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<tr><td colspan="2">IN THE UNITED STATES DISTRICT COURT</td></tr>
<tr><td colspan="2">FOR THE DISTRICT OF ALASKA</td></tr>
<tr><td>ROBERT GRIFFIN, STANLEY ALLEN VEZEY, TREVOR SHAW, FAMILIES OF THE LAST FRONTIER, AND THE ALASKA FREE MARKET COALITION,

Plaintiffs,

v.

RICHARD STILLIE JR., in his official capacity as chair of the Alaska Public Offices Commission; AND LANETTE BLODGETT, ERIC FEIGE, DAN LASOTA, AND WALTER CARLTON MONEGAN III, in their official capacities as members of the Alaska Public Offices Commission,

Defendants,
v.

ALASKANS FOR BETTER ELECTIONS, INC.,

Intervenor-Defendants.</td><td>Case No. 3:22-cv-00077

Memorandum in Opposition to Defendants' Motion for Summary Judgment</td></tr>
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Introduction

Defendants, the five commissioners of the Alaska Public Offices Commission, move for summary judgment to block Plaintiffs' challenge to the sweeping censorship imposed by Ballot Measure 2 (BM2). Whether intentionally or inadvertently, their motion contains serious, inaccurate assertions of both fact and law that need to be addressed.

Ultimately, Defendants' motion should be rejected for six reasons. Firstly, Defendants misstate the timeline of BM2's functional 30-second ad ban—a ban that is subject to strict scrutiny and prohibited by the Constitution. Secondly, Defendants defend BM2 with a justification that has been explicitly and unambiguously rejected by Circuit precedent. Thirdly, Defendants have frequently changed their position on what BM2 requires, underscoring how the censorship law cannot be enforced fairly or in a manner consistent with the Constitution. Fourthly, even setting aside the fact that the disclaimer requirement is a functional ban on 30-second radio ads, BM2 is subject to (and fails) strict scrutiny because it is invidious discrimination. Fifthly, even under exacting scrutiny, BM2 is unconstitutional. Lastly, Defendants' combined motion and memorandum rests on the false assertion that free speech is a privilege, not a right.

Standard of Review

As BM2 is a government restriction on protected speech, Defendants have the burden of proving its constitutional muster. *See NAACP, W. Region v. Richmond*, 743 F.2d 1346, 1354 (9th Cir. 1984). Furthermore, "on a defendant's motion for summary judgment, not only does the movant carry the burden of establishing that no genuine dispute of material fact exists, but the court also views the evidence in the light most favorable to the non-moving party." *JL Bev. Co., LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1105 (9th Cir. 2016) (describing the standard under Fed. R. Civ. P. 56). "The defendant-movant must demonstrate that, even viewing the evidence in the light most favorable to the plaintiff, the plaintiff cannot satisfy its burden to prove its claims." *Id.*

ARGUMENT

"A grant of summary judgment is appropriate only when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Baird v. Bonta*, 163 F.4th 723, 731 (2026) (quoting *Frlekin v. Apple, Inc.*, 979 F.3d 639, 643 (9th Cir. 2020)). Movant-Defendants fail this standard because their motion relies on numerous inaccurate assertions of both law and fact.

I. Defendants Misstate the Timeline of the Functional 30-Second Ad Ban, which is Subject to Strict Scrutiny and Prohibited by the Constitution

Defendants are factually incorrect about the history of BM2's effective 30-second ad ban, and cite overturned case law to support their erroneous positions. These errors go directly to the heart of what is being disputed and show that the ban is not constitutional.

A. Defendants' factual inaccuracies about the ad ban's history go to the heart of the issue being litigated.

Defendants state that the effective 30-second ad ban, which they refer to as a disclaimer requirement, preceded BM2 and has been in place for well over a decade.

This is not accurate, and this misstatement obfuscates how the law was designed to censor speech.

The spoken and text messaging disclaimer being litigated requires that political advocacy in Alaska recite the following disclaimer:

> This communication was paid for by (person's name and city and state of principal place of business). The top contributors of (person's name) are (the name and city and state of residence or principal place of business, as applicable). A MAJORITY OF CONTRIBUTIONS TO (OUTSIDE-FUNDED ENTITY'S NAME) CAME FROM OUTSIDE THE STATE OF ALASKA. I certify that this ad is not authorized, paid for, or approved by any candidate.

(Disclaimer text taken from AS 15.13.090).

In their motion for summary judgment, Defendants claim this requirement has been "in place since 2010" and the only addition to the law is that "an entity receiving most of its funding from outside Alaska must declare that." Dkt. 131, p. 7, 25. Defendants claim that Plaintiffs are thus challenging a law "enacted earlier by the legislature," and not just BM2. Dkt. 131, p. 2. This is incorrect.

Until BM2, this lengthy disclaimer did not apply to "printed material" or radio advertisements, and it did not need to be spoken when in video ads. *See* AS 15.13.090(b)(3) (2019). Instead, radio ads were required to run a far shorter disclaimer, presumably tailored so as not to burden the "core political speech that lies at the heart of the First Amendment." *Butcher v. Knudsen*, 38 F.4th 1163, 1165 (9th Cir. 2022); *see also* AS 15.13.090(b)(3)(d) (2019) (writing out the much shorter disclaimer required for radio ads). BM2's disclaimer is a wholly different beast. *Compare* AS 15.13.090, with AS 15.13.090(b)(3) (2019).

This misstatement of fact by Defendants obscures how BM2 is designed to silence speech from smaller independent expenditure (IE) groups. An accurate accounting of when this so-called "disclaimer," Dkt. 131, p. 4, was imposed is necessary.

In 2018, amidst a dispute over the state budget, several Alaska IE groups launched ad campaigns arguing against the reelection of several political incumbents. *See* Exhibt A, p. 1, 3–4; Dkt. 133, Ex. 81, ¶¶ 8–9. One of these groups was Plaintiff Families of the Last Frontier (FLF), a mid-budget activist group whose donations registered in the thousands rather than millions and utilized high-impact, lower-cost outreach methods such as short radio and social media ads. *See* Dkt. 40, ¶10; Dkt. 133, Ex. 81, ¶ 6.

The groups were effective: several incumbent legislators lost their primaries. *See* Ex. A, p. 1, 3–4; Dkt. 133, Ex. 8, 6:12.. Two self-described "political thinkers," drafted a law that would ensure such a political defeat would not reoccur, and then established the Alaskans for Better Elections (ABE) organization. Dkt. 133, Ex. 8, 6:12, 14:53. When enacting BM2, ABE—which is Defendant-Intervenor in this case—boasted that the law would protect incumbent politicians. *See, e.g.*, Dkt. 133, Ex. 17.

The disclaimer provision uniquely burdened mid-budget IE groups like FLF. *See* Dkt. 133, Ex. 1, p. 6; Ex. 81, ¶ 6. In contrast, Defendant-Intervenor's expert witness, Kimberly Hays of the Alaska AFL-CIO and its affiliate Putting Alaskans First Committee, came from a better-funded political faction. *See* Ex. 80, p. 6 ¶ 6–12, 8 ¶ 17–25. Hays acknowledged her employers were minimally affected by the spoken disclaimer issue, saying: "We do not run 30-second ads. . . we've always run 60-second [ads]." *Id.* at p. 47, ¶ 19–22. Hays even confessed that her groups were so financially comfortable that they had not even "asked for. . . the price differential" between the two ad-lengths. *Id.* at 49, ¶ 3–6.

The same holds true for text messages. FLF's disclaimer is 282 characters long: longer than many text message companies will even be willing to include in a single message, even if they charge by the character. *See* Dkt. 133, Ex. 1, p. 6. The record shows at least one person expressing frustration and confusion that the disclaimer, which would likely exceed 250 characters, would have to be included in text messages, with the Commission insisting that the disclaimer be applied even if the text advocacy was accompanied by a (pricy) image that also displayed the disclaimer. *See id.* at Ex. 1, p. 6; Ex. 62, p. 1–2.

Plaintiffs' motion for summary judgment cites extensive evidence of how cognizant Defendant-Intervenor was of the burden its new rules would impose on its political opponents. Defendant-Intervenor's strategic documents for passing BM2 emphasized:

> This plan will take advantage of radio's relative strength during the summer months. Because we plan to keep the messages simple, we will air 30-second ads, which will maximize the efficiency of the buy.

Dkt. 133, Ex. 30, p. 1.

Even though Defendant-Intervenor represented in public that it was "[l]eading by example" and was "modeling the financial disclosure policies that BM2 will make standard practice," Dkt. 133, Ex. 9, p. 2, Defendant-Intervenor's ads did not include the onerous disclaimer, which takes twenty-six seconds to say (as elaborated in Subsection B, *supra*). *See* Dkt. 133, p. 16; Ex. 24; Ex. 25; Ex. 26; Ex. 27.

All this evidence of both burdensome intent and burdensome results is obfuscated by Defendants' verifiably false assertion that the effective 30-second ad ban predates BM2.

B. Defendants cite overruled precedent to defend a functional speech ban.

What Defendants refer to as a "disclaimer" is effectively a ban on 30-second ads. Defendants cite overruled case law to justify this speech restriction, but current case law shows such censorship is subject to strict scrutiny and constitutionally prohibited.

"The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." *Citizens United v. FEC*, 558 U.S. 310, 319 (2010). This is because "[t]he First Amendment. . . reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs," and "[o]ur Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

Though presented as a disclosure requirement, the spoken disclaimer is in reality a total ban on 30-second radio ads if they contain political speech. Speaking rapidly, expert witness Art Hackney recorded the disclaimer with FLF's donor information (Mr. Hackney never worked for FLF). Dkt. 133, p. 16. Doing so took twenty-six seconds. Dkt. 133, Ex. 2. This means that anyone who paid for a 30-

second ad spot, as FLF had done, would effectively be wasting their money, because the disclaimer required by BM2 consumes all but 4 seconds of this popular form of political speech. As Art Hackney, a political communications professional, explained:

> I ceased running less expensive :30 second issue messages because of the requirements that now make the disclosure information far longer than the message itself. . . . It forces groups to more than double their expenditures to accommodate these disclaimer requirements.

Dkt. 133, Ex. 1, p. 6.

Supra subsection A, this speech ban uniquely burdens mid-budget IE groups like FLF. In *Citizens United v. FEC*, the Supreme Court invalidated expenditure caps on political advertising, holding that the "rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." 558 U.S. at 350. Here, we have an inverse regulation: one that effectively puts in place an expenditure *floor*. To comply with BM2, an IE group must either pay for the more expensive sixty-second spot or remain silent. If the "'beggar thy neighbor' approach to free speech—'restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others'—is 'wholly foreign to the First Amendment,'" then BM2's 'No Speech for Paupers' policy must be even more unacceptable. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 741 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976)).

To defend this speech ban, Defendants frequently urge this court to follow *McConnell v. FEC*'s framework when engaging in exacting scrutiny analysis. *See* Dkt. 133, p. 3, 11, 12–13, 25, 31, 33, 35, 38. Defendants fail to mention that *McConnell*, a controversial Supreme Court decision upholding some bans on political speech, was overturned sixteen years ago. *See Citizens United*, 558 U.S. at 319. This oversight is particularly egregious because Defendants' description of *McConnell*'s holding is lifted from *Citizens United v. FEC*, a decision in which the *introductory paragraphs* held that *McConnell* was no longer good law because it "suppress[ed]" constitutionally protected speech. *See id.* at 319.

The current Supreme Court precedent does not permit bans on political speech. Yet BM2's so-called "disclaimer" for spoken and text messaging is a speech ban.

II. Defendants' Argument for Summary Judgment has been Explicitly Rejected by the Supreme Court

Defendants defend BM2 with a justification that has been explicitly and unambiguously forbidden by Supreme Court precedent.

In *Arizona Free Enterprise Club's Freedom PAC v. Bennett,* the Supreme Court explained:

> We have also held that "independent expenditures do not give rise to corruption or the appearance of corruption. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." The candidate-funding circuit is broken. The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of quid pro quo corruption with which our case law is concerned.

564 U.S. 721, 751 (2011) (tidied) (quoting *Citizens United*, 558 U.S. at 357).

Plaintiffs challenge BM2's censorship of independent expenditures. They do not challenge candidate contribution caps or coordination rules. *Freedom PAC* has categorically barred censors from justifying limits on independent expenditures as necessary to prevent corruption or its appearance. Nevertheless, throughout their motion, Defendants continue to argue that this Court uphold BM2's censorship because Alaska's "disclosure laws 'deter actual corruption and avoid the appearance of corruption.'" Dkt. 131, p. 14 (quoting *Buckley*, 424 U.S. at 67, out of context).

Defendants even go so far as to assert: "Although the Supreme Court has said that anti-corruption or regulatory avoidance interests do not justify *banning* or *limiting* independent expenditures, these interests still justify *elucidating* them." Dkt. 131, p. 14 (emphasis in original). Setting aside the fact that the spoken and text message disclaimer *are* a functional expenditure limit, *supra* Section I, Defendants' statement is untrue. Anti-corruption interests cannot justify "elucidating" independent expenditures because there is no valid concern of corruption in independent expenditures. The Supreme Court has been clear: "independent expenditures *do not* give rise to corruption or the appearance of corruption." *Freedom PAC*, 564 U.S. at 751 (emphasis added) (quoting *Citizens United*, 558 U.S. at 357).

Defendants' motion should be rejected because the restrictions that BM2 places on independent expenditures cannot be justified under Supreme Court precedent.

III. Defendants' Contradictions Drive Home Ballot Measure 2's Fundamental Defects

Faced with the impossible task of having to implement and enforce a vague, ambiguous statute, Defendants have frequently changed their position on what BM2 requires. This ambiguity and confusion creates exactly the type of chilling effect the First Amendment forbids: underscoring how BM2 cannot be enforced fairly or in a manner consistent with the Constitution.

"[L]aws must provide proper 'precision and guidance' to ensure that 'those enforcing the law do not act in an arbitrary or discriminatory way.'" *Butcher*, 38 F.4th at 1168 (quoting *Fox Television Stations*, 567 U.S. at 253). "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480. "When laws fail to 'provide explicit standards for those who apply them,' they 'impermissibly delegate basic policy matters for resolution on an ad hoc and subjective basis.'" *Butcher*, 38 F.4th at 1169 (cleaned up) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

A. Defendants now suggest that spending can be earmarked, but they have provided no mechanism by which to do so.

Defendants' combined motion and memorandum suggests there is an earmarked donation exception to BM2. Defendants never made this claim before and provide no mechanism for how one could claim said exception. If Defendants are instead merely referencing segregated accounts, their argument is extremely misleading.

In both their complaint and their own motion for summary judgment, Plaintiffs have highlighted how listing the top three contributors in a short spoken or text-based ad misrepresents to voters that those contributors have endorsed the ad's message. *See* Dkt. 133, p. 24; Dkt. 40, ¶ 32, . As Plaintiffs noted, "[a]n adamantly pro-choice libertarian who gives to a right-leaning IE group could end up opening the paper one day and seeing his name listed alongside anti-abortion messaging, or a pro-Israel Democrat who gives to a left-leaning IE group could find her name appearing in a text ad referring to the country as an apartheid state." Dkt. 133, p. 24. Expert witness Professor David Primo explained that the disclaimer, even in printed form, would likely have a chilling effect on speech and instead serve to "'facillitat[e] social pressure.'" Dkt. 133, Ex. 6, p. 12 (quoting Perez-Truglia, Ricardo, and Guillermo Cruces. 2017. "Partisan Interactions: Evidence from a Field Experiment in the United States." Journal of Political Economy 125(4):1208-1243).

Contrary to Defendants' assertions, *see* Dkt. 131, p. 3, Plaintiffs do not argue that donation to IE groups should be anonymous.[1] Instead, they underscore how the disclaimer requirement is entirely redundant for the purpose of informing voters, as all that information is already publicly available on the Commission's website. Dkt. 133, p. 21.

Plaintiffs have produced compelling evidence for how the disclaimer is used to chill speech rather than inform voters. *See* Dkt. 133, p. 23–24. They have shown how Defendant-Intervenor filed a complaint with the Commission against a private citizen because he posted an IE group's video on the social media platform X without writing out the disclaimer in his post, Dkt. 133, Ex. 69, p. 5. They also

[1] Defendants combined motion and memorandum states that Plaintiffs want to keep donors anonymous, Dkt. 131, p. 3, but then later acknowledges that Plaintiffs "have not challenged the recipient disclosure law" and do no ask this Court to "shield names from publicity." *Id.* at p. 22.

provided documentation of how Defendant-Intervenor itself was repudiated by the Commission for arguing its press releases did not need a disclaimer. Dkt. 133, Ex. 75, p. 25–28, 31–36.

Now, for the first time, Defendants claim in their combined motion and memorandum that while BM2 "does not contain an explicit 'opt out' provision for donors who do not want their money used to make" specific advertisements, "the freedom to opt out is inherent in the definition of 'contribution'" and "[i]f a donor gives money with no such purpose" of "'influencing the nomination or election of a candidate,'" then the donation need not be "report[ed]." Dkt. 131, p. 16 (quoting AS 15.13.400(4)(A)(i)). They have never said this before, and the Commission's decisions have never indicated this was an option. *See, e.g.,* Dkt. 133, Ex. 75. The Commission provides no form with which Defendants could specify which donations were earmarked for which ads. Even if the Commission did provide such a form, this new view of contributions only increases the burden of compliance and further complicates the understanding an individual must have of BM2 before they can engage in what is supposed to be protected political speech. *See Citizens United*, 558 at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney. . . . before discussing the most salient political issues of our day.")).

The language in Defendants' motion is, admittedly, rather vague. *See* Dkt. 131, p. 16. Perhaps what they intend to say is that IE groups can segregate funds, and that only contributors to the funds for electioneering need to be reported. But that is not the same thing at all, and does not solve the problem Plaintiffs highlighted. If a donor gives to FLF for the purpose of electioneering, they are comfortable with being known as a donor to FLF. That does not mean they are endorsing every individual ad run by FLF. Putting that donor's name on the ad's disclaimer deceives voters and makes it seem as if the donor was endorsing an ad he or she probably never even saw. As a result, the BM2 disclaimer incentivizes donors to withhold donations to all groups that do not demonstrate 100% fealty to their personal positions.

Defendant-Intervenor has effectively conceded this point. Its expert witness, professional political consultant John-Henry Heckendorn, admitted that he runs ads without first getting the approval of the top donors whose names will be included. Dkt. 133, Ex. 82, p. 70 ¶¶ 21–23. This is unsurprising, as the fast-paced world of electioneering requires fast responses, and it is impossible to speedily preclear ads with individual donors before running them. *See id.* Defendant-Intervenor's motion for summary judgment, Dkt. 132, does not deny this burden, which makes it so confounding that, for the first time, Defendants do.

Either Defendants have manufactured a new earmark-your-donation rule that they never mentioned before and have no mechanism for reporting, or they are misleadingly suggesting that choosing whether or not to give to an electioneering group is the same as choosing which ads to endorse. This Court should not accept either of these justifications for censoring core political speech.

B. Defendants have also manufactured a sweeping federal PAC loophole that they could easily close after this litigation.

Defendants' eleventh-hour earmark exception follows another mid-litigation change to BM2's enforcement: creating a (probably temporary) loophole by which federal PACS effectively act as pass-throughs, negating any positive benefit to BM2's true source and outside contribution requirements.

In the litigation over the preliminary injunction, Plaintiffs objected that the true source and outside disclaimer requirements were not "narrowly tailored" to Defendant-Intervenor's stated goal of informing voters. *See Smith v. Helzer*, 95 F.4th 1207, 1214 (9th Cir. 2024). The outsider disclaimer applies only based on where the majority of contributions come from, not where the group's roots are. *See* AS 15.13.090. A group entirely composed of Alaskans, like FLF, would have to include the disclaimer, but a group entirely composed of Virginians would not so long as it received 50.01% of its funding from a single wealthy Alaskan. *See id.*

After that round of litigation, the Commission abruptly began letting IE groups count federal (but not state) PACs as a "true source." *See* Dkt. 133, Ex. 78, p. 1–2. This meant that a sophisticated donor could give to a federal PAC it knows gives to an Alaskan IE group, but that donor need not be named on the disclaimer or have to submit a contribution form at all. *See id.* This would effectively be using a pass-through, but under the Commission's advice, it would not be illegal so long as the donor did not intend that their donation exclusively go to the Alaskan IE group: something that would be near-impossible to prove. *See id.*

This new assertion by the Commission seemingly contradicts what Defendants say in their pending motion: that the law will "enhance the political marketplace of ideas by supplying voters with more (not less) information." See Dkt. 131, p. 3. As a result, Plaintiffs are cautious to utilize this tactic, as they believe that Defendants will likely change their mind after this case is decided. In the meantime, though, Defendants have manufactured a loophole by which they can temporarily conceal the extent of censorship BM2 inflicts on free speech.

Defendants' ability to manufacture a federal PAC loophole, adopted mid-litigation, is further evidence of the inherent ambiguities in BM2's text, and how it forces Americans to only speak "at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480.

C. Defendants have punished people for following the Commission's own recommendation.

Defendants change their interpretation of what BM2 requires minute-to-minute. Then the Commission, which they run, penalizes people for following the directions they gave. *See Butcher v. Knudsen*, 38 F.4th 1163, 1168 (9th Cir. 2022) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.") (quoting *Fox Television Stations*, 567 U.S. at 253).

When one man reached out to the Commission to get clarification on how to register his ballot initiative group, he was told he did not need to register. Dkt. 133, Ex. 63, p. 1–4. 114 days later, the Commission informed him what they said was "inaccurate," adding: "It does not appear that you corrected [staff's] understanding."

Dkt. 133, Ex. 64, p. 1. This led to an onerous investigation and, eventually, over $156,000 in fines. *See* Dkt. 133, Ex. 57, 65, 66.

It is understandable why conduct like this would anger some, but Defendants are in a difficult situation. Plaintiffs do not bring up these reversals and contradictions to embarrass Defendants, but to highlight how the Commission has an impossible task. BM2 is extremely confusing, and its terms are not understood even by those who should be most knowledgeable on the matter. One of the top donors to the effort to enact BM2 inadvertently violated the law when he made a donation over the winter holidays when no one was at the office to realize it was received. Dkt. 133, Ex. 80, p. 34–36. *Supra* subsection A, Defendant-Intervenor itself was repudiated by the Commission for suggesting its press releases did not need a disclaimer. Dkt. 133, Ex. 75, p. 25–28, 31–36.

Defendants do not enforce BM2 consistently or fairly, and they perpetually switch their positions and interpretations. But this is because ***no one*** could enforce BM2 consistently or fairly, because it "fail[s] to 'provide explicit standards for those who apply them'" and "'impermissibly delegate[s] basic policy matters for resolution on an ad hoc and subjective basis." *Butcher*, 38 F.4th at 1169 (quoting *Grayned*, 408 U.S. at 108–09).

IV. Ballot Measure 2 is Subject To---and Fails---Strict Scrutiny Because It is Impermissible Invidious Discrimination.

Defendants repeatedly and wrongly state that the standard of scrutiny for evaluating its censorship law is "exacting scrutiny." Dkt. 131, p. 23–24. Even setting aside that the disclaimer requirement is a functional ban on 30-second radio ads, *supra* section I, BM2 is subject to strict scrutiny because it is invidious discrimination. It also fails that scrutiny, as it lacks any compelling interest besides silencing the Defendant-Intervenors' critics.

A. The entirety of Ballot Measure 2 is invidious discrimination and thus subject to (and forbidden under) strict scrutiny.

Campaign finance restrictions may never be designed to "disfavor certain subjects or viewpoints," *Citizens United*, 558 U.S. at 340, and courts must apply "strict scrutiny" to "laws that, though facially content neutral, [are] considered content-based regulations of speech" because they "were adopted by the government 'because of disagreement with the message the speech conveys.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (tidied) (quoting *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989)); *see also NAACP v. Button*, 371 U.S. 415, 439 (1963) ("'Regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.'"). In evaluating whether a seemingly "content-neutral" regulation is in fact "content-skewed," "[t]he government bears the burden of proof. . . as it does in all First Amendment cases." *NAACP, W. Region v. Richmond*, 743 F.2d 1346, 1354 (9th Cir. 1984).

While a court will not nullify a law merely "on the basis of an alleged illicit legislative motive," *Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)), when there is "record evidence of invidious discrimination," *Buckley*, 424 U.S. at 31, a campaign finance regulation can only be sustained if the government shows a "compelling interest" and demonstrates there is no "less restrictive means" available. *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 469 (2025) (articulating the strict scrutiny standard).

While protecting political incumbents is hardly a "compelling interest," *id.*, the law takes an especially dim view of laws motivated by race, as "such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("racial discrimination is not just another competing consideration."). The same is true for the "impermissible object" of targeting "religious beliefs." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524, 533 (1993).

In its extremely recent en banc decision in the case of *Moving Oxnard Forward, Inc. v. Lopez*, which was decided after Intervenor-Defendant filed its motion, the Ninth Circuit analyzed an "invidious discrimination" claim over a ballot measure that imposed contribution caps on political campaigns. 2026 U.S. App. LEXIS 11429, *24, 41 (en banc) (*cert. pending*). The Circuit chose to employ a two-part, nine-factor test taken from the plurality opinion of *Randall v. Sorrell*, 548 U.S. 230, 248–49 (plurality opinion) that was unique to campaign contribution cases and asked questions entirely inapplicable to independent expenditure groups (such as whether contribution—not spending—limits apply to contributions from political parties). *Moving Oxnard*, 2026 U.S. App. LEXIS 11429 at *23–31. The Ninth Circuit does not have clear guidelines for how to analyze such claims in the IE context, but

Moving Oxnard did explicitly hold that while invidious political discrimination claims may be better suited for Fourteenth Amendment equal protection claims, in the campaign finance context, allegations of "race-based motives" *necessitated* "invidious discrimination" analysis. *Id.* at *42, 45.

Moving Oxnard also emphasized that when analyzing "invidious discrimination" of all kinds, invidious "restraints on speech,'" such as limits on advertising, are held to a higher standard than "campaign contribution limits." *Id.* at *47–48.

Here, Plaintiffs produce mountains of evidence that the purpose of BM2 was to disfavor certain political factions, and this focus was inextricably intertwined with racialist objectives. *See* Dkt. 133. Defendant-Intervenor was explicit that the goal of BM2 was to increase the political power of native Alaskans and stop the "breed[s]" of "nosy Outsiders" it did not want to have participate in electoral democracy. *Id.* at 13; Ex. 15, p. 1–2 (emphasizing this "spicy" piece should be signed by someone "young and Republican."). Defendant-Intervenor complained extensively about "big-money outsiders," Dkt. 133, Ex. 29, p. 1—"the likes of George Soros," Dkt. 133, Ex. 35, p. 1—who were "more interested in the resources of the state than its people." Dkt. 133, Ex. 36. Defendant-Intervenor bragged that passing BM2 would mean an increase in indigenous "power" and that more "representatives" would be of indigenous ethnicity. Dkt. 133, Ex. 37, p. 1–3. Its ad campaign frequently invoked explicit racial appeals to urge indigenous Alaskans not to "let these outsiders get away with just a slap on the wrist." Dkt. 133, Ex. 38, p. 2; *see, e.g.*, Dkt. 133, Ex. 15,

p. 1–2, Ex. 34, Ex. 37, p. 1–3, Ex. 39, p. 2, Ex. 40, Ex. 41, Ex. 42, Ex. 43, Ex. 44, Ex. 45, Ex. 46, Ex. 47, Ex. 48.

Plaintiffs also produce evidence that Defendant-Intervenor employs BM2 to target those of religious faiths it dislikes. When promoting BM2, Defendant-Intervenor also attacked the religion of the "radical voters" it wanted to silence, Ex. A, p. 4, arguing they did not follow the true "teachings of Jesus Christ." Ex. B, p. 1. Within months of BM2 going into effect, Defendant-Intervenor filed a complaint to have the Commission audit a political rival's church, disclosing the name of its tithers. *See* Ex. 70 (the audit); Ex. 71 (more auditing); Ex. 72 (response to the audit); Ex. 73 (Defendant-Intervenor's complaint); Ex. 74 (confirming that the rental was at market rate). Perhaps this is the reason why Defendant-Intervenor refused to discuss the entire portions of its disclaimer regime in corporate deposition. When asked "what is the purpose of having that out-of-state disclaimer," Defendant-Intervenor responded: "I'm not familiar with the disclaimer." Dkt. 133, Ex. 83 p. 108, ¶ 12–14.

Outside of its filings to this Court, Defendant-Intervenor is vocal and explicit that the goal, not the side effect, of BM2 is to discourage IE groups from participating in Alaska elections. In multiple pieces drafted by Defendant-Intervenor, its treasurer stated that when faced with the "price of admission to participate in Alaska," many IE groups would "take their ball and play on someone else's field." Dkt 133, Ex. 9, p. 2, Ex. 10, Ex. 11. This, she declared, would be a "win." Dkt. 133, Ex. 9, p. 2, Ex. 10, Ex. 11.

Even if invidious discrimination targeting specific races could *ever* be a permissible objective, BM2 is not the "least restrictive means" of advancing permissible public policy. *Free Speech Coal.*, 606 U.S. at 469. In fact, Defendant-Intervenor's promotional material featured a quote explaining that "[e]ven ranked choice voting by itself would undercut the influence of money in politics," Dkt. 133, Ex. 17, thereby acknowledging "less restrictive means," *Free Speech Coal.*, 606 U.S. at 469, of accomplishing its goal of stopping "breed[s]" of "nosy Outsiders."[2] Dkt. 133, Ex. 15, p. 1–2.

Defendants may point to language in *Moving Oxnard Forward* saying "[i]f any motive was relevant here, it would be the motive of the voters, not the" politicians who wrote the offending ballot measure. *Moving Oxnard*, 2026 U.S. App. LEXIS 11429 at *41. Here, context is key. In *Oxnard*, the councilors accused of improper discrimination kept their intentions secret, whereas here, there is ample evidence that Defendant-Intervenor explicitly made racial and discriminatory appeals to voters to ratify its law. *Id.* at *45. Secondly, after its *Randall* analysis, the Court found that "the parties did not raise or brief" the invidious discrimination issue properly, and the arguments mostly centered around points raised by the initial appellate panel. *Id.* Thirdly, the *Oxnard* Court took special notice of how the targeting in that case focused on stopping a single individual rather than protecting political incumbents more broadly, which it stated would be a more serious Constitutional concern. *Id.* at *44. Lastly, the alleged invidious discrimination in

[2] In addition to censorship speech, BM2 instituted ranked choice voting. *See* Dkt. 133, Ex. 17. Plaintiffs do not challenge that provision of the law. *See* Dkt. 40.

Oxnard did not involve race, and the *Oxnard* court was emphatic that racial discrimination in the campaign finance context was a more serious concern. *Id.* at *42.

Defendants are wrong to claim the law should be evaluated under exacting scrutiny. BM2 is invidious discrimination subject to strict scrutiny, which it fails because it has no compelling interest and is not the least restrictive means of accomplishing any legitimate objective.

B. Ballot Measure 2's out-of-state disclaimer is particularly invidious discrimination, making this form of compelled speech subject to (and forbidden under) strict scrutiny.

It "offends the First Amendment" to "compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586–87 (2023). Therefore, campaign finance regulation may not "contraven[e] 'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.'" *Freedom Club PAC*, 564 U.S. at 739 (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995)).

While Defendants are correct that some political disclaimers are not subject to strict scrutiny, *see* Dkt. 131, p. 23–24, Defendant-Intervenor demonstrated BM2 is not a typical campaign finance disclosure law. Defendant-Intervenor wrote extensively of how "Alaskans are a special breed" who dislike "all the nosy Outsiders trying to tell us what to do." Dkt. 133, Ex. 15, p. 1–2. Its promotional and internal documents frequently refer to the capital-O "Outside" and "Lower 48 political groups" with contempt. *See, e.g.*, Dkt. 133, Ex. 15, p. 2 ("nosy Outsiders"); Ex. 19 ("the large sums of Outside political dollars"), Ex. 29, p. 1 ("big-money outsiders"); Ex. 35, p. 1 ("the likes of George Soros"), Ex. 38, p. 2 ("Don't let these outsiders get away with just a slap on the wrist."), Ex. 51 ("Alaskans might be resistant to doing anything similar to how things are done Outside"), Ex. 52, 12:32–35 ("shell companies from the Lower 48"), Ex. 53 ("someone from the lower 48"), Ex. 54 ("'Alaska is the crown jewel of America,' said Shea Siegert, Campaign Manager of Yes on 2, 'so we can understand why people from Outside might have opinions about our state's future.'"), Ex. 55, p. 1, 2 ("over a quarter of a million dollars from Lower 48 political groups"; "hundreds of thousands of dollars from Outside sources"; "over $250,000 from Outside special interests"), Ex. 56 ("someone from the lower 48"), Ex. 60, p. 1 (the formal preamble of BM2 laments "the undermining of self-governance in Alaska by the undue influence of wealth, including from outside the state").

Even if this Court were to deny that Defendant-Intervenor intended BM2 to silence non-Alaskans from speaking (i.e. invidious discrimination), this venomous language is proof that there is a strong hostility to outsiders in Alaska. Furthermore, *supra* subsection A, there is substantial evidence in Defendant-Intervenor's own words and rhetoric indicating that hostility to so-called outsiders is inherently intertwined with racial animus. Forcing an IE group to associate itself with outsiders would be bound to undermine the speaker's message.

V. Even Under Exacting Scrutiny, Ballot Measure 2 is Unconstitutional

Even under exacting scrutiny—the standard of scrutiny Defendants request—BM2 is unconstitutional. What is more, BM2 is unconstitutional under both prongs of the exacting scrutiny analysis.

Exacting scrutiny "demands that the government show that it has (1) a sufficiently important interest (2) to which the challenged regulations are substantially related and narrowly tailored." *Smith*, 95 F.4th at 1214. For a regulation to prevail under "exacting scrutiny," the government "must do more than 'simply posit the existence of the disease sought to be cured.'" *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 307 (2022) (quoting *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996)). "It must instead point to 'record evidence or legislative findings' demonstrating the need to address a special problem." *Cruz for Senate*, 596 U.S. at 307 (quoting *Colorado Republican*, 518 U.S. at 618).

A. Defendants gloss over the first prong of exacting scrutiny analysis, even though Ballot Measure 2 fails this prong.

Defendants' combined motion and memorandum cruises through the first step of exacting scrutiny analysis, which requires the State to show "a sufficiently important interest" in burdening speech. *Smith*, 95 F.4th at 1214; *see also NAACP, W. Region*, 743 F.2d at 1354 (reiterating that in First Amendment cases, it is the government that bears the burden of showing constitutionality). When analyzing the disclosure requirements, Defendants write—correctly—that "[t]he Ninth Circuit has already held that the State's interest in an informed electorate satisfies the first prong" of the exacting scrutiny test. Dkt. 131, p. 12. It then assumes that BM2 informs the electorate. *See id.*

But BM2 does not inform the electorate. Defendant-Intervenor crafted the law, *supra* section IV, with the purpose of putting a "price of admission" on "participat[ion] in Alaska" politics so rival IE groups would "take their ball and play on someone else's field." Dkt 133, Ex. 9, p. 2, Ex. 10, Ex. 11. BM2's disclosure requirements are entirely redundant, meaning they have no informative purpose. *See* AS 15.13.090.

Courts have upheld some redundant disclaimers before, *see, e.g.*, *Citizens United*, 558 U.S. at 366 (upholding a disclaimer "displayed on the screen in a "clearly readable manner" for at least four seconds"), but never of the scale of redundancy in BM2. Not only do BM2's disclaimers contain no new information (all of it is included in the mandatory reports available on the Commission's website), but the disclaimer requires some pieces of information (such as the name of the speaker and, in some cases, specific donors' locations) to be repeated twice. *See* AS 15.13.090. It also contains pointless superfluous information: Why, for example, would a voter who is told a group's top donor is Robert Griffin of Fairbanks need to be reminded that Fairbanks is in the state of Alaska?

Defendants are wrong to gloss over the first prong of exacting scrutiny analysis. The purpose of BM2 is not to inform.

B. **Even if Ballot Measure 2 served an informative purpose, its speech restrictions are neither substantially related nor narrowly tailored toward that goal.**

Even if BM2 did have an informative purpose, Plaintiffs' evidence has shown that it does not have an informative effect. Instead, it has the result of silencing core political speech.

i. **Continuous double-reporting with a 24-hour rule fails exacting scrutiny's second prong, posing a profound burden on political speech while being redundant, arbitrary, and unhelpful to voters.**

In discovery, the Commission, Defendants, and Defendant-Intervenor were all unable to show one instance of a campaign finance crime being prevented by double-reporting (having both the recipient and the donor report the same contribution separately). *See, e.g*. Dkt. 112. Similarly, neither Defendant-Intervenor's promotional materials nor internal documents showed any instance of pre-BM2 campaign finance fraud that double reporting would have caught.

Even if double reporting had a purpose beyond silencing the political opposition, it is unclear how that purpose would be served by having such a short-time frame and making it continuous year-round. When it was using the more deferential preliminary injunction standard, the Ninth Circuit took "pause" at how "Ballot Measure 2's contribution-reporting requirement applies at all times, rather than only close to an election." *Smith*, 95 F.4th at 1218. The record now shows how a 24-hours-a-day, 365 days a year requirement brought catastrophic consequences for ordinary citizens. Witness Cheryl Frasca described the struggle of trying to get a submission in for a donor in her nineties who lacked internet access. Dkt. 133, Ex. 84, p. 1 ¶ 6. She also attested to how a large portion of the state's conservative donors have to rely on her or else they would fail to get their forms in on time. *Id.* at ¶¶ 3–5. Plaintiff Bob Griffin has sworn that he gave up much of his political giving because of his concerns of running afoul of the 24-hour rule, especially given his work as a pilot where internet service can be spotty. Dkt. 133, Ex. 85, p. 2 ¶ 14. Plaintiff Trevor Shaw said he put Plaintiff Alaska Free Market Coalition on ice because the risk of a donor forgetting to file his or her form on time was too great. Dkt. 133, Ex. 87, p. 1–2.

Perhaps most strikingly, this harm to free speech was also reflected in the testimony of Defendant-Intervenor's witnesses. Heckendorn admitted that he teaches donors how to create a myAlaska account (something he is under no legal obligation to do) so *the donors* do not get fined. Dkt. 133, Ex. 82, p. 94–97. Hays said she does so as well. Ex. 80, p. 28–30. Hays also admitted that, because of the continuous reporting, she accidentally triggered over $10,000 in fines because of a donation made over the winter holidays when no one was at the office to realize it was received. *Id.* at p. 35–36.

Courts will "never accep[t] mere conjecture as adequate to carry a First Amendment burden," and instead require "'record evidence or legislative findings' demonstrating the need to address a special problem" before approving of a campaign finance restriction. *Cruz for Senate*, 596 U.S. at 307 (first quoting *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014)) (then quoting *Colorado Republican*, 518 U. S. at 618). It would be hard to find a better example of a law that "force[s] speakers to retain a campaign finance attorney. . . . before discussing the most salient political issues of our day" than BM2. *Citizens United*, 558 U.S. at 324. Defendants have not, and cannot, carry their burden of demonstrating that BM2's continuous 24-hour double-reporting requirement is "substantially related and narrowly tailored" to "a sufficiently important interest." *Smith*, 95 F.4th at 1214.

ii. Ballot Measure 2's disclaimer fails exacting scrutiny's second prong because *it* is redundant, arbitrary, and unhelpful to voters while posing a profound burden on political speech.

Professor Primo has provided extensive evidence that BM2's disclaimer does not have an informative effect. His research showed that "survey respondents with access to disclosure information did no better than respondents without such information in identifying the positions of interest groups on a ballot measure." Dkt. 133, Ex. 7, p. 3–4. Evaluating the specific disclaimer requirement of BM2, Primo elaborated:

> At best, the information will have little impact once all the other information available to voters in a campaign is considered. At worst, the disclosures may distort the speech of groups making independent expenditures, confuse voters, or lead voters to make decisions at odds with their preferences.

Dkt. 133, Ex. 6, p. 4.

In addition to its ineffectiveness at educating voters and profound redundancy, BM2's disclaimer is also arbitrarily underinclusive if its goal is to educate voters. For starters, despite the great emphasis BM2 puts on requiring "true source" disclosures to the Commission, the disclaimer requires only the top three contributors, not the top three true sources. *Compare* AS 15.13.074 (prohibiting certain "contributions"), *and* AS 15.13.090 (requiring communications to identify "top contributors"), with AS 15.13.040 (requiring the "true source" of contributions to be reported to the Commission); *see also* AS 15.13.400(19) (defining "true source"). Furthermore, there is little reason to believe that knowing the third highest contributor would be of any more value to the voter than knowing the fourth highest or the fifth highest. This arbitrary top-three cut-off, paired with a lack of a true source requirement, enables more sophisticated donors to simply avoid having their names listed by using intermediary groups.

While the disclaimer is woefully ineffective at educating donors, it is profoundly effective at silencing political speech. As discussed in Section I, *supra*, when applied to spoken and text-based ads, the disclaimer is a de facto expenditure floor that bans thirty-second and 250-character text ads. To comply, poorer groups must forgo spoken and text-based advertising, whereas wealthier speakers like Hays's clients can purchase higher-cost 60-second ads. *See* Dkt. 133, Ex. 80, p. 47 ¶ 19–22, 49 ¶ 3–6.

Professor Primo's report also documented that the disclaimer, even in printed form, would likely have a chilling effect on speech and instead serve to "'facillitat[e] social pressure.'" Dkt. 131, Ex. 6, p. 12 (quoting Truglia, Journal of Political Economy 125(4):1208-1243). *Supra* sub-subsection i, Shaw has confirmed this concern, saying he ceased AFMC's operations because of his alarm that donors would be harassed due to having their names highlighted. Dkt. 133, Ex. 87, p. 1–2.

Compliance complexity is not the only burden of the disclaimer rule. Even an ordinary print mailer by a sophisticated firm fully versed in the disclaimer's requirements would impose substantial monetary costs, as each reprint would need to be updated based on the day-to-day ratio of who is the top fourth versus the top third donor. *See* Dkt. 133, Ex. 62 (the requirement's confusing timeframe).

iii. Ballot Measure 2's 24-hour true source reporting requirement fails exacting scrutiny because it is vague, ambiguous, and ineffective at anything other than chilling speech.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Butcher v. Knudsen*, 38 F.4th 1163, 1168–69 (9th Cir. 2022) (quoting *Fox Television Stations*, 567 U.S. at 253). In defiance of that principle, BM2 defines "true source" as "the person or legal entity whose contribution is funded from wages, investment income, inheritance, or revenue generated from selling goods or services." AS 15.13.400(19). While wordy, this definition is chock full of ambiguity, *supra* Section III. Years after the implementation of BM2, the scope of its true source requirement is still being hotly debated by the most talented legal minds in Alaska. Yet at the same time, BM2 requires both IE groups *and individual donors* to be able to understand its meaning within 24 hours. *See* AS 15.13.090.

Hays and Heckendorn both testified that they feel it is their job as paid employees of political firms to educate donors on how to actively comply with the reporting requirement—indicating that a firm that does not want its donors subjected to massive fines should be hiring someone to tell people how to do 24-hour reports. Ex. 80, p. 10; Ex. 82, p. 96–97. There is no reason for the law to be "tailored" this way. *Smith*, 95 F.4th at 1214. The true source requirement is already exempted from the disclaimer, so there would be little harm in allowing donors extra time to understand this provision's requirements (twenty-five hours, perhaps?). *Compare* AS 15.13.074, *with* AS 15.12.040(r); *see supra*, subsection ii. This is especially true for donations made months or even years before the scheduled election, as it is of little relevance when the voter receives this information so long as it is before he casts his vote. *See Smith*, 95 F.4th at 1233 (Forrest, J. dissenting) ("Even assuming that prompt disclosure is helpful to voters *during an election cycle*, why a 24-hour filing deadline is needed in the lulls between active elections is a mystery." (emphasis in original)).

iv. Ballot Measure 2's expedited hearing requirement fails exacting scrutiny's second prong because it gives the Commission no discretion to block bad faith actors from exploiting the rule so as to censor their opponents.

BM2's application to the expedited hearing format gives the Commission zero discretion in blocking bad faith actors from filing frivolous complaints just to waste an opponent's valuable time right before the election. The Commission is legally obligated to hold a hearing on a complaint within twenty-four hours and must inform the person whom the complaint was filed against that it could adjudicate the facts of the dispute at that hearing. 2 AAC 50.888.

This provision is already being abused: Plaintiff FLF was subjected to an expedited hearing notice with just a few *hours* notice. *See* Dkt. 112-4, p. 19–20. As with all complaints, a hearing occurs even when the victim of the complaint *already got their speech precleared* with the Commission. *Compare* Dkt. 133, Ex. 76 (getting preclearance), with Ex. 77, p. 1–3 (Defendant-Intervenor filed a complaint anyway).

The days before an election are among the most critical for any group engaged in electioneering: it is what years' worth of preparation builds up to. *See* Ex. 81, ¶ 10. No law that demands someone attend a hearing during that critical period with less than a day's notice is "substantially related and narrowly tailored" to a valid state interest. *Smith*, 95 F.4th at 1214.

v. Ballot Measure 2's penalties are far too high and subjective to survive exacting scrutiny's second prong.

On the opposite end of the spectrum from its zero-discretion expedited hearing process, BM2's penalty system gives inappropriately vast discretion to the Commission. BM2's penalties are "up to $500 a day" for recipients and "up to $1,000 a day" for donors (plus three times the cost of the donation or the daily fine if it was willful). Dkt. 133, p. 32. Defendant-Intervenor itself acknowledged that even for "deliberate, and repeated, violations of the law," "imposition of completely un-mitigated penalties could be seen as leading to the imposition of disproportional civil penalties with respect to these violations." Dkt. 118-1, p. 3, 17. Yet aside from its extra, three-times-the-contribution penalty for "willful" behavior, BM2 provides no "precision and guidance" on how Defendants should apply the penalties. *Butcher*, 38 F.4th at 1168 (quoting *FCC*, 567 U.S. at 253); *see also* AS 15.13.390. This is especially disturbing as Defendants are temporary political appointees, four out of five of whom must have been preapproved by a political party. AS 15.13.020. The incentives for them to apply the law subjectively or unfairly are strong, and their track record shows they sometimes succumb to political pressure. At least one local court has already ruled that the Commission knowingly fined someone for a donation the commissioners *knew* he did not make. *See Alaskans for Honest Elections v. Alaska Pub. Offs. Comm'n*, 2024 Alas. Trial Order LEXIS 84, at *28–29 (Alaska Super. Ct. 2024) ("APOC appeared to understand that the $2358 in cash was not actually from Mathias, but elected to call it a wash and attribute that amount to Mathias").

vi. Ballot Measure 2 fails exacting scrutiny's second prong because it imposes strict liability on core political speech.

The Supreme "Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*," *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). "Strict liability is generally disfavored in criminal law, particularly with respect to cases that implicate the First Amendment." *United States v. Sheehan*, 512 F.3d 621, 629 (D.C. Cir. 2013); *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 434 (1978) ("limited circumstances in which Congress has created and this Court has recognized such offenses"); *Butcher*, 38 F.4th at 1165 (emphasizing the duty to prevent unnecessary burdens on the "core political speech that lies at the heart of the First Amendment").

The highest courts of Colorado and Ohio have already struck down strict liability regimes on federal constitutional grounds. *See In re Judicial Campaign Complaint Against Stormer*, 137 Ohio St. 3d 449, 453 (Ohio 2013); *Dallman v. Ritter*, 225 P.3d 610, 629 (Colo. 2010). And the D.C. Circuit threw out a political speech conviction for being based on strict liability. *See Sheehan*, 512 F.3d at 624. Our own circuit has strongly implied strict liability cannot apply to speech-based offenses, throwing out a strict liability conviction for misstatements in a government interview because of "the general rule that criminal liability requires an 'evil-meaning mind.'" *United States v. Pasillas-Gaytan*, 192 F.3d 864, 868 (9th Cir. 1999).

BM2 "imposes strict liability for failure to comply," *Smith*, 95 F.4th at 1231 (Forrest, J. dissenting), even for the most innocuous mistakes, and where a person was following the Commission's previous recommendation. *See* Ex. 64, p. 1 ("It does not appear that you corrected [staff's] understanding."). Defendant-Intervenor's own witness, Hays, testified that both she and one of BM2's top donors accidentally triggered over $10,000 in fines because he made a donation over the winter holidays when no one was at the office to realize it was received. Dkt. 133, Ex. 80, p. 34–36. Hays minimized this civil liberties violation by saying "we successfully got our fines mitigated" (but not removed). Dkt. 133, p. 34. This mitigation, though, was entirely based on "the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480. In other cases, Defendants have not been as merciful, even when Defendant-Intervenor itself argued "imposition of completely un-mitigated penalties could be seen as leading to the imposition of disproportional civil penalties with respect to these violations." *Compare* Dkt. 118-1, p. 3, 17, with *AHE*, 2024 Alas. Trial Order LEXIS 84, at *28–29.

Well-connected people like Hays may still feel comfortable speaking at the "mercy" of Defendants, but plaintiffs like Bob Griffin do not. *Stevens*, 559 U.S. at 480; *see* Dkt. 133, Ex. 85. And even when an individual may be confident enough in Defendants' discretion to make a donation, recipients like AFMC have declined to receive it because they view the strict liability regime as so risky to potential donors that it would be unkind to them to allow them to take such a risk. Dkt. 133, Ex. 87, p. 1–2.

VI. Defendants Repeat Defendant-Intervenor's False Assertion that Speech is a Privilege Rather than a Right

Relying on irrelevant and out-of-context caselaw, Defendants' combined motion and memorandum rests on Defendant-Intervenor's assertion that free speech is a privilege, not a right.

"The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. "The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office," *id.* at 340 (quoting *Eu v. San Francisco Cnty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989)), and "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *Stevens*, 559 U.S. at 470.

Rejecting this philosophy, Defendant-Intervenor stated it wanted to put a "price of admission," Dkt. 133, Ex. 9, p. 2; Ex. 10; Ex. 11, on the "privilege of influencing Alaska's elections." Dkt. 133 Ex. 28, p. 1. Picking up on this point, Defendants' motion and memorandum relies heavily on *Shelton v. Tucker*, 364 U.S. 479 (1960). *See* Dkt. 131, p. 18. Defendants say that *Shelton* set out the guidelines for how broad a speech restriction could be, which they interpret as meaning a law is unconstitutional when it "require[s] vastly more disclosure than needed." *Id.*

Defendants fail to mention that *Shelton* was not a First Amendment case and did not cite the First Amendment once. *See Shelton*, 364 U.S. at 479–99. Instead, it was a Fourteenth Amendment case regarding due process concerns over the disclosure statements people wishing to serve as public school teachers had to make (the plaintiffs won). *Id.* at 480.

Serving as a teacher is a privilege. While teachers retain First Amendment rights during employment, *see Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968), they have "no 'right' to their job" and "the government may deny [them that] benefit for any number of reasons." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Such employment disputes have courts "balance competing interests," with courts employing "a 'sliding scale' in which the state's burden to justify a particular discharge or adverse employment action 'varies depending upon the nature of the employee's expression.'" *Thompson v. Cent. Valley Sch. Dist. No. 365*, 163 F.4th 654, 663 (9th Cir. 2025) (quoting *Moser v. L.V. Metro. Police Dep't*, 984 F.3d 900, 906 (9th Cir. 2021)).

In contrast, First Amendment cases adjudicating the criminalization of the speech of private citizens (as BM2 does) are not subject to "an ad hoc balancing of relative social costs and benefits." *Stevens*, 559 U.S. at 470. Instead, as "core political speech. . . . lies as the heart of the First Amendment," *Butcher*, 38 F.4th at 1165, "[o]ur Constitution forecloses any attempt to" limit it "on the basis of a simple cost-benefit analysis." *Stevens*, 559 U.S. at 470–71.

Contrary to what both Defendants and Defendant-Intervenor have now asserted, Plaintiffs have a fundamental right, not a conditional privilege, to free speech.

CONCLUSION

For these reasons, Defendants' motion for summary judgment should be denied.

Dated: May 29, 2026

Respectfully submitted,
Liberty Justice Center

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limit of Cir. R. 32-1 because this brief contains 9,638 words, excluding the items exempted by Local Rule 7.4. The brief's type size and typeface comply with Local Rule 7.5.

Dated: May 29, 2026

LIBERTY JUSTICE CENTER

By:/s/ Reilly Stephens

Reilly Stephens

Attorneys for Plaintiff–Appellant

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2026, I electronically filed the foregoing Opposition to a Motion for Summary Judgment with the Clerk of the Court for the United States District Court of Alaska by using the CM/ECF System. Prior to filing this, I served the memorandum and exhibits by email to the counsel for Defendants and Defendant-Intervenor.

Dated: May 29, 2026

LIBERTY JUSTICE CENTER

By: /s/ Tim Kilcullen

Tim Kilcullen

Attorneys for Plaintiff–Appellant

Exhibit A

Don’t believe the special interests or the politicians they’ve bought—Ballot Measure 2 will help end corruption in Alaska politics.

The election reforms contained in Ballot Measure 2 would end the gravy train for politicians who have dined at the public’s expense for too long without producing solutions to Alaska’s problems. It’s a shame they don’t show the same fight for fixing the budget crisis or addressing education and health care issues, but such is the state of our hyper-polarized politics.

Democracy works when our elected officials are held accountable for their decisions by competition at the ballot box. Unfortunately, the dominance of the two major parties has turned our political system into a team sport where beating the other team is more important than solving problems.

Politics should be a competition of ideas. Unfortunately, neither of the two major parties seem to have any. We need leadership that’s focused on solutions—not just holding onto power. And we need a system that encourages cooperation and greater participation.

The results of the recent primary provide a stark illustration of why change is needed. Legislators who defied their party leadership and worked across the aisle on solutions were targeted in the Republican primary. Secret donors funneled hundreds of thousands of dollars into personal attack ads against a handful of incumbents that were designed to depress moderate voter turnout while increasing enthusiasm among the party’s most radical voters.

The results were predictable-—some incumbents lost with as little as 6 percent of their district voting against them. In a closed primary system, a small percentage of voters can successfully decide which candidates make it to the November general election and thereby limit voters’ choices. Those candidates too often represent the interests of their parties, not the voters who are left to choose between the lesser of two evils.

Ballot Measure 2 was designed to address these problems. It will bring an end to the secret dark money spending tainting our elections by requiring prompt and full disclosure of the people actually putting in big dollars to support a particular candidate. Right now, special interests can hide their funding by funneling it through third-party organizations and Super PACs. The money is then often passed through multiple organizations to disguise the identity of the original donor.

Why would a special interest go to all that trouble to hide its giving to a candidate? Politics cost money and candidates rely on the small-dollar donations of voters to campaign. But those small dollar donations are drowned out by the flood of dark money that's entered elections since the Supreme Court's 2010 Citizens United decision. Between 2014 and 2018, spending on Alaska campaigns jumped from $3.9 million to $14 million, and it continues to increase each election cycle.

With so much money flowing into politics—and the fact that we don't know where all of it is coming from—it's impossible for candidates to run without courting deep-pocketed special interests who often expect those candidates to do their bidding once elected. Stricter disclosure rules will allow Alaskans to follow the money and hold elected officials accountable for their decisions. After all, elections are for voters, not the corporations who want access to Alaska's resources.

Ballot Measure 2 would give voters a greater say in elections by creating a single unified primary ballot that lists every candidate regardless of party affiliation. Over 60 percent of Alaska voters choose to register as undeclared or nonpartisan. Alaskans rarely vote the straight party ticket, choosing instead to vote for the best candidate regardless of party. It's not uncommon for Alaskans to choose a candidate from one party for congress and another party for their local legislative district. Unfortunately, the current system allows the parties to restrict who can vote in the primary and thereby dictate which candidates appear on the ballot in November.

Opponents of Ballot Measure 2 argue that they have a first amendment right to hold private primaries, but that's no justification for forcing Alaskans to pay for them. Under Ballot Measure 2, parties can still nominate a candidate of their choosing—but they can't do it with state funds.

Opponents of Ballot Measure 2 insist there's nothing wrong with our elections and that nothing needs to change. It's an answer that benefits them—not voters. Their argument boils down to "better the devil you know than the devil you don't."

But we know that the devil we have now is bankrupting the state and dividing neighbors along partisan lines. We can do better. Vote yes on Ballot Measure 2 for better elections and a better future for Alaska.

SIGNED: Yes on 2 For Better Elections Campaign Team

SHORTER VERSION (447 words):

Don't believe the special interests or the politicians they've bought—Ballot Measure 2 will help end corruption in Alaska politics.

The election reforms contained in Ballot Measure 2 would end the gravy train for politicians who have dined at the public's expense for too long without producing solutions to Alaska's problems. It's a shame they don't show the same fight for fixing the budget crisis or addressing education and health care issues, but such is the state of our hyper-polarized politics.

Democracy works when our elected officials are held accountable for their decisions by competition at the ballot box. Unfortunately, the dominance of the Republican and Democratic parties has turned our political system into a team sport where beating the other team is more important than solving problems.

Politics should be a competition of ideas. Unfortunately, neither of the two major parties seem to have any. We need leadership that's focused on solutions—not just holding onto power. And we need a system that encourages cooperation and greater participation.

The results of the recent primary provide a stark illustration of why change is needed. Legislators who defied their party leadership and worked across the aisle on solutions were targeted in the Republican primary. Secret donors funneled hundreds of thousands of dollars into personal attack ads against a handful of incumbents that were designed to depress moderate voter turnout while increasing enthusiasm among the party's most radical voters.

The results were predictable-—some incumbents lost with as little as 6 percent of their district voting against them. In a closed primary system, a small percentage of voters can successfully decide which candidates make it to the November general election and thereby limit voters' choices. Those candidates too often represent the interests of their parties, not the voters who are left to choose between the lesser of two evils.

Ballot Measure 2 was designed to address these problems. It will bring an end to the secret dark money spending tainting our elections by requiring prompt and full disclosure of the people actually putting in big dollars to support a particular candidate. Stricter disclosure rules will allow Alaskans to follow the money and hold elected officials accountable for their decisions. After all, elections are for voters, not the corporations who want access to Alaska's resources.

That's why Ballot Measure 2 will also give voters a greater say in elections by creating a single unified primary ballot that lists every candidate, and allow voters to make their voices heard by establishing ranked-choice voting for general elections. Voters should be able to share their preference for elected leaders at every stage, regardless of party affiliation, and have more transparent information to make their own choices.

Exhibit B

Reclaiming Alaska, Our Political Process, and Our Souls

The election season is nearly behind us and I am confident not many people will miss it. To most of us it feels like Alaska is under siege by something worse than a pandemic - a toxic stew of extreme polarization and identity politics that uses deception, slander, and pejorative one-liners to demonize and destroy "other" Alaskans of different views.

I believe we are witnessing a paradigm shift in the general political atmosphere of the past 50 years in Alaska. Identity politics and extreme polarization now rule the day. It used to be that the shared difficulties and hardships of work and life in Alaska pulled the broader group into a centrist, "community-first" mentality that was primarily concerned with *protecting the rights of our citizens*, promoting a *strong economy*, and *cultivating a healthy sense of citizenry* that was entrepreneurial, faithful, and loyal to neighbors.

If you open Facebook today, it doesn't take more than a minute to see that our party extremes are wholly consumed by the thirst to win, through any means necessary, often leaving an "opponent" – a person who is first and foremost our neighbor – as bloodied as possible. Party purity is now given a higher value than our spiritual faith, a faith which compels us to do justice, love mercy and walk humbly with our God.

We see this evidenced in the Alaska Family Council's recent descent into the abyss of partisan extremism, exchanging the peace and good news of the gospel for the role of "winner takes all - ends justify the means" political action arm. To judge by the language of their political mailers and communications, you would hardly imagine they had studied the teachings of Jesus Christ with the attention they profess to have given the subject.

And this is only the symptom of a much deeper problem across our state and nation, the sickness of our hearts. We don't love our neighbor, or honestly face our own frailty and capacity for evil, or seek the peace, unity and welfare of our community. This has produced a culture of fear and resentment with no real hope. We can't fix this problem with legislation, getting 'the right person' into office, or 'that stupid party' out of power.

Today in Alaska we allow those with interests far different than ours – Outside lobbying firms, Washington D.C. think tanks – to overwhelm our local elections with money and advocacy that has nothing to do with improving our community. They cut checks, dump resources into races, and leave town after 3 months, with no care for the character of the person they elect, as long as they will conduct themselves according to the will of the Party.

We wonder why real, local community concerns and basic rights of citizenry aren't fought for by our elected leaders. Why? Because our current party system elects to have leaders who will only care about the issues the Party wants them to care about, to vote the way the Party wants them to vote, and to leave other matters alone. It is no wonder many Alaskans have become disillusioned with politics, their elected representatives are beholden not to the people, but to the Party bosses.

For Alaska's most successful leaders, party power was always secondary to getting the job done for Alaska. Yet today we condemn one another for a newly minted cardinal sin: working with "the other side". As if the "other side" were not people who go to our same PTA meetings, fish beside us in the same creeks, or rush to the side of the same neighbor in times of need. Does "our side" really have a monopoly on perspective or answers to every challenge?

What can we do to regain what has been lost, and reclaim a process promised to all Alaskans? It begins with us releasing our death grip on a dead paradigm run by partisan extremes, running the same campaigns, with no new ideas whatsoever on good governance. Alaska needs leaders to show up for their communities, put forward real solutions, and work with anyone who shares those same values and a commitment to a better future. And we must recognize that we are all broken people who need grace. This will enable us to look at those who disagree with us as our neighbor, brother and sister, and not "the enemy".

We can turn the tide. Let's remind the arsonists who would rather set their political opponents on fire than listen to them, that the only progress we have ever made was when Alaskans pulled together as one people. Alaskans can reclaim Alaska, decide what's best for Alaska, and save Alaska.

Representative Chuck Kopp
House Rules Chair
Lifelong Alaskan