

HB

409

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 10, 2010

SUBJECT: Constitutional Issues in CSHB 409(STA)
(Work Order No. 26-LS1495\S)

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard *LAB*
Legislative Counsel

This memorandum accompanies the draft committee substitute you requested. I have some concerns about the constitutionality of some of its provisions.

1. Bill Section 8 (expenditures and contributions by foreign nationals).

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.¹ Whether the state may regulate contributions and expenditures from foreign nationals in campaigns for state office is not clear. 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. To the extent a court might find 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.

2. Bill Section 10 (anonymous expenditures).

Conceptual amendment number 9 deleted a portion of AS 15.13.084 that permits an individual, acting independently of any other person, to make an anonymous expenditure to influence the outcome of a ballot proposition, if the expenditure is made for a (1) billboard, (2) sign, or (3) printed material, other than an advertisement in a newspaper or other periodical. In McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), the United States Supreme Court recognized an individual's First Amendment right to anonymous speech. A statute that prohibits an individual from making any anonymous expenditure, no matter how small, in connection with a state election is unlikely to survive scrutiny under the First Amendment or art. I, sec. 5 of the state constitution.²

¹ See 2 U.S.C. § 441e, 22 U.S.C. § 611(b), and 11 C.F.R. 110.4.

² 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

Representative Bob Lynn
March 10, 2010
Page 2

3. Bill Section 12 (precertification).

Subsection 15.13.090(c) requires the principal officer of a person (other than a candidate, individual, or political party) making a communication under AS 15.13.090 to certify to the Alaska Public Offices Commission that the officer has reviewed the communication and, based on the officer's knowledge, the communication is not defamatory and does not contain defamatory statements. This requirement burdens speech and may violate the First Amendment. Candidates, individuals, and political parties would not be required to provide these certifications, which creates a possible equal protection issue.

4. Bill Section 12 (identification of foreign ownership).

Subsection 15.13.090(e) requires a corporation or other person in which a foreign government holds a 10 percent ownership interest or more to identify the foreign government's ownership interest (in the person) in any communication under AS 15.13.090 paid for by that person. The regulation of foreign governments' involvement in state elections may be preempted by federal law (see 1., above). Requiring identification of a foreign government's ownership interest of 10 percent or more in a person paying for a communication under AS 15.13.090 also raises equal protection and First Amendment associational rights issues.

5. Bill Section 17 (severability).

This version of CSHB 409(STA) includes a severability provision. There is a general severability provision in the Alaska statutes (AS 01.10.030). Usually a severability clause is not included in a bill unless it is necessary to specify more details than are provided in AS 01.10.030.

Please note the changes to the title due to the inclusion of the adopted amendments.

The conceptual amendment to amendment #5 (26-LS1495\E.3) is located in a new subsection (f) to AS 15.13.090, found in sec. 12 of this draft.

Since the bill has passed out of your committee, please share the constitutional concerns identified in this memorandum with the next committee of referral. If you have any questions, please do not hesitate to contact me.

TLAB:ljw
10-148.ljw

Enclosure

First Amendment. Mickens v. City of Kodiak, 640 P. 2d 818, 820 (Alaska 1982); Messerli v. State, 626 P.2d at 83 (Alaska 1980). Additionally, the federal First Amendment right to anonymous speech may extend beyond individuals to encompass groups of individuals and organizations see American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979, 989 - 991 (9th Cir. 2004).

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MEMORANDUM

March 8, 2010

SUBJECT: Federal Preemption and audio identification requirements
(CSHB 409(STA), Draft Version "E", Am. E.3)

TO: Representative Max Gruenberg

FROM: Kathryn L. Kurtz *KK*
Assistant Revisor

You have asked whether there is a federal preemption problem with the requirement in amendment E.3 that the person making an independent expenditure, and that person's top contributors, be audibly identified in an advertisement.

The answer is no.

The state clearly does not have authority to regulate independent 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"); *see also* 11 C.F.R. 108.7. An attempt to impose the requirements of amendment E.3 on independent expenditures relating to candidates for federal office would likely be preempted under 2 U.S.C. 453.

However, the enclosed amendment does not attempt to regulate independent expenditures in campaigns for federal office.¹ Rather, it is consistent with the scope of AS 15.13, which applies to elections for state office, some elections for municipal office, and state ballot measures. AS 15.13.010(a). AS 15.13 does not purport to control campaign finance in elections for federal office, and neither does amendment E.3.

KLK:med
10-034.med

¹ The federal identification requirement is found in 2 U.S.C. 441d, which requires identification of the person who pays for an independent expenditure. However, it uses the term "candidate," which is defined in 2 U.S.C. 431(2) as a candidate for federal office. It does not mention state or local elections, and it does not appear to apply to state and local elections. The fact that the federal identification requirement is different than that proposed in E.3 does not invalidate E.3.

Alaska State Legislature



Chairman
State Affairs Committee

Member
Judiciary Committee
Labor & Commerce Committee
Health & Social Services Committee
Military & Veterans Affairs Committee

Finance Subcommittees
Labor and Workforce Development
Military and Veterans' Affairs
Public Safety

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

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FAX

To: Legal Services

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Alaska State Capitol, room 104
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of Pages (including cover): 2

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Re DRAFT CS for HB 409 Version E

3/9/10 HB 409 Version E passed out of the House State Affairs Committee this morning amended. Please draft a CS with the following amendments. We request that this be in draft form only at this time so we can review amendments before ordering a final.

Conceptual Amendment #1 (Seaton) (this was the tabled R.3b amendment and it is a conceptual amendment because we are amending from the R version to the E version) Page 6 Line 13 after the word "made." *Delete* the rest of **Line 13 thru 17.**

Amendment #2 (Lynn)
26-LS1495\E.1

Amendment #3 (Lynn)
26-LS1495\E.2

Amendment #4 (Lynn)
26-LS1495\E.3
Withdrawn

3/09/10 Fax to Legal
Draft new HSTA CS to HB 409 Version E

Amendment #5 as amended (Gruenberg)
26-LS1495\E.3

Conceptual Amendment #1 to Amendment #5 (Gruenberg)

Line 17 after the word "person's" use the short version of the corporate name

Line 19 after the word "top" *add* "**3**"

*Amendment only
Speaks to the
audio portion of the bill*

Conforming Conceptual Amendment #6 (Seaton)

identifying the top **3** as opposed to "5" top contributors under the disclaimer section

Amendment #7 as amended (Petersen)
26-LS1495\E.5

Amendment #1 to Amendment #7 (Gruenberg)

Page 1 Line 10 after the word "person" *delete* the rest of **line 10 up to and including the word "person." on line 13.**

Amendment #8 (Petersen)
26-LS1495\E.6
Withdrawn

Conceptual Amendment #9 (Johnson)

Page 4 of the CS Version E Line 18 after the word "(1) anonymously," *delete* the rest of **Line 18 thru Line 27**

Friendly Amendment #1 to Conceptual Amendment #9 (Gruenberg)

Add a severability clause to every portion of the bill. That if any provision in the bill is declared unconstitutional that it will not affect the rest of the bill.

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MEMORANDUM

March 8, 2010

SUBJECT: Section 11 of CSHB 409(STA), Draft Version "E"
(Work Order No. 26-LS1495E)

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard
Legislative Counsel

You asked that I review section 11 of CSHB 409(STA). This section adds a new subsection "(c)" to AS 15.13.090 (as that section is modified by sec. 10 of the bill). The subsection would require the principal officer of a person (other than a candidate, individual, or political party) making a communication under AS 15.13.090 to certify to the Alaska Public Offices Commission (APOC) that the officer has reviewed the communication, and based on the officer's knowledge, that the communication is not defamatory and does not contain defamatory statements. This requirement burdens speech and may violate the First Amendment. Candidates, individuals, and political parties would not be required to similarly certify their own communications made under AS 15.13.090. This creates a possible equal protection issue.

ANALYSIS

Defamation and Public Figures

In New York Times v. Sullivan, the Supreme Court held that the First and Fourteenth Amendments to the United States Constitution guaranteeing freedom of speech and press prohibited a public official from recovering damages for a defamatory falsehood relating to his official conduct unless the official proved that the statement was made with "actual malice," "that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 280. This standard operates as a constitutional check on defamation law, limiting a public figure's right to recover for defamation. So, as extended by later decisions of the United States Supreme Court,¹ a candidate for office, as

¹ The New York Times rationale was extended by the United States Supreme Court to cover new causes of action, Garrison v. Louisiana, 379 U.S. 64 (1964) (actual malice standard applicable to criminal libel laws), Time, Inc. v. Hill, 385 U.S. 734 (1967) (standard applicable in false light privacy actions) and Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (standard applicable to litigation claiming intentional infliction of

a public figure, who believes that he or she has suffered a false attack would be barred from recovering damages unless the candidate could clearly prove that the person making the communication consciously knew the statement was false or acted with reckless disregard for the statement's truth.

Although the Supreme Court has recognized a legitimate government interest in compensating victims of defamation, it has never recognized a legitimate interest in protecting candidates for political office from criticism. Rickert v. Public Disclosure Commission, 168 P.3d 826, 830 (Wash. 2007) (state Supreme Court struck down a statute prohibiting a person from sponsoring, with actual malice, a political advertisement containing a false statement of material fact about a candidate for public office) (citing Gertz, 418 U.S. at 348). In fact, the First Amendment has the opposite effect, recognizing a "profound national commitment" to protecting the people's right to criticize candidates for public office. New York Times v. Sullivan, 376 U.S. at 270.

Proposed Sec. 15.13.090(c) and the First Amendment

Under sec. 11 of CSHB 409(STA), a communication may not be made unless the principal officer (of the person making the communication) first certifies to APOC that the communication is not defamatory, and does not contain defamatory statements. This could be interpreted as a prior restraint on political speech, which may prove very difficult to defend in court. The Alaska Supreme Court has defined the term "prior restraint":

"A prior restraint is an official restriction imposed upon speech or other forms of expression in advance of actual publication. Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Probs. 648 (1955). This is in contrast to a subsequent punishment, which is a penalty imposed after the communication has been made. Id."

State v. Haley, 687 P.2d 305, 315 (Alaska 1984). The court went on to explain why prior restraints on speech are problematic:

"Any system of prior restraints of expression comes to [a court] bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 9 L. Ed. 2d 584, 593, 83 S. Ct. 631 (1963). One reason why a system of prior restraints holds such disfavor is that it "subjects to government scrutiny and approval *all* expression in the area controlled -- the innocent and borderline as well as the offensive. . . ."

emotional distress), and to a broader range of plaintiffs, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) ("public figures" must prove actual malice before collecting damages for defamation), Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (a person may become a public figure for a limited range of issues, and such "'limited purpose' public figures" must demonstrate actual malice).

Emerson, supra at 656. Another reason is that, while subsequent punishment does not prevent dissemination of the speech in question, a prior restraint, by its very nature, seeks absolutely to exclude the speech from "the market place of ideas." Id. at 657. These considerations and others have resulted in a bar to systems of prior restraints unless there is compelling proof that a prior restraint is essential to a vital governmental interest. See New York Times Co. v. United States, 403 U.S. 713, 726-27, 29 L. Ed. 2d 822, 832, 91 S. Ct. 2140 (1971) (Brennan, J., concurring) ("Only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.").

Id.

If a court viewed AS 15.13.090(c) as a prior restraint on speech, it would apply strict scrutiny, and might well find that the certification requirement in AS 15.13.090(c) is not supported by a compelling state interest.

In addition, AS 15.13.090(c) could be viewed as a content-based restriction on political speech, which would also be subject to strict scrutiny.² The U.S. Supreme Court has cautioned that any claim by a state that it is "enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." Eu, 489 U.S. at 228 (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 221, (1986)). Furthermore, despite the lack of "constitutional value in false statements of fact," the First Amendment requires protecting "some falsehood in order to protect speech that matters." Gertz, 418 U.S. at 340-41.

Again, strict scrutiny requires that a restriction on political speech be narrowly tailored to serve a compelling state interest. Alaska Right to Life Committee v. Miles, 441 F.3d 773 (9th Cir. 2006). Requiring a principal officer of a person to certify that a statement is not defamatory is a burden on that person's speech that does not directly inform the electorate, deter corruption or the appearance of corruption, or allow the state to gather data necessary to enforce more substantive electioneering restrictions. Unless a compelling rationale for the restriction could be found, the proposed sec. 15.13.090(d) is vulnerable on this ground as well.

² "[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." Burson v. Freeman, 504 U.S. 191, 196 (1992) (plurality opinion) (internal quotation marks omitted) (quoting Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 223 (1989)). A content-based restriction on speech or association is subject to strict scrutiny. Mickens v. City of Kodiak, 640 P.2d 818, 821 (Alaska 1982) ("laws prohibiting free expression, based on the content of the expression, are sustainable only for the most compelling of reasons.")

Note also that some statutes that have attempted to directly prohibit false statements made in political advertisements have been struck down on First Amendment grounds. See State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691 (Wash. 1998) (state court struck down statute that prohibited any person from sponsoring, with actual malice, a political advertisement containing a false statement of material fact) and Rickert, 168 P.3d at 827 (Wash. 2007).

Proposed Sec. 15.13.090(c) and equal protection

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. "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."⁴ 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).

It is not clear to me what state interest would justify requiring only persons making communications under AS 15.13.090 that are not candidates, individuals, or political parties to have a principal officer certify that the communication is not defamatory and does not contain defamatory statements.

EFFECTS

Penalties

AS 15.56.014(a)(3) already provides that a person commits the crime of campaign misconduct in the second degree if the person knowingly makes a communication that (1) contains false factual information relating to a candidate for an election; (2) the person knows it to be false; and (3) would provoke a reasonable person under the circumstances to a breach of the peace or that a reasonable person would construe as damaging to the candidate's reputation for honesty or integrity, or to the candidate's qualifications to serve if elected to office. Violation of AS 15.56.014 is a class B misdemeanor.⁵

New subsection "(c)" added by sec. 11 of CSHB 409(STA) would impose a different standard for a principal officer reviewing a potential communication to be made in a state

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

⁴ Anderson v. State, 78 P.3d 710, 718 (Alaska 2003).

⁵ Note that this statute may be unconstitutional. See Rickert, 168 P.3d 826.

election campaign. If a principal officer under proposed 15.13.090(c) certified to APOC that a communication was not defamatory, when the officer knew that it was in fact defamatory under Alaska law, the officer would be liable for civil penalties under AS 15.13.390(a)⁶ and could be subject to prosecution under AS 15.13.012.⁷ Under AS 15.13.018,⁸ if the person was found to have violated AS 15.13.012, an Alaska court could be required to suspend, for a period of one year, any license held by the defendant that allows the defendant to do business in the state.

⁶ AS 15.13.390(a) provides: [a] person who fails to register when required by AS 15.13.050(a) or who fails to file a properly completed and certified report within the time required by AS 15.13.040, 15.13.060(b) - (d), 15.13.110(a)(1), (3), or (4), (e), or (f) is subject to a civil penalty of not more than \$50 a day for each day the delinquency continues as determined by the commission subject to right of appeal to the superior court. A person who fails to file a properly completed and certified report within the time required by AS 15.13.110(a)(2) or 15.13.110(b) is subject to a civil penalty of not more than \$500 a day for each day the delinquency continues as determined by the commission subject to right of appeal to the superior court. A person who violates a provision of this chapter, except a provision requiring registration or filing of a report within a time required as otherwise specified in this section, is subject to a civil penalty of not more than \$50 a day for each day the violation continues as determined by the commission, subject to right of appeal to the superior court. An affidavit stating facts in mitigation may be submitted to the commission by a person against whom a civil penalty is assessed. However, the imposition of the penalties prescribed in this section or in AS 15.13.380 does not excuse that person from registering or filing reports required by this chapter.

⁷ AS 15.56.012 provides:

Sec. 15.56.012. Campaign misconduct in the first degree. (a) Except as provided in AS 15.56.014 and 15.56.016, a person commits the crime of campaign misconduct in the first degree if the person knowingly engages in conduct that violates a provision of AS 15.13 or a regulation adopted under authority of AS 15.13.

(b) Violation of this section is a corrupt practice.

(c) Campaign misconduct in the first degree is a class A misdemeanor.

⁸ AS 15.56.018 provides:

Sec. 15.56.018. Applicability of campaign misconduct provisions.

(a) For purposes of AS 15.56.012(a) and 15.56.016(a)(1), each day a violation continues constitutes a separate offense.

(b) When a person is convicted of violating AS 15.56.012, in addition to imposition of a sentence as authorized by AS 12.55.015, notwithstanding AS 12.55.015(c), **the court shall order suspension, for a period of one year, of any license held by the defendant that allows the defendant to do business in the state** (emphasis added).

Representative Bob Lynn
March 8, 2010
Page 6

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

TLAB:med
10-035.med

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: HB 409
() Publish Date: _____

Identifier (file name) HB409-DOA-APOC-03-01-10 Dept. Affected: Administration
Title "An Act relating to state election campaigns..." RDU AK Public Offices Commission
Component AK Public Offices Commission
Sponsor (H)STA
Requester (H) STA Component Number 70

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	Appropriation Required	Information					
	FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
Personal Services	78.7		78.7	78.7	78.7	78.7	78.7
Travel							
Contractual	50.0						
Supplies							
Equipment	2.5						
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	131.2	0.0	78.7	78.7	78.7	78.7	78.7

CAPITAL EXPENDITURES

CHANGE IN REVENUES ()

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	131.2		78.7	78.7	78.7	78.7	78.7
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	131.2	0.0	78.7	78.7	78.7	78.7	78.7

Estimate of any current year (FY2010) cost: _____

POSITIONS

Full-time	1		1	1	1	1	1
Part-time							
Temporary							

ANALYSIS: (Attach a separate page if necessary)

This bill would impact the Alaska Public Offices Commission (APOC) by allowing coporations and labor unions to make independent expenditures to comport with a recent U.S. Supreme Court decision. The bill will require changes to regulations and changes to APOC's electronic filing program, currently in development. The bill increases the number of allowable filers and requires additional reporting. This will require additional staff time in assisting the filers; preparing manuals, performing training; and tracking and auditing reports. Changes to regulations will require an amendment to an existing contract estimated at \$25.0 and \$25.0 is included to analyze programming changes and capital funds necessary for the electronic filing program to accommodate the new reports. This increment includes 1 FT employee (range 16, Paralegal II) with computer and furniture.

Prepared by: Holly Hill, Director
Division: Alaska Public Office Commission
Approved by: Rachael Petro, Deputy Commissioner
Department of Administration

Phone (907) 334-1726
Date/Time 3/1/10 12:00 PM
Date 3/1/2010

Seaton

26-LS1495B.3
Burford
3/1/10

Conceptual
AMENDMENT # 1

OFFERED IN THE HOUSE
TO: HB 409

BY REPRESENTATIVE SEATON

1 Page 6, line 12:

2 Delete "three days"

3A Passed

3 Insert "24 hours"

4

5 Page 6, lines ¹³⁻¹⁷ 12 - 16:

3B Conceptual Amendment # 4

6 Delete "An expenditure report filed under this subsection must include any
7 expenditure not yet reported that was made before the filing of the report. However, an
8 expenditure that exceeds \$250 and that is made within nine days of an election shall be
9 reported to the commission not later than 24 hours after the expenditure is made."

Conceptual
amend
3B
Passed

Passed

pg 6

↑ Tabled

after the word "made" delete the rest of line 13 - 17

850 am ish
857 am ish

there is an ^{concep} amend to the amend 2

26-LS1495E.1
Bullard
3/3/10

AMENDMENT #2 passed as is adopted

OFFERED IN THE HOUSE BY REPRESENTATIVE LYNN
TO: CSHB 409(STA), Draft Version "E"

1 Page 4, following line 9:

2 Insert a new bill section to read:

3 **** Sec. 7. AS 15.13.067 is amended to read:**

4 **Sec. 15.13.067. Who may make expenditures.** Only the following may make
5 an expenditure that is not an independent expenditure in an election for candidates
6 for elective office:

- 7 (1) the candidate;
- 8 (2) an individual;
- 9 (3) a group that has registered under AS 15.13.050; and
- 10 (4) a nongroup entity that has registered under AS 15.13.050."

11 ^{Gruenberg Amend.}
12 Renumber the following bill sections accordingly. ^{Seaton objects}
~~concep amend to amend 2~~ Withdrawn

^{Gruenberg} 14 Page 4, line 29, through page 5, line 6:

15 Delete all material.

Lines 14 & 15 delete
leave rest of sec 9

17 Renumber the following bill sections accordingly.

19 Page 7, line 13:

20 Delete "AS 15.13.067 and 15.13.140(a) are"

21 Insert "AS 15.13.140(a) is"

^{Gruenberg}
 Concep Amend 2 to Amend 2 — failed
 of amend #2
 ? — delete line 14 & 15
 Amend Sec 9 of the bill
 changing "in" to "on"
 line 5 "in" to "on"
 retaining 15.13.067 (3)
 not to repeal H.
 Seaton objects
 Johnson N
 Gatto Y
 Gruen Y
 Peler Y
 Sea N
 Will N
 Lynn N

Amend failed

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MEMORANDUM

March 5, 2010

SUBJECT: Expenditures, independent expenditures, and the effect of amendment 26-LS1495E.1 to CSHB 409(STA)

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard *ALB*
Legislative Counsel

This memorandum accompanies the amendment described above.

If the purpose of the draft House Committee Substitute is to conform Alaska statutes with the decision of the United States Supreme Court in Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. ____ (January 21, 2010) (a case about independent election campaign expenditures made by corporations),¹ this amendment would make explicit that the only expenditures that CSHB 409(STA) permits, beyond those that are currently allowed, are the independent expenditures that the Court held could not be prohibited under the First Amendment.

The United States Supreme Court's Citizens United decision spoke in terms of permissive "independent expenditures" in the course of an election campaign. Since the legal distinction between an "expenditure" on behalf of a candidate made by a corporation or labor union and a "contribution" from that corporation or labor union to the candidate is not entirely clear,² it seems best to follow the court's lead and to make explicit in the bill

¹ Because one of the statutes involved in this case and considered by the Court concerned labor unions, it also, arguably, is a case about independent election campaign expenditures made by labor unions, though that is not made explicit in the U. S. Supreme Court opinion.

² See definitions for "contribution" and "expenditure" at AS 15.13.400:

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made and that is made for the purpose of influencing the nomination or election of a candidate, and in AS 15.13.010(b) for the purpose of influencing a

that the only expenditures that may be made under AS 15.13 by a person that is not a candidate, individual, group, or nongroup entity, are independent expenditures.

ballot proposition or question, including the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that are rendered to the candidate or political party; . . .

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party;

(6) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party; or

(iv) influencing the outcome of a ballot proposition or question;

(B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;

(C) includes an express communication and an electioneering communication, but does not include an issues communication;

Representative Bob Lynn

March 5, 2010

Page 3

As a drafting mater, bill section 7, to be added as part of amendment E.1, proposes to modify existing AS 15.13.067 to clarify that the only persons permitted to make an expenditure that is not an independent expenditure in a state election are those persons who are currently permitted to do so under state law. Because, as a drafting choice, I have opted to retain (and modify) AS 15.13.067, the last entry in amendment E.1 deletes "AS 15.13.067" from the list of sections proposed to be repealed. And, because AS 15.13.067 is to be retained (and modified), I saw no need to repeal the reference to that section that appears in bill section 9; since the remainder of the amendment proposed in bill section 9 constitutes technical changes, the second entry in amendment E.1 eliminates bill section 9 in its entirety.

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

TLAB:plm
10-125.plm

Enclosure

AMENDMENT #3

passed

OFFERED IN THE HOUSE

BY REPRESENTATIVE LYNN

TO: CSHB 409(STA), Draft Version "E"

1 Page 4, following line 9:

2 Insert a new bill section to read:

3 **** Sec. 7.** AS 15.13 is amended by adding a new section to read:

4 **Sec. 15.13.068. Expenditures and contributions by foreign nationals.** (a) A
5 foreign national may not, directly or indirectly, in connection with an election under
6 this chapter, make a contribution or expenditure or make an express or implied
7 promise to make a contribution or expenditure.

8 (b) In this section, "foreign national" includes

9 (1) a foreign government, every political subdivision of a foreign
10 government, every official, agent, or representative of a foreign government, and
11 every agency, corporation, or instrumentality of the foreign government or of a
12 political subdivision of a foreign government;

13 (2) a person outside of the United States, unless it is established that
14 the person is an individual and a citizen of and domiciled in the United States, or that
15 the person is not an individual and is organized under or created by the laws of the
16 United States or of any state or other place subject to the jurisdiction of the United
17 States and has its principal place of business in the United States;

18 (3) a partnership, association, corporation, organization, or other
19 combination of persons organized under the laws of or having its principal place of
20 business in a foreign country; or

21 (4) a domestic subsidiary of an entity described in (1) - (3) of this
22 subsection or a domestic corporation controlled by an entity described in (1) - (3) of
23 this subsection, if that entity finances, participates in, or selects a person who

1 participates in the making of a contribution or an expenditure of the domestic
2 subsidiary or domestic corporation.

3 (c) The provisions of this section apply only to the extent permitted by federal
4 law."

5

6 Renumber the following bill sections accordingly.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 8, 2010

SUBJECT: Prohibiting foreign nationals from making contributions or expenditures in connection with a state election
(Work Order No. 26-LS1495\E.2, amendment to CSHB 409(STA))

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard *LAB*
Legislative Counsel

You requested a legal opinion as to whether, under federal law, the state could regulate contributions and expenditures by foreign nationals made in connection with a state election, and if it were permissible under federal law, an amendment prohibiting all contributions and expenditures by foreign nationals.

A foreign national is not permitted under federal law to directly or indirectly, make a contribution or expenditure in connection with a federal, state, or local election. 2 U.S.C. § 441e. The Federal Election Commission (FEC) has interpreted this prohibition broadly. See 11 C.F.R. 110.4(a)(3) (clarifying that a foreign national cannot participate, even indirectly, in election related decisions).

Federal Preemption

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.

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,

Representative Bob Lynn
March 8, 2010
Page 2

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 coordinate 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.

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. . . .

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." . . .

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 regulate contributions and expenditures 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 contributions and 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

Representative Bob Lynn

March 8, 2010

Page 3

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.

Drafting Approach

The accompanying amendment, in a manner consistent with federal law,¹ prohibits foreign nationals from making contributions and expenditures in state elections. The amendment is drafted to avoid the issue of whether federal law could be interpreted to preempt all state laws relating to campaign contributions and expenditures by foreign nationals, by providing that the state's prohibition applies "only to the extent permitted by federal law."

I hope that the amendment is consistent with your intent. I will look forward to your further direction in this matter.

TLAB:med:ljw
10-033.med

Enclosure

¹ See 2 U.S.C 411e, 22 U.S.C. 611(b), and 11 C.F.R. 110.4.

Lynn offered seaton objects
AMENDMENT # 4

Withdrawn

OFFERED IN THE HOUSE

TO: CSHB 409(STA), Draft Version "E"

1 Page 5, line 22, following "the":

2 Insert "name and city and state of residence or principal place of business, as
3 applicable, of each of the"

4
5 Page 5, line 24:

6 Delete ", with the words "top five contributors." [.]"

7 Insert "."

8
9 Page 6, following line 9:

10 Insert a new subsection to read:

11 "(d) To satisfy the requirements of (a)(2)(C) of this section and, if applicable,
12 (a)(2)(D) of this section, the following statement or statements must be read, in a
13 manner that is easily heard, or placed in the communication so as to be easily
14 discernable, or, in a communication that is transmitted by a method that includes both
15 audio and video components, be read in a manner that is easily heard and placed in the
16 communication so as to be easily discernable:

17 This communication was paid for by (person's name and city
18 and state of principal place of business).

19 The top ³ contributors of (person's name) are (the name and city
20 and state of residence or principal place of business, as applicable, of
21 the largest contributors to the person under AS 15.13.090(a)(2)(D))."

*Johnson
Gail's
Seaton
Lynn
Gneuberg
Wilson
Peterson*

C Amend # 5 — as amended passed
E.3 Johnson objects
same as amend #4
Gruenberg

Johnson N
Gatto Y
Seaton Y
Gruenberg Y
Petersen Y
Wilson N
Lynn N

Amendment
Only Speaker
No. the Audio
portion of
the Bill

915
A

Gruenberg Johnson objects
Concept Amend 1 to Amend 5
Line 19 after

Passed

Does (2)
things
pg 1 Line 17

top 3 contributors

Johnson N
Gatto Y
Seaton Y
Gruen Y
Peters Y
Wilson Y
Lynn N

925
a

Concept
Conforming Amendment # 6 Seaton
identifying to 3 top

on the disclaimer
identif top 3 three contribs

Clarification

~~Not identify 5 Largest to 3 Largest
Contrib.~~

~~This is only the audio portions~~
max said

Mon, March 8, 2010

CSHB 409 Version E, amendments, opinions - Checklist:

New CS Version E memo ✓

New CS Version E bill ✓

Memo for E.1 on independent expenditures and effect of E.1 amendment on CSHB 409 (STA)

Amendment E.1 for CSHB 409 Version E

Memo for E.2 prohibiting foreign nationals from making state contributions and expenditures

Amendment E.2 prohibiting foreign contributions and expenditures

Amendment E.3 for both audio and video components for identification of communications

Legal Memo to Rep. Greenberg on federal pre-emption ? memo on amendment R.5 & R.4

Tues, March 2, 2010 State Affairs Meeting

Amendment R.1 passed ✓

Amendment R.2 withdrawn ✓

Amendment R.3A passed

Amendment R.3B tabled

Amendment R.7 passed

Amendment R.5 not offered yet ✓

Amendment R.6 not offered yet ✓

~~Check in / look on
by offer members~~

Handwritten signature

as amended
AMENDMENT #7 *passed*

OFFERED IN THE HOUSE

BY REPRESENTATIVE PETERSEN

TO: CSHB 409(STA), Draft Version "E"

Seaton objects
removed

1 Page 6, line 4:

2 Delete "a new subsection"

3 Insert "new subsections"

4

5 Page 6, following line 9:

6 Insert a new subsection to read:

7 "(d) If a foreign government holds more than a 10 percent ownership interest
8 in a person paying for a communication under (a) of this section, the foreign
9 government must be clearly identified in the communication as a partial owner of the
10 person. ~~If a foreign government holds more than 50 percent of the ownership interest~~

amend #1 to amend #7 delete

11 in a person paying for a communication under (a) of this section, the foreign
12 government must be clearly identified in the communication as the majority owner
13 and controlling interest holder of the person. A foreign government identified in a
14 communication under this subsection must be identified by the foreign government's
15 common or usual name. In this subsection, "foreign government" includes every
16 political subdivision of the foreign government, every official, agent, or representative
17 of the foreign government, and every agency, corporation, or instrumentality of the
18 foreign government or of a political subdivision of the foreign government."

Gruenberg
Amend #1 to Amend #7
delete sentence
line 10 to line 13

passed

Johnson
Gallo
Seaton
Gruenberg
Petersen
Wilson
Lynn

AMENDMENT # 8 *Withdrawn*

OFFERED IN THE HOUSE

BY REPRESENTATIVE PETERSEN

TO: CSHB 409(STA), Draft Version "E"

Sealon objects

1 Page 3, line 27, following "contributor":

2 Insert ";

3 (6) for a person that is a for-profit entity, the address used by the
4 person for federal income tax purposes, if different than the address provided
5 under (1) of this subsection"

6

7 Page 5, line 21, following "business":

8 Insert "if the person is a nonprofit entity, or the address used by the person for
9 federal income tax purposes if the person is a for-profit entity"

943 a
Concept amend # 9 Johnson - passed
delete pg 4 line 18 after word anonymously,
delete everything thru line 27

947 a
Conceptually amend # 1 to amend # 9 (Grunberg) - passed
severability Clause
to every portion of the bill

*memo to be
forward along
w/ bill to next
committee
reference*

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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MEMORANDUM

March 8, 2010

SUBJECT: Questions relating to proposed amendments 26-LS1295\R.5 and R.6 to HB 409

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard
Legislative Counsel

You asked that I review amendments 26-LS1495\R.5 and R.6, which were drafted to amend House Bill 409 (HB 409).

26-LS1495\R.5

This amendment amends sec. 11 of HB 409 by adding a new subsection to AS 15.13.090 that requires a corporation or other person in which a foreign government¹ holds a 10 percent ownership interest or more to identify the foreign government's ownership interest (in the person) in any communication under AS 15.13.090 paid for by that person. The amendment additionally requires that if a foreign government holds more than a 50 percent ownership interest in the person, the person must identify that a foreign government is "the majority owner and controlling interest holder of the person" in a communication under AS 15.13.090.

This amendment could be interpreted to raise constitutional and legal issues. The regulation of foreign governments' involvement in state elections may be preempted by federal law. Requiring identification of a foreign government's ownership interest of 10 percent or more in a person paying for a communication under AS 15.13.090 may also raise constitutional issues of equal protection and First Amendment associational rights.

1. Preemption. The Federal Election Campaign Act (FECA) prohibits any foreign national from contributing, donating, or spending funds in connection with any federal,

¹ The amendment defined "foreign government" to include every political subdivision of the foreign government, every official, agent, or representative of the foreign government, and every, agency, corporation, or instrumentality of the foreign government or of a political subdivision of the foreign government.

state, or local election in the United States, either directly or indirectly.² 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.

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 coordinate 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.

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. . . .

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." . . .

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

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

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 regulate contributions and 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 contributions and 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.

2. Equal protection. Because the amendment's additional identification requirements apply only to persons that have a 10 percent or greater foreign government ownership interest, and not to other persons, the amendment could prompt an equal protection challenge. 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. "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."⁴ 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).

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 the amendment serves. Consequently, I do not know how a court would evaluate the state's interest in requiring persons, of which a foreign government owns 10 percent

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

⁴ Anderson v. State, 78 P.3d 710, 718 (Alaska 2003).

or more or, of which a foreign government owns 50 percent or more, to identify the foreign government's ownership interest in any communication made by the person under AS 15.13.090.

3. Freedom of speech and association. The amendment requires a person, in which a foreign government owns a 10 percent or greater interest to identify the foreign government's ownership interest (in the person) in any communication under AS 15.13.090 funded by that person. In deciding whether a state election law violates a person's rights under the Federal Constitution's First and Fourteenth Amendments and the state constitution's art I, secs. 5 and 6, a court will (1) weigh the character and magnitude of the burden that the state's rule imposes on the person's rights against the interests that are contended by the state to justify that burden, and (2) consider the extent to which the state's concerns make the burden necessary.

Election related laws and regulations that impose a severe burden on associational rights must be narrowly tailored and advance a compelling state interest. A statute or regulation that imposes a lesser burdens triggers less exacting review, and a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. However, no bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.⁵

In the recent Citizens United v. Federal Election Commission case, the court wrote:

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley*, 424 U.S., at 64, 96 S. Ct. 612, 46 L. Ed. 2d 659, and "do not prevent

⁵ In Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), the Supreme Court established the relevant framework for a court to employ in resolving these competing interests:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Id. at 358 - 359 (internal quotation marks and citations omitted).

anyone from speaking," *McConnell, supra*, at 201, 124 S. Ct. 619, 157 L. Ed. 2d 491 (internal quotation marks and brackets omitted). The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Buckley, supra*, at 64, 66, 96 S. Ct. 612, 46 L. Ed. 2d 659 (internal quotation marks omitted); see *McConnell, supra*, at 231-232, 124 S. Ct. 619, 157 L. Ed. 2d 491.

Citizens United v. Federal Election Commission, 558 U.S. ___ (2010), slip. op at 51; 175 L. Ed. 2d 753, 799; 130 S. Ct. 876, 914. At a minimum, the state would have to demonstrate an important regulatory interest in requiring persons that have a foreign government ownership interest of 10 percent or more to identify the foreign government's ownership interest.

26-LS1495\R.6

This amendment modifies secs. 4 and 10 of HB 409. a provision amending AS 15.13.040(e) (expenditure reports). It requires for-profit entities to disclose the address used by the entity for federal income tax purposes in an expenditure report, if that address was different from the address provided for the individual filing the report under the bill's sec. 15.13.040(e)(1). The amendment also requires a for-profit entity to identify the address used by the entity for federal-tax purposes (instead of the entity's principal place of business) in a communication made under AS 15.13.090(a).

It was my understanding that this amendment was requested in order that for-profit entities that take advantage of foreign jurisdictions for tax purposes be identified. However, under federal law,⁶ a for-profit entity that is located outside the United States may not legally make direct or indirect contributions or expenditures in a federal, state, or local election.

TLAB:ljw
10-139.ljw

⁶ See *id.*

For Tues., March 9, 2010

CSHB 409 Version E, amendments, opinions ... Checklist:

New CS Version E bill

New CS Version E memo (see Tabled Amendment R.3B)

Amendment E.1 for CSHB 409 Version E

Memo for E.1 on independent expenditures and effect of E.1 amendment on CSHB 409 (STA)

Amendment E.2 prohibiting foreign contributions and expenditures

Memo for E.2 prohibiting foreign nationals from making state contributions and expenditures

Amendment E.3 for both audio and video components for identification of communications

Amendment R. 3B *tabled* at March 2, 2010 meeting

Amendment E.5 (formerly R.5) *not offered yet*

Amendment E.6 (formerly R.6) *not offered yet*

Memo for Rep. Petersen Amendments R.5 and R.6

Tues, March 2, 2010 State Affairs Meeting

Amendment R.1 *passed*

Amendment R.2 *withdrawn*

Amendment R.3A *passed*

Amendment R.3B *tabled*

Amendment R.7 *passed*

Verbal requests of John Ptacin, Dept. of Law

Opinion on nationality

Opinion on true source of funds, certification of by CEO and others, conspiracy

26-LS1495E
Bullard
3/2/10

CS FOR HOUSE BILL NO. 409(STA)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to state election campaigns, the duties of the Alaska Public Offices**
2 **Commission, the reporting and disclosure of expenditures and independent**
3 **expenditures, the filing of reports, and the identification of certain communications in**
4 **state election campaigns; and providing for an effective date."**

5 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

6 *** Section 1.** AS 15.13.010(b) is amended to read:

7 (b) Except as otherwise provided, this chapter applies to contributions,
8 expenditures, and communications made [BY A CANDIDATE, GROUP,
9 NONGROUP ENTITY, MUNICIPALITY OR INDIVIDUAL] for the purpose of
10 influencing the outcome of a ballot proposition or question as well as those made to
11 influence the nomination or election of a candidate.

12 *** Sec. 2.** AS 15.13.030 is amended to read:

13 **Sec. 15.13.030. Duties of the commission.** The commission shall
14 (1) develop and provide all forms for the reports and statements

1 required to be made under this chapter, AS 24.45, and AS 39.50;

2 (2) prepare and publish a manual setting out uniform methods of
3 bookkeeping and reporting for use by persons required to make reports and statements
4 under this chapter and otherwise assist all persons [CANDIDATES, GROUPS, AND
5 INDIVIDUALS] in complying with the requirements of this chapter;

6 (3) receive and hold open for public inspection reports and statements
7 required to be made under this chapter and, upon request, furnish copies at cost to
8 interested persons;

9 (4) compile and maintain a current list of all filed reports and
10 statements;

11 (5) prepare a summary of each report filed under AS 15.13.110 and
12 make copies of this summary available to interested persons at their actual cost;

13 (6) notify, by registered or certified mail, all persons who are
14 delinquent in filing reports and statements required to be made under this chapter;

15 (7) examine, investigate, and compare all reports, statements, and
16 actions required by this chapter, AS 24.45, and AS 39.50;

17 (8) prepare and publish a biennial report concerning the activities of
18 the commission, the effectiveness of this chapter, its enforcement by the attorney
19 general's office, and recommendations and proposals for change; the commission shall
20 notify the legislature that the report is available;

21 (9) adopt regulations necessary to implement and clarify the provisions
22 of AS 24.45, AS 39.50, and this chapter, subject to the provisions of AS 44.62
23 (Administrative Procedure Act); [AND]

24 (10) consider a written request for an advisory opinion concerning the
25 application of this chapter, AS 24.45, AS 24.60.200 - 24.60.260, or AS 39.50; and

26 (11) make available to the public information contained in a report
27 filed under AS 15.13.040(e) within 24 hours after the filing of the report with the
28 commission.

29 * Sec. 3. AS 15.13.040(d) is amended to read:

30 (d) Every [INDIVIDUAL,] person [, NONGROUP ENTITY, OR GROUP]
31 making an independent expenditure shall make a full report of expenditures, upon a

1 form prescribed by the commission, unless exempt from reporting.

2 * Sec. 4. AS 15.13.040(e) is amended to read:

3 (e) Each person [THE REPORT] required to report under (d) of this section
 4 shall file a full report in accordance with AS 15.13.110(g) on a form prescribed by
 5 the commission. If the report is filed by a person that is not an individual, the
 6 report must be certified as correct by the treasurer or fiscal officer of the person.

7 The report must contain

8 (1) the name, address, principal occupation, and employer of the
 9 individual filing the report;

10 (2) [, AND] an itemized list of all expenditures made, incurred, or
 11 authorized by the person;

12 (3) the name of the candidate or the title of the ballot proposition
 13 or question supported or opposed by each expenditure and whether the
 14 expenditure is made to support or oppose the candidate or ballot proposition or
 15 question;

16 (4) the name, address, and nationality of each officer and director
 17 of the person, when applicable;

18 (5) the aggregate amount of all contributions made to the person,
 19 if any, for the purpose of influencing the outcome of an election; for all
 20 contributions to the person that exceed \$100 in the aggregate in a year, the date
 21 of the contribution and amount contributed by each contributor; and for a
 22 contributor

23 (A) who is an individual, the name, address, principal
 24 occupation, and employer of the contributor; or

25 (B) that is not an individual, the name and address of the
 26 contributor and the name, address, and nationality of each officer and
 27 director of the contributor [EXPENDITURES. THE REPORT SHALL BE
 28 FILED WITH THE COMMISSION NO LATER THAN 10 DAYS AFTER
 29 THE EXPENDITURE IS MADE].

30 * Sec. 5. AS 15.13.040(h) is amended to read:

31 (h) The provisions of (d) of this section do not apply to one or more

1 expenditures made by an individual acting independently of any other person
2 [GROUP OR NONGROUP ENTITY AND INDEPENDENTLY OF ANY OTHER
3 INDIVIDUAL] if the expenditures

4 (1) cumulatively do not exceed \$500 during a calendar year; and

5 (2) are made only for billboards, signs, or printed material concerning
6 a ballot proposition as that term is defined by AS 15.13.065(c).

7 * Sec. 6. AS 15.13.040(p) is amended to read:

8 (p) For purposes of (b), (e), and (j) of this section, "contributor" means the
9 true source of the funds, property, or services being contributed.

10 * Sec. 7. AS 15.13.082(b) is amended to read:

11 (b) A person, other than an individual exempt from reporting under
12 AS 15.13.040(h), [CANDIDATE, GROUP, OR NONGROUP ENTITY] may not
13 make an expenditure unless the source of the expenditure has been disclosed as
14 required by this chapter.

15 * Sec. 8. AS 15.13.084 is amended to read:

16 **Sec. 15.13.084. Prohibited expenditures.** A person may not make an
17 expenditure

18 (1) anonymously, unless the expenditure is

19 (A) paid for by an individual acting independently of any
20 person [GROUP OR NONGROUP ENTITY AND INDEPENDENTLY OF
21 ANY OTHER INDIVIDUAL];

22 (B) made to influence the outcome of a ballot proposition as
23 that term is defined by AS 15.13.065(c); and

24 (C) made for

25 (i) a billboard or sign; or

26 (ii) printed material, other than an advertisement made
27 in a newspaper or other periodical;

28 (2) using a fictitious name or using the name of another.

29 * Sec. 9. AS 15.13.086 is amended to read:

30 **Sec. 15.13.086. Authorized makers of expenditures.** An expenditure

31 (1) authorized by or on [IN] behalf of a candidate may be made only

1 by

2 (A) the candidate; or

3 (B) the candidate's campaign treasurer or a deputy campaign
4 treasurer;

5 (2) authorized [BY AS 15.13.067(3)] by or on [IN] behalf of a group
6 may be made only by the group's campaign treasurer.

7 * Sec. 10. AS 15.13.090 is amended to read:

8 **Sec. 15.13.090. Identification of communication.** (a) All communications
9 shall be clearly identified by the words "paid for by" followed by the name and
10 address of the person [CANDIDATE, GROUP, NONGROUP ENTITY, OR
11 INDIVIDUAL] paying for the communication. In addition,

12 (1) candidates and groups may identify the name of their campaign
13 chairperson; and

14 (2) a person other than a candidate, an individual, or a political
15 party shall clearly

16 (A) identify the person's principal officer and the officer's
17 title;

18 (B) include a statement from the principal officer
19 approving the communication;

20 (C) provide the address of the person's principal place of
21 business; and

22 (D) identify the person's five largest contributors under
23 AS 15.13.040(e)(5), if any, during the 12-month period before the date of
24 the communication, with the words "top five contributors." [.]

25 (b) The provisions of (a) of this section do not apply when the communication

26 (1) is paid for by an individual acting independently of any other
27 person [GROUP OR NONGROUP ENTITY AND INDEPENDENTLY OF ANY
28 OTHER INDIVIDUAL];

29 (2) is made to influence the outcome of a ballot proposition as that
30 term is defined by AS 15.13.065(c); and

31 (3) is made for

1 (A) a billboard or sign; or

2 (B) printed material other than an advertisement made in a
3 newspaper or other periodical.

4 * **Sec. 11.** AS 15.13.090 is amended by adding a new subsection to read:

5 (c) A person other than a candidate, individual, or political party may not
6 make a communication under (a) of this section unless the person's principal officer
7 has certified to the commission in writing that the officer has reviewed the
8 communication, and, based on the officer's knowledge, the communication is not
9 defamatory and does not contain any defamatory statements.

10 * **Sec. 12.** AS 15.13.110 is amended by adding a new subsection to read:

11 (g) An independent expenditure report required under AS 15.13.040(e) shall
12 be filed with the commission not later than 24 hours after an expenditure has been
13 made. An independent expenditure report filed under this subsection must include any
14 expenditure not yet reported that was made before the filing of the report. However, an
15 independent expenditure that exceeds \$250 and that is made within nine days of an
16 election shall be reported to the commission not later than 24 hours after the
17 expenditure is made.

18 * **Sec. 13.** AS 15.13.111(a) is amended to read:

19 (a) Each [CANDIDATE, GROUP, NONGROUP ENTITY, OR] person
20 required to report under this chapter shall preserve all records necessary to substantiate
21 information required to be reported under this chapter for a period of six years from
22 the date of the election for which the information was required to be reported, unless
23 the records have been submitted to the commission under (c) of this section.

24 * **Sec. 14.** AS 15.13.135 is amended to read:

25 **Sec. 15.13.135. Independent expenditures for or against candidates.** (a)
26 [ONLY AN INDIVIDUAL, GROUP, OR NONGROUP ENTITY MAY MAKE AN
27 INDEPENDENT EXPENDITURE SUPPORTING OR OPPOSING A CANDIDATE
28 FOR ELECTION TO PUBLIC OFFICE.] An independent expenditure supporting or
29 opposing a candidate for election to public office, except an independent expenditure
30 made by a nongroup entity with an annual operating budget of \$250 or less, shall be
31 reported in accordance with AS 15.13.040 and 15.13.100 - 15.13.110 and other

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requirements of this chapter.

(b) A person [AN INDIVIDUAL, GROUP, OR NONGROUP ENTITY] who makes independent expenditures for a mass mailing, for distribution of campaign literature of any sort, for a television, radio, newspaper, or magazine advertisement, or any other communication that supports or opposes a candidate for election to public office

(1) shall comply with AS 15.13.090; and

(2) shall place the following statement in the mailing, literature, advertisement, or other communication so that it is readily and easily discernible:

This NOTICE TO VOTERS is required by Alaska law. (I/we) certify that this (mailing/literature/advertisement) is not authorized, paid for, or approved by the candidate.

* Sec. 15. AS 15.13.067 and 15.13.140(a) are repealed.

* Sec. 16. This Act takes effect immediately under AS 01.10.070(c).

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MEMORANDUM

March 3, 2010

SUBJECT: Committee Substitute for House Bill 409 (STA)
(Work Order No. 26-LS1495\E)

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard *LAB*
Legislative Counsel

This memorandum accompanies the above-described Committee Substitute that is amended by amendments 26-LS1495\R.1, 26-LS1495\R.7, and half of 26-LS1495\R.3. I have one comment.

The committee tabled a portion of amendment 26-LS1495\R.3. As a result, sec. 12 of CSHB 409(STA) now reads:

(g) An independent expenditure report required under AS 15.13.040(e) shall be filed with the commission not later than 24 hours after an expenditure has been made. *An independent expenditure report filed under this subsection must include any expenditure not yet reported that was made before the filing of the report. However, an independent expenditure that exceeds \$250 and that is made within nine days of an election shall be reported to the commission not later than 24 hours after the expenditure is made (emphasis added).*

The provision would have the same substantive effect if the tabled portion of the amendment were included, resulting in a subsection that would read:

(g) An independent expenditure report required under AS 15.13.040(e) shall be filed with the commission not later than 24 hours after an expenditure has been made.

The language in sec. 12 of CSHB 409(STA) italicized above, requires independent expenditures of over \$250 made within nine days of an election to be reported to the Alaska Public Offices Commission within 24 hours. The first sentence of the subsection now requires that all independent expenditures be reported within 24 hours. The first sentence of the subsection makes the final sentence of CSHB 409(STA) unnecessary.

Representative Bob Lynn
March 3, 2010
Page 2

Similarly, if all independent expenditures must be reported to the Alaska Public Offices Commission within 24 hours of being made, there is no need to require an independent expenditure report to include expenditures "not yet reported that [were] made before the filing of the report." This sentence was included in HB 409 (26-LS1495\R) to ensure against the possibility that, in the sentence's absence, the statute could be interpreted to permit expenditures that are made 10 days before an election to not be reported until the day following the election, where an expenditure made within nine days of an election would have to be reported within 24 hours of the expenditure being made. If all independent expenditures must be disclosed within 24 hours, this sentence is no longer necessary for the purposes for which it was originally included, is redundant, and should be removed from the bill.

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

TLAB:plm
10-124.plm

Enclosure

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE LYNN

TO: CSHB 409(STA), Draft Version "E"

1 Page 4, following line 9:

2 Insert a new bill section to read:

3 **"* Sec. 7. AS 15.13.067 is amended to read:**

4 **Sec. 15.13.067. Who may make expenditures.** Only the following may make
5 an expenditure **that is not an independent expenditure** in an election for candidates
6 for elective office:

7 (1) the candidate;

8 (2) an individual;

9 (3) a group that has registered under AS 15.13.050; and

10 (4) a nongroup entity that has registered under AS 15.13.050."

11

12 Renumber the following bill sections accordingly.

13

14 Page 4, line 29, through page 5, line 6:

15 Delete all material.

16

17 Renumber the following bill sections accordingly.

18

19 Page 7, line 13:

20 Delete "AS 15.13.067 and 15.13.140(a) are"

21 Insert "AS 15.13.140(a) is"

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MEMORANDUM

March 5, 2010

SUBJECT: Expenditures, independent expenditures, and the effect of amendment 26-LS1495\E.1 to CSHB 409(STA)

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard *ALB*
Legislative Counsel

This memorandum accompanies the amendment described above.

If the purpose of the draft House Committee Substitute is to conform Alaska statutes with the decision of the United States Supreme Court in Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. ___ (January 21, 2010) (a case about independent election campaign expenditures made by corporations),¹ this amendment would make explicit that the only expenditures that CSHB 409(STA) permits, beyond those that are currently allowed, are the independent expenditures that the Court held could not be prohibited under the First Amendment.

The United States Supreme Court's Citizens United decision spoke in terms of permissive "independent expenditures" in the course of an election campaign. Since the legal distinction between an "expenditure" on behalf of a candidate made by a corporation or labor union and a "contribution" from that corporation or labor union to the candidate is not entirely clear,² it seems best to follow the court's lead and to make explicit in the bill

¹ Because one of the statutes involved in this case and considered by the Court concerned labor unions, it also, arguably, is a case about independent election campaign expenditures made by labor unions, though that is not made explicit in the U. S. Supreme Court opinion.

² See definitions for "contribution" and "expenditure" at AS 15.13.400:

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made and that is made for the purpose of influencing the nomination or election of a candidate, and in AS 15.13.010(b) for the purpose of influencing a

that the only expenditures that may be made under AS 15.13 by a person that is not a candidate, individual, group, or nongroup entity, are independent expenditures.

ballot proposition or question, including the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that are rendered to the candidate or political party; . . .

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party;

(6) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party; or

(iv) influencing the outcome of a ballot proposition or question;

(B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;

(C) includes an express communication and an electioneering communication, but does not include an issues communication;

Representative Bob Lynn
March 5, 2010
Page 3

As a drafting mater, bill section 7, to be added as part of amendment E.1, proposes to modify existing AS 15.13.067 to clarify that the only persons permitted to make an expenditure that is not an independent expenditure in a state election are those persons who are currently permitted to do so under state law. Because, as a drafting choice, I have opted to retain (and modify) AS 15.13.067, the last entry in amendment E.1 deletes "AS 15.13.067" from the list of sections proposed to be repealed. And, because AS 15.13.067 is to be retained (and modified), I saw no need to repeal the reference to that section that appears in bill section 9; since the remainder of the amendment proposed in bill section 9 constitutes technical changes, the second entry in amendment E.1 eliminates bill section 9 in its entirety.

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

TLAB:plm
10-125.plm

Enclosure

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE LYNN

TO: CSHB 409(STA), Draft Version "E"

1 Page 4, following line 9:

2 Insert a new bill section to read:

3 **"* Sec. 7. AS 15.13 is amended by adding a new section to read:**

4 **Sec. 15.13.068. Expenditures and contributions by foreign nationals.** (a) A
5 foreign national may not, directly or indirectly, in connection with an election under
6 this chapter, make a contribution or expenditure or make an express or implied
7 promise to make a contribution or expenditure.

8 (b) In this section, "foreign national" includes

9 (1) a foreign government, every political subdivision of a foreign
10 government, every official, agent, or representative of a foreign government, and
11 every agency, corporation, or instrumentality of the foreign government or of a
12 political subdivision of a foreign government;

13 (2) a person outside of the United States, unless it is established that
14 the person is an individual and a citizen of and domiciled in the United States, or that
15 the person is not an individual and is organized under or created by the laws of the
16 United States or of any state or other place subject to the jurisdiction of the United
17 States and has its principal place of business in the United States;

18 (3) a partnership, association, corporation, organization, or other
19 combination of persons organized under the laws of or having its principal place of
20 business in a foreign country; or

21 (4) a domestic subsidiary of an entity described in (1) - (3) of this
22 subsection or a domestic corporation controlled by an entity described in (1) - (3) of
23 this subsection, if that entity finances, participates in, or selects a person who

1 participates in the making of a contribution or an expenditure of the domestic
2 subsidiary or domestic corporation.

3 (c) The provisions of this section apply only to the extent permitted by federal
4 law."

5

6 Renumber the following bill sections accordingly.

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MEMORANDUM

March 8, 2010

SUBJECT: Prohibiting foreign nationals from making contributions or expenditures in connection with a state election
(Work Order No. 26-LS1495\E.2, amendment to CSHB 409(STA))

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard *AB*
Legislative Counsel

You requested a legal opinion as to whether, under federal law, the state could regulate contributions and expenditures by foreign nationals made in connection with a state election, and if it were permissible under federal law, an amendment prohibiting all contributions and expenditures by foreign nationals.

A foreign national is not permitted under federal law to directly or indirectly, make a contribution or expenditure in connection with a federal, state, or local election. 2 U.S.C. § 441e. The Federal Election Commission (FEC) has interpreted this prohibition broadly. See 11 C.F.R. 110.4(a)(3) (clarifying that a foreign national cannot participate, even indirectly, in election related decisions).

Federal Preemption

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.

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 coordinate 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.

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. . . .

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." . . .

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 regulate contributions and expenditures 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 contributions and 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

Representative Bob Lynn
March 8, 2010
Page 3

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.

Drafting Approach

The accompanying amendment, in a manner consistent with federal law,¹ prohibits foreign nationals from making contributions and expenditures in state elections. The amendment is drafted to avoid the issue of whether federal law could be interpreted to preempt all state laws relating to campaign contributions and expenditures by foreign nationals, by providing that the state's prohibition applies "only to the extent permitted by federal law."

I hope that the amendment is consistent with your intent. I will look forward to your further direction in this matter.

TLAB:med:ljw
10-033.med

Enclosure

¹ See 2 U.S.C 411e, 22 U.S.C. 611(b), and 11 C.F.R. 110.4.

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 409(STA), Draft Version "E"

1 Page 5, line 22, following "the":

2 Insert "name and city and state of residence or principal place of business, as
3 applicable, of each of the"

4

5 Page 5, line 24:

6 Delete "with the words "top five contributors."[.]"

7 Insert "."

8

9 Page 6, following line 9:

10 Insert a new subsection to read:

11 "(d) To satisfy the requirements of (a)(2)(C) of this section and, if applicable,
12 (a)(2)(D) of this section, the following statement or statements must be read, in a
13 manner that is easily heard, or placed in the communication so as to be easily
14 discernable, or, in a communication that is transmitted by a method that includes both
15 audio and video components, be read in a manner that is easily heard and placed in the
16 communication so as to be easily discernable:

17 This communication was paid for by (person's name and city
18 and state of principal place of business).

19 The top contributors of (person's name) are (the name and city
20 and state of residence or principal place of business, as applicable, of
21 the largest contributors to the person under AS 15.13.090(a)(2)(D))."

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE PETERSEN

TO: CSHB 409(STA), Draft Version "E"

1 Page 6, line 4:

2 Delete "a new subsection"

3 Insert "new subsections"

4

5 Page 6, following line 9:

6 Insert a new subsection to read:

7 "(d) If a foreign government holds more than a 10 percent ownership interest
8 in a person paying for a communication under (a) of this section, the foreign
9 government must be clearly identified in the communication as a partial owner of the
10 person. If a foreign government holds more than 50 percent of the ownership interest
11 in a person paying for a communication under (a) of this section, the foreign
12 government must be clearly identified in the communication as the majority owner
13 and controlling interest holder of the person. A foreign government identified in a
14 communication under this subsection must be identified by the foreign government's
15 common or usual name. In this subsection, "foreign government" includes every
16 political subdivision of the foreign government, every official, agent, or representative
17 of the foreign government, and every agency, corporation, or instrumentality of the
18 foreign government or of a political subdivision of the foreign government."

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE PETERSEN

TO: CSHB 409(STA), Draft Version "E"

1 Page 3, line 27, following "contributor":

2 Insert ";

3 (6) for a person that is a for-profit entity, the address used by the
4 person for federal income tax purposes, if different than the address provided
5 under (1) of this subsection"

6

7 Page 5, line 21, following "business":

8 Insert "if the person is a nonprofit entity, or the address used by the person for
9 federal income tax purposes if the person is a for-profit entity"

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MEMORANDUM

March 8, 2010

SUBJECT: Questions relating to proposed amendments 26-LS1295\R.5 and R.6 to HB 409

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard
Legislative Counsel

You asked that I review amendments 26-LS1495\R.5 and R.6, which were drafted to amend House Bill 409 (HB 409).

26-LS1495\R.5

This amendment amends sec. 11 of HB 409 by adding a new subsection to AS 15.13.090 that requires a corporation or other person in which a foreign government¹ holds a 10 percent ownership interest or more to identify the foreign government's ownership interest (in the person) in any communication under AS 15.13.090 paid for by that person. The amendment additionally requires that if a foreign government holds more than a 50 percent ownership interest in the person, the person must identify that a foreign government is "the majority owner and controlling interest holder of the person" in a communication under AS 15.13.090.

This amendment could be interpreted to raise constitutional and legal issues. The regulation of foreign governments' involvement in state elections may be preempted by federal law. Requiring identification of a foreign government's ownership interest of 10 percent or more in a person paying for a communication under AS 15.13.090 may also raise constitutional issues of equal protection and First Amendment associational rights.

1. Preemption. The Federal Election Campaign Act (FECA) prohibits any foreign national from contributing, donating, or spending funds in connection with any federal,

¹ The amendment defined "foreign government" to include every political subdivision of the foreign government, every official, agent, or representative of the foreign government, and every, agency, corporation, or instrumentality of the foreign government or of a political subdivision of the foreign government.

state, or local election in the United States, either directly or indirectly.² 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.

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 coordinate 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.

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. . . .

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." . . .

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

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

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 regulate contributions and 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 contributions and 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.

2. Equal protection. Because the amendment's additional identification requirements apply only to persons that have a 10 percent or greater foreign government ownership interest, and not to other persons, the amendment could prompt an equal protection challenge. 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. "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."⁴ 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).

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 the amendment serves. Consequently, I do not know how a court would evaluate the state's interest in requiring persons, of which a foreign government owns 10 percent

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

⁴ Anderson v. State, 78 P.3d 710, 718 (Alaska 2003).

or more or, of which a foreign government owns 50 percent or more, to identify the foreign government's ownership interest in any communication made by the person under AS 15.13.090.

3. Freedom of speech and association. The amendment requires a person, in which a foreign government owns a 10 percent or greater interest to identify the foreign government's ownership interest (in the person) in any communication under AS 15.13.090 funded by that person. In deciding whether a state election law violates a person's rights under the Federal Constitution's First and Fourteenth Amendments and the state constitution's art I, secs. 5 and 6, a court will (1) weigh the character and magnitude of the burden that the state's rule imposes on the person's rights against the interests that are contended by the state to justify that burden, and (2) consider the extent to which the state's concerns make the burden necessary.

Election related laws and regulations that impose a severe burden on associational rights must be narrowly tailored and advance a compelling state interest. A statute or regulation that imposes a lesser burdens triggers less exacting review, and a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. However, no bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.⁵

In the recent Citizens United v. Federal Election Commission case, the court wrote:

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley*, 424 U.S., at 64, 96 S. Ct. 612, 46 L. Ed. 2d 659, and "do not prevent

⁵ In Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), the Supreme Court established the relevant framework for a court to employ in resolving these competing interests:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Id. at 358 - 359 (internal quotation marks and citations omitted).

Representative Bob Lynn
March 8, 2010
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anyone from speaking," *McConnell, supra*, at 201, 124 S. Ct. 619, 157 L. Ed. 2d 491 (internal quotation marks and brackets omitted). The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Buckley, supra*, at 64, 66, 96 S. Ct. 612, 46 L. Ed. 2d 659 (internal quotation marks omitted); see *McConnell, supra*, at 231-232, 124 S. Ct. 619, 157 L. Ed. 2d 491.

Citizens United v. Federal Election Commission, 558 U.S. ____ (2010), slip. op at 51; 175 L. Ed. 2d 753, 799; 130 S. Ct. 876, 914. At a minimum, the state would have to demonstrate an important regulatory interest in requiring persons that have a foreign government ownership interest of 10 percent or more to identify the foreign government's ownership interest.

26-LS1495\R.6

This amendment modifies secs. 4 and 10 of HB 409. a provision amending AS 15.13.040(e) (expenditure reports). It requires for-profit entities to disclose the address used by the entity for federal income tax purposes in an expenditure report, if that address was different from the address provided for the individual filing the report under the bill's sec. 15.13.040(e)(1). The amendment also requires a for-profit entity to identify the address used by the entity for federal-tax purposes (instead of the entity's principal place of business) in a communication made under AS 15.13.090(a).

It was my understanding that this amendment was requested in order that for-profit entities that take advantage of foreign jurisdictions for tax purposes be identified. However, under federal law,⁶ a for-profit entity that is located outside the United States may not legally make direct or indirect contributions or expenditures in a federal, state, or local election.

TLAB:ljw
10-139.ljw

⁶ See *id.*

Alaska State Legislature



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of Pages (including cover): 4

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Re Draft CS for HB 409 Version R

March 2, 2010

Alpheus - As you know HB 409 Version R did not pass out of the HSTA Committee this morning but we did have a few amendments. Please draft a new STA CS for our next committee hearing.

Amendment#1 (Seaton)
26-LS1495\R.1

Conceptual Amendment #2 (Seaton)
26-LS1495\R.2 - Withdrawn

Amendment#3a (Seaton)
26-LS1495\R.3a

R.3 was divided into two amendments. R.3a lines 1-3 passed.

Amendment R.3b (Seaton)
26-LS1495\R.3b - Tabled

Amendment#4 (Seaton)
26-LS1495\R.7

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 409

BY REPRESENTATIVE SEATON

- 1 Page 2, line 27:
- 2 Delete "not less than 24 hours after the report is filed"
- 3 Insert "within 24 hours after the filing of the report"

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE SEATON

TO: HB 409

1 Page 6, line 12:

2 Delete "three days"

3 Insert "24 hours"

4

R.3a

5 Page 6, lines 12 - 16:

6 Delete "An expenditure report filed under this subsection must include any
7 expenditure not yet reported that was made before the filing of the report. However, an
8 expenditure that exceeds \$250 and that is made within nine days of an election shall be
9 reported to the commission not later than 24 hours after the expenditure is made."

R.3b Tabled

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 409

BY REPRESENTATIVE SEATON

- 1 Page 2, line 31, following "an":
- 2 Insert "independent"
- 3
- 4 Page 6, line 11, following "An":
- 5 Insert "independent"
- 6
- 7 Page 6, line 12, following "An":
- 8 Insert "independent"
- 9
- 10 Page 6, line 14, following "an":
- 11 Insert "independent"

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 409

BY REPRESENTATIVE PETERSEN

1 Page 6, line 4:

2 Delete "a new subsection"

3 Insert "new subsections"

4

5 Page 6, following line 9:

6 Insert new subsections to read:

7 "(d) If a foreign government holds more than a 10 percent ownership interest
8 in a person paying for a communication under (a) of this section, the foreign
9 government must be clearly identified in the communication as a partial owner of the
10 person. If a foreign government holds more than 50 percent of the ownership interest
11 in a person paying for a communication under (a) of this section, the foreign
12 government must be clearly identified in the communication as the majority owner
13 and controlling interest holder of the person. A foreign government identified in a
14 communication under this subsection must be identified by the foreign government's
15 common or usual name.

16 (e) In this section, "foreign government" includes every political subdivision
17 of the foreign government, every official, agent, or representative of the foreign
18 government, and every agency, corporation, or instrumentality of the foreign
19 government or of a political subdivision of the foreign government."

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE PETERSEN

TO: HB 409

1 Page 3, line 27, following "contributor":

2 Insert ";

3 (6) for a person that is a for-profit entity, the address used by the
4 person for federal income tax purposes, if different than the address provided
5 under (1) of this subsection"

6

7 Page 5, line 21, following "business":

8 Insert "if the person is a nonprofit entity, or the address used by the person for
9 federal income tax purposes if the person is a for-profit entity"

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 409

BY REPRESENTATIVE SEATON

- 1 Page 2, line 27:
- 2 Delete "not less than 24 hours after the report is filed"
- 3 Insert "within 24 hours after the filing of the report"

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE SEATON

TO: HB 409

1 Page 2, line 26, following "**public**":

2 Insert "**on the commission's Internet website**"

3

4 Page 2, line 27:

5 Delete "**not less than 24 hours**"

6 Insert "**within three days**"

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 409

BY REPRESENTATIVE SEATON

1 Page 6, line 12:

2 Delete "three days"

3 Insert "24 hours"

4

5 Page 6, lines 12 - 16:

6 Delete "An expenditure report filed under this subsection must include any
7 expenditure not yet reported that was made before the filing of the report. However, an
8 expenditure that exceeds \$250 and that is made within nine days of an election shall be
9 reported to the commission not later than 24 hours after the expenditure is made."

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 409

BY REPRESENTATIVE SEATON

- 1 Page 2, line 31, following "an":
- 2 Insert "independent"
- 3
- 4 Page 6, line 11, following "An":
- 5 Insert "independent"
- 6
- 7 Page 6, line 12, following "An":
- 8 Insert "independent"
- 9
- 10 Page 6, line 14, following "an":
- 11 Insert "independent"