

BEFORE THE ALASKA PUBLIC OFFICES COMMISSION

Alaskans for Better Elections,)
)
 Complainant,)
)
 v.) APOC Case No. **23-02-CD**
)
 Preserve Democracy, Kelly Tshibaka,)
 and Alaskans For Honest Elections,)
)
 Respondents.)
 _____)

FINAL ORDER

Alaskans for Better Elections alleged that Preserve Democracy (PD) and Alaskans for Honest Elections (AHE) violated AS 15.13 in connection with the 22AKHE ballot initiative by failing to timely register with the Alaska Public Offices Commission (APOC), file reports, and identify top contributors. The complaint also alleges that PD engaged in a partisan get-out-the-vote effort that fell outside the AS 15.13.150(4) safe harbor and that Kelly Tshibaka and PD violated AS 24.45 by failing to comply with lobbyist rules. The Commission heard the matter on November 16, 2023, and dismisses all allegations in the Complaint for the reasons stated herein.¹

Alaska voters adopted a top-four open primary and ranked-choice general election system by ballot initiative in 2020. Under this system, the primary election includes all

¹ The allegations against AHE in this matter overlap with those in Complaint 23-01-CD and related staff-initiated civil penalty matters. This complaint is therefore dismissed as to AHE, without prejudice to resolution of those allegations in other matters. This order addresses only the allegations against PD and Kelly Tshibaka.

candidates, and voters select just one.² The top four vote getters in the primary election move on to the general election. In the general election, voters can rank their first, second, third, and fourth choice candidates, allowing those preferences to be taken into account if a voter’s top-ranked choice receives the least number of votes.³

Kelly Tshibaka was a candidate for the office of U.S. Senator in the 2022 election. After the election, on December 6, 2022, she founded PD, a nonprofit corporation of which she is CEO, president, and treasurer. She testified that she intended PD to work on get-out-the-vote efforts in Alaska and nationwide education against ranked choice voting.

Meanwhile, on November 23, 2022, Phillip Izon, Art Mathias, and Jamie R. Donley filed an application for certification of an initiative entitled “An Act Restoring Political Party Primaries and Single-Choice General Elections.”⁴ The Lieutenant Governor certified the petition,⁵ which its sponsors named “Alaskans for Honest Elections” and identified as 22AKHE, on January 20, 2023. The Division of Elections delivered petition booklets on February 8, 2023, and signature collection began.

² AS 15.15.025; AS 15.25.010.

³ AS 15.15.350(d).

⁴ See AS 15.45.020, AS 15.45.030.

⁵ See AS 15.45.070.

I. The Commission concludes that Preserve Democracy’s website is not an express communication.

Complainant’s primary allegation in this matter is that PD made expenditures in support of 22AKHE but failed to register with APOC and make the required reports. Each “person other than an individual” must register “[b]efore making an expenditure in support of or in opposition to . . . an initiative proposal application”⁶ An “expenditure” is “a purchase or transfer of money or anything of value, or promise or agreement to purchase or transfer anything of value, incurred or made for the purpose of . . . supporting or opposing an initiative proposal application.”⁷ The definition of an expenditure “includes an express communication,” but “does not include an issues communication.”⁸ And an express communication is one that “when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”⁹ APOC uses that definition of “express communication” in the ballot proposition and initiative context, in addition to candidate elections.¹⁰

The only alleged expenditure identified in the Complaint or Staff’s investigation is the money PD spent on its website. PD purchased its web domain on December 12, 2022,

⁶ AS 15.13.050(a). “Person” includes APOC entities and groups. AS 15.13.400(16).

⁷ AS 15.13.400(7)(A)(iv).

⁸ AS 15.13.400(7)(C).

⁹ AS 15.13.400(8).

¹⁰ *See Brief of Appellee, Alaska Policy Forum v. APOC*, 2023 WL 3972969 at *12-21 (Alaska Apr. 4, 2023) (describing APOC’s longstanding use of the definition to identify express communications in the ballot measure context).

and paid a website developer for services on January 23, 2023.¹¹ The website “went live” as a placeholder template on December 19, 2022.¹² Then on January 23, 2023, the website launched with more content, which was further revised on February 27, 2023.¹³

The Commission must decide whether PD’s website, read “with limited reference to outside events,” was “susceptible of no other reasonable interpretation but as an exhortation” to support 22AKHE.¹⁴ That analysis begins with the content of the website itself and then looks to surrounding context. The Commission has previously considered expenditures on communications about a subject that overlaps with an active ballot measure effort.¹⁵ Factors relevant to the Commission in those matters have included (1) whether the communications identified the ballot measure directly, (2) the extent to which the communications encouraged voters to do something, (3) the extent to which

¹¹ Staff Report Ex. 11 & 26.

¹² *Id.*

¹³ *Id.*

¹⁴ AS 15.13.400(8).

¹⁵ *Yes on 2 for Better Elections v. Alaska Policy Forum, et al.*, APOC Complaint 20-05-CD (approved July 12, 2021), (available at <https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=22767>); *Bags for Change*, AO 19-04-CD (approved Sept. 18, 2019) (available at <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=21018>); *Renewable Resources Foundation*, AO 13-04 CD (approved June 6, 2013) (available at <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=8475>); *Resources Coalition*, AO 08-02-CD (approved June 11, 2008) (available at <http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=4878>).

the communications were neutral, (4) the entity’s history of communicating about the topic, and (5) the timing of the communications relative to the ballot measure.¹⁶

Here, Staff recommended finding that PD’s website was an express communication in support of 22AKHE. In reaching that conclusion, Staff emphasized (1) the website’s close timing to the initiative application and certification, (2) the website’s non-neutral, anti-ranked-choice-voting message, and (3) Ms. Tshibaka’s comments in support of 22AKHE at two events in February 2023.¹⁷

The Commission reaches a different conclusion. This case does bear some similarities to others where the Commission has found express communications. But PD’s website is “susceptible of” “reasonable interpretations” other than “an exhortation to” support 22AKHE.¹⁸

A. Website content

The Commission first considers the website’s language itself. Staff’s investigation “revealed no evidence that PD’s website ever directly *or indirectly* identified 22AKHE.”¹⁹ The website also did not mention AHE or link to any AHE materials.

In its original bare-bones form, from December 19, 2022 through January 23, 2023, visitors encountered only a logo, a donation page, and a landing page with this text:

¹⁶ *Brief of Appellee, Alaska Policy Forum v. APOC*, 2023 WL 3972969 at *19-26 (Alaska Apr. 4, 2023) (discussing prior Commission decisions and analyzing the *Alaska Policy Forum* matter on appeal to the Alaska Supreme Court).

¹⁷ Staff Report at 13.

¹⁸ AS 15.13.400(8).

¹⁹ Staff Report at 4 (emphasis added).

Preserving Democracy means election systems are simple to understand and accessible to all Americans. We focus on increasing voter turnout and fighting the spread of Rank Choice Voting. This is key to protecting the democratic participation of all and upholding the will of the majority.²⁰

On January 23, 2023, PD published more extensive material on the website, and the content remained unchanged in substance through February 27, 2023.²¹ The landing page described PD as “a non-partisan group dedicated to preserving the fundamentals of our democracy by fighting the spread of [ranked choice voting] and increasing voter turnout,” which it said is “key to protecting democratic participation and preserving the will of the constituents.”²² The page also said:

- “In order to preserve our democracy, elections must be easy to understand and accessible to all Americans.”
- “Ranked Choice Voting (RCV) is a political weapon and emerging threat to our democracy.”
- “It is a complex, multi-step process that confuses voters, escalates negativity, increases costs, and results in voter suppression.”
- “RCV is already in 28 states,” “legislatures in 14 states are considering expanding or implementing RCV,” and “Congress has introduced a bill twice before to make RCV mandatory in all 50 states for U.S. House and Senate races.”
- “If we don’t act now, the entire U.S. election system is about to change.”²³

²⁰ Staff Report Ex. 11 & 26; Resp. Ex. B (available at <https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=25492>).

²¹ Staff Report Ex. 12 & 26; Resp. Ex. C., (available at <https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=25492>).

²² Staff Report Ex. 12; Resp. Ex. C.

²³ *Id.*

On a separate tab, the website expanded upon PD’s criticisms of ranked choice voting.²⁴ It described PD’s missions as “combatting RCV” and “working to increase voter turnout,”²⁵ telling readers that PD’s priorities were:

- [c]ombat RCV in Alaska, Nevada, and [o]ther [s]tates” by “showing RCV suppressed the vote and disenfranchised voters in Alaska” to “educate decision-makers in AK, NV, & other states considering enacting RCV state-wide,”
- engage in “Targeted Voter Registration and Get Out the Vote Efforts” in Alaska and “other House districts with tight races as funds allow,” and
- “Oppose Other RCV Initiatives” as “RCV proposals spread,” by “mobilizing and empowering voters and policy-makers to oppose RCV by educating and equipping them with real data, case studies, and RCV voter perspectives.”

On February 27, 2023, the website underwent further expansion, but without notable changes to the substance of its message about ranked choice voting.²⁶

PD’s website differs from the Alaska Policy Forum website about ranked choice voting, which the Commission found was express communication that advocated voting against the ballot measure that implemented ranked choice voting in Alaska.²⁷ The two websites are similar in that their content is not neutral; both proclaim a strong anti-ranked-choice-voting position and seek to persuade readers of that view.²⁸ But the

²⁴ Resp. Ex. C.

²⁵ *Id.*

²⁶ Staff Report Ex. 11; Resp. Ex. A (available at <https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=25492>).

²⁷ *Alaska Policy Forum*, APOC Complaint 20-05-CD at 3 (“[T]he Commission concludes that Alaska Policy Forum’s communications were made to influence the vote on the ballot measure and so were covered expenditures and communications.”).

²⁸ *Id.* at 2, 4-6.

messages differ in what they ask of readers. Alaska Policy Forum’s message was pointed squarely at Alaskans, encouraging them to look out for ranked choice voting when going “to the polls in November” and to “SAY NO to Ranked Choice Voting,” providing links to material opposing the ballot measure by name.²⁹ Its clear objective was to persuade Alaska voters to defeat the initiative.³⁰

By contrast, PD’s website cannot be read only as encouraging Alaskans to take action in support of 22AKHE. PD encourages a variety of actions, including opposing ballot measures to adopt ranked choice voting in other states and working to improve voter turnout. PD comes closest to encouraging support of 22AKHE when it promotes “mobilizing and empowering voters and policy-makers to oppose RCV.”³¹ But that statement, especially early in the 22AKHE process, can also be read as supportive of a bill in the Alaska legislature to repeal ranked choice voting,³² or as general opposition to ranked choice voting nationwide.

B. Factors regarding “outside events”

The second part of the analysis considers context, including the timing of the communication and the organization’s other messages about the subject over time. With respect to timing, Staff noted that PD’s website arose shortly after the 22AKHE

²⁹ *Brief of APOC*, 2023 WL 3972969 at *22-24.

³⁰ *Id.*

³¹ Resp. Ex. C.

³² Such a bill was introduced in the Alaska House of Representatives on January 19, 2023. Staff Report Ex. 21.

application was filed. The Alaska Policy Forum’s communications, however, were disseminated during the active campaign, after the initiative to adopt ranked choice voting was placed on the ballot.³³ During the relevant period for PD’s website, 22AKHE was in a far lower profile stage.

Staff also noted that PD, like Alaska Policy Forum, had no pre-initiative history communicating about ranked choice voting. As a candidate, though, Ms. Tshibaka testified that she frequently expressed negative views about ranked choice voting.³⁴

Staff focused on PD’s communications about 22AKHE concurrent with its website’s availability to the public. Specifically, Staff highlighted comments supportive of 22AKHE that Ms. Tshibaka made at two events. First, she spoke at a PD fundraiser at Bell’s Nursery on February 9, 2023.³⁵ When asked whether PD and AHE were “combining . . . efforts” or “coordinat[ing],” she noted that AHE leaders were co-hosting the event and said “so in that sense, yes, we are running in parallel.”³⁶ She explained that AHE had “a ballot initiative to overturn ranked choice voting” and encouraged listeners to attend AHE’s event the following week, where “the money that they are raising is going to collecting signatures.”³⁷ Ms. Tshibaka went on to say “[w]e’ve got to get a counter message out there, so when it is on the ballot, we win.” She described PD’s

³³ *Brief of APOC*, 2023 WL 3972969 at *25.

³⁴ *See* Staff Report Ex. 1 at 36; Response to Staff Report at 4 (available at <https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=25489>).

³⁵ Staff Report at 5 & Ex. 17.

³⁶ *Id.*

³⁷ *Id.*

messaging as “super important” and the two groups’ efforts as “a, both and,” as opposed to “an either or,” and said “we’re working in tandem like that.”³⁸

Another listener asked Ms. Tshibaka whether the petition books would be available to sign at AHE’s event the following week, and she confirmed that they would.³⁹ She said, “we wanted the petitions to be here tonight, I thought they were, but I think they were delayed being printed off in the Division of Elections.”⁴⁰ And she encouraged supporters to volunteer to help get the petition signed.⁴¹

Second, Ms. Tshibaka spoke at the Alaska School of Government on February 13, 2023.⁴² There, she outlined four ways to attack ranked choice voting:

- Educate and persuade Alaskans and Americans why ranked choice voting is bad;
- Try to get the legislature to overturn ranked choice voting;
- Do a ballot initiative – “please sign it”;
- Through the Courts.⁴³

Ms. Tshibaka went on to say, “we can’t let the narrative get away from us so that nine months from now when we go yeah, we got the signatures, it’s on the ballot, we also have been inundated with propaganda about how great ranked choice voting is and there is no counter message.”⁴⁴

³⁸ *Id.*

³⁹ Staff Report at 5-6 & Ex. 18.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Staff Report at 6.

⁴³ *Id.* (quoting an audio recording of the event).

⁴⁴ *Id.*

An entity can tie its messaging so tightly to a campaign about a ballot initiative that the entity’s website—even if it speaks in more oblique terms—can only be read as part of the campaign effort. For example, in Complaint 23-01-CD, decided concurrently with this one, the Commission found that an entity’s non-specific, anti-ranked-choice website was an express communication supporting 22AKHE because (1) the more general website was immediately preceded by the entity’s former website, which openly and specifically supported 22AKHE, and (2) the entity continued, during the relevant time period, to present itself to the public as “the group” behind the initiative.⁴⁵

Here, Ms. Tshibaka’s few public statements expressing support for 22AKHE do not tie PD nearly so tightly to the initiative. She described PD as a different organization from AHE with a different and broader focus. And she told PD supporters that money “they” raised—referring to an upcoming AHE fundraiser, not PD’s money—would go to support signature gathering.⁴⁶

At most, Ms. Tshibaka’s statements can be read as an expression of her hope that PD’s “counter message” against ranked choice voting might influence Alaska public opinion in advance of an election on the initiative, “so when it is on the ballot we win.”⁴⁷ If, closer to an election on 22AKHE, PD indeed uses its resources, including its website

⁴⁵ *Alaskans for Better Elections v. Alaskans for Honest Elections, et al.*, APOC Complaint 23-01-CD (approved Jan. 3, 2024) at 12-13 (available at <https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=25547>).

⁴⁶ Staff Report Ex. 17.

⁴⁷ Staff Report Ex. 17.

or other expenditures, as tools to support AHE’s campaign to pass the initiative, PD should report those expenditures.

In sum, the Commission concludes that PD’s website against ranked choice voting is susceptible of other reasonable interpretations than as an exhortation to support 22AKHE. The website itself does not directly or indirectly advocate for the initiative. And Ms. Tshibaka’s separate expression of support for 22AKHE is not enough to make PD’s website unmistakably part of the 22AKHE campaign.

II. The remaining allegations in the Complaint are also dismissed.

The Commission agrees with Staff’s recommendations to dismiss the Complaint’s other allegations. First, Complainant alleged that PD’s get-out-the-vote effort in the 2023 Anchorage municipal election was directed at Republican voters and was therefore a reportable campaign expenditure.⁴⁸ Voter turnout advocacy falls within a safe harbor if the effort “do[es] not favor a particular candidate, political party, or political position.”⁴⁹ Staff’s investigation did not find evidence supporting this allegation. PD’s mailers did not encourage voters to vote any particular way. And PD reported that they went to “medium propensity voters” in Assembly Districts 4 and 5, regardless of party registration.

The Complaint also asserted that Ms. Tshibaka violated AS 24.45.041(a) by failing to register as a lobbyist. A “lobbyist” is a paid employee or contractor who communicates with public officials “for the purpose of influencing legislation or

⁴⁸ Staff Report at 15.

⁴⁹ AS 15.13.150(4).

administrative action for more than 10 hours in any 30-day period in one calendar year” or represents herself as a lobbyist.⁵⁰ Complainant thought Ms. Tshibaka might be paid for her work for PD. And Complainant noted that she testified before the House State Affairs Committee in support of a bill to repeal ranked choice voting and commented on a podcast that she was advocating for the legislature to overturn ranked choice voting.⁵¹

Ms. Tshibaka testified that she is volunteer and is not paid by PD. She also testified that her advocacy for legislative repeal of ranked choice voting has consisted of only a letter writing campaign and her testimony on the subject on one occasion. She provided that testimony remotely, and it lasted only a few minutes. In sum, no evidence supported the allegation that Ms. Tshibaka must register as a lobbyist.

III. CONCLUSION

The Commission concludes that Preserve Democracy’s website opposing ranked choice voting did not trigger the registration, reporting, and paid-for-by identifier requirements during the relevant time period, and dismisses those allegations against it.

The Commission agrees with Staff that the evidence supports Preserve Democracy’s position that its get-out-the-vote mailers for the 2023 Anchorage municipal election fell within the AS 15.13.150(4) safe harbor and dismisses that allegation.

The Commission agrees with Staff that no evidence showed that AS 24.45 applies to any activities of Preserve Democracy or Ms. Tshibaka and dismisses that allegation.

⁵⁰ AS 24.45.171(11).

⁵¹ Staff Report at 16.

The Commission dismisses the allegations in this Complaint against Alaskans for Honest Elections, without prejudice to their resolution in other matters.

This is a final Commission order. It may be appealed to the superior court within 30 days from the date of this order.⁵² A request for the Commission to reconsider this order must be filed within 15 days from the date this order is delivered or mailed.⁵³

Dated: January 4, 2024.

BY ORDER OF THE ALASKA PUBLIC OFFICES COMMISSION⁵⁴

Certificate of Service: I hereby certify that on this date, I served, by certified mail, US mail, and email a true and correct copy of the foregoing in this proceeding on the following:	
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Paralegal

1.4.23
Date

⁵² AS 15.13.380(g), AS 44.62.560, Alaska R. App. P. 602.

⁵³ 2 AAC 50.891(g).

⁵⁴ Commissioners Suzanne Hancock, Dan LaSota, Richard Stillie, and Lanette Blodgett voted to approve this order. Commissioner Eric Feige did not participate in the November 16, 2023 meeting or the decision.