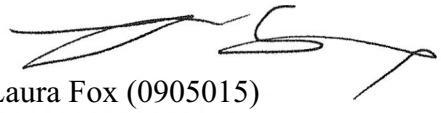
IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

DONNA PATRICK, JAMES K. BARNETT, and JOHN P. LAMBERT, Appellant, v. INTERIOR VOTERS FOR JOHN COGHILL, WORKING FAMILIES OF ALASKA, and THE ALASKA PUBLIC OFFICES COMMISSION Appellees.	)	Case No. **3AN-18-05726 CI**

APPEAL FROM THE ALASKA PUBLIC OFFICES COMMISSION

BRIEF OF APPELLEE THE ALASKA PUBLIC OFFICES COMMISSION

KEVIN G. CLARKSON
ATTORNEY GENERAL



Laura Fox (0905015)
Senior Assistant Attorney General
Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
(907)269-5100

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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 injudicial 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.

PARTIES

The appellants are Donna Patrick, James Barnett, and John Lambert (collectively, "Patrick"). The appellee is the Alaska Public Offices Commission ("the Commission"). The Court dismissed the other appellees, Interior Voters for John Coghill and Working Families of Alaska, from this appeal at their request.

ISSUES PRESENTED

1. When the Commission issues an advisory opinion approving of certain conduct, should it later retract the opinion and prosecute the conduct after receiving a complaint, even though AS 15.13.374(e)(2) instructs that it "may not" consider a complaint about a transaction or activity that "is indistinguishable from the description of an activity that was approved in an advisory opinion"?

2. Must the Commission expend its limited resources enforcing statutory limits on campaign contributions to independent expenditure groups, even though federal courts uniformly hold that doing so violates the First Amendment?

INTRODUCTION

When the federal courts agree that enforcing a certain type of campaign finance law is unconstitutional, the Commission may decline to enforce it. To enforce it would, in the eyes of the federal courts, violate people's constitutional rights. And it would invite almost certain litigation that the Commission would almost certainly lose.

In its 2010 decision in *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."[1] Since then, federal courts—including the Ninth Circuit-have uniformly struck down laws limiting contributions to independent expenditure groups under the First Amendment, reasoning that after *Citizens United,* such laws cannot be justified based on the government's interest in preventing corruption.[2]

In a 2012 advisory opinion, the Commission took note of this caselaw and decided that it will no longer enforce limits on contributions to independent expenditure groups. [Exc. 110-35] So when Patrick filed complaints against two independent expenditure groups for accepting contributions in excess of Alaska's statutory limits in 2018, the Commission rejected the complaints under AS 15.13.374(e)(2), which instructs that the Commission "may not" consider a complaint about activity that "is indistinguishable from the description of an activity that was approved in an advisory opinion."

The premise of Patrick's appeal is that *Citizens United* and all of the ensuing federal cases "were wrongly decided." [At. Br. 18] But the Commission's position is not that the federal court decisions were correctly decided, only that they are the law. The Commission has no particular quarrel with the creative constitutional theories Patrick advances to attack these precedents and argue that the State may limit contributions to independent expenditure groups. However, the Commission is not obligated to expend its limited resources advancing such long-shot legal theories that would require the U.S. Supreme Court to change its approach to campaign finance. The Court should affirm.

---

1 558 U.S. 310, 357 (2010).

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

STATEMENT OF THE CASE

I. In 2012, the Commission issued advisory opinion 12-09-CD stating that it will no longer enforce Alaska's limits on contributions to independent expenditure groups following *Citizens United v. FEC.*

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 even if the group makes only "independent expenditures"—i.e., expenditures to influence an election that are in no way coordinated with any candidate's campaign.

In 2010, the U.S. Supreme Court decided the landmark case of *Citizens United v. FEC,* holding that the First Amendment prohibits the government from suppressing political speech on the basis of the speaker's corporate identity and striking down a federal statute that barred corporations from making independent expenditures for electioneering.[3] The Court examined its prior opinion in *Buckley v. Valeo,*[4] which had upheld limits on campaign contributions to candidates in the face of a First Amendment challenge, justifying them as a way of preventing the reality or appearance of corruption because large contributions could be given "to secure a political *quid pro quo."*[5] The Court declined to extend this anti-corruption justification to limits on independent expenditures, reasoning that the absence of coordination reduces their value to candidates as a *quid pro quo,* and concluding that "independent expenditures, including those made

---

3 558 U.S. 310, 365 (2010).

4 558 U.S. 1 (1976).

5 *Citizens United,* 558 U.S. at 356-57 (quoting *Buckley,* 424 U.S., at 26).

by corporations, do not give rise to corruption or the appearance of corruption."[6] The Court also held that "[w]hen *Buckley* 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."[7]

Less than a month after *Citizens United* came out, Alaska's Attorney General provided the Office of the Governor with a memo analyzing the decision. [Exc. 77-84] The memo concluded that Alaska laws prohibiting corporate independent expenditures were likely unconstitutional. [Exc. 77, 81] The memo further briefly opined that *Citizens United* "does not directly call into question the constitutionality of any other contribution, expenditure, disclaimer, or disclosure law." [Exc. 80] But the memo did not analyze the constitutionality of contribution limits, or more specifically, of enforcing such limits on contributions to groups that make only independent expenditures. [Exc. 77-84]

In 2012, an independent expenditure group called Alaska Deserves Better requested an advisory opinion from the Commission on several questions. [Exc. 111-12] The group asked the Commission 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. 111] The Commission's staff prepared an advisory opinion confirming that Alaska Deserves Better "■—as an independent expenditure group—-can obtain contributions in unlimited amounts,

---

6 *Id.* at 357.

7 *Id.* at 359.

with no restriction on the amounts or sources." [Exc. 117] The opinion observed that although AS 15.13.070 sets limits on contributions to all types of groups, "the United States Supreme Court's decision in *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" like Alaska Deserves Better. [Exc. 117] The opinion noted that following *Citizens United,* "several federal district and appellate courts have invalidated other states' restrictions on amounts of contributions to organizations that make only independent campaign expenditures." [Exc. 117] The Commission'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. 118] The Commission approved the advisory opinion. [Exc. 110]

IL In 2018, the Commission rejected three complaints asking it to enforce Alaska's limits on contributions to independent expenditure groups.

In February 2018, the Commission received three identical complaints filed by Donna Patrick, James Barnett, and John Lambert against two independent expenditure groups, Interior Voters for John Coghill and Working Families of Alaska. [Exc. 3-66] The complaints alleged that these groups had accepted many contributions exceeding the contribution limits in AS 15.13.070. *[Idi*

The Commission's staff rejected all of the complaints, concluding that they concerned "transactions and activity described in and indistinguishable from" activity deemed lawful in the 2012 advisory opinion about Alaska Deserves Better. [Exc. 67]

Patrick requested that the Commission review the staffs decision, and the request was considered at the Commission's February 2018 regular meeting. [Exc. 72-75]

At that meeting, the Commission heard argument. [Exc. 102] An attorney for the Commission's staff argued that the 2012 advisory opinion was correct under federal law. *[Id.}* Next, an attorney for Patrick argued that the federal court decisions cited by the staff s attorney were incorrect interpretations of federal law, urging the Commission to reconsider the 2012 advisory opinion and investigate the complaints. *[Id.}* Finally, an attorney for Working Families of Alaska appeared and urged the Commission to affirm the staff s rejection of the complaints because the federal court decisions were correct. *[Id.}* No representative for Interior Voters for John Coghill appeared. *[Id.}*

After some limited procedural discussion and several motions, the Commission voted 3-2 to affirm the staffs rejection of Patrick's complaints. [Exc. 102] The Commission later issued a written order confirming this decision, followed by a corrected order and then a clarified written order at Patrick's request. [Exc. 89-90, 106-07, 93-96, 97-99, 101-03] In the final, clarified order, the Commission found that the complaints concern transactions and activity described in and indistinguishable from the activity in approved Advisory Opinion 12-09-CD and therefore must be rejected under AS 15.13.374(e)(1) and (2), which provide that the Commission 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." [Exc. 102-03] The Commission

further found that the conclusion in Advisory Opinion 12-09-CD remains valid, and there was no good cause to reconsider that opinion. [Exc. 103]

Patrick has appealed the Commission's rejection of the complaints.

STANDARDS OF REVIEW

"Constitutional issues are questions of law subject to independent review."[8] The Court also substitutes its own judgment for the agency's on questions of statutory interpretation when the agency's expertise is not implicated.[9]

However, this is an appeal of the Commission's decision not to institute an enforcement action, and "(generally, courts decline to review executive-branch decisions *not* to prosecute an individual or *not* to enforce a law under particular circumstances."[10] [11] Although the Alaska Supreme Court does not appear to have yet examined the scope of the Commission's enforcement discretion, some judicial restraint is appropriate in this context. An agency's enforcement decision is "due more judicial deference" when—as is the case here—" 'an agency functions to protect the public in general, as contrasted with providing a forum for the determination of private disputes.'[5,11]

---

[8] *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)).

[9] *See Id.*

[10] *Yankee v. City & Borough of Juneau,* 407 P.3d 460, 464 (Alaska 2017) (emphasis in original).

[11] *Id.* at 467 (quoting Pzćfc v. *Bd. of Elec. Examiners, 626* P.2d 90, 93 (Alaska 1981)).

ARGUMENT

I. The Commission 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 the Commission "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." This provision allows the public to rely on the Commission's advisory opinions in attempting to conform their conduct to the law and avoid enforcement actions. Although the Commission may reconsider an advisory opinion,[12] 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 Advisory Opinion 12-09-CD. [Exc. 111-12, 117] The advisory 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. 117] 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 the Commission's statement that it will not enforce contribution limits against independent expenditure groups. Thus, the

---

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

Commission was statutorily prohibited from considering Patrick's complaints and did not err in declining to accept and investigate them.

Patrick's brief does not address AS 15.13.374(e)(2), seeming to assume that the Commission may consider a complaint describing activity approved in an advisory opinion by simply reconsidering the underlying advisory opinion—i.e., that it may (1) receive a complaint, then (2) revise or withdraw the relevant advisory opinion, and then (3) take enforcement against a person who had relied on that previously effective advisory opinion. But Patrick does not explain the assumption that the Commission may do this, nor cite any authority to support it. Such a course of action seems unfair, and would undermine the utility of the Commission's advisory opinions to the public. If the Commission can punish conduct that it previously approved in an advisory opinion by simply retroactively revising the opinion when it receives a complaint, the public will be unable to rely on the Commission's advisory opinions in any way. The Court should therefore reject this interpretation of AS 15.13.374(e)(2).

II. The Commission's advisory opinion correctly recognized that federal courts have uniformly struck down laws limiting contributions to independent expenditure groups under the First Amendment.

Even assuming the Commission may reconsider an advisory opinion in the context of a complaint and punish previously approved conduct, the Commission had no reason to do so here. As Patrick acknowledges, ever since *Citizens United,* courts have been in agreement that enforcing limits on contributions to groups that make only independent expenditures violates such groups' First Amendment rights. [At. Br. 18-19, 44] The

Commission does not argue that these decisions were correct, only that they are the law. The Commission's 2012 advisory opinion simply recognizes this reality. [Exc. 117]

Patrick correctly identifies the legal standard that applies when campaign contribution limits are challenged under the First Amendment, which is an intermediate scrutiny test set forth in *Montana Right to Life Ass'n* v. *Eddleman)*[5] [At. Br. 20] Under this test, which has four major parts, contribution limits will be upheld if:

> (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are "closely drawn"—i.e., if they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign.[14]

The Ninth Circuit has held that this remains the proper legal test for contribution limits even after subsequent U.S. Supreme Court decisions such as *Citizens United)*[5]

But although *Citizens United* did not change the legal test for contribution limits nor even directly concern contribution limits, the Court made some statements that are relevant here. As explained above, the Court held 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 *qtddpro quo* corruption."[16] The Court also held that "independent expenditures, including those made by corporations, do not give rise to corruption or the

---

13 343 F.3d 1085 (9th Cir. 2003).

14 *Id.* at 1092.

15 Lażr v. *Bullock,* 798 F.3d 736, 748 (9th Cir. 2015).

16 *Id.* at 359.

appearance of corruption."[17] Combined, these statements make it hard to defend limits on contributions to independent expenditure groups because they essentially say that independent expenditures do not implicate the one governmental interest that supports contribution limits—the interest in preventing quid pro quo corruption.

After *Citizens United,* the U.S. Supreme Court also decided *McCutcheon* v. *FEC,* which contains further statements that make it hard to defend limits on contributions to independent expenditure groups.[18] The Court again said it "has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption."[19] It also said that "Congress may target only a specific type of corruption—'quid pro quo' corruption."[20] It defined this to mean "a direct exchange of an official act for money."[21] 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."[22] Nor does "the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties."[23] These statements thus reiterate that contribution limits are only valid if they further the interest

---

17 *Id.* at 357.

18 572 U.S. 185 (2014).

19 *Id.* at 206.

20 *Id.* at 207.

21 *Id.* at 192.

22 *Id.* at 208.

23 *Id.*

in preventing quid pro quo corruption—an interest that Patrick appears to acknowledge is not implicated by contributions to independent expenditure groups. [At. Br. 45]

Building on *Citizens United* and *McCutcheon,* federal courts have struck down limits on contributions to independent expenditure groups. The first such decision—which quickly followed *Citizens United*—was the D.C. Circuit's decision in *SpeechNoyv.org v. FEC,* striking down federal limits.[24] The D.C. Circuit 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."[25] The D.C. Circuit 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.[26] The D.C. Circuit concluded: "In light of the [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."[27]

As Patrick acknowledges, the D.C. Circuit's reasoning in *SpeechNow* "quickly proliferated across the country," including in the Ninth Circuit, before being recognized

---

24 599 F.3d 686 (D.C. Cir. 2010).

25 *Id.* at 692.

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

27 *Id.* at 694.

by the Commission in its 2012 advisory opinion.[28] [At. Br. 44] The 2012 advisory opinion simply read the writing on the wall. [Exc. 117] And since the 2012 advisory opinion, the trend of courts invalidating limits on contributions to independent

---

[28] *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); *Wise. Right to Life State Political Action Comm.* v. *Borland,* 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) (permanently enjoining enforcement of contribution limits as applied to independent expenditure groups).

expenditure groups has continued.[29] Indeed, as the Second Circuit observed, "Few contested legal questions are answered so consistently by so many courts and judges."[30]

So to successfully enforce Alaska's contribution limits against independent expenditure groups, the Commission would have to overcome the weight of all of this authority, arguing that all of these federal court decisions were wrong.[31] And then, even

---

[29] *See New York Progress & Prot. PACv.* IPu/5/2, 733 F.3d 483, 487 (2d Cir. 2013) ("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. Ya. 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.I11. 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").

[30] *New York Progress,* 733F.3dat488.

[31] Below, Patrick asserted that the federal district court in *Thompson v. Dauphinais,* 217 F. Supp. 3d 1023 (D. Alaska 2016) had "upheld these statutory limits against a constitutional challenge." [Exc. 5] But the *Thompson* court did not consider or approve of imposing limits on contributions to independent expenditure groups, because—under the 2012 advisory opinion—the Commission was not enforcing such limits.

assuming the Commission succeeded such that the government may target a broader conception of corruption than that recognized by *Citizens United* and *McCutcheon,* that would not be the end of the First Amendment analysis. To survive the *Eddleman* test, the Commission would need to prove that limiting contributions to independent expenditure groups actually furthers this interest and is a "closely drawn" means of doing so.[32] Patrick fails to complete the analysis, simply asserting that the limits are "supported by the State's interested in preventing institutional corruptions and are thus valid." [At. Br. 48]

The Commission's 2012 advisory opinion correctly recognizes the reality that given the current state of federal law, enforcing and defending contribution limits against independent expenditure groups would be an uphill battle with little chance of success. Patrick's novel legal theory does not undermine this conclusion.

III. The Commission may defer to federal law rather than being forced to expend its limited resources advancing long-shot legal theories.

The Commission is not obligated to ignore the weight of authority and expend its limited resources advancing long-shot constitutional theories that are unlikely to succeed. The Commission thus committed no error by declining to take enforcement action that the federal courts uniformly agree is unconstitutional.

The Commission does not argue that the federal court decisions discussed above were correct and that Patrick's novel legal analysis is wrong. The Commission would enforce limits on contributions to independent expenditure groups if it could reasonably do so, and—as a state agency—the Commission does not wish to take the position of

---

32 343 F.3d at 2092.

affirmatively arguing that any state statutes are unconstitutional. But the Commission recognizes the authority of the federal courts and the negligible chance that it would succeed in enforcing contribution limits against independent expenditure groups.

Patrick asserts that the "better practice" for the Commission would be to ignore the authority discussed above and just keep enforcing limits on contributions to independent expenditure groups until a court steps in and stops it. [At. Br. 19 n.7] But the Commission has limited resources, and many other statutes to enforce. The Commission can reasonably conclude that the "better practice" is to expend its resources elsewhere, rather than pinning its hopes on an unlikely about-face by the U.S. Supreme Court.

Deciding whether to pursue long-shot constitutional litigation involves just the kind of "[qjuestions of... policy, of practicality, and of the allocation of [the] agency's resources" that are "the very essence of what is meant when one speaks of an agency exercising its discretion."[33] The Commission's decision was neither "arbitrary," nor "capricious," nor did it violate due process[34]—on the contrary, the decision's logic is apparent, and Patrick's due process rights are not at stake in the Commission's decision whether to pursue enforcement against others.[35] The Court should accord the

---

[33] *Yankee v. City & Borough of Juneau,* 407 P.3d 460, 464 (Alaska 2017) (quoting *Vick v. Bd. of Elec. Examiners, 626* P.2d 90, 93 (Alaska 1981)).

[34] *See Id.* at 463 ("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.' ").

[35] *See Burke v. Raven Elec., Inc.,* 420 P.3d 1196, 1204 (Alaska 2018) ("Before there can be a violation of due process, a person must have a substantive right that entitles her to a certain level of process in order to protect that right.").

Commission a measure of prosecutorial leeway rather than forcing it to take enforcement action when the federal courts uniformly agree that doing so would be unconstitutional.

CONCLUSION

For these reasons, the Court should affirm the Commission's order.

Dated January 30, 2019.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By:
Laura Fox
Senior Assistant Attorney General
Alaska Bar No. 0905015

anc.law.ecf@alaska.gov

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Donna Patrick, James K. Barnett, and John P. Lambert,

Appellant,

v.

The Alaska Public Offices Commission,

Appellee.) Case No. SAN-18-05726CI

CERTIFICATE OF SERVICE

I certify that on this date true and correct copies of the ***Brief of Appellee The Alaska Public Offices Commission*** and this ***Certificate of Service*** were served via U.S. Mail on the following:

Jason S. Harrow
Lawrence Lessig
Equal Citizens US
12 Eliot Street
Cambridge, MA 02138

Elizabeth Hodes
M. Scott Broadwell
Davis Wright Tremaine, LLP
188 W. Northern Lights Blvd., Ste. 1100
Anchorage, AK 99503-3985

I further certify, pursuant to App. R. 513.5, that the aforementioned documents were prepared in 13 point proportionately spaced Times New Roman typeface.

1-30-19

Jennifer L. Williams
Paralegal I

Date

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100