

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

March 13, 2014

**SUBJECT:** Constitutionality of AS 15.13.072(g)  
(Work Order No. 28-LS1579)

**TO:** Senator Berta Gardner  
Attn: Thomas Presley

**FROM:** Alpheus Bullard  
Legislative Counsel

You asked about the constitutionality of the portion of AS 15.13.072(g)<sup>1</sup> that prohibits non-incumbent candidates for governor and lieutenant governor from soliciting or accepting campaign contributions in Juneau during a legislative session.

A court is likely to find that the portion of AS 15.13.072(g) that serves to prohibit non-incumbent candidates for governor and lieutenant governor from soliciting or accepting campaign contributions in Juneau during a legislative session is an unconstitutional abridgement of the First Amendment freedoms of those persons who desire to contribute to these candidates while the legislature is in session.<sup>2</sup>

The U.S. Supreme Court has held that the only rationale for restricting the time or place in which campaign contributions may be made is the threat of corruption or the appearance of corruption. *See Buckley v. Valeo*, 424 U.S. 1 (1976). Campaign contributions made to legislators and legislative employees during a legislative session do create the potential for actual or apparent corruption. But campaign contributions made to candidates who are *not* legislators or legislative employees do not present the same concern.

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<sup>1</sup> AS 15.13.072(g) provides:

(g) A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 for election or reelection to the office of governor or lieutenant governor may not solicit or accept a contribution in the capital city while the legislature is convened in a regular or special legislative session.

<sup>2</sup> While beyond the scope of your question, it is also likely that a court would find the entire provision (AS 15.13.072(g)) unconstitutional.

In *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), the Alaska Supreme Court invalidated two statutory provisions: a ban on non-election year contributions in AS 15.13.074(c)(1) and a bar on contributions to legislative candidates during the legislative session in AS 15.13.074(c)(2).<sup>3</sup> Although the court did not address the limits on candidates found in AS 15.13.072 (the court's focus being on the rights of potential contributors and not those of candidates),<sup>4</sup> the court did find that prohibiting contributions to candidates during the legislative session interfered with a contributor's right of association with non-incumbent candidates without promoting the government's interest in preventing corruption or the appearance of corruption.<sup>5</sup>

The court found that the state's interest in preventing corruption or its appearance could not be used as a justification for prohibiting non-incumbent candidates from accepting contributions during legislative sessions. By the same logic, the state's interest in preventing corruption or its appearance would most likely be found insufficient to justify prohibiting non-incumbent candidates for governor and lieutenant governor from accepting campaign contributions during a legislative session. It is not clear to me how the potential for possible corruption or its appearance is increased by any person outside of the legislature soliciting or accepting a campaign contribution during a legislative session. I do not see any clear relationship between the timing of a legislative session, corruption or the potential for government corruption, and campaign fundraising by persons outside of the legislature (and potentially outside of government altogether).

While the court acknowledged in *ACLU* that the state may impose restraints on the exercise of First Amendment free speech rights in order to prevent corruption or the appearance of corruption, and that the receipt of contributions by legislative incumbents was relevant to the appearance of impropriety, the court distinguished this from the receipt of contributions by challengers, and found that prohibiting challengers from

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<sup>3</sup> The 1996 amendment to election campaign laws enacted AS 15.13.074(c), which, at that time, limited the time when persons and groups could make contributions to candidates. (Section 11, Ch. 48, SLA 1996.) Under AS 15.13.074(c)(2), as it read when the *ACLU* suit was filed, contributions to legislative candidates, both incumbents and challengers, could not be made during a regular legislative session.

<sup>4</sup> While the court did not expressly invalidate AS 15.13.072(d) in the *ACLU* case (until amended by sec. 1, ch. 106, SLA 2008, AS 15.13.072(d) prohibited non-incumbent candidates for the legislature from soliciting or accepting campaign contributions), the Alaska Public Offices Commission (APOC) ceased enforcing the statute against non-incumbent candidates for the legislature on the basis of the court's ruling.

<sup>5</sup> The statutory restriction on candidates for governor and lieutenant governor accepting contributions during the legislative session at AS 15.13.072(g) was added by sec. 4, ch. 74, SLA 1998, and thus was not addressed in the *ACLU* case.

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accepting contributions during legislative sessions was not narrowly tailored to the state's compelling interest.<sup>6</sup>

Accordingly, it is my opinion that the campaign fundraising restrictions imposed on non-incumbent candidates for governor and lieutenant governor by AS 15.13.072(g) would be interpreted by a court as insufficiently tailored to the state's interest in preventing corruption and the appearance of corruption.<sup>7</sup>

If you have questions, or if I can be of further assistance, please do not hesitate to contact me.

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Enclosure

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<sup>6</sup> "Statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611 - 612 (1973) (citations omitted).

<sup>7</sup> Note that the Department of Law has opined that, while it has doubts as to the subsection's constitutionality, it "cannot conclude that it is unconstitutional." See Inf. Op. Att'y Gen. 661-99-0513 (June 22, 1999) at 8.