

August 8, 2007

The Honorable Sean R. Parnell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of 07CASE Initiative Application
A.G. file no: 663-07-0191

Dear Lieutenant Governor Parnell:

You have asked for additional review and analysis regarding potential First Amendment issues in 07CASE. This letter responds to your request.

As your letter observes, in 07COGA we stated that there may be First Amendment issues with the bill's scheme of public financing for electoral campaigns. 2007 Op. Att'y Gen. 14-15 n.12 (July 18; 663-07-0191). But we explained that at this stage we consider only those issues that are identified as prohibited subjects by the Alaska Constitution. All other constitutional issues, unless "clearly unconstitutional," must be deferred until after the voters have had a chance to vote on the initiative. By "clearly unconstitutional" the Alaska Supreme Court requires "clear authority establishing [the bill's] invalidity." *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003). As an example, the Court has stated that a bill that requires racial segregation is a clearly unconstitutional bill. *Id.* at 900 n.22. Furthermore, the Alaska Supreme Court held that a blanket primary statute was "clearly unconstitutional" after the U.S. Supreme Court struck down the blanket primary in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). *See O'Callaghan v. State*, 6 P.3d 728, 730 (Alaska 2000). Thus, we conclude that an initiative bill will be plainly unconstitutional only when there is controlling authority directly on point that establishes that it is unconstitutional.

In 07COGA we noted the potential for First Amendment issues primarily because such issues have been raised in other states that have adopted similar programs of public campaign financing, and because the U.S. Supreme Court is vigilant in protecting

First Amendment rights in the campaign finance context.¹ There is, however, no controlling authority directly on point that establishes that publicly financed campaign financing in general is unconstitutional or that the kind of public financing proposed by 07COGA and 07CASE is unconstitutional. Indeed, as we noted, the cases that have considered similar publicly financed campaign financing schemes have rejected the First Amendment challenges. *See Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000); *Ass'n of Am. Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005). We discuss those cases in response to your questions below.

From a First Amendment perspective 07COGA and 07CASE are identical, with one exception. 07CASE does not seek to impose a tax upon the oil industry to pay for the publicly financed campaign financing program. In our 07COGA opinion, we noted that an Arizona tax on lobbyists that was intended to fund a similar campaign financing program was struck down as an “unconstitutional prior restraint on the exercise of free speech.” *See* 2007 Op. Att’y Gen. 13-14 n.11 (July 18; 663-07-0191) (*quoting Lavis v. Bayless*, CV 2001-006078 (Sup. Ct. Ariz. Dec. 21, 2001)). Since 07CASE does not seek to impose a tax on any particular group, there is no prior restraint issue.

With this background, we shall address your questions.

I. RESPONSE TO QUESTIONS

Question 1: In the broad sense, what standard would the Alaska Supreme Court use to evaluate whether a clear or plain violation of a citizen’s right to engage in free speech has occurred?

The Alaska Supreme Court has held that the right to free speech under the Alaska Constitution is “at least as broad” as the right to free speech under the U.S. Constitution. *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 979 n.13 (Alaska 2005). The seminal Alaska case on First Amendment issues in the campaign finance context is *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000). There, the Alaska Supreme Court adopted a two-part test derived from U.S. Supreme Court precedent for determining whether campaign finance measures that

¹ We similarly noted the potential for First Amendment issues in our review of another campaign finance reform initiative, 03CAMP, but nevertheless recommended the initiative application be certified as we do here. *See* 2003 Op. Att’y Gen. (Aug. 25; 663-04-0025).

burden free speech pass constitutional muster. First, there must be some indication that the measure is justified by “real harm.” This can be shown by either empirical support or sound reasoning for the measure. *Id.* at 607. Second, the measure must be narrowly tailored to serve a compelling state interest. *Id.* at 603, 606-09 (*citing Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)). There are points in the opinion, however, where the Court characterizes the governmental interest as “substantial” or “legitimate,” but it is unclear whether it is actually departing from the standard requiring a *compelling* interest. *Id.* at 600, 613, 626.

Question 2: Has the Alaska Supreme Court ever addressed a free speech claim in the context of campaign finance, and, if so, with what result and on what grounds?

Yes. In *State v. Alaska Civil Liberties Union*, the Alaska Supreme Court considered several challenges to campaign finance reform legislation (“SB 191”). 978 P.2d 597. Applying the two-part test set out above, the Court sustained the following campaign finance restrictions:

-- a ban on independent expenditures by corporations, labor unions and certain “non-group” entities² (978 P.2d at 607-13);

--a ban on contributions by corporations, labor unions and non-group entities (*Id.* at 613-14);

--limits on contributions by individuals, groups, and political parties (*Id.* at 621-26);

At

--restrictions on contributions by non-resident individuals and groups (*Id.* at 614-17);

--a ban on lobbyists’ contributions to out-of-district candidates (*Id.* at 617-20);

--a restriction on the amount of unused contributions a candidate may carry forward to the next campaign (*Id.* at 631-32); and

² The Court narrowly construed the scope of the ban as it applied to other non-group entities to exclude entities that (1) cannot participate in business activities, (2) have no shareholders who have a claim on corporate earnings, and (3) are independent from the influence of business corporations. *Id.* at 612.

--a ban on inter-candidate contributions (*Id.* at 632-33).

In general, the Court appeared to be satisfied that “real harm” had been demonstrated by the State’s submission of extensive evidence showing the existence of corruption or the appearance of corruption in electoral campaigns in the state. *Id.* at 608, 610, 618-21. The Court found that this evidence also demonstrated the state’s compelling interest³ in imposing the challenged campaign finance restrictions so as to reduce corruption, the appearance of corruption, and the disproportionate influence of corporations and labor unions in the campaign process. *Id.* Finally, the Court found each of these campaign finance restrictions to be sufficiently narrowly tailored so as to pass constitutional muster.

The Court invalidated two of SB 191’s restrictions, however: (1) a ban on non-election year contributions (*Id.* at 626-30); and (2) a ban on contributions during the legislative session (*Id.* at 630-31). The Court held that these bans did not address corruption or the appearance of corruption and thus were not sufficiently narrowly tailored. *Id.* at 629-31.

We think it fair to conclude from this case that the Alaska Supreme Court is inclined to be receptive to campaign finance measures that seek to deter corruption and the appearance of corruption so long as the measure is narrowly tailored. We note that the U.S. Supreme Court has likewise upheld similar restrictions. *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003) (upholding some of the campaign finance restrictions in the Bipartisan Campaign Reform Act of 2002). However, the U.S. Supreme Court recently signaled a possible new direction in its campaign finance jurisprudence in *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 75 U.S.L.W. 4503, 127 S. Ct. 2652 (2007), by reversing *McConnell* in part and holding that the Bipartisan Campaign Reform Act’s ban on electioneering communications by a non-profit advocacy corporation prior to an election cycle violated the non-profit corporation’s First Amendment rights. It is safe to say that federal campaign finance reform law is in flux at this time.

Question 3: Footnote 12 of your July 18, 2007, legal opinion mentions that the U.S. Supreme Court has, “vigilantly protected First Amendment principles in the campaign finance context.” Has the U.S. Supreme Court ruled on any cases involving government funding of elections (the presidential race check-off system, for example)? If so, were First Amendment issues raised and how were they evaluated?

³ Though as noted above, the court sometimes described the governmental interest as “substantial” or “legitimate” as opposed to “compelling.” *Id.* at 600, 613, 626.

Yes. In *Buckley v. Valeo*, the U.S. Supreme Court upheld the presidential race check-off system⁴ against a First Amendment challenge. 424 U.S. 1, 92-3 (1976). The Court held that the check-off system did not “abridge, restrict, or censor speech.” Instead, its purpose was to “facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.” *Id.*

Question 4: Footnotes 11 and 12 of your July 18, 2007, legal opinion referred to other state’s cases (Lavis, Daggett and Association of American Physicians and Surgeons) where First Amendment challenges had been made. Please provide a written review of the free speech issues raised and in what factual context, the legal standards used by the court and their applicability or inapplicability to the question of the 07CASE initiative’s suitability for the ballot.

These cases involved publicly financed campaign financing programs that are essentially identical to the one proposed by 07CASE. As here, the proponents of these programs call them “clean elections” programs. The first such program was enacted in Maine in 1996. Subsequently, First Amendment challenges were brought and considered by the First Circuit in *Daggett v. Commission on Governmental Ethics*, 205 F.3d 445 (1st Cir. 2000). Specifically, the challengers contended that the feature of the clean elections program that provided funds to participating candidates sufficient to match the funds of a non-participating opponent violated the First Amendment rights of non-participating candidates by chilling and penalizing their speech. *Id.* at 463-64. The challengers further contended that the clean election program’s treatment of independent expenditures as campaign contributions violated both the right to free speech as well as the right of association because it forced individuals making independent expenditures “to be associated with candidates they oppose by in effect facilitating their speech.” *Id.* at 464. Finally, the challengers argued that the public financing program was “impermissibly coercive” because it provided so many benefits to participation and so many detriments to nonparticipation that it essentially forced candidates to participate. *Id.* at 466.

The First Circuit in *Daggett* applied a test similar to that described in *State v. Alaska Civil Liberties Union*. It first evaluated whether the challenged statute burdened

⁴ The check-off system is a program whereby individuals may elect to contribute \$3 of their federal income tax to the presidential election campaign fund. 26 U.S.C. § 6096. Presidential candidates may elect to use such funding if they submit to certain campaign finance restrictions. 26 U.S.C. § 9004. It is called the “check-off system” because individuals elect to contribute by checking a box on I.R.S. Form 1040.

First Amendment rights, and if so whether it was narrowly tailored to serve a compelling state interest. 205 F.3d at 464. The court determined that the statute did not directly or indirectly burden First Amendment rights:

The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures. These facts allow us comfortably to conclude that the provision of matching funds based on independent expenditures does not create a burden on speakers' First Amendment rights.

Id. Furthermore, the court held that associational rights were not burdened because there was no forced association with the candidate the speaker opposed. *Id.* at 465. With respect to the coercion claim, the court held that public financing programs can be impermissibly coercive but that under existing precedent Maine's was not. *Id.* at 466-72. The court determined that the benefits of participation in the program were offset by burdens to participation, and this was reflected by the fact that a substantial number of candidates declined to participate in the program. *Id.* at 472. Nevertheless, while the court concluded that the program, on the face of it, was not impermissibly coercive, the court stated that the "door remains open" to a challenge that the program could be unconstitutional "as applied" to a particular set of circumstances in the future. *Id.*

A similar clean elections program was enacted in Arizona in 1998. Similar First Amendment challenges were brought and considered by the District Court of Arizona in *Association of American Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005). The district court adopted the reasoning of *Daggett* and held that the Arizona program was constitutional. *Id.* at 1200-03. On appeal, the Ninth Circuit declined to reach the merits of the case and dismissed the appeal as moot because the appellant, Association of American Physicians and Surgeons, had terminated its political action committee. *Ass'n of Am. Physicians and Surgeons v. Brewer*, No. 05-15630 (9th Cir. May 10, 2007).

In *Lavis*, the funding mechanism of the Arizona clean elections program was challenged. *Lavis v. Bayless*, CV 2001-006078 (Sup. Ct. Ariz. Dec. 21, 2001)). The Arizona program was funded in part by an annual \$100 lobbyist fee on lobbyists, and by a 10 percent surcharge on civil and criminal fines. The court held that these funding mechanisms were not forced speech because they did not compel funding for any particular candidate or ideology. *Id.* But the court did strike down the lobbyist fee. While the state had presented compelling reasons for the fee, it could not justify why the

fee had to be borne only by lobbyists. The court found that the fee was a “distinct, independent tax singling out a discrete group of First Amendment speakers,” and that it imposed an “unconstitutional prior restraint on the exercise of free speech.” *Id.*

The program of publicly financed campaign financing in 07CASE is quite similar to the Maine and Arizona clean elections programs. In this regard, if enacted by the people, 07CASE will likely trigger similar First Amendment challenges as were raised in *Daggett* and *Association of American Physicians and Surgeons*. The concern in *Lavis*, however, will not be raised because 07CASE does not impose a tax on a particular group of First Amendment speakers. Because the courts in *Daggett* and *Association of American Physicians and Surgeons* rejected the First Amendment challenges, there is no basis on which to find that the provisions in 07CASE which potentially burden First Amendment rights rise to the level of “clearly unconstitutional.” Accordingly, we may only flag the issue at this time. We note that the *Daggett* court left open the possibility that a clean elections scheme could be found unconstitutional in an “as applied” challenge to a particular set of circumstances. But it did not describe what those circumstances might be.

In sum, we reiterate our view that 07CASE does not violate any prohibited subjects, and recommend that the application be certified.

II. PROPOSED BALLOT AND PETITION SUMMARY

We have prepared the following ballot-ready petition summary and title for your consideration:

BILL PROVIDING FOR PUBLICLY FINANCED CAMPAIGNS

This bill creates a program of public financing for state election campaigns. To qualify, candidates must collect a certain number of signatures and \$5 campaign donations. Once qualified, candidates may receive campaign funding from the State of Alaska based on the office sought, upon agreeing to limits for campaign fundraising and spending. A qualified candidate may receive state matching funds if the candidate is opposed by a candidate that does not take part in the program.

Should this initiative become law?

This summary has a Flesch test score of 48.2, which approximates the target readability score of 60. We believe that the summary meets the readability standards of AS 15.60.005.

III. CONCLUSION

Assuming that the Division of Elections determines that there are a sufficient number of qualified subscribers, we conclude that this bill and application are in the proper form, and that the application complies with the constitutional and statutory provisions governing the use of the initiative. Therefore, we recommend that you certify this initiative application, and so notify the initiative committee. Preparation of the petitions may then commence in accordance with AS 15.45.090.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By:

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MAB/ajh

cc: Whitney Brewster, Director of Division of Elections