IN THE SUPREME COURT OF THE STATE OF ALASKA

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| The Alaska Public Offices Commission,<br><br>Petitioner,<br>v.<br><br>Donna Patrick, James K. Barnett, and John P. Lambert,<br><br>Respondents. | ) | Supreme Court No. S-17649 |

Trial Court Case No. 3AN-18-05726 CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE WILLIAM F. MORSE, JUDGE

# OPENING BRIEF OF PETITIONER THE ALASKA PUBLIC OFFICES COMMISSION

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Court Rules**



**Federal Statutes**



**Alaska Statutes**



**Alaska Regulations**

## AUTHORITIES PRINCIPALLY RELIED UPON

### ALASKA STATUTES:

### AS 15.13.070. Limitations on amount of political contributions

(a) An individual or group may make contributions, subject only to the limitations of this chapter and AS 24.45, including the limitations on the maximum amounts set out in this section.

(b) An individual may contribute not more than

(1) $500 per year to a nongroup entity for the purpose of influencing the nomination or election of a candidate, to a candidate, to an individual who conducts a write-in campaign as a candidate, or to a group that is not a political party;

(2) $5,000 per year to a political party.

(c) A group that is not a political party may contribute not more than $1,000 per year

(1) to a candidate, or to an individual who conducts a write-in campaign as a candidate;

(2) to another group, to a nongroup entity, or to a political party.

(d) A political party may contribute to a candidate, or to an individual who conducts a write-in campaign, for the following offices an amount not to exceed

(1) $100,000 per year, if the election is for governor or lieutenant governor;

(2) $15,000 per year, if the election is for the state senate;

(3) $10,000 per year, if the election is for the state house of representatives; and

(4) $5,000 per year, if the election is for

(A) delegate to a constitutional convention;

(B) judge seeking retention; or

(C) municipal office.

(e) This section does not prohibit a candidate from using up to a total of $1,000 from campaign contributions in a year to pay the cost of

(1) attendance by a candidate or guests of the candidate at an event or other function sponsored by a political party or by a subordinate unit of a political party;

(2) membership in a political party, subordinate unit of a political party, or other entity within a political party, or subscription to a publication from a political party; or

(3) co-sponsorship of an event or other function sponsored by a political party or by a subordinate unit of a political party.

(f) A nongroup entity may contribute not more than $1,000 a year to another nongroup entity for the purpose of influencing the nomination or election of a candidate, to a candidate, to an individual who conducts a write-in campaign as a candidate, to a group, or to a political party.

**AS 15.13.400. Definitions**

In this chapter,

(1) “candidate”

(A) means an individual who files for election to the state legislature, for governor, for lieutenant governor, for municipal office, for retention in judicial office, or for constitutional convention delegate, or who campaigns as a write-in candidate for any of these offices; and

(B) when used in a provision of this chapter that limits or prohibits the donation, solicitation, or acceptance of campaign contributions, or limits or prohibits an expenditure, includes

(i) a candidate's campaign treasurer and a deputy campaign treasurer;

(ii) a member of the candidate's immediate family;

(iii) a person acting as agent for the candidate;

(iv) the candidate's campaign committee; and

(v) a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of the candidate;

(2) “commission” means the Alaska Public Offices Commission;

(3) “communication” means an announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass mailing, excluding those placed by an individual or nongroup entity and costing $500 or less and those that do not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c);

(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 includes the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party, and that is made for the purpose of

(i) influencing the nomination or election of a candidate;

(ii) influencing a ballot proposition or question; or

(iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(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;

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

(vii) an opportunity to participate in a candidate forum provided to a candidate without compensation to the candidate by another person and for which a candidate is not ordinarily charged;

(5) "electioneering communication" means a communication that

(A) directly or indirectly identifies a candidate;

(B) addresses an issue of national, state, or local political importance and attributes a position on that issue to the candidate identified; and

(C) occurs within the 30 days preceding a general or municipal election;

(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;

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

(v) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(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;

(7) "express communication" means a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate;

(8) "group" means

(A) every state and regional executive committee of a political party;

(B) any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election; a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate shall be considered to be controlled by that candidate; a group whose major purpose is to further the nomination, election, or candidacy of only one individual, or intends to expend more than 50 percent of its money on a single candidate, shall be considered to be controlled by that candidate and its actions done with the candidate's knowledge and consent unless, within 10 days from the date the candidate learns of the existence of the group the candidate files with the commission, on a form provided by the commission, an affidavit that the group is operating without the candidate's control; a group organized for more than one year preceding an election and endorsing candidates for more than one office or more than one political party is presumed not to be controlled by a candidate; however, a group that contributes more than 50 percent of its money to or on behalf of one candidate shall be considered to support only one candidate for purposes of AS 15.13.070, whether or not control of the group has been disclaimed by the candidate; and

(C) any combination of two or more individuals acting jointly who organize for the principal purpose of filing an initiative proposal application under AS 15.45.020 or who file an initiative proposal application under AS 15.45.020;

(9) "immediate family" means the spouse, parent, child, including a stepchild and an adopted child, and sibling of an individual;

(10) “independent expenditure” means an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate;

(11) “individual” means a natural person;

(12) “issues communication” means a communication that

(A) directly or indirectly identifies a candidate; and

(B) addresses an issue of national, state, or local political importance and does not support or oppose a candidate for election to public office;

(13) “nongroup entity” means a person, other than an individual, that takes action the major purpose of which is to influence the outcome of an election, and that

(A) cannot participate in business activities;

(B) does not have shareholders who have a claim on corporate earnings; and

(C) is independent from the influence of business corporations.

(14) “person” has the meaning given in AS 01.10.060, and includes a labor union, nongroup entity, and a group;

(15) “political party” means any group that is a political party under AS 15.80.010 and any subordinate unit of that group if, consistent with the rules or bylaws of the political party, the unit conducts or supports campaign operations in a municipality, neighborhood, house district, or precinct;

(16) “publicly funded entity” means a person, other than an individual, that receives half or more of the money on which it operates during a calendar year from government, including a public corporation.

**AS 15.13.374. Advisory opinion**

(a) Any person may request an advisory opinion from the commission concerning this chapter, AS 24.45, AS 24.60.200--24.60.260, or AS 39.50.

(b) A request for an advisory opinion

(1) must be in writing or contained in a message submitted by electronic mail;

(2) must describe a specific transaction or activity that the requesting person is presently engaged in or intends to undertake in the future;

(3) must include a description of all relevant facts, including the identity of the person requesting the advisory opinion; and

(4) may not concern a hypothetical situation or the activity of a third party.

(c) Within seven days after receiving a request satisfying the requirements of (b) of this section, the executive director of the commission shall recommend a draft advisory opinion for the commission to consider at its next meeting.

(d) The approval of a draft advisory opinion requires the affirmative vote of four members of the commission. A draft advisory opinion failing to receive four affirmative votes of the members of the commission is disapproved.

(e) A complaint under AS 15.13.380 may not be considered about a person involved in a transaction or activity that

(1) was described in an advisory opinion approved under (d) of this section;

(2) is indistinguishable from the description of an activity that was approved in an advisory opinion approved under (d) of this section; or

(3) was undertaken after the executive director of the commission recommended a draft advisory opinion under (c) of this section and before the commission acted on the draft advisory opinion under (d) of this section, if

(A) the draft advisory opinion would have approved the transaction or activity described; and

(B) the commission disapproved the draft advisory opinion.

(f) Advisory opinion requests and advisory opinions are public records subject to inspection and copying under AS 40.25.100--40.25.295, except that, if a person requesting an advisory opinion requests that the person's name be kept confidential, the person's name shall be kept confidential and the commission shall redact the name of the requester from the request and from the advisory opinion before making the request and opinion public.

**AS 15.13.380. Violations; limitations on actions**

(a) Promptly after the final date for filing statements and reports under this chapter, the commission shall notify all persons who have become delinquent in filing them, including contributors who failed to file a statement in accordance with AS 15.13.040, and shall make available a list of those delinquent filers for public inspection. The commission shall also report to the attorney general the names of all candidates in an election whose campaign treasurers have failed to file the reports required by this chapter.

(b) A person who believes a violation of this chapter or a regulation adopted under this chapter has occurred or is occurring may file an administrative complaint with the commission within five years after the date of the alleged violation. If a member of the commission has filed the complaint, that member may not participate as a commissioner in any proceeding of the commission with respect to the complaint. The commission may consider a complaint on an expedited basis or a regular basis.

(c) The complainant or the respondent to the complaint may request in writing that the commission expedite consideration of the complaint. A request for expedited consideration must be accompanied by evidence to support expedited consideration and be served on the opposing party. The commission shall grant or deny the request within two days after receiving it. In deciding whether to expedite consideration, the commission shall consider such factors as whether the alleged violation, if not immediately restrained, could materially affect the outcome of an election or other impending event; whether the alleged violation could cause irreparable harm that penalties could not adequately remedy; and whether there is reasonable cause to believe that a violation has occurred or will occur. Notwithstanding the absence of a request to expedite consideration, the commission may independently expedite consideration of the complaint if the commission finds that the standards for expedited consideration set out in this subsection have been met.

(d) If the commission expedites consideration, the commission shall hold a hearing on the complaint within two days after granting expedited consideration. Not later than one day after affording the respondent notice and an opportunity to be heard, the commission shall

(1) enter an emergency order requiring the violation to be ceased or to be remedied and assess civil penalties under AS 15.13.390 if the commission finds that the respondent has engaged in or is about to engage in an act or practice that constitutes or will constitute a violation of this chapter or a regulation adopted under this chapter;

(2) enter an emergency order dismissing the complaint if the commission finds that the respondent has not or is not about to engage in an act or practice that constitutes or will constitute a violation of this chapter or a regulation adopted under this chapter; or

(3) remand the complaint to the executive director of the commission for consideration by the commission on a regular rather than an expedited basis.

(e) If the commission accepts the complaint for consideration on a regular rather than an expedited basis, the commission shall notify the respondent within seven days after receiving the complaint and shall investigate the complaint. The respondent may answer the complaint by filing a written response with the commission within 15 days after the commission notifies the respondent of the complaint. The commission may grant the respondent additional time to respond to the complaint only for good cause. The commission shall hold a hearing on the complaint not later than 45 days after the respondent's written response is due. Not later than 10 days after the hearing, the commission shall issue its order. If the commission finds that the respondent has engaged in or is about to engage in an act or practice that constitutes or will constitute a violation of this chapter or a regulation adopted under this chapter, the commission shall enter an order requiring the violation to be ceased or to be remedied and shall assess civil penalties under AS 15.13.390.

(f) If the complaint involves a challenge to the constitutionality of a statute or regulation, necessary witnesses that are not subject to the commission's subpoena authority, or other issues outside the commission's authority, the commission may request the attorney general to file a complaint in superior court alleging a violation of this chapter. The commission may request the attorney general to file a complaint in superior court to remedy the violation of a commission order.

(g) A commission order under (d) or (e) of this section may be appealed to the superior court by either the complainant or respondent within 30 days in accordance with the Alaska Rules of Appellate Procedure.

(h) If the commission does not complete action on an administrative complaint within 90 days after the complaint was filed, the complainant may file a complaint in superior court alleging a violation of this chapter by a respondent as described in the administrative complaint filed with the commission. The complainant shall provide copies of the complaint filed in the superior court to the commission and the attorney general. This subsection does not create a private cause of action against the commission; against the commission's members, officers, or employees; or against the state.

(i) If a person who was a successful candidate or the campaign treasurer or deputy campaign treasurer of a person who was a successful candidate is convicted of a violation of this chapter, after the candidate is sworn into office, proceedings shall be held and appropriate action taken in accordance with

(1) art. II, sec. 12, Constitution of the State of Alaska, if the successful candidate is a member of the state legislature;

(2) art. II, sec. 20, Constitution of the State of Alaska, if the successful candidate is governor or lieutenant governor;

(3) the provisions of the call for the constitutional convention, if the successful candidate is a constitutional convention delegate;

(4) art. IV, sec. 10, Constitution of the State of Alaska, if the successful candidate is a judge.

(j) Information developed by the commission under (b)-(e) of this section shall be considered during a proceeding under (i) of this section.

(k) If, after a successful candidate is sworn into office, the successful candidate or the campaign treasurer or deputy campaign treasurer of the person who was a successful candidate is charged with a violation of this chapter, the case shall be promptly tried and accorded a preferred position for purposes of argument and decision so as to ensure a speedy disposition of the matter.

## PARTIES

The petitioner is the Alaska Public Offices Commission ("APOC" or "the State"). The respondents are Donna Patrick, James Barnett, and John Lambert (collectively, "Patrick"). The superior court dismissed the other parties, Interior Voters for John Coghill and Working Families of Alaska, from this case at their request.

## JURISDICTION

This case is before the Court on a petition for review of the decision of the superior court, the Honorable William F. Morse, reversing APOC's decision not to pursue Patrick's complaints against Interior Voters for John Coghill and Working Families of Alaska. This Court granted APOC's petition for review in a March 27, 2020, order and has jurisdiction over this case under AS 22.05.010 and Appellate Rule 402.

## ISSUES PRESENTED[1]

1. *Safe harbor statute*. After issuing a 2012 advisory opinion based on *Citizens United v. FEC*[2] and other federal decisions, APOC stopped enforcing Alaska's campaign contribution limits against groups that make only independent expenditures. Did APOC err in rejecting complaints against two independent expenditure groups under AS 15.13.374(e)(1) and (2), which provide that APOC may not consider a complaint about a person involved in a transaction or activity that "is indistinguishable from the description of an activity that was approved in an [approved] advisory opinion"?

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[1] These issue statements incorporate the questions listed in the Court's March 27 order granting APOC's petition for review.

[2] 558 U.S. 310 (2010).

2. *Correctness of the 2012 advisory opinion*. Is limiting contributions to independent expenditure groups constitutional in light of *Citizens United* and other federal case law? Did APOC abuse its discretion by not revisiting its 2012 advisory opinion and reinstating enforcement efforts against independent expenditure groups based on the subsequent federal court decisions in *Thompson v. Hebdon*,[3] even though that case did not involve limits on contributions to groups that make only independent expenditures and those decisions have since been vacated?

3. *Propriety of the 2012 advisory opinion*. If enforcing limits against independent expenditure groups is unconstitutional, should the Court order APOC to do it anyway? Does APOC have discretionary authority to decline to enforce statutes within its enforcement purview? Is a formal APOC advisory opinion that a statute within its enforcement purview is unconstitutional and therefore unenforceable contrary to Alaska law regarding administrative agencies' jurisdiction to decide constitutional issues?[4] When APOC believes a statute within its enforcement purview is unconstitutional, is it required to file a complaint under AS 15.13.380(f) rather than declining enforcement?

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[3] 909 F.3d 1027 (9th Cir. 2018), *cert. granted, judgment vacated*, No. 19-122, 2019 WL 6257598 (U.S. Nov. 25, 2019).

[4] *See, e.g., Alaska Public Interest Group v. State*, 167 P.3d 27, 36 (Alaska 2007) ("Administrative agencies do not have jurisdiction to decide issues of constitutional law.")

## INTRODUCTION

An Alaska state court should not order an Alaska state agency to pursue an enforcement action that federal courts uniformly agree would violate the constitutional rights of Alaskan citizens. That is what the superior court did here. This Court should not repeat this mistake, and should instead uphold the agency's decision not to enforce campaign contribution limits against independent expenditure groups.

In the 2010 case *Citizens United v. FEC*, the U.S. Supreme Court held that independent expenditures—i.e., expenditures made to influence an election that are not coordinated with any candidate's campaign—"do not give rise to corruption or the appearance of corruption."[5] Since then, federal courts—including the Ninth Circuit—have struck down laws limiting campaign contributions to groups that make only independent expenditures, reasoning that after *Citizens United*, such laws cannot be justified based on the government's interest in preventing corruption.[6]

In a 2012 advisory opinion, APOC took note of this caselaw and announced that it would cease enforcing Alaska's statutory campaign contribution limits against groups that make only independent expenditures (while continuing to enforce the limits against other groups). [Exc. 8-9] So when Patrick filed complaints against two independent expenditure groups for accepting contributions in excess of the limits in 2018, APOC rejected the complaints under a safe harbor statute that instructs that APOC "may not"

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5 558 U.S. 310, 357 (2010).

6 *See, e.g.*, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

consider a complaint about activity that "is indistinguishable from the description of an activity that was approved in an advisory opinion."[7]

But the superior court reversed, requiring APOC to revisit its 2012 advisory opinion and resume enforcing contribution limits against independent expenditure groups contrary to the overwhelming weight of federal authority. The court's decision was based on its *sua sponte* misinterpretation of the inapposite Ninth Circuit case *Thompson v. Hebdon*, which does not concern limits on independent expenditure groups.[8]

This Court should reverse the superior court and uphold APOC's non-enforcement decision. APOC was statutorily prohibited from prosecuting the groups who relied on its 2012 advisory opinion. And that advisory opinion was both correct and proper. Federal courts universally agree that limiting contributions to independent expenditure groups violates the First Amendment. As the Second Circuit put it, "Few contested legal questions are answered so consistently by so many courts and judges."[9] APOC has express statutory authority to issue advisory opinions, and it can—and should—try to conform its enforcement actions to the constitution. It thus acted properly here.

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7 AS 15.13.374(e)(2).

8 909 F.3d 1027 (9th Cir. 2018).

9 *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

## STATEMENT OF THE CASE

### I. In 2010, *Citizens United v. FEC* cast doubt on the constitutionality of limits on contributions to independent expenditure groups.

Alaska Statute 15.13.070 sets limits on how much money individuals, groups, and political parties may contribute to candidates, groups, and political parties for the purpose of influencing elections. The statute is written such that its limits on contributions to a group apply to all kinds of groups, including groups that make only "independent expenditures"—i.e., expenditures to influence an election that are in no way coordinated with any candidate's campaign. Such groups are sometimes called "independent expenditure groups" or "Super PACs"[10] (terms that do not appear in Alaska's statutes).

In 2010, the U.S. Supreme Court decided *Citizens United v. FEC*, striking down on First Amendment grounds a federal statute that barred corporations from making independent expenditures for electioneering not coordinated with any candidate's campaign.[11] Although *Citizens United* did not consider limits on contributions to independent expenditure groups, statements in the Court's opinion call into question such limits.[12] Indeed, not long after in *SpeechNow.org v. FEC*, the D.C. Circuit struck down federal limits on contributions to independent expenditure groups based on *Citizens*

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10 *See* Wikipedia, *Political action committee*: *Super PACs*, https://en.wikipedia.org/wiki/Political_action_committee#Super_PACs (explaining the popular meaning of the term "Super PAC").

11 558 U.S. 310, 365 (2010).

12 *See infra* at 15-17.

*United*.[13] As Patrick acknowledged below, the D.C. Circuit's reasoning in *SpeechNow* "quickly proliferated across the country," including in the Ninth Circuit.[14] [Exc. 144]

## II. In 2012, APOC issued an advisory opinion stating that it will no longer enforce limits on contributions to independent expenditure groups.

In 2012, the independent expenditure group Alaska Deserves Better requested an advisory opinion, asking APOC to "[p]lease confirm" that as an independent expenditure group, it "can obtain contributions and make independent expenditures in unlimited amounts, with no restriction on the amounts or sources." [Exc. 2]

APOC's staff prepared an advisory opinion confirming that Alaska Deserves Better "—as an independent expenditure group—can obtain contributions in unlimited amounts, with no restriction on the amounts or sources." [Exc. 8] The opinion observed that although AS 15.13.070 sets limits on contributions to all types of groups, "*Citizens United v. FEC* has potentially rendered these restrictions unconstitutional as applied to groups that make only independent expenditures" such that the "contribution restrictions in AS 15.13 are likely unconstitutional for independent expenditure only groups." [*Id*.]

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13 599 F.3d 686, 692 (D.C. Cir. 2010).

14 *See Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 687-99 (9th Cir. 2010) (striking down limits on contributions to independent expenditure groups as not supported by anti-corruption rationale); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121-22 (9th. Cir. 2011) (relying on *Long Beach* to uphold a preliminary injunction against enforcement of limits on contributions to independent expenditure groups); *Wisc. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 154-55 (7th Cir. 2011) (permanently enjoining enforcement of contribution limits as applied to independent expenditure groups, opining that "after *Citizens United* there is *no* valid governmental interest sufficient to justify imposing limits on fundraising by independent-expenditure organizations"); *Yamada v. Weaver*, 872 F.Supp.2d 1023, 1039 (D. Hawai'i 2012) (permanently enjoining enforcement of contribution limits as applied to independent expenditure groups).

Citing *SpeechNow* and other cases, the opinion observed that "several federal district and appellate courts have invalidated other states' restrictions on amounts of contributions to organizations that make only independent campaign expenditures." [*Id*.]

APOC's staff "recommend[ed] that [Alaska Deserves Better's] proposed contribution activity be allowed because the statutory limitation to that activity may be unconstitutional." [Exc. 9] APOC approved the advisory opinion. [Exc. 1]

## III. In 2018, APOC rejected three complaints asking it to enforce Alaska's limits on contributions to independent expenditure groups.

In February 2018, APOC received three identical complaints filed by Donna Patrick, James Barnett, and John Lambert (collectively, "Patrick") against two independent expenditure groups, Interior Voters for John Coghill and Working Families of Alaska. [Exc. 10-73] The complaints alleged that these groups accepted contributions exceeding Alaska's contribution limits. [*Id*.] APOC's staff rejected the complaints in reliance on the 2012 advisory opinion. [Exc. 74]

Patrick requested that APOC review the staff's decision, and APOC considered the request at its February 2018 regular meeting. [Exc. 75-77] Patrick argued that the federal decisions supporting the 2012 advisory opinion were incorrect, urging APOC to reconsider the opinion and investigate the complaints. [Exc. 76] APOC affirmed the staff's rejection of the complaints. [Exc. 76-77] In its final, written, clarified order, APOC concluded that the complaints must be rejected under AS 15.13.374(e)(1) and (2), which provide that APOC may not consider a complaint about a person involved in a transaction or activity that "was described in an [approved] advisory opinion" or "is

indistinguishable from the description of an activity that was approved in an [approved] advisory opinion." [*Id*.] APOC further concluded that the conclusion in the advisory opinion remains valid, and there was no good cause to reconsider the opinion. [*Id*.]

## IV. The superior court reversed, ordering APOC to pursue the complaints against the independent expenditure groups.

Patrick appealed APOC's rejection of the complaints based on the 2012 advisory opinion to the superior court. [R. 539-41] The superior court allowed Patrick to supplement the administrative record with the testimony of two expert witnesses about corruption and campaign finance. [R. 362-68, 372-73] Patrick wanted to introduce this evidence in the hope of eventually convincing the U.S. Supreme Court to change its mind about some of the things it said in *Citizens United* and related cases.[15]

After hearing this evidence, the superior court reversed, remanding the case to APOC with instructions to consider the complaints. [Exc. 173-96] But the court's decision was not based on Patrick's evidence challenging *Citizens United*. [Exc. 195 n.68] Instead, it was based on the recent federal decisions in *Thompson v. Hebdon*[16]—the court held that APOC abused its discretion by not reconsidering its 2012 advisory

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[15] *See* Exc. 79 ("To date, the Supreme Court has permitted regulations targeting quid pro quo corruption. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 360 (2010). But the logic of the Supreme Court's cases should permit states to prevent dependence corruption as well—at least if the courts were to adopt the understanding of 'corruption' that the Framers of the U.S. Constitution embraced. In other words, if courts give 'corruption' the same meaning that our Framers did, then regulations targeting dependence corruption satisfy the First Amendment, just as regulations targeting quid pro quo corruption do.").

[16] 909 F.3d 1027, 1032 (9th Cir. 2018), *cert. granted, judgment vacated*, No. 19-122, 2019 WL 6257598 (U.S. Nov. 25, 2019).

opinion based on that case. [Exc. 187-94] The court reached this conclusion *sua sponte*—Patrick did not argue this theory, so the significance of *Thompson* had not been briefed.

*Thompson* was a federal First Amendment challenge to several of Alaska's campaign contribution limits, including the $500 individual-to-candidate and $500 individual-to-group contribution limits.[17] Because the 2012 advisory opinion only applied to independent expenditure groups, APOC has continued to enforce the $500 individual-to-group limit against groups that contribute to (or coordinate with) candidates. The *Thompson* plaintiffs included an individual who wished to contribute more than $500 to groups that contribute to (or coordinate with) candidates—i.e., groups against whom APOC was still enforcing the individual-to-group limit.[18] The district court and the Ninth Circuit both upheld Alaska's $500 individual-to-candidate and individual-to-group contribution limits.[19] But they did not discuss the constitutionality of limiting contributions to independent expenditure groups, which was not at issue.

The superior court observed that *Thompson* upheld Alaska's $500 individual-to-group contribution limit, but it overlooked the distinction between independent expenditure groups and groups that contribute to (or coordinate with) candidates. [Exc. 187-94] The court read *Thompson* as approving of the limit in all of its possible

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17 *Id*.

18 *Id*.

19 *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023 (D. Alaska 2016), *aff'd in part, rev'd in part and remanded sub nom. Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018), *cert. granted, judgment vacated*, No. 19-122, 2019 WL 6257598 (U.S. Nov. 25, 2019).

applications, including to independent expenditure groups, concluding that this "should have caused APOC to question and re-evaluate i[t]s 2012 advisory opinion." [Exc. 190] APOC promptly petitioned for rehearing, explaining why this reliance on *Thompson* was misplaced, but the superior court denied the petition. [R. 578-81, 572]

Shortly thereafter, the U.S. Supreme Court vacated the Ninth Circuit's decision in *Thompson*, rejecting that opinion's analysis and remanding for another look.[20] The Ninth Circuit received further briefing on remand but has yet to issue a new decision.

APOC petitioned this Court for review of the superior court's order, and this Court granted review in a March 27, 2020, order that requests briefing on these questions:

- Does APOC have discretionary authority to decline to enforce statutes within its enforcement purview? Is a formal APOC advisory opinion that a statute within its enforcement purview is unconstitutional and therefore unenforceable contrary to Alaska law regarding administrative agencies' jurisdiction to decide constitutional issues?[21] When APOC believes a statute within its enforcement purview is unconstitutional, is it required to follow the directives of AS 15.13.380(f) rather than declining enforcement?

- Is AS 15.13.070's limit on contributions to independent expenditure groups constitutional in light of *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and other recent federal case law?

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[20] *See Thompson v. Hebdon*, No. 19-122, 2019 WL 6257598, at *2 (U.S. Nov. 25, 2019) ("[T]he judgment of the Court of Appeals is vacated, and the case is remanded for that court to revisit whether Alaska's contribution limits are consistent with our First Amendment precedents.").

[21] *See, e.g., Alaska Public Interest Group v. State*, 167 P.3d 27, 36 (Alaska 2007) ("Administrative agencies do not have jurisdiction to decide issues of constitutional law.")

## STANDARDS OF REVIEW

"Constitutional issues are questions of law subject to independent review."[22] The Court also substitutes its own judgment for the agency's on questions of statutory interpretation when the agency's expertise is not implicated.[23]

## ARGUMENT

### I. Even if APOC's 2012 advisory opinion was wrong or improper, APOC was statutorily prohibited from considering the complaints because they concerned activity approved in an advisory opinion.

Alaska Statute 15.13.374(e)(2) instructs that APOC "may not" consider a complaint about a person involved in a transaction or activity that "is indistinguishable from the description of an activity that was approved in an [approved] advisory opinion."[24] This allows the public to rely on APOC's current advisory opinions in attempting to conform their conduct to the law and avoid enforcement actions. Although APOC may reconsider an advisory opinion,[25] the opinion provides a safe harbor for the type of activity approved in it as long as the opinion remains in effect.

Here, the activity described in Patrick's complaints—independent expenditure groups accepting contributions that exceed Alaska's campaign contribution limits—is indistinguishable from the activity approved in the 2012 advisory opinion. [Exc. 8-9] The

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22 *Eberhart v. Alaska Pub. Offices Comm'n*, 426 P.3d 890, 894 (Alaska 2018) (quoting *Patterson v. GEICO Gen. Ins. Co*., 347 P.3d 562, 568 (Alaska 2015)).

23 *See id*.

24 APOC's federal analog, the Federal Election Commission (FEC), has an advisory opinion statute with a similar safe harbor provision, 52 U.S.C. § 30108(c).

25 *See* 2 AAC 50.840 ("Nothing in this section precludes the commission from revising a previous advisory opinion for good cause.").

opinion explicitly stated that the group Alaska Deserves Better "—as an independent expenditure group—can obtain contributions in unlimited amounts, with no restriction on the amounts or sources." [Exc. 8] Under AS 15.13.374(e)(2), the respondents—Interior Voters for John Coghill and Working Families of Alaska—were entitled to rely on this advisory opinion as APOC's statement that it will not enforce contribution limits against independent expenditure groups like them. APOC was thus statutorily prohibited from pursuing Patrick's complaints against these two groups, even if the 2012 advisory opinion was incorrect or otherwise improper and should be withdrawn.

Patrick's view that APOC can pursue the complaints anyway is unfair, contrary to the text of the advisory opinion statute, and would render APOC's advisory opinions effectively useless to the public. Patrick assumes that APOC may avoid AS 15.13.374(e)(2)'s safe harbor by simply withdrawing the advisory opinion. Below, Patrick argued that "[h]ad the Commission agreed with [Patrick], then the 2012 Advisory Opinion could have been withdrawn, and the complaints investigated," with APOC perhaps considering the withdrawn opinion as a discretionary mitigating factor to reduce the penalties. [R. 594] But this would be contrary to the text of AS 15.13.374(e)(2), which says a complaint "*may not* be considered" (emphasis added). Although APOC may revise or withdraw an advisory opinion, it "may not" consider complaints concerning approved conduct. And considering such complaints would be unfair to the groups, who relied on the opinion as a statement that they would *not be prosecuted at all*—not just that they might face reduced penalties if prosecuted. If APOC could prosecute previously

approved conduct by simply retroactively revising its opinions, the public would be unable to rely on APOC's advisory opinions in any way.

The superior court noted APOC's concerns about the safe harbor, opining that "[t]here is no reason APOC could not revise an opinion in response to a complaint that seeks or requires the revision and still honor the safe harbor that the old opinion afforded those who relied upon it." [Exc. 193] But the superior court nonetheless reversed APOC's decision and remanded with instructions to consider Patrick's complaints against two groups who relied on the safe harbor. [Exc. 195] The court's mandate does not seem to give APOC any leeway on remand to "honor the safe harbor" by rejecting the complaints. [*Id*.] Even if this Court agrees with the superior court that the 2012 advisory opinion was wrong or improper, it should allow APOC's rejection of the complaints to stand because pursuing enforcement against groups who relied on the advisory opinion would be unfair to them and contrary to the letter and purpose of AS 15.13.374(e)(2).

## II. The 2012 advisory opinion was correct.

APOC correctly declined to revisit its 2012 advisory opinion because that opinion was correct. The Court's briefing order asks, "Is AS 15.13.070's limit on contributions to independent expenditure groups constitutional in light of *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and other recent federal case law?" The answer is no: under recent federal case law, Alaska's limit on contributions to groups is

unconstitutional as applied to independent expenditure groups.[26] Absent a change in federal law—a change that neither APOC nor this Court can realistically effectuate, despite Patrick's creative legal theories—APOC cannot successfully enforce and defend Alaska's contribution limits against independent expenditure groups.

### A. The 2012 advisory opinion correctly recognized that federal courts have uniformly struck down limits on contributions to independent expenditure groups under the First Amendment.

As Patrick acknowledges, ever since *Citizens United*, courts have universally agreed that limiting contributions to groups that make only independent expenditures in elections (groups that don't contribute to or coordinate with candidates) violates the First Amendment. [Exc. 118-19, 144] Indeed, as the Second Circuit put it, "Few contested legal questions are answered so consistently by so many courts and judges."[27]

In general, campaign contribution limits implicate the First Amendment freedoms of political expression and association and are therefore subject to an intermediate scrutiny test that has its roots in the seminal 1976 campaign finance case of *Buckley v. Valeo*.[28] Under this test, contribution limits are permissible as long as the government

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[26] Alaska's statutes do not contain a specific "limit on contributions to independent expenditure groups"—rather, they contain a limit on contributions to groups, which does not distinguish between those groups that contribute to and coordinate with candidates as opposed to those groups that make only independent expenditures. APOC continues to enforce this group limit against groups that contribute to and coordinate with candidates.

[27] *New York Progress & Prot. PAC*, 733 F.3d at 488.

[28] 424 U.S. 1, 25 (1976).

demonstrates that they are "closely drawn" to match a "sufficiently important interest."[29] The government interest in preventing corruption or its appearance is such an interest.[30]

The U.S. Supreme Court's 2010 decision in *Citizens United v. FEC*[31] did not change this basic legal test, but the Court elaborated on it by holding that "[w]hen *Buckley* [*v. Valeo*] identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption" to justify contribution limits under the First Amendment, "that interest was limited to *quid pro quo* corruption."[32] The Court further held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[33] Combined, these statements make it hard to defend limiting contributions to groups that make only independent expenditures because they mean that independent expenditures do not implicate the governmental interest that supports contribution limits—preventing *quid pro quo* corruption. If the U.S. Supreme Court says independent expenditures do not implicate *quid pro quo* corruption, it is hard to see how contributions to independent expenditure groups could do so.

After *Citizens United*, the U.S. Supreme Court also decided *McCutcheon v. FEC*, which contains further statements that make it hard to defend limiting contributions to

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29 *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoting and summarizing the legal test for contribution limits from *Buckley*).

30 *Buckley*, 424 U.S. at 25.

31 558 U.S. 310 (2010).

32 *Id*. at 359.

33 *Id*. at 357.

independent expenditure groups.[34] The Court again said it "has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption."[35] It also said that the government "may target only a specific type of corruption—'*quid pro quo*' corruption."[36] It defined this to mean "a direct exchange of an official act for money."[37] The Court said that "[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption."[38] Nor does "the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties."[39] These statements thus reiterate that contribution limits are only valid if they further the interest in preventing *quid pro quo* corruption—an interest that Patrick appears to acknowledge is not implicated by contributions to independent expenditure groups. [Exc. 145]

Building on *Citizens United* and *McCutcheon*, federal courts have struck down limits on contributions to independent expenditure groups under the First Amendment. The first such decision—which quickly followed *Citizens United*—was the D.C. Circuit's decision in *SpeechNow.org v. FEC*, striking down federal limits.[40] The D.C. Circuit

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34 572 U.S. 185 (2014).

35 *Id*. at 206.

36 *Id*. at 207.

37 *Id*. at 192.

38 *Id*. at 208.

39 *Id*.

40 599 F.3d 686 (D.C. Cir. 2010).

observed that "[t]he Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption."[41] The court then observed that *Citizens United* held that "the government has *no* anti-corruption interest in limiting independent expenditures," and rejected the argument that donors having increased "influence over or access to elected officials" constitutes a form of corruption.[42] The court concluded: "In light of the [U.S. Supreme] Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption."[43]

As Patrick acknowledges, the D.C. Circuit's reasoning in *SpeechNow* "quickly proliferated across the country," including in the Ninth Circuit, before being recognized by APOC in its 2012 advisory opinion.[44] [Exc. 144] APOC's 2012 advisory opinion

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41 *Id*. at 692.

42 *Id*. at 693-95 (emphasis in original).

43 *Id*. at 694.

44 *See Long Beach Area Chamber of Commerce*, 603 F.3d at 687-99 (striking down limits on contributions to independent expenditure groups as not supported by anti-corruption rationale); *Thalheimer*, 645 F.3d at 1121-22 (relying on *Long Beach* to uphold a preliminary injunction against enforcement of limits on contributions to independent expenditure groups); *Wisc. Right to Life State Political Action Comm.*, 664 F.3d at 154-55 (permanently enjoining enforcement of contribution limits as applied to independent expenditure groups, opining that "after *Citizens United* there is *no* valid governmental interest sufficient to justify imposing limits on fundraising by independent-expenditure organizations"); *Yamada*, 872 F.Supp.2d at 1039 (permanently enjoining enforcement of contribution limits as applied to independent expenditure groups).

simply acknowledged this federal law. [Exc. 8-9] To date, no federal court has upheld limits on contributions to independent expenditure groups, and the trend of federal courts invalidating such limits has continued.[45]

Below, Patrick dismissed *SpeechNow* and its progeny as decisions from "lower courts" that do not address Alaska's statutes and are not controlling on Alaska's state courts. [Exc. 155] But Alaska is in the Ninth Circuit, which has ruled on this issue.[46] And

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[45] *See New York Progress*, 733 F.3d at 487 ("The Supreme Court held in *Citizens United v. FEC* that the government has no anti-corruption interest in limiting independent expenditures. … It follows that a donor to an independent expenditure committee … is even further removed from political candidates and may not be limited in his ability to contribute to such committees. All federal circuit courts that have addressed this issue have so held."); *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013) ("Indeed, every federal court that has considered the implications of *Citizens United* on independent groups … has been in agreement: There is no difference in principle—at least where the only asserted state interest is in preventing apparent or actual corruption—between banning an organization … from engaging in advocacy and banning it from seeking funds to engage in that advocacy."); *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1096–97 (10th Cir. 2013) ("As every other circuit to consider the issue has recognized, quid pro quo corruption no longer justifies restrictions on uncoordinated spending for independent expenditure-only entities, and the absence of a corruption interest breaks any justification for restrictions on contributions for that purpose."); *Stay the Course W. Va. v. Tennant*, No. 12–cv–01658, 2012 WL 3263623, at *6 (S.D.W.Va. Aug. 9, 2012) (unreported) ("The government has no interest in maintaining the contribution limit as applied to [independent expenditure groups]"); *Pers. PAC v. McGuffage*, 858 F.Supp.2d 963, 968 (N.D.Ill. 2012) (rejecting a factual argument about corruption in Illinois, reasoning that until the Supreme Court takes up the issue, lower courts are "bound to follow the Supreme Court's decisions and repeat that, even in Illinois, independent expenditures do not lead to corruption. Thus, regulations imposing limits on fundraising by independent expenditure organizations cannot be justified."); *see also Lieu v. FEC*, 370 F. Supp. 3d 175, 186 (D.D.C. 2019), *aff'd*, 2019 WL 5394632 (D.C. Cir. 2019) (affirming the FEC's decision not to enforce contribution limits against independent expenditure groups upon receiving a complaint).

[46] *See Long Beach Area Chamber of Commerce*, 603 F.3d at 687-99; *Thalheimer*, 645 F.3d at 1121-22.

even decisions that are not controlling may be overwhelmingly persuasive and directly on point. To successfully enforce limits against independent expenditure groups, APOC would have to overcome the weight of all of this authority, arguing that all of these cases were wrongly decided. And APOC would eventually have to convince the U.S. Supreme Court either that independent expenditures actually do implicate *quid pro quo* corruption (contra *Citizens United*[47]) or that the government may permissibly target a broader concept of corruption (contra *Citizens United*[48] and *McCutcheon*[49]).

Patrick believes this is possible based on some creative legal theories not yet argued to the U.S. Supreme Court, but that does not make it any less of a long shot. [Exc. 161-63] And even assuming APOC succeeded in changing the U.S. Supreme Court's mind about what governmental interests are valid, that would not be the end of the First Amendment analysis, because APOC would also need to prove that limiting contributions to independent expenditure groups is a "closely drawn" means of furthering those governmental interests.[50] APOC's 2012 advisory opinion correctly reflects the weight of

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47 558 U.S. at 357 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

48 *Id*. at 359 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.").

49 572 U.S. at 207 ("[W]hile preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—'*quid pro quo*' corruption.").

50 *See Randall*, 548 U.S. at 247 (summarizing the legal test for contribution limits).

federal authority that makes this unrealistic. Alaska cannot enforce contribution limits against independent expenditure groups given the current state of federal law.

### B. *Thompson v. Hebdon* does not warrant revisiting the 2012 advisory opinion because it did not concern independent expenditure groups.

The superior court concluded that APOC should have reconsidered its 2012 advisory opinion based on the federal district court and Ninth Circuit decisions in *Thompson v. Hebdon*,[51] but it misread those decisions. [Exc. 187-93] Although those decisions upheld Alaska's $500 individual-to-group contribution limit, they did not uphold it *as applied to independent expenditure groups* because that case was litigated and decided with the express understanding that APOC—ever since its 2012 advisory opinion—does not apply the limit to such groups. And even if *Thompson* were relevant, the U.S. Supreme Court has since vacated the Ninth Circuit's opinion.[52] The superior court erred in relying on *Thompson* to reverse APOC's decision.

As previously explained, independent expenditure groups are those that make election-related expenditures but do not contribute to (or coordinate with) candidates, as contrasted with groups that do contribute to (or coordinate with) candidates. The text of the statute creating Alaska's $500 individual-to-group contribution limit does not distinguish between these types of groups.[53] But APOC's 2012 advisory opinion does,

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[51] *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023 (D. Alaska 2016), *aff'd in part, rev'd in part and remanded sub nom. Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018), *cert. granted, judgment vacated*, No. 19-122, 2019 WL 6257598 (U.S. Nov. 25, 2019).

[52] *Thompson v. Hebdon*, No. 19-122, 2019 WL 6257598, at *2 (U.S. Nov. 25, 2019).

[53] AS 15.13.070.

concluding that the limit cannot be applied to independent expenditure groups. [Exc. 8-9] After issuing this advisory opinion, APOC stopped enforcing the $500 individual-to-group contribution limit against independent expenditure groups, but continued to enforce the limit against groups that contribute to (or coordinate with) candidates.

The federal court litigation in *Thompson*, which began three years later in 2015, was initiated and decided in this context—i.e., a context in which APOC applies the $500 individual-to-group limit only to groups that contribute to (or coordinate with) candidates, not to independent expenditure groups. The *Thompson* plaintiffs challenged the $500 individual-to-group limit (among other limits) under the First Amendment. One of the plaintiffs wanted to contribute more than the $500 individual-to-group limit to the Alaska Miners Association Political Action Committee, which is a group that contributes to candidates (i.e., *not* an independent expenditure group).[54] Because APOC still enforces the $500 limit against groups that contribute to candidates, he could not do so.

The *Thompson* litigation was thus about whether the State could constitutionally impose a $500 limit on contributions to groups like the Alaska Miners Association Political Action Committee—that is, *groups that contribute to candidates*—not whether the State could limit contributions to independent expenditure groups. Indeed, the

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[54] *See* Complaint, Docket 1 in *Thompson v. Dauphinais*, Case 3:15-cv-00218-TMB at 4 (available on PACER). The Alaska Miners Association Political Action Committee's contributions to candidates can be seen on APOC's records online, available at https://aws.state.ak.us/ApocReports/CampaignDisclosure/CDTransactions.aspx (for example, select the year 2016, select to search by "Contributor Name," and type "Alaska Miners" (without quotation marks) in the search box).

*Thompson* plaintiffs would not have had standing to challenge limiting contributions to independent expenditure groups, because the State had not done so in years.

The parties' arguments in *Thompson* make clear that the case did not concern independent expenditure groups. In defending the $500 individual-to-group limit, the State specifically told the federal courts that the limit did not apply to independent expenditure groups.[55] The reasoning of the State's defenses relied on this fact: the State argued that the limit was narrowly tailored in part because it did not apply to independent expenditure groups, and that contributors were not overly constrained because they remained free to contribute unlimited amounts to independent expenditure groups.[56] The

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[55] *See* Defendants' Response to Plaintiffs' Post-Trial Findings of Fact and Conclusions of Law, Docket 143 in *Thompson v. Dauphinais*, Case 3:15-cv-00218-TMB at 35 (available on PACER) ("[I]n the wake of *Citizens United*, 558 U.S. 310 (2010), the Alaska Public Offices Commission adopted an advisory opinion recommending against application of contribution limits to independent expenditure groups on the ground that '[w]ith the exception of the foreign national restriction,' the 'contribution restrictions in AS 15.13 are likely unconstitutional for independent expenditure only groups.' Alaskans Deserve Better, AO 12-09-CD at 7-8 (2012)"); Answering Brief of Appellees, Docket 25 in *Thompson v. Hebdon*, Ninth Circuit No. 17-35019 at 80 (available on PACER) ("APOC does not apply contribution limits to independent expenditure groups. *See* Alaskans Deserve Better, AO 12-09-CD at 7-8 (2012)").

[56] *See* Answering Brief of Appellees, Docket 25 in *Thompson v. Hebdon*, Ninth Circuit No. 17-35019 at 38 (available on PACER) ("Alaska's base limit does not apply to other types of campaign contributions that do not create the same risk: for example, contributions in support of ballot measures rather than candidates, because a ballot measure is not a person who can participate in a quid pro quo arrangement, *or contributions to independent expenditure groups*, because the Supreme Court has held that such contributions do not risk corruption.") (emphasis added) & at 80 ("[T]he individual-to-group limit is narrowly focused. It only limits contributions to groups formed 'with the principal purpose of influencing the outcome of one or more [candidate] elections,' and does not apply to ballot measure groups *or independent expenditure groups*.") (emphasis added).

plaintiffs, for their part, did not argue that the State cannot apply contribution limits to independent expenditure groups (nor did they invoke the extensive authority so holding). Such arguments would not have made sense, because APOC was not doing so.

Likewise, the Ninth Circuit's opinion upholding Alaska's $500 individual-to-group limit did not discuss independent expenditure groups and rested on a justification that would not make sense for such groups: that the limit prevents circumvention of the $500 individual-to-candidate limit because "any two individuals could form a 'group,' which could then funnel money to a candidate."[57] This is not true for independent expenditure groups because—by definition—they do not contribute to candidates. The Ninth Circuit would not have upheld limits on contributions to independent expenditure groups without even mentioning, much less addressing or distinguishing, the extensive authority—including directly controlling circuit precedent[58]—holding that such limits are unconstitutional. Thus, *Thompson* does not approve the State imposing a $500 individual-to-group limit on independent expenditure groups—it approves only the limit as enforced by APOC (i.e., as a limit on contributions to groups that contribute to candidates).

Below, even Patrick did not initially rely on *Thompson*—rather, Patrick's position was that *Citizens United* and subsequent cases about independent expenditure groups

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57 *Thompson*, 909 F.3d at 1040.

58 *See Long Beach Area Chamber of Commerce*, 603 F.3d at 687-99; *Thalheimer*, 645 F.3d at 1121-22; *Rodrigues v. AT&T Mobility Serv. LLC*, 728 F.3d 975, 979 (9th Cir. 2013) ("As a three-judge panel of this circuit, we are bound by prior panel decisions . . . and can only reexamine them . . . [i]f that authority is 'clearly irreconcilable' with the reasoning or theory of intervening higher authority." (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)).

were incorrectly decided and should be reconsidered in light of Patrick's novel ideas about how the framers of the U.S. Constitution would have thought about the concept of corruption. [Exc. 117-149] The superior court raised the *Thompson* theory *sua sponte* in its final decision; it was never briefed by the parties.

The superior court's order puts the State's attorneys in an awkward position, because they could not in good conscience advise APOC to enforce limits against independent expenditure groups based on the superior court's misreading of *Thompson* (or defend such an action on that theory, in response to the inevitable constitutional challenge). They participated in the litigation of *Thompson* and specifically represented to the federal courts that Alaska's individual-to-group contribution limit does not apply to independent expenditure groups.[59] They are well aware that neither the district court nor the Ninth Circuit considered the limit they upheld to apply to such groups.

When the State petitioned for rehearing of the superior court's decision, Patrick defended the misreading of *Thompson* on the basis that the Ninth Circuit upheld the $500 individual-to-group limit without mentioning that APOC does not apply that limit to independent expenditure groups. [R. 574-75] Patrick asserted that "the fact that a case was litigated narrowly but decided on broader principles is not particularly unusual" and that "it is the reasoning of a court's opinion that matters for future courts." [R. 575] But even allowing the possibility that the district court and Ninth Circuit in *Thompson* might have decided an issue that was not presented to them (and decided it contrary to every

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[59] *Supra* at fn. 55-56.

other court, *sub silentio*), the reasoning of the opinions does not actually support limiting contributions to independent expenditure groups. As mentioned, the courts upheld the individual-to-group limit on the grounds that the individual-to-candidate limit furthers the State's interest in preventing *quid pro quo* corruption, and the individual-to-group limit also furthers this interest by preventing donors from circumventing the individual-to-candidate limit by giving money to a group that then funnels it to a candidate.[60] This justification plainly does not support limiting contributions to independent expenditure groups, because such groups (by definition) do not give money to candidates.

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[60] *See Thompson*, 217 F. Supp. 3d at 1034 ("Without the $500 individual-to-group limit, an individual could make unlimited donations to a group, $1,000 of which could then be passed on to the candidate—double the individual-to-candidate limit."); *Thompson*, 909 F.3d at 1040 ("[T]he risk of circumvention of the individual-to-candidate limit is apparent: under Alaska law, any two individuals could form a 'group,' which could then funnel money to a candidate. Alaska Stat. § 15.13.400(8)(B). Such groups could easily become pass-through entities for, say, a couple that wants to contribute more than the $500 individual-to-candidate limit.").

What's more, the U.S. Supreme Court recently vacated the Ninth Circuit's decision in *Thompson*, remanding the case for another analysis which is not yet complete.[61] Thus, not only did the superior court misinterpret *Thompson*, but the Ninth Circuit decision in *Thompson* is no longer valid law. And when the Ninth Circuit issues its new decision on remand, it still will not address independent expenditure groups because they were never at issue in *Thompson*. *Thompson* is thus wholly irrelevant to this case, and the superior court erred in reversing APOC's decision based on it.

In sum, APOC's 2012 advisory opinion was legally sound. Under the current state of federal case law—even taking into account *Thompson*—APOC cannot constitutionally enforce Alaska's limit on contributions against independent expenditure groups.

## III. The 2012 advisory opinion and APOC's actions were not improper.

The Court's briefing order also asks several questions about whether APOC's course of action here was proper—i.e., whether APOC can issue an advisory opinion on a constitutional issue and decline to enforce a statute, or whether it must take a different path instead. In the end, APOC's actions here were proper because state agencies are supposed to follow the law, including federal law. APOC need not—and should not—pursue an enforcement action that would violate Alaskans' constitutional rights according to every court to confront the issue, and the superior court erred in ordering it to do so.

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[61] *See Thompson v. Hebdon*, No. 19-122, 2019 WL 6257598, at *2 (U.S. Nov. 25, 2019) ("[T]he judgment of the Court of Appeals is vacated, and the case is remanded for that court to revisit whether Alaska's contribution limits are consistent with our First Amendment precedents.").

### A. APOC may defer to the weight of federal authority rather than pursuing unconstitutional enforcement actions.

The Court asks, "Does APOC have discretionary authority to decline to enforce statutes within its enforcement purview?" The answer is yes. Even if APOC does not have the broad enforcement discretion of a criminal prosecutor, it at least has the discretion to recognize the weight of the federal authority discussed above and decline to pursue an enforcement action under the circumstances presented here.

Contrary to Patrick's assertions below, APOC is not arguing that it has *unreviewable* enforcement discretion and that the Court cannot look at its reasons for not pursuing a complaint. [Exc. 169] Rather, APOC is arguing that it may decline to enforce a statute under some circumstances and that its decision to do so here was eminently reasonable. The Court can review APOC's decision, but should uphold it because it was neither "arbitrary" nor "capricious" nor based on a mistaken view of the law.[62]

If the Court disagrees with APOC's view of current federal law, the Court can order it to reconsider its 2012 advisory opinion. But the Court should not reverse the agency's decision simply on the basis that the agency lacks any enforcement discretion whatsoever, and must always enforce its statutes even where doing so would be held unconstitutional. Actions of state officials under color of state law in violation of federal constitutional rights can lead to civil liability under 42 U.S.C. § 1983; the Court should

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[62] *See Yankee v. City & Borough of Juneau*, 407 P.3d 460, 463 (Alaska 2017) ("Although courts generally refrain from reviewing an executive agency's exercise of discretionary enforcement authority, we have observed that we may review such an exercise to insure its 'conformity with law and that it is not so capricious or arbitrary as to offend due process.' ").

not hold that this is required. APOC has limited resources, and many other statutes to enforce. It is reasonable for APOC to accede to the federal authority discussed above rather than swimming against the tide by pursuing long-shot constitutional litigation to try to enforce contribution limits against independent expenditure groups.

These are just the kind of "[q]uestions of ... policy, of practicality, and of the allocation of [the] agency's resources" that the Court in *Yankee v. City & Borough of Juneau* called "the very essence of what is meant when one speaks of an agency exercising its discretion."[63] An agency's enforcement decision is "due more judicial deference" where—as here—" 'an agency functions to protect the public in general, as contrasted with providing a forum for the determination of private disputes.' "[64]

Below, Patrick resisted this analogy to *Yankee v. City & Borough of Juneau*, arguing that the official in that case had traditional enforcement discretion, whereas APOC has "no enforcement discretion at all" because "the Legislature used mandatory language that stripped the agency of discretion." [Exc. 156, 166-67] But APOC's statutes do not so clearly strip APOC of all discretion. Alaska Statute 15.13.380 says that "*[i]f*" the agency finds a violation, it "shall enter an order requiring the violation to be ceased or to be remedied and shall assess civil penalties." Under the circumstances here, APOC could reasonably conclude that there was no "violation" of the contribution limit because the contribution limit cannot be constitutionally applied to these groups.

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63 *Id.* at 464 (Alaska 2017) (quoting *Vick v. Bd. of Elec. Examiners*, 626 P.2d 90, 93 (Alaska 1981)).

64 *Id*. at 467 (quoting *Vick v. Bd. of Elec. Examiners*, 626 P.2d 90, 93 (Alaska 1981)).

But even more clearly, in AS 15.13.374 the Legislature gave APOC broad discretion to issue advisory opinions on campaign finance laws, and it did not restrict the permissible content of APOC's opinions in any way. The Legislature also created the safe harbor provision discussed above.[65] The Legislature thus gave APOC the discretion to issue an advisory opinion approving certain conduct, and then not only allowed—but *required*—APOC not to prosecute the conduct approved in its opinions. APOC is thus not statutorily obligated to pursue every complaint regardless of the circumstances.

APOC's course of action here was similar to that of its federal analog the Federal Election Commission (FEC), which has a similar advisory opinion statute.[66] After the U.S. Supreme Court's decision in *Citizens United* and the D.C. Circuit's decision in *SpeechNow*, the FEC issued an advisory opinion concluding that contribution limits cannot be enforced against independent expenditure groups.[67] It later invoked that advisory opinion in declining to pursue complaints against such groups, rejecting the complainant's demand that it continue to prosecute violations outside of the D.C. Circuit

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65 AS 15.13.374(e)(2).

66 52 U.S.C. § 30108.

67 *Lieu v. FEC*, 370 F. Supp. 3d 175, 180 (D.D.C. 2019) (explaining that the FEC issued an advisory opinion saying it "necessarily follows" from *Citizens United* and *SpeechNow* "that there is no basis to limit the amount of contributions to" an independent expenditure-only political committee "from individuals, political committees, corporations and labor organizations," thereby triggering the "safe harbor for 'any person involved in any specific transaction or activity which is indistinguishable in all its material aspects' from the activity described in the opinion, and that "[s]ince issuing the advisory opinion, the [FEC] has not enforced the limits … when contributions are given to groups that make only independent expenditures").

where *SpeechNow* was not directly controlling.[68] A federal district court upheld the agency's rejection of the complaints based on the advisory opinion,[69] and the D.C. Circuit summarily affirmed.[70] This Court should similarly uphold APOC's actions here.

### B. APOC may issue an advisory opinion concluding that a particular type of enforcement action would be unconstitutional.

The Court asks, "Is a formal APOC advisory opinion that a statute within its enforcement purview is unconstitutional and therefore unenforceable contrary to Alaska law regarding administrative agencies' jurisdiction to decide constitutional issues?" The answer is no. Even if an administrative agency like APOC lacks jurisdiction to prosecute or adjudicate constitutional claims, it still may—and indeed, should—pay attention to constitutional law and try not to violate the constitution when carrying out its functions.

Although the Court has said in a handful of cases that administrative agencies lack jurisdiction to "decide issues of constitutional law,"[71] the foundation of this statement is somewhat tenuous, and the Court should not extend it to mean that agencies must ignore constitutional law. This statement has its roots in a 1983 case in which the Court concluded that the Department of Labor lacked authority to prosecute an employee's

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68 *Id*.

69 *Id*. at 186. The district court concluded that the advisory opinion's legal conclusion was correct and declined to decide other issues such as "whether the [FEC] erroneously acquiesced to *SpeechNow* or whether the FEC's reliance on its advisory opinion was contrary to law." *Id*. at 186 n.8.

70 2019 WL 5394632 (D.C. Cir. 2019) (unpublished).

71 *See, e.g.*, *Dougan v. Aurora Elec. Inc*., 50 P.3d 789, 796 n.27 (Alaska 2002) ("Administrative agencies have no jurisdiction to decide issues of constitutional law such as a violation of one's right to privacy.").

claim that his employer "unconstitutionally, illegally, arbitrarily and capriciously failed to increase" his salary.[72] The Court reasoned that the "legislature intended the Department of Labor's authority to extend only to claims for wages owing under an express or implied contract," not to constitutionally based claims for increased wages.[73] The Court was thus only ruling on the scope of one particular agency's statutory authority, not making a general statement about the outer limits of agency authority. Nonetheless, the Court later cited this Department of Labor case—in a footnote without analysis while rejecting a series of "meritless" claims by a pro se litigant—for the broader proposition that "[a]dministrative agencies have no jurisdiction to decide issues of constitutional law."[74] The Court has since invoked this statement to explain why a claimant should not (or need not) raise a constitutional claim in front of an agency, or just as a general observation about agencies.[75] But this statement should not be further extended. Although

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72 *State Dep't of Labor, Wage & Hour Div. v. Univ. of Alaska*, 664 P.2d 575, 580 (Alaska 1983).

73 *Id*.

74 *See Dougan*, 50 P.3d at 796 n.27 (citing the Department of Labor case in rejecting a series of "meritless" claims by a pro se litigant that had been rejected by the Workers' Compensation Board, including alleged violations of the litigant's right to privacy which the Court concluded were beyond the Board's jurisdiction).

75 *Walker v. State, Dep't of Corr*., 421 P.3d 74, 81 (Alaska 2018) (invoking this statement in holding that "prisoners who fail to raise their constitutional claims during the administrative appeal process do not necessarily forfeit those claims" in part because the prison may not have jurisdiction); *Bolden v. State, Dep't of Corr*., 2010 WL 1632692, at *2 (Alaska 2010) (unreported) (invoking this statement in observing that the prison grievance process was not necessarily the proper forum for an inmate's constitutional claim) *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 36 (Alaska 2007) (invoking this statement in describing the various features of quasi-judicial agencies).

these cases support the proposition that a claimant need not raise a constitutional claim before an administrative agency like APOC, the Court should not further conclude that agencies must ignore constitutional law when carrying out their assigned functions.

Here, APOC neither prosecuted nor adjudicated any person's constitutional claim, such as an employee's claim that an employer violated his right to privacy, or a prisoner's claim that a prison violated his right to rehabilitation. No constitutional claims were brought either by or before APOC here. Instead, APOC issued an advisory opinion—pursuant to its express statutory authority to do so—and then declined to prosecute an enforcement action that it believed would be held unconstitutional. In doing this, APOC analyzed a constitutional *issue*, but it did not prosecute or decide any constitutional *claim*.

APOC was thus simply holding *itself* accountable for following the constitution—not attempting to wield its prosecutorial or adjudicative powers to hold somebody else accountable for following the constitution. State agencies regularly confront constitutional issues in the course of carrying out their functions, and—with the advice of counsel—they try to avoid violating the constitution. The Court can override the legal analysis of an agency like APOC, just as it could if the relevant question were one of statutory interpretation rather than constitutional law. APOC does not argue that the Court should defer to its constitutional analysis or that it ever has the final word on any constitutional question. But the Court should not hold that the agency exceeded its authority by looking at the law and trying to conform its conduct to the constitution, because that is something that all administrative agencies can and should do.

### C. Alaska Statute 15.13.380(f) does not provide a clearer procedural path for APOC than issuing an advisory opinion.

Finally, the Court's briefing order asks, "When APOC believes a statute within its enforcement purview is unconstitutional, is it required to follow the directives of AS 15.13.380(f) rather than declining enforcement?" But AS 15.13.380(f) does not provide a clear procedural path for APOC here.

Alaska Statute 15.13.380(f) provides a means for the State to *prosecute* campaign finance enforcement actions in superior court, not a means to obtain an advisory opinion confirming its view that a certain kind of enforcement action would be unconstitutional. The statute says that if a complaint filed with APOC "involves . . . a challenge to the constitutionality of a statute or regulation, . . . or other issues outside the commission's authority," APOC may "request the attorney general to file a complaint in superior court alleging a violation of this chapter." Thus, the statute authorizes APOC to ask the attorney general to prosecute an enforcement action in the superior court. But if APOC believes, based on consultation with the attorney general, that an enforcement action would be unconstitutional, it would not make sense for the attorney general to prosecute that enforcement action in superior court. It would be strange for the attorney general's office to file a complaint against groups it believes cannot constitutionally be prosecuted, asking the superior court to punish those groups. And it would be doubly strange for the attorney general's office to argue to the superior court, in the context of such an enforcement action, that its own complaint should fail for constitutional reasons.

The superior court read AS 15.13.380(f) as providing a means for APOC to simply request an advisory opinion from the superior court "ruling on the status of Alaska's contribution limits." [Exc. 186] But the plain language of AS 15.13.380(f) does not appear to allow APOC and the attorney general's office to do this. The statute authorizes only the filing of a "complaint … alleging a violation of" state campaign finance laws. This language seems to contemplate a typical live controversy filed by a plaintiff against an opposing defendant, not a free-floating request for an advisory opinion. If APOC wanted a court opinion "ruling on the status of Alaska's contribution limits" outside the context of an enforcement action—for example, an opinion confirming APOC's view that it cannot enforce limits against independent expenditure groups—it is not apparent who the attorney general should file a "complaint" against and what "violation of" state campaign finance laws that complaint should "alleg[e]."

What's more, requiring APOC to go to superior court to request an advisory opinion whenever it has a constitutional question could burden the court system and the attorney general's office. The simpler course is to allow the agency to do its best to follow the constitution, and for the judiciary to review the agency's decision-making if a challenge like this one arises. If, however, this Court reads AS 15.13.380(f) as authorizing (and requiring) APOC and the attorney general's office to request advisory opinions from the superior court on constitutional issues related to campaign finance, the State could do so in the future pursuant to the Court's instructions.

Regardless, even if the Court concludes that APOC took the wrong procedural path here, a state agency should not take an unconstitutional action, nor should a court

order it to do so. APOC thus correctly declined enforcement against independent expenditure groups and the superior court erred in ordering such enforcement.

## CONCLUSION

For these reasons, the Court should affirm APOC's decision not to pursue the complaints against Interior Voters for John Coghill and Working Families of Alaska and not to revisit its 2012 advisory opinion.