alaska
 Public Defender Agency
 Anchorage, AK

POSITION STATEMENT: Commented on the unintended consequences in section 7 of SB 72.

THOMAS OBERMEYER, staff to Senator Davis
 Alaska State Legislature
 Juneau, AK

POSITION STATEMENT: Introduced SB 11 on behalf of the sponsor.

SLADE MARTIN, representing himself

POSITION STATEMENT: Testified in support of SB 11.

SHAYLE HUTCHISON, Board Member
 Alaskans Together for Equality

POSITION STATEMENT: Testified in support of SB 11.

NELSON ANGAPAK, Senior Vice President
 Alaska Federation of Natives

Anchorage, AK

POSITION STATEMENT: Testified in support of SB 11.

KATE BURKHART, Executive Director
Alaska Mental Health Board
Department of Health and Social Services
Juneau, AK

POSITION STATEMENT: Spoke to why the Alaska Mental Health Board supports SB 11.

KELLI BURKINSHAW, Board Member
Alaskans Together for Equality

POSITION STATEMENT: Testified in support of SB 11.

JEFFERY MITTMAN, Executive Director
Alaska Civil Liberties Union
Anchorage, AK

POSITION STATEMENT: Testified that, as currently drafted, SB 11 is susceptible to a facial challenge.

WANDA GREENE, President
NAACP Anchorage
Anchorage, AK

POSITION STATEMENT: Testified in support of SB 11.

ANDY MODEROW, Staff to Senator French
Alaska State Legislature
Juneau, AK

POSITION STATEMENT: Provided a sectional analysis of SB 39.

ACTION NARRATIVE

[1:30:35 PM](#)

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 1:30 p.m. Senators McGuire, Wielechowski, Paskvan, and French were present at the call to order. Senator Coghill joined the committee soon thereafter.

SB 58-INCREASING NUMBER OF SUPERIOR CT JUDGES

[1:31:22 PM](#)

CHAIR FRENCH announced the consideration of SB 58 relating to increasing by two the number of superior court judges. The bill was discussed at length during the previous hearing, and public testimony was taken and then closed. He solicited a motion.

[1:32:21 PM](#)

SENATOR WIELECHOWSKI moved to report SB 58 from committee with individual recommendations and attached fiscal note(s).

There being no objection, SB 58 moved from the Senate Judiciary Standing Committee.

At ease from 1:32 p.m. to 1:34 p.m.

SB 72-CRIMES INVOLVING MINORS/STALKING/INFO

[1:34:01 PM](#)

CHAIR FRENCH announced the consideration of SB 72. He asked Ms. Carpeneti to continue the sectional analysis, starting with Section 8.

ANNE CARPENETI, Assistant Attorney General, Criminal Division, Department of Law (DOL), said Section 8 is a conforming amendment to clarify that the sexting provisions in Section 7 aren't included in the crime of harassment in the second degree.

[1:35:15 PM](#)

Section 9 makes two amendments to the crime of distribution of indecent material to minors. First, it clarifies the culpable mental state that the state must prove in order to convict a person of the offense. It provides that the person must know that the material he or she distributed depicts the prohibited conduct. Second, it clarifies that if the minor to whom the material is sent is under age 16, the person who sent the material was reckless as to that circumstance.

SENATOR PASKVAN noted that the term "lewd" is included as an adjective in this section to specifically describe "touching" and "exhibition." He asked what the mental status is for "lewd."

MS. CARPENETI replied it would be the circumstance of "reckless." The person would have to know that the material included the "lewd" touching of a person's genitals, anus, or female breast.

SENATOR PASKVAN said he didn't understand what the term "lewd" means in that context.

[1:37:55 PM](#)

MS. CARPENETI replied that's a question for a jury; it's not defined in the statutes.

SENATOR WIELECHOWSKI asked if the bill applies to cartoon characters.

MS. CARPENETI answered no.

[1:38:19 PM](#)

CHAIR FRENCH noted a letter dated today from the American Civil Liberties Union (ACLU) pointing out that there is a preliminary injunction, on First Amendment grounds, against this section. Mr. Mittman says that Section 9 of the bill would narrow AS 11.61.128(a) "to only criminalize the distribution of material 'harmful to minors' by an adult if the recipient is under 16 years old and the adult is reckless regarding the recipient's age... ." Mr. Mittman goes on to say that the bill is an improvement on the statute that was enjoined, but it would still violate both the First Amendment and the Commerce Clause of the U.S. Constitution. Senator French asked Ms. Carpeneti if DOL is in communication with Mr. Mittman on this topic.

MS. CARPENETI replied they have been in communication with Michael Bamberger, an attorney who is working with the litigants in this case. She added that she had not been in communication with Mr. Mittman, but she had spoken to him.

[1:39:42 PM](#)

CHAIR FRENCH said he wasn't inclined to ask the ACLU to write the statute, but they did win an injunction so there has to be some accommodation.

MS. CARPENETI said both sides have filed motions for a summary judgment, but the court hasn't issued an opinion.

CHAIR FRENCH asked how long the motions have been pending.

MS. CARPENETI said she'd find out, but she believes they're fairly recent.

SENATOR COGHILL asked if the amended language regarding "reckless disregard for the age of the child" would be a second line of proof.

MS. CARPENETI answered it would require the state to prove that the child was under age 16 and the person distributing the material was reckless as to that fact. "Reckless" is defined in the statutes as knowing there is a high probability that the person would be under age 16 and knowingly disregarding that fact.

SENATOR COGHILL said he was trying to figure out why "reckless regard" was used instead of "ignoring" or "disregard."

[1:41:39 PM](#)

CHAIR FRENCH explained that it's easier to prove than "intentional."

MS. CARPENETI said this is the crux of the lawsuit. The argument is that the state would have to prove that the person who is distributing the material knows that the person is under age 16. DOL uses the culpable mental state of "reckless disregard" because it's a lower standard. However, it still requires the state to prove that the person knew that there was a substantial risk that the person was under age 16 and knowingly disregarded that risk.

SENATOR COGHILL surmised that this is because it's so easy for people to get false IDs.

CHAIR FRENCH said he believes it's less than that; you seldom ask for identification from anyone you communicate with, but you have a general idea of their age.

SENATOR WIELECHOWSKI asked why the court said this violated the First Amendment.

MS. CARPENETI said she would follow up and provide that information.

[1:43:48 PM](#)

MSL CARPENETI continued with the analysis. Section 10 adds two new crimes to the criminal code dealing with misconduct involving confidential information in the first and second degrees. This is not specific to children but it fits with the theme of using new technology to victimize people. She mentioned merchants that ask for a driver's license and then use the information, sometimes to commit a crime; and new technology that collects personal identification and credit card information from a person's satchel, backpack, or purse without opening it.

MS. CARPENETI said that "confidential information" is defined as "information that is defined as confidential by law." Responding to questions, she agreed to provide a list of the things that would be considered confidential, and suggested the committee

decide how broadly it wanted to define "confidential information."

[1:45:49 PM](#)

SENATOR PASKVAN asked if there's a product on the market that would shield any personal information that's inside a wallet or purse.

MS. CARPENETI said she's heard that some women put a lead liner in their purse, but she hasn't heard of anything else.

SENATOR MCGUIRE noted that she worked on legislation several years ago that would inform consumers if RFID chips were used in things like a Carrs card, but the bill didn't advance because of wide-spread opposition. She asked if DOL had thought about the scenarios in which that information would be obtained and if the courts would be filled with prosecutions for this new crime.

MS. CARPENETI replied she'd certainly look at the minutes from those hearings to make sure they'd thought through the different scenarios.

[1:49:23 PM](#)

SENATOR WIELECHOWSKI asked if the bill could also classify as confidential things involving biometrics, the methods of identifying a person based on things like fingerprints or retinal scans.

MS. CARPENETI said she would follow up, but the statutes do identify certain health records as confidential.

Continuing with Section 10, she said the first degree provision, which is a class A misdemeanor, would be taking the confidential information and using it to commit a crime or to obtain a benefit. She noted that the statutes define "benefit" rather broadly.

Section 11 clarifies that a person may be prosecuted for online enticement of a minor and for sending an explicit image of a minor if the minor was in Alaska, even if the defendant was in another jurisdiction at the time that he or she committed the prohibited conduct.

[1:51:02 PM](#)

Section 12 amends AS 12.55.125(i), the sentencing statutes for sex crimes, by conforming the terms of imprisonment for persons who commit unlawful exploitation of a minor or online enticement

of a minor to the correct level in accord with the changes in Sections 3-5 of the bill.

SENATOR PASKVAN suggested drafting the law to make it illegal to be in possession of technology that is used for wrongdoing.

CHAIR FRENCH said it's like possession of burglary tools.

MS. CARPENETI said she'd have to think about it because it would have to be a specific intent crime.

SENATOR PASKVAN opined that society should be most worried about the people who have access to equipment that can get personal information as they walk by you on the street. If they don't have a legitimate reason for possessing this equipment, the presumption would be that they're using it to steal information.

SENATOR MCGUIRE suggested using the Oregon law that prohibits the possession of a radar detector as a model and including a rebuttable presumption for proving that there's a legitimate reason for possessing the equipment.

[1:53:51 PM](#)

SENATOR WIELECHOWSKI asked how "unlawful exploitation" is defined on page 7, line 9.

MS. CARPENETI replied it's the crime that's in AS 11.41.455, unlawful exploitation of a minor. Basically, it's the creation of child pornography.

CHAIR FRENCH asked how often DOL prosecutes online enticement and unlawful exploitation of a minor.

MS. CARPENETI replied there were 7 cases filed last year under the unlawful exploitation of a minor statute and 4 cases filed under the online enticement of a minor statute.

CHAIR FRENCH said he has some concern with enhancing the penalties for crimes that are rarely prosecuted.

MS. CARPENETI responded that these cases are very serious and shocking; Sergeant DeGraaf was prepared to testify in a House committee about some of the cases that have been prosecuted.

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CHAIR FRENCH said he could not agree more that these are very serious crimes.

MS. CARPENETI said it's DOL's position that the seriousness of these crimes is ample justification of the penalties.

SENATOR COGHILL asked if these cases have other co-occurring charges, like kidnapping.

MS. CARPENETI said most of the cases of child kidnapping also have sexual assaults and she suspects that it would be the same with these. She offered to follow up.

SENATOR MCGUIRE mentioned the three strikes law and asked Senator French to clarify what he meant when he talked about increasing the penalties.

CHAIR FRENCH said the section the committee was just discussing incorporates these crimes into the three strikes scheme. He then asked Ms. Carpeneti if under this bill a second offense for unlawful exploitation of a minor would be an unclassified felony, eligible for a 99 year sentence.

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MS. CARPENETI replied that would need to be stated in the statute.

CHAIR FRENCH summarized that the first offense would be an A felony, the second would be an A felony, and the third would be the third strike.

MS. CARPENETI clarified that unlawful exploitation of a minor, which is the creation of this material, is already in the felony sentencing provisions, but online enticement of a minor was somehow left out of the three strikes provision. Under this bill it would be a class B felony for a person who is not required to register as a sex offender.

CHAIR FRENCH commented that in Alaska transmission of child pornography is horrifically and shockingly prevalent. The resources that are being poured in and the level of activity would suggest more than four prosecutions a year.

MS. CARPENETI said she hopes it will get better.

CHAIR FRENCH asked if the expanded subpoena power would be included in this bill in the form of a committee substitute.

MS. CARPENETI answered yes; she knows the committee would be interested in that.

MS. CARPENETI said Section 13 deals with probation officers. It clarifies that while the commissioner of corrections provides probation officers to the superior court for the active supervision of a person on probation for felony offenses, it's not required. The commissioner may, at his or her discretion, also provide probation officers for the active supervision of persons released for misdemeanor offenses.

Senator French opened public testimony.

2:04:08 PM

TONY NEWMAN, Social Services Program Officer, Division of Juvenile Justice, Department of Health and Social Services (DHSS), said DJJ is concerned about the way communications technology and social media are outpacing the ability to understand how they impact young people. Several of the offenses that are the focus of SB 72 can be committed by unthinking and impulsive youths who think it's little more than a prank, but the consequences can be very long-term and damaging for victims. DJJ appreciates that the governor and the Department of Law are trying to get ahead of these issues before too many lives are ruined.

Alaska has a juvenile justice system that recognizes that minors should be managed differently than adults. The DJJ mission is to hold youth accountable when they commit offenses, but at the same time to provide opportunities to keep them from continuing to make mistakes. The bill strikes a balance and allows DJJ to appropriately respond to the juvenile given his/her risk to reoffend and his/her needs. For example, the division could refer a youth to a diversion program such as a youth court without requiring them to go through formal court proceedings.

The exception is the increase in the charge class level for unlawful exploitation of a minor. Class A felonies against a person are known in the juvenile system as auto-waiver offenses; youths age 16 and age 17 are referred directly to the adult criminal justice system. Unlawful exploitation of a minor is a serious offense, but DJJ believes that when a youth commits this crime it is counterproductive to automatically waive him into the adult system. DOL agrees and is working to craft an amendment to address this issue.

2:06:50 PM

QUINLAN STEINER, Public Defender for the State of Alaska, Public Defender Agency, said his comments would center on two topics related to the unintended consequences in Section 7 of SB 72. The first is the breadth and nature of who it covers. Potentially couples who exchange photographs via email would be in violation of the statute. It would also cover a broader spectrum like grandparents who electronically send photos of grandchildren to their friends or post them on Facebook. That would be criminalized by this statute. He suggested narrowing the language to target the intended situation, which is the distribution where the broader distribution would be embarrassing. He also suggested the bill provide an exclusion for people who are taking and involved in the pictures.

MR. STEINER said the other concern relates to the C felony penalty for publishing or distributing the depiction on the Internet. The bill refers to the broad definition of "Internet," which refers to its physical nature and how things are transferred. It would in fact become a felony to take a photo and email it to one person unless a printed photo was used for the publishing and distribution. He said he believes what was intended was posting on the Internet for public viewing rather than simple distribution. He described this as a technical problem.

CHAIR FRENCH said the committee is focused on getting at this without including too much.

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CHAIR FRENCH announced he would hold SB 72 in committee.

SB 11-HATE CRIMES

[2:10:55 PM](#)

CHAIR FRENCH announced the consideration of SB 11.

THOMAS OBERMEYER, staff to Senator Davis, introduced SB 11 speaking to the following sponsor statement:

This bill increases the sentencing for crimes motivated prejudice, bias, or hatred based on the victim's race, sex, color, creed, physical or mental disability, sexual orientation, gender identity, ancestry, or national origin. This new crime can only be committed when a person commits some underlying crime and the person directed the conduct constituting the crime at the victim due to one of the listed

characteristics of the victim. The new crime increases the classification of the underlying crime one level.

Without creating a new list of "hate crimes" under AS 11.76, new Sec. 11.76.150 simply reclassifies the level of any crime up one notch if motivated by prejudice, bias, or hatred based on the victim's race, sex, color, creed, physical or mental disability, sexual orientation, gender identity, ancestry, or national origin. For example, a class B misdemeanor becomes a class A misdemeanor; a class A misdemeanor becomes a C felony; a class C felony becomes a B felony, etc. Such reclassification, of course, increases the penalties appropriate to the classification in sentencing under AS 12.55. The bill also amends AS 12.55.155(c)(22), an aggravating factor as sentencing for felonies, by adding "sexual orientation" and "gender identity" to the list of protected characteristics.

The need for this bill is demonstrated by increasing reports of violence against homeless persons, minorities, religious groups, and others motivated by prejudice, bias, and hatred in Alaska and across the country in our highly diverse and multicultural society. When crimes are committed because of people's differences, the effects reverberate beyond a single victim or group into an entire community, city, state, and society as a whole. While this bill alone cannot eliminate prejudice, bias, or hatred, it will send a message that Alaskans will not tolerate hate crimes in any form, and sentencing for them will be substantially increased.

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SENATOR MCGUIRE asked if he'd read the February 16, 2011 letter from the ACLU.

MR. OBERMEYER answered yes; Mr. Mittman was concerned that the language didn't conform to the language in the federal bill. However, the drafter indicated that it would be unnecessary to add the federal language because most of this comes under Rule 404 relating to Character Evidence Not Admissible to Prove Conduct. Furthermore, it's understood by prosecutors and has worked well in the past.

SENATOR MCGUIRE said she liked the idea of using the language in the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act because it maintains consistency, but she was also looking for a comment on the examples on page 2 of the letter that delineate between two situations of offering evidence. These examples of racism are repugnant, but the right to speak and freely associate is protected. The ACLU is saying that the language in the bill is overly broad and vague and instead suggests the following:

In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense.

However, nothing in this section affects the rules of evidence governing the impeachment of a witness.

SENATOR MCGUIRE asked Mr. Obermeyer to comment.

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MR. OBERMEYER reiterated that Mr. Luckhaupt's view was that the additional language was unnecessary. Prosecutors deal with this language on a daily basis and have been successful with the current definition of aggravation under AS 12.55.155(c)(22). Mr. Luckhaupt believes that nothing in SB 11 overrides the rules of evidence. He suggested the committee get additional information from the drafter and the Department of Law (DOL) before making any changes. SB 11 simply seeks to change the definitional aggravators, including sexual orientation and gender identity, without addressing additional associational rights.

He mentioned the paint ball attacks targeting Natives that precipitated the bill initially and noted that Senator French indicated that proving motive can be very difficult for prosecutors, even in the best of circumstances.

CHAIR FRENCH assured Mr. Obermeyer that the committee would get a good array of advice before the bill is passed. He then opened public testimony.

[2:23:16 PM](#)

SLADE MARTIN, representing himself, testified in support of SB 11. He stated that he became aware of the bill while attending the Youth Policy Summit and was immediately intrigued. Buckling down on the consequences for committing acts of hate based on

any of the protected clauses is an amazing idea, he said. Doing so would send a message that Alaska cares about its residents and their safety. Victims would regain a sense of safety, justice, and trust in the legal system. Victims often feel confused, self-loathing, alone, and scared. Sometimes they are suicidal. Suicide is a problem in this state so passing this bill may be a step toward prevention. Everyone is aware of the epidemic of teen bullying based on sexual orientation where suicide has been the unfortunate end result. Mr. Martin said he had experienced hate based on his sexual orientation and the experiences were terrifying. As violence becomes more prevalent and accepted, he fears for himself, his loved-ones, the community, and future generations.

[2:25:49 PM](#)

SHAYLE HUTCHISON, Board Member, Alaskans Together for Equality, stated that passing SB 11 is a way to increase the safety of residents and the sense of justice for Alaska communities. When a person is assaulted he or she feels fear, oppression and trauma, but when a person is attacked based on bias it affects an entire group of people. It changes the dynamics of how a community functions. It changes how people act in public places, where they go, how they walk down the street, and how they express themselves. Apart from the psychological effect, violence that is based on bias increases the opportunity for a retaliatory attack followed by a counter retaliatory act. That ripple of violence will continue until there's a strong message that these kinds of crimes will not be tolerated. The Legislature has the opportunity to send a strong message by passing SB 11.

MS. HUTCHISON said she particularly appreciates that sexual orientation and gender identity were added. In Alaska we need to send a message that a person has an absolute right to believe what he or she wants to believe and to hold the values he or she wants to hold, but no one has a right to impose their beliefs or values on another person using violence, coercion, oppression, or fear.

[2:29:19 PM](#)

NELSON ANGAPAK, Senior Vice President, Alaska Federation of Natives, requested that the AFN written statement be incorporated into the record. He proposed a moment of silence and then stated that 66 years ago when the Territorial Senate met to discuss equal rights, many spoke against this and refused to recognize that this was a problem. Elizabeth Peratovich spoke to the issue of prejudice and injustice stating, "I would not

have expected that I, who am barely out of savagery, would have to remind gentlemen with five thousand years of recorded civilization behind them, of our Bill of Rights."

MR. ANGAPAK further stated that the Alaska Federation of Natives fully supports elevating the punishment for hate crimes based on race, [sex, color, creed, physical or mental disability, sexual orientation, gender identity, ancestry, or national origin.] They hope that elevating the penalties will serve as a deterrent. He urged the committee to report SB 11 from committee and speak favorably when it reaches the Senate floor.

[2:33:50 PM](#)

KATE BURKHART, Executive Director, Alaska Mental Health Board (AMHB) and Advisory Board on Alcoholism and Drug Abuse and Statewide Suicide Prevention Council, said she would focus on why the mental health board supports SB 11 and the protection it affords this unique constituency. According to the Department of Justice (DOJ), people who have a disability are 2-3 times more likely to be the victim of a violent crime. Sometimes the attack is based solely on the disability, which leads AMHB to believe that this additional protection is appropriate.

The DOJ reports that of the crimes that are motivated based on hate toward a suspect class, the crimes against people with disabilities are in the minority. Most hate crimes occur based on race, faith affiliation, and then gender. However, of the victims who report being targeted because of their disability, three-fourths of the attacks are because of a mental health or cognitive disability. DOJ also reports that half of those victims report multiple disabilities, which compounds their vulnerability. The Alaska Mental Health Board supports this prioritized protection, but it's also important from an education and policy-making standpoint. The National Council on Disability, the National Center for Victims of Crime, and the Association of University Centers on Disability have called for increased public education and policy changes to prevent victimization of people with disabilities. SB 11 goes a long way to achieve those goals.

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KELLI BURKINSHAW, Board Member, Alaskans Together for Equality, stated that as a member of a board that advocates for gay, lesbian, bisexual, and transgender rights, she would encourage the committee to pass the bill as quickly as possible.

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JEFFERY MITTMAN, Executive Director, Alaska Civil Liberties Union (ACLU), said SB 11 is an important piece of legislation and the ACLU is gratified to see that gender identity has been included. Statistics show that transgender individuals are targeted for violence. It's important, however, to balance these protections with First Amendment rights of speech and association. While the ACLU doesn't support repugnant speech or hateful groups, it is incumbent on them to protect the right of individuals to say things that are hurtful and hateful.

MR. MITTMAN pointed out that as currently drafted, the bill is susceptible to a facial challenge. Without the limiting language that he suggested in the February 16, 2011 letter to the committee, SB 11 could be construed to chill First Amendment associational rights. The limiting language would not harm the bill because it would not limit the ability to bring prosecutions, but it would make it clear that the evidence must relate commission of a crime. He urged the committee to work with DOL, the sponsor, and the drafter to make the suggested modifications.

SENATOR PASKVAN asked if attacks on homeless people would fit within one of the classifications in the bill.

MR. MITTMAN said yes to the extent that the homeless person was targeted based on race or a physical or mental disability. But a homeless person who was of a majority race and not suffering from a disability, potentially could be left out of this protection.

CHAIR FRENCH asked why the ACLU was raising First Amendment issues of associational rights when they weren't raised when the bill was introduced in previous years.

[2:41:07 PM](#)

MR. MITTMAN replied they did raise similar issues when the bill was introduced last session. The ACLU suggested the sponsor include gender identity, which has been accomplished, but they also raised First Amendment concerns. He said he would forward that written testimony. The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act makes explicit that because of associational and free speech issues, the evidence must be carefully limited.

SENATOR WIELECHOWSKI asked if he believes that the current statute is unconstitutional because that language isn't included.

MR. MITTMAN said the protections are currently in AS 12.55.155, the aggravator section. Potentially, the way the aggravating evidence is introduced could be susceptible to an as applied challenge, but because this bill creates the crime of motivation by prejudice, it raises the concern to a higher level.

SENATOR WIELECHOWSKI noted that the statute says it's against the law to discriminate based on race so if the suggested language were adopted you couldn't introduce the fact that some was a member of the Ku Klux Klan, for example. I believe that would be relevant evidence in a racial discrimination case, he said.

MR. MITTMAN reviewed the current statute and opined that it could potentially allow introduction of associational rights, and that introduction, on its own, is susceptible to an as applied challenge on First Amendment grounds. For example, a defendant would not be allowed to state that he or she had no bias whatsoever and open the door to evidence that he or she did in fact have bias. The ACLU believes that the language in the federal legislation strikes an appropriate balance. A prosecutor would be allowed to introduce necessary evidence to establish the elements of the crime, but not so broadly as to be susceptible to a constitutional challenge.

CHAIR FRENCH said it's an interesting issue that the committee would ponder.

[2:45:08 PM](#)

WANDA GREENE, President, NAACP Anchorage, stated that the local NAACP, in line with the national NAACP, supports SB 11. She noted that the national NAACP unanimously supported passage of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act. Part of the NAACP mission is to ensure social and economic equality for all citizens to achieve equality of rights and eliminate race prejudice among citizens in the community and the state. The national NAACP has backed social issues such as this legislation to eliminate discrimination where ever it is found. She said she was pleased to see that gender identity, ancestry, or national origin was added to this legislation.

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CHAIR FRENCH closed public testimony and announced he would hold SB 11 in committee.

SB 39-U.S. PRESIDENTIAL ELECTION COMPACT

[2:47:43 PM](#)

CHAIR FRENCH announced the consideration of SB 39 and stated that public testimony would be taken during a subsequent hearing.

He read the sponsor statement into the record as follows:

If there is one bedrock rule in elections it is this: the person with the most votes is the winner. This legislation would guarantee the Presidency to the candidate who receives the most votes in the United States.

The concept of 'the person with the most votes wins' is simple, but it hasn't always worked out that way in our Presidential elections.

In 1876 Samuel Tilden received 254,000 more votes than Rutherford Hayes; however, Hayes won the Electoral College tally by one vote by having won a number of states by very small margins. In 1888 Grover Cleveland led in the popular vote over Benjamin Harrison, 48.6 percent to 47.8 percent, but Harrison won the Electoral College by a 233-168 margin, largely by virtue of his 1 percent win in Cleveland's home state of New York. In 2000 Al Gore won the popular vote by just over 500,000 votes but lost in the Electoral College to George Bush 266-271. In 2004 a shift of only 60,000 votes in Ohio from George Bush to John Kerry would have resulted in Kerry winning the Electoral College despite losing the popular vote by over 3 million votes.

SB 39 corrects this defect in our Presidential elections not by doing away with the Electoral College but by modifying how each state's electoral votes are cast. Currently the state's Electoral College votes are cast 100% in favor of the popular vote winner in the state. The bill would have Alaska join a compact made up of states that have pledged to cast their electoral votes in favor of the national popular vote winner. The compact would not go into effect until enough states have joined to put a majority of the Electoral College votes in the compact.

The choice of how to allocate our vote within the Electoral College was given to us by Article II,

Section I of the US Constitution. The founding fathers of our country left the decision on how to select electors up to each individual state legislature. The US Supreme Court has written that "the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States." *McPherson v. Blacker*, 146 U.S. 1 at 29 (1892).

Many believe that the current system causes candidates to focus on swing states, and swing state issues, instead of approaching the country as a whole. It is beyond dispute that under the current system candidates spend their campaign funds on just a few states. Here's an example of how this plays out in Alaska. During the final 40 days of the 2008 election, 99% of all media expenditures were made in 17 states. Alaska, needless to say, was not one of them.

In a close presidential election that decides our country's future, all states should be swing states. Every vote should count, and should be sought by every candidate. This bill will promote truly national presidential campaigns, and it will ensure that the person sent to occupy the most powerful office in the world is the one who got the most votes in the election.

[2:51:15 PM](#)

CHAIR FRENCH said he was surprised to learn that the method of awarding electoral votes has changed substantially over the years. In 1789 when George Washington was elected, only a few of the Electoral College electors were selected by election; most were assigned by the state legislators. The U.S. Constitution specifically identifies state legislators as the sole arbiters of how electoral votes are awarded.

SB 39 is about ensuring that the Electoral College awards the presidency to the person who got the most votes. Absent some action by Congress to undo the Electoral College, this is a way to achieve that goal.

[2:52:58 PM](#)

ANDY MODEROW, staff to Senator French, said SB 39 adds new sections to AS 15.30, which pertains to national elections in the state. He provided the following sectional analysis:

Section 1 - page 1, lines 9-13, outline that Alaska joins in this compact with the other states that enact it.

Article I of the compact outlines that any state and the District of Colombia may join in the compact.

Article II of the compact requires that member states conduct a statewide popular election for president and vice president.

Article III of the compact discusses how presidential electors are selected.

- Page 2, lines 9-14, require member states to count state votes, and calculate a national popular vote total for each presidential slate.

- Page 2, lines 15-16, require the state election official to designate the national popular vote winner. In Alaska this is the director of the Division of Elections.

- Page 2, lines 17-19, require the presidential elector certifying official in Alaska to certify the appointment of the winning candidate's elector slate.

- Page 2, lines 20-24, require that member states communicate state vote totals at least six days before presidential electors meet and cast votes. This is a federal law reiterated in the compact.

- Page 2, lines 25-28, require each member state to treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate, on the day currently required by law for states to make that final determination. This is a federal law reiterated in the compact.

- Page 2, line 29, through page 3, line 1, makes it clear that, in case of a national popular vote tie, states are to cast their electoral votes as determined by state vote totals.

- Page 3, lines 2-7, outline procedures in case the number of presidential electors nominated in a member state does not equal the number of electoral votes the state is entitled to.

- Page 3, lines 8-9, require public disclosure of vote totals as they are determined or obtained.

- Page 3, lines 10-12, require that this compact govern the appointment of presidential electors if it is active on July 20 of a presidential election year.

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Article IV of the compact contains other provisions.

- Page 3, lines 14-16, set when this compact becomes active. When a majority of Electoral College votes are governed by this compact, it takes effect.

- Page 3, lines 17-20, allow that any state may withdraw from this compact, but not during the final six months of a president's term. This July 20 through January 20 blackout is to provide for set election procedures going into the election season.
- Page 3, lines 21-24, require that member states notify other member states when the compact is enacted, or withdrawn.
- Page 3, line 25, terminates this compact if the Electoral College is abolished.
- Page 3, lines 26-27, provide for severability of each component of this Act.

Article V provides definitions. To highlight a few:

- (A) on page 3, lines 29-31, clarify who the chief election official is in each state. In Alaska, it is the director of the Division of Elections.
- (E) on page 4, lines 8-10, discuss who certifies the appointment of presidential electors. In Alaska, under current statute AS 15.30.060, this is the director of the Division of Elections.
- Page 4, lines 22-24, declare that the Alaska director of the Division of Elections is the chief election official described by the compact.

Section 2 - page 4, lines 25-29, adjust AS 15.30.060 (which relates to notification of electors) to adapt when the compact is activated.

Section 3 - page 4, lines 30-31, through page 5, lines 1-9, add a new subsection to AS 15.30.060. It requires notification of electors as outlined by the compact, and not as outlined by current law.

Section 4 - page 5, lines 11-19, adjust AS 15.30.090, which is the current Duties of Electors statute, to adapt when the compact is activated.

Section 5 - page 5, lines 20-31, through page 6, line 1, adds a new subsection to the current duties of elector statute. It clarifies that elector duties are outlined by the compact, not current statutes.

MR. MODEROW offered to answer questions.

[2:58:32 PM](#)

CHAIR FRENCH asked the committee to hold their questions until the next hearing on SB 39.

2:58:50 PM

There being no further business to come before the committee, Chair French adjourned the Senate Judiciary Standing Committee meeting at 2:58 p.m.