

# INSIDE *ALEC*

A PUBLICATION OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

## State Budget Reform Toolkit

## 8 Things States Can Do to Push Back Against ObamaCare

SPECIAL ISSUE for the  
**2011 Legislative  
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## Washington's Special Tax Brand

BY JOHN STEPHENSON

Investment guru Warren Buffett once said, “Your premium brand had better be delivering something special, or it’s not going to get the business.” To get the business, Washington State has developed a brand based on its distinction as one of only seven states with no personal income tax of any kind. This has helped the state earn the rank of the ninth-best business tax climate in the nation, according to the Tax Foundation. Governor Christine Gregoire also promotes this brand on trade missions. But in 2010, Washington’s advantage was under threat.

Initiative 1098 (I-1098) on the November ballot would have imposed a new 5 percent tax on individuals whose adjusted gross incomes are greater than \$200,000 (\$400,000 for married couples who file jointly) and a 9 percent tax on those whose incomes are greater than \$500,000 (\$1 million for married couples filing jointly).

But Washingtonians rejected I-1098’s assault on the state’s brand by a 2-1 margin, despite massive spending by labor unions and cleverly designed incentives built into the measure.

Proponents argued that I-1098 was a “modest” tax increase on the wealthiest one percent of residents that would gener-

ate nearly \$2 billion annually in revenues dedicated to education and health care. Moreover, they said that I-1098 would spur investment and provide tax relief by increasing the amount of the business and opportunities (B&O) tax credit and lowering the state property tax.

In reality, I-1098’s “brand” didn’t deliver. For one, the tax would’ve fallen on more than high-income taxpayers. Many small and medium-sized businesses are organized as “pass through entities,” which means that any income from the business passes through to the individual owners or shareholders. Facing the prospect of a new tax liability, they would likely have fled or avoided the state altogether. A study by John Havens at Boston College found that, after New Jersey increased its income tax rate by three points, the state experienced a \$69.8 billion net decrease in wealth due to outward migration.

Like the Garden State does now, the Evergreen State would have had less fertile soil for prosperity thanks to an income tax. The Beacon Hill Institute at Suffolk University calculated that I-1098 would have cost the state 49,188 jobs and reduced real disposable income by \$2.5 billion, or \$149 per person, in Fiscal Year 2013.

Additionally, little in I-1098 would’ve protected taxpayers from politicians who

wished to expand the tax. After two years a simple majority vote of the State Legislature could have altered I-1098’s provisions. Such was the case in early 2010, when the Legislature suspended a citizen-initiated “supermajority” vote requirement for tax hikes in order to ram through an increase in the state’s sales tax.

For all the promises of relief, I-1098 would’ve done little to alleviate the overall tax burden, which even without an income tax is 15th-highest in the nation. According to the Washington Research Council, the proposal’s business tax savings amounted to only about 7 percent of total B&O tax collections. Further, because property taxes fall heaviest at the local level, I-1098’s reduction in the state’s component would’ve reduced a homeowner’s overall bill by just four percent.

An income tax is anything but a stable source of revenue, having fallen by double-digits in other jurisdictions during the current economic downturn. Recently, Oregon reported that it will collect 33 percent less than what it expected from a 2010 income tax hike on wealthy individuals. Of course, a volatile tax only increases the likelihood that politicians will seek more revenues regardless of the source. Just ask residents of Connecticut, New Jersey, Ohio, Pennsylvania, and Rhode Island, whose governments adopted income taxes over the last 40 years amid promises of less burdensome property and sales taxes. All continue to suffer under total state and local taxes above the national average.

Washington already has something special to “get the business,” and that is no income tax. On Nov. 2, Washingtonians overwhelmingly voted against I-1098 because they realized that a winning brand is not something to be tossed away. 🗳️

John Stephenson is State Government Affairs Manager for the 362,000-member National Taxpayers Union (ntu.org), a nonprofit, nonpartisan citizen group founded in 1969 to work for lower taxes, smaller government, and economic freedom at all levels. NTU is a private-sector member of ALEC’s Tax and Fiscal Policy and Energy, Environment, & Agriculture task forces.



# ALEC Releases its “State Budget Reform Toolkit”

BY JONATHAN WILLIAMS

The American Legislative Exchange Council's (ALEC) Tax and Fiscal Policy Task Force is pleased to announce the release of the *State Budget Reform Toolkit*. This new publication advances a set of budget reform and procurement best practices to guide state policymakers as they work to solve current budget shortfalls.

“This new ALEC publication will be a vital resource for America's legislators who are interested in real budget reform and taxpayer protection,” says Indiana Senator Jim Buck, public sector chair of ALEC's Tax and Fiscal Policy Task Force.

Eight nationally acclaimed authors provide more than 20 recommendations for legislators looking to modernize state budgeting, improve budget transparency, control cost, and improve government efficiency. Utilizing ALEC model legislation, the “toolkit” will assist legislators in prioritizing and more efficiently delivering core government services.

The need to reform state budgeting is more vital than ever before. As federal stimulus funds recede, states will grapple with even larger budgeting gaps. Clearly, the “business-as-usual” budgeting approach of raiding non-general fund accounts and using tricky accounting techniques will no longer rescue states from a budget crisis. States need innovative budgeting strategies to address these new economic challenges—without resorting to economically damaging tax increases. As ALEC's *Rich States, Poor States* publication so aptly points out, tax increases come at a very high cost: the erosion of state economic competitiveness. In the words of President John F. Kennedy: “An economy constrained by high tax rates will never produce enough revenue to balance the budget, just as it will never create enough jobs.”

This *State Budget Reform Toolkit* is designed to help legislators address the serious financial crises in the states by changing their budgetary system from the conventional input system, which is clearly a failed

policy model, to one focused on outcomes. This new budgetary system is called priority-based budgeting. By state officials and citizens determining the core functions of government first, the legislature can make the shift to priority-based budgeting. While this may seem like an elementary step, it is seldom taken before legislative appropriations are made. To gain control of a state budget, the following questions should be answered:

- What is the role of government?
- What are the essential services that government must provide to fulfill its purpose?
- How will we know if government is doing a good job?
- What should all of this cost?
- When cuts must be made, how will they be properly prioritized?

Only by carefully considering the proper role of government can legislators and governors effectively protect individual rights, while providing essential services to taxpayers in an efficient, cost-effective manner. This is not an “anti-government” philosophy; rather it ensures that what government is supposed to do, it does well. Furthermore, great savings can be achieved if legislators and agencies focus on the core functions of government rather than wasting time determining how a non-essential function can better perform.

In 2003, Washington state actually implemented priority-based budgeting to eliminate a budget deficit of \$2.4 billion without raising taxes. Had the traditional budgeting system been used, legislators would have started with the baseline budget and focused on cutting programs or raising taxes until the general fund matched the forecasted revenue. The state's economy was recognized by both parties as too weak to withstand a tax hike. Instead, the state prioritized services and determined the most important things to buy or deliver for the dollars invested.

Daunting state budget problems can



be solved by using the tools provided in ALEC's *State Budget Reform Toolkit*. If lawmakers ultimately ask state citizens to pay higher taxes for additional spending, the public will know one of two things: either, lawmakers believe the state's lowest priorities are still worth funding and taxpayers need to sacrifice more; or taxpayers will know the budget is not properly prioritized and lower priorities are being funded first, resulting in the request for tax increases to fund higher priorities.

Despite the economic difficulties facing the states, there is a pathway to budget reform. By following the policies suggested in ALEC's *State Budget Reform Toolkit*, lawmakers can make informed decisions and build a solid budget focused on delivering the best results and core essential government services for taxpayers.

To obtain your copy of the *State Budget Reform Toolkit*, visit [www.alec.org](http://www.alec.org) or contact Jonathan Williams at [jwilliams@alec.org](mailto:jwilliams@alec.org).



Jonathan Williams is the director of the Tax and Fiscal Policy Task Force, and co-author of *Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index*.

# 8 Things States Can Do to Push Back Against ObamaCare

BY GRACE-MARIE TURNER

States will be on the front lines in the battle against ObamaCare over the next two years as they lead the fight against this hugely unpopular law.

Newly elected state legislators and governors are facing a torrent of federal mandates to implement the new health overhaul law—a law which many vociferously campaigned against.

The federal government is demanding that states spend precious time in upcoming legislative sessions to set up massive new bureaucracies in anticipation of spending billions of dollars to implement ObamaCare.

But there are ways states can protect themselves from being swamped by these federal demands.

Some governors are prohibiting state officials from requesting any federal funds or taking any actions to implement the law without clearing it first with them.

Other states are considering joining the Florida lawsuit challenging the constitutionality of the health overhaul law.

Some governors, like Texas Gov. Rick Perry, are threatening to pull out of Medicaid altogether, not only because the program is already devouring funds needed for transportation, public safety, schools, etc., but also because the huge Medicaid expansion mandated under the *Patient Protection and Affordable Care Act* (PPACA) will overwhelm his state's budget.

And still others are planning to do as little as possible to comply—but just enough to keep federal officials out.

Here are eight things legislators can do to protect your states against the destructive health overhaul law:

## 1. Set up only a minimal health exchange

Using Utah as a model. The federal government is demanding that state legislators get to work creating health insurance exchanges that will be the mechanisms for strict federal regulation of health insurance and delivery of new subsidies in 2014. If they don't, the federal government will move in and set it up. A minimal exchange will be a firewall against more aggressive federal intrusion. (See more discussion below.)

## 2. Request a block grant for Medicaid

Medicaid is already gobbling up resources for everything from public safety to education to transportation, and the law requires states to expand it to cover at least 16 million more people in families earning up to \$30,000 a year. States have been pleading for years for more flexibility so they can gain control over spending and be freed from federal micro-management.

States could follow the lead of Rhode Island, which was granted a waiver from the Bush Administration in January of 2009 to receive its Medicaid funding as a block grant rather than a federal match for Medicaid spending. The result: The state saved \$150 million in the first 18 months. The state's Health Secretary Gary Alexander says the savings from Medicaid were "the sole reason why Rhode Island possessed a state budget surplus in 2010."

## 3. Join the Florida lawsuit

Consider having your state join 20 other states in the Florida lawsuit challenging the constitutionality of the individual mandate and the authority of the federal government to treat the states like contractors in implementing ObamaCare, violating the 10th Amendment.

## 4. Pass ALEC's *Freedom of Choice in Health Care Act*

At least 42 states have either passed or introduced legislation or amendments to protect their citizens from the federal law's onerous "individual mandate." Starting in 2014, everyone will be required to have government-approved health insurance or pay a fine. State law can help erect a firewall.

## 5. Request MLR waivers

Immediately request a waiver from the feds for health insurers to escape the onerous medical loss ratio rules that are going to drive many of them out of business. The federal government is dictating precisely how much insurers must spend on medical care vs. administrative costs. This is not workable, and it will put companies out of business, dry up competition and choices of policies, and put tens of thousands of insurance brokers out of work.





Grace-Marie Turner is president of the Galen Institute, a non-profit research organization devoted to free-market ideas for health reform. She can be reached at [galen@galen.org](mailto:galen@galen.org)

## 6. Get business waivers

Encourage businesses in your state to request waivers from federal regulations that dictate what they must cover in employee health insurance policies, which already are causing costs to increase and threatening their ability to continue to provide coverage to workers.

## 7. Hold hearings

State officials also are planning hundreds of hearings to learn from business people and entrepreneurs the effect on job creation and health costs of the law's new taxes and mandates. Hearings provide an opportunity to educate citizens about the impact the \$500 billion in new taxes in the law on job creation and health costs, the impact of adding 16 million more people to Medicaid rolls, and how seniors will be affected by cutting \$525 billion from the Medicare program.

## 8. Most importantly, do what works for your state

If the law were to be repealed or declared unconstitutional, states will need to be on the road to having policies in place to do the right kind of reform. Block grants for Medicaid and a lightly regulated exchange would be a good start.

**To exchange, or not:** One of the biggest dilemmas for state legislators is whether or not to create a Health Exchange, as required by PPACA.

The PPACA requires states to set up Health Exchanges to provide a vehicle for the legislation's strict and onerous regulation of health insurance and delivery of new subsidies for health insurance, which start in 2014. States must get plans in place starting in 2011 in order to meet federal deadlines.

Many states are really struggling with this: most Republicans and conservative Democrats are adamantly opposed to the legislation and want to see it repealed and replaced with sensible reform. The last thing in the world they want to do is spend precious time and resources implementing this law.

The danger is that if states don't set up their own exchanges and if the law is not

thrown out by the courts or repealed, the feds have legal authority to come in and set up an exchange that surely will be much more aggressively regulatory. The right kind of exchange could provide a vehicle for small businesses to pool together for more affordable policies, and for individuals to have portable insurance and to use Section 125 of the Internal Revenue Code to purchase insurance with pre-tax dollars.

**Don't follow Massachusetts:** States are looking at the experience of Massachusetts as a harbinger of things to come with the federal law. Massachusetts enacted a law under former Gov. Mitt Romney in 2006, creating an exchange, expanding Medicaid, and mandating that its citizens purchase health insurance or pay a fine, just like ObamaCare.

Massachusetts did nothing to lower health costs—the biggest concern of fam-

ilies and small businesses. Government control over the lives of citizens is becoming more onerous by the day. The Commonwealth's version of a health exchange "has turned into a legal pit bull by aggressively going after a growing number of Bay Staters who say they can't afford the mandated insurance—or the penalties imposed for not having it," according to the *Boston Herald*.

Many states are ready to push back against the micromanagement of a Massachusetts-style exchange and instead are looking at the much more lightly regulated Utah Health Exchange model. Utah's exchange is run by fewer than five state employees and is primarily a web-portal to facilitate the purchase of pre-tax health insurance for individuals and small businesses. It is a model many states were considering even before the federal law passed.


**At the federal level,** a vote to repeal ObamaCare will be high on the agenda of the House of Representatives when the new Congress convenes this month, and the bill is very likely to pass the House with support from both Republicans and conservative—or at least frightened—Democrats.

But the repeal bill will likely stall in the Democratic-controlled Senate and would certainly hit a brick wall with President Obama's inevitable veto.

So what next?

After the full repeal vote, the House will launch targeted votes to defund, delay, dismantle, and do direct oversight and investigation, especially into the avalanche of regulations being issued every day.

But the political battles will continue, and it is important that the American people understand the details of the health overhaul law and its damaging impact on the health sector and the economy, especially jobs creation and health costs.

ObamaCare seems to have become a modern-day hydra—like the mythological creature that grew new heads every time one was cut off. But the opposition efforts can play the same game. The battles have only begun, and the states are on the front lines. 

# Pushing Back on ObamaCare with ALEC's *Freedom of Choice in Health Care Act*

BY CHRISTIE HERRERA

With big conservative gains in statehouses throughout the country, state legislators now have a tremendous opportunity to fight the federal *Patient Protection and Affordable Care Act*, otherwise known as ObamaCare. And perhaps the primary legislative vehicle for state pushback of the new law is ALEC's *Freedom of Choice in Health Care Act*, which was introduced or announced that it would be introduced by 42 states during the 2010 session.

The model legislation—drafted by Phoenix-area physician Dr. Eric Novack and Arizona’s Goldwater Institute—was endorsed by ALEC in 2008 as a way for legislators to prevent a state-level requirement to purchase health insurance, known

as the “individual mandate,” as well as a Canadian-style, single-payer system within a state.

Today, ALEC's *Freedom of Choice in Health Care Act* can provide legislators with a state-level defense against ObamaCare's excessive federal power until the federal individual mandate takes effect in 2014.

If passed by statute, as six states have already done, the measure can provide standing to a state participating in any current lawsuits against the federal individual mandate; allow a state to launch additional, 10th-Amendment-based litigation if the current lawsuits fail; and empower a state attorney general to litigate on behalf of individuals harmed by the mandate.

If enacted as a constitutional amendment, as Arizona and Oklahoma have

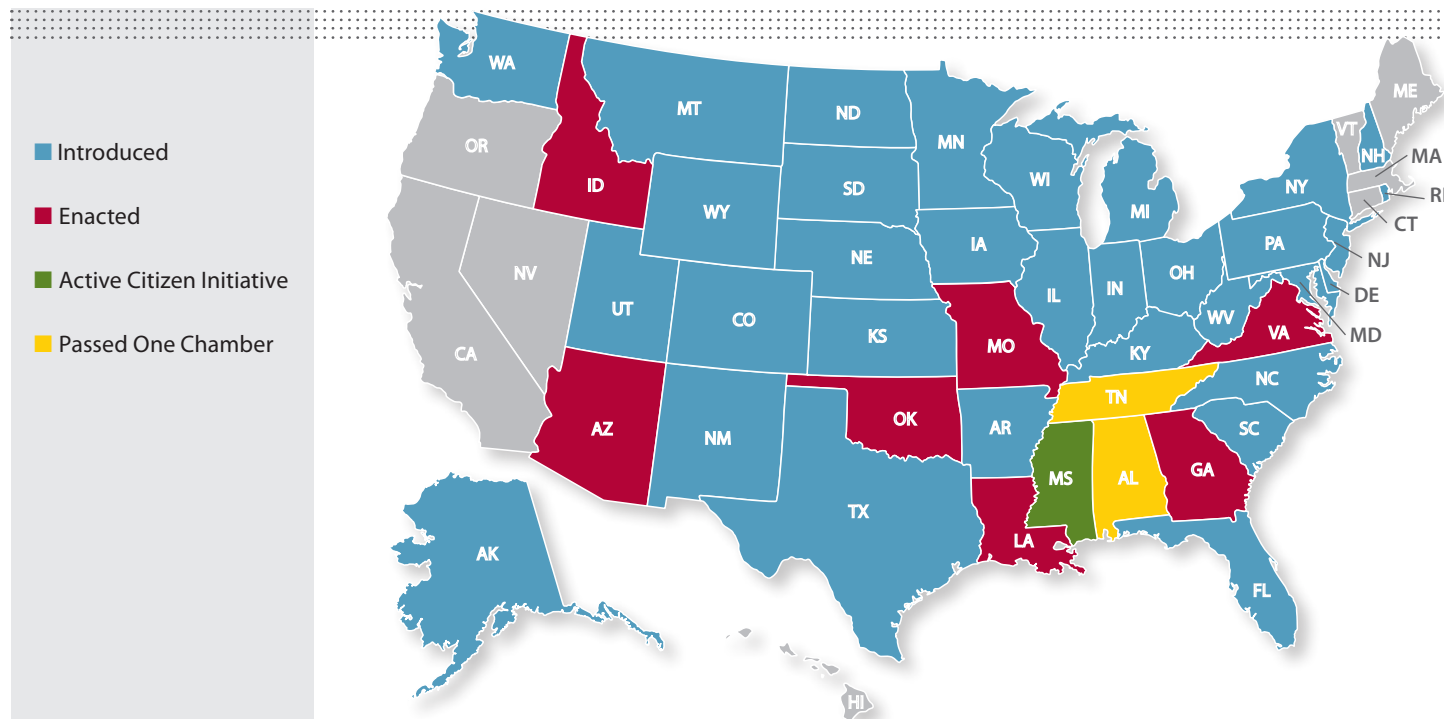
done, the measure will not only help defend against the federal individual mandate, but it will also prohibit a Canadian-style, single-payer system, and a state-level requirement to purchase health insurance, if ObamaCare is repealed.

With newly-energized, conservative majorities in many states, now is the time to take back state sovereignty—and, in the process, create an irresistible health policy momentum that Congress and the White House cannot ignore. And so we hope that you make ALEC's *Freedom of Choice in Health Care Act* part of your 2011 legislative agenda. 7

Christie Herrera is director of ALEC's Health and Human Services Task Force.

## ALEC's Freedom of Choice in Health Care Act

## 2010 State Action





# Hurricane Tax Holidays

BY ELI LEHRER, The Heartland Institute

Although half a decade has passed since the last major hurricane hit the United States, such luck in avoiding storms won't last forever. Eventually, major hurricanes will ravage the American coastline, destroy property, damage beaches, and destroy lives. Storm-prone areas that want to make themselves safer need to allow risk factors—not politics—to set property insurance rates, prepare good evacuation plans, and help people of modest means reinforce their homes against storms. Government, however, can only do so much; most homeowners and small businesses will need to work to take care of themselves when nature throws a temper tantrum. That's why it's a good idea for free-market legislators concerned about getting people ready for storm season to support the idea of sales tax holidays intended to encourage hurricane preparedness. Such holidays for storm preparation are a good idea because they save millions of dollars for consumers, have almost no impact on overall state revenue, and encourage citizens to take steps to make their properties safer.

Some background first: sales tax holidays are a reasonably new idea that began with a New York State law in 1996. During tax holidays that last between two and nine days, individuals can buy various, specified items without paying state-levied "sales and use taxes" that apply to most items purchased at retail. Because the tax holidays create attention and free advertising, many large retailers tend to offer special sales and discounts that add to consumer savings. In areas where localities can collect their own sales taxes without state permission, most local governments also suspend their taxes during this period. Right now, at least 19 tax holiday laws exist in 14 states and the District of Columbia, while five states lack any broadly-based sales tax. The original New

York State holiday exempted clothing from sales tax and most of the laws (15 of the 22) involve August holidays intended to help families buy "back to school" items. Since 2008, Virginia has maintained a May "Hurricane Preparedness Equipment" holiday in the last week of May. (Florida also experimented with the idea in 2006 and 2007.) This is the idea that ought to be expanded to every hurricane-prone state.

To begin with, the Virginia holiday, originally proffered by former Sen. Ken Stolle, saves real money for taxpayers. Since it began in 2008, estimates prepared by the Virginia Department of Taxation show that taxpayers in the state have saved at least \$7 million. With this money, Virginia residents have bought batteries, chargers, emergency lights, storm shutters, hurricane straps and more. When storms come, having these items around will make families and communities more secure against nature's worst wrath.

At the same time, Virginia's holiday seems to have had no significant impact on revenue and may have even improved it. While the severe recession means that Virginia hardware retailers reported sharply lower overall sales tax collections in 2008 than in 2007 (the last year without the holiday), the quarter including the tax holiday had the smallest year-over-year decline. It's impossible to know if the tax holiday actually lifted the state's revenue—Virginia doesn't track the exact amount of sales tax revenue it forgoes as a result of the holiday—but it's probably safe to say that it didn't hurt it. Since the Virginia holiday, and

proposed ALEC model legislation based on it, deals mostly with lower-cost items sold by stores that also sell higher-priced things, it's quite possible that increased traffic from sales and promotions related to the tax holiday actually increased state revenues. (At least a few people intending to buy flashlight batteries probably picked up other items they had been eyeing.)

Most importantly, tax holidays encourage the type of preparation that government should encourage—self-help. When a hurricane strikes a community, everyone encounters challenges. Public sector resources are often stretched to the breaking point and by necessity police, emergency management, and fire professionals must focus their efforts on maintaining order and helping vulnerable segments of the population like children, frail senior citizens, and the very poor. If most people can fend for themselves, at least in a limited way, the government will have more resources to devote to the people who need help the most. Thus, most people, in most hurricane-prone areas can and should be prepared to take care of themselves for several days without any help from the government. With the proper supplies, a bit of guidance, and plenty of ingenuity, most people can learn to survive in relative comfort and peace even when nature unleashes great fury. Tax holidays won't solve America's hurricane problems but they're not harmful to government revenues, are good for citizens, and help people to help themselves. Legislators should get on board to support them. 🌀

## What Should a Hurricane Tax Holiday Cover?

Based on the items included in the Virginia law and consultations with emergency preparedness experts, insurance, and building experts the following list of supplies will serve most communities well.

### Costing Less than \$1,000 each:

Portable Generators

### Costing Less than \$60 each:

Blue ice

Batteries (other than automobile and boat)

Carbon Monoxide Detectors,

Flashlights and Portable lanterns

Ground Anchors

Hurricane Straps

Mobile Phone Batteries

Mobile Phone Chargers

Fuel tanks

Nonelectric Food Storage Coolers

Portable self-powered radios

Two-way radios

Storm shutter devices

Tarps

# Public Employee Unions

## Pushing Government to Bankruptcy

BY MICHAEL HOUGH

The ever increasing size of government is a huge issue for the public and for state lawmakers who are held responsible for producing balanced budgets. A major factor in the growth of local and state government is public employee unions, which constantly push for higher member pay and more generous pensions, regardless of economic conditions. These unions wield a great deal of power as they can funnel members' dues into political campaigns. ALEC lawmakers should work to adopt paycheck protection legislation to reduce the size of government and protect workers from having their money go to candidates they don't want to support.

Two examples of public-sector unions harming taxpayers are Vallejo, Calif., and Montgomery County, Md. In the City of Vallejo, 74 percent of the city's \$80 million general budget was for police and firefighter salaries, benefits, and pensions.<sup>1</sup> The average firefighter salary was \$171,000.<sup>2</sup> City employees could retire at age 55 with 81 percent of their final year's pay guaranteed and police and city firefighters can retire at age 50 with 90 percent of their salaries for life and for the lives of their spouses.<sup>3</sup>

Despite Vallejo providing generous benefits for years, when the city faced a \$16.6 million deficit, the unions refused to cut salaries or benefits. Even after Vallejo filed for bankruptcy, unions took the city to court forcing

it to pay a 14 percent salary increase. Listed on Vallejo's bankruptcy filing as top creditors were the city retiree health plans, \$135 million, and the California Public Employees Retirement System, \$84 million.<sup>4</sup>

In Montgomery County, Md., even the *Washington Post* took them to task for their "political spinelessness—particularly in the face of politically powerful public employee unions."<sup>5</sup>

Eighty percent of Montgomery County's budget is for personnel. *The Washington Post* noted that in 2006 former County Executive "Douglas M. Duncan, a career politician then running in the Democratic primary for governor, pitched a gold-plated, pork-laden grab bag of political largess that drove county spending up by 11 percent."<sup>6</sup>

Over three years, Duncan increased spending by 30 percent and increased pay for firefighters, police, and county employees. Teachers also received raises so that today the average teacher salary in Montgomery County is \$76,483.<sup>7</sup> *The Washington Post* editors wrote, "Montgomery County Council members, most of whom were hoping for union endorsements in the fall elections, rubber-stamped Mr. Duncan's contracts. The Board of Education, equally beholden to the teachers union did the same..."

After years of fiscal irresponsibility and politicians caving into every demand of public-employee unions, Montgomery County now faces over a \$1 billion deficit.

These are just two examples of many where public-employee unions were responsible for recklessly driving up government costs.

To reduce the size of government and close budget gaps, legislators should limit the power of public employee unions. Unions often have hoards of money to spend in political campaigns because they can use automatically deducted dues from

government employee paychecks. *The Wall Street Journal* reported that The American Federation of State, County and Municipal Employees (AFSCME) was the largest outside spending group in the 2010 elections, spending \$87.5 million.<sup>8</sup> "We're the big dog," said Larry Scanlon, the head of AFSCME's political operations.<sup>9</sup>

Public employee unions will continue being the "big dog" as long as they have access to the taxpayer provided salaries of their members. Lawmakers should adopt paycheck protection legislation to block this process. ALEC has two model bills which state lawmakers can introduce:


### ***The Voluntary Contributions Act***

This legislation requires public employee unions that engage in political activities keep a segregated fund for political contributions. Contributions to this fund must be voluntary and the state payroll system shouldn't be used to distribute political contributions.

### ***Prohibition on Compensation Deductions Act***

This legislation prohibits public employee pay from being deducted for a political committee or to an intermediary through which any amount is provided to a political committee.

Both of these reforms will help protect public employee paychecks and will hinder the political influence of public employee unions who rely on funneling taxpayer funds into political campaigns. Public employee unions have used their influence to relentlessly push for bigger and bigger government—driving local and state governments to the brink of bankruptcy. These groups should not use coerced wages to push their big government agenda.

For more information on paycheck protection legislation, go to [www.alec.org](http://www.alec.org) or email [mhough@alec.org](mailto:mhough@alec.org). 

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5 "A Tale of Two Counties" *The Washington Post*. May 30, 2010.

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9 Ibid



JANUARY 23 - 29, 2011

National School Choice Week Needs YOU...

National School Choice Week is a national celebration dedicated to shining a spotlight on **effective** education **options** for every child. With participation by more than 150 organizations, ALEC members are encouraged to use National School Choice Week as an opportunity to promote educational choice and advance ALEC's school choice model legislation.

**How You Can Help:** State legislators are encouraged to join Speaker John Boehner, Senator Joe Lieberman, and governors across the country by proclaiming that they're "In" for National School Choice Week. Visit [www.schoolchoiceweek.com](http://www.schoolchoiceweek.com) to affirm your support, and then use the week, January 23-29, to send press releases, write opinion pieces, and reach out to your fellow lawmakers about the importance of school choice.

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# Digital Learning Now!

## Former Governors Bush and Wise Launch New Campaign to Transform Public Education

BY LIV FINNE

### THE PROBLEM

One-third of fourth graders and one-quarter of eighth graders in our nation are functionally illiterate. Nearly one-third of students don't earn a high school diploma. An estimated \$1 billion a year is spent each year on college remediation to teach lessons students should have learned in high school. Among the top 30 industrialized nations, U.S. high school students ranked 21st in science and 23rd in math. How can policymakers and lawmakers meet these problems?

### Digital Learning can be the Catalyst for Change

A Who's Who of 50 of the nation's smartest and most effective education reformers have launched *Digital Learning Now!*, a national initiative to advance policies to accelerate the shift to digital learning in public education. Led by former Govs. Jeb Bush (R-Florida) and Bob Wise (D-West Virginia), proponents released their Digital Learning Report on December 1, 2010. The report is available online at <http://www.excelined.org>. The introduction of the report sums up the many benefits of digital learning:

*"Digital learning can transform education.*

*"Technology has the power and scalability to customize education so each and every student learns in his or her own style and pace, which maximizes the chances for success in school. It offers teachers an effective way to overcome challenges and better educate students of all learning needs.*

*"Digital learning is the great equalizer. It holds the promise of extending access to rigorous high quality instruction to every student across America, regardless of language, zip code, income levels or special needs. New tools and improved services will help schools diagnose and address special learning needs more effectively and efficiently.*

*"Digital learning is a proven method. For more than a decade, corporations, the military, and higher education have used multiple modes of instruction to create a rapid and efficient path to mastery. In some countries, digital learning is already an integral part of the education system. In the U.S. an increasing number of K-12 school models are utilizing the best of online and blended learning. The fact is digital interaction and learning through social media, the Internet, and mobile devices are a way of life for most teens everywhere except in education.*

*"With digital learning, students will learn more, teachers will be provided new tools and skills, and schools will be more productive."*

Rocketship Education, founded in 2006, are California charter public schools which operate only with government funding. Rocketship charter public schools have transformed the elementary school model by using "blended" or "hybrid" classrooms which use both teachers and computer-assisted instruction. Two Rocketship elementary schools in San Jose, Calif., serve 1,000 students; 90 percent of them are low-income, and 70 percent of them speak English as a second language.

In 2007, one year after their school opened, students at Rocketship Mateo Sheedy Elementary School, scored 886 on California's Academic Performance Indicator (API), seventh highest in the state for low-income elementary schools. One year later, they scored 926 API, making them third highest in the state and outperforming students at upscale Palo Alto schools.

Students at Rocketship charter public schools spend 25 percent of their time before a computer, receiving individualized, interactive instruction through high-quality computer programs. Teachers provide the balance of their instruction.

Rocketship charter public schools have eliminated the achievement gap for its mostly low-income Hispanic children. They have also saved \$500,000 in staffing costs, money which has been used to pay teachers more and provide them with more professional development.

### Specific Recommendations for Lawmakers and Policymakers

Govs. Bush and Wise have released their "Ten Elements of High Quality Digital Learning" to help lawmakers identify policies "that will integrate current and future technological innovations into public education." Below is a list of the Ten Elements with specific policy changes states should implement to meet these goals.

#### 1. Student Eligibility: All students are digital learners.

- State ensures access to high-quality digital content and online courses to all students.
- State eliminates barriers to access, such as previous attendance in public school, which only limits, delays and diminishes opportunities for learning.

#### 2. Student Access: All students have access to high-quality digital content and online courses

- State does not restrict access to high-quality digital content and online courses with policies such as class size ratios and caps on enrollment or budget.



- State does not restrict access to high-quality digital content and online courses based on geography, such as school district, county or state.
- State requires students to take high-quality online college or career-prep course in order to earn a high school diploma.

### 3. Personalized Learning: All students can customize their education using digital content through an approved provider

- State allows students to take online classes full-time, part-time, or by individual course.
- State allows students to enroll with multiple providers and blend online courses with onsite learning.
- State allows rolling enrollment year round.
- State does not limit the number of credits earned online.
- State does not limit provider options for delivering instruction.

### 4. Advancement: Students progress based on demonstrated competency.

- State requires matriculation based on demonstrated competency.
- State does not have a seat-time requirement for matriculation.
- State provides assessments when students are ready to complete the course or unit.

### 5. Content: Digital content, instructional materials, and online and blended learning courses are high quality.

- State requires digital content and online and blended learning courses to be aligned with state standards or common core standards where applicable.

### 6. Instruction: Digital instruction and teachers are high quality.

- State provides alternative certification routes, including online instruction and performance-based certification.
- States provide certification reciprocity for online instructors certified by another state.
- State creates opportunity for multi-location instruction.
- State encourages post-secondary institutions with teacher preparation programs to offer targeted digital instruction training.
- State ensures that teachers have professional development or training to better utilize technology and before teaching an online or blended learning course.

### 7. Providers: All students have access to multiple high quality providers.

- State has open, transparent, expeditious approval process for digital learning providers.
- State provides students with access to multiple approved providers, including public, private and nonprofit.
- State treats all approved education providers—public, chartered, not-for-profit, and private—equally.
- State provides all students with access to all approved providers.
- State has no administrative requirements that would unnecessarily limit participation of high-quality providers (e.g., office location).
- State provides easy-to-understand information about digital

learning, including programs, content, courses, tutors, and other digital resources to students.

### 8. Assessment and Accountability: Student learning is the metric for evaluating the quality of content and instruction.

- State administers assessments digitally.
- State ensures a digital formative assessment system.
- State evaluates the quality of content and courses predominantly based on student learning data.
- State evaluates the effectiveness of teachers based, in part, on student learning data.
- State holds schools and providers accountable for achievement and growth.


### 9. Funding: Funding creates incentives for performance, options and innovation.

- State funding model pays providers in installments that incentivize completion and achievement.
- State allows for digital content to be acquired through instructional material budgets and does not discourage digital content with print adoption practices.
- State funding allows customization of education including choice of providers.

### 10. Delivery: Infrastructure supports digital learning.

- State is replacing textbooks with digital content, including interactive and adaptive media.
- State ensures high-speed broadband Internet access for public school teachers and students.
- State ensures all public school students and teachers have Internet access devices.
- State uses purchasing power to negotiate lower cost licenses and contracts for digital content and online courses.
- State ensures local and state data systems and related applications are updated and robust to inform longitudinal management decisions, accountability and instruction.

A list of organizations offering strategic and technical support to state leaders is provided at the end of the Digital Learning Report. The report concludes with a list of “Things State Leaders Can Do.” These include consulting resources at Keeping Pace 2010, updating surveys of student access to technology, and holding a digital learning summit like the one recently held in Virginia. *Digital Learning Now!* will then release a *Report Card on Digital Learning*, giving details about state-by-state progress, in October 2011.

Govs. Jeb Bush and Bob Wise have outlined a strategy for integrating digital learning into public education. Policymakers and lawmakers across the nation can improve public schools significantly by following the roadmap laid out by *Digital Learning Now!* 



Liv Finne is Director of Washington Policy Center's Center for Education. Liv represents WPC on ALEC's Education Task Force.



# Blueprint for Environmental Regulatory Reform

BY RUSS HARDING

**C**ompetition between the states for attracting jobs significantly intensifies during a down economy. While business taxes and labor policy receive much attention, the environmental regulatory system may be the most important factor in a state's ability to attract jobs. Most businesses desiring to locate or expand in a state must enter through the regulatory gate before they can invest and create jobs. A state's tax or labor policy makes little difference if a business cannot obtain an operating permit or license in a timely fashion. When a state's environmental regulatory system does not work properly, the gate becomes a barrier.

## PRINCIPLES

The following principles are recommended in legislating and administering state regulatory requirements:

- Environmental protection and economic development are not mutually exclusive, and both goals can be accomplished by utilizing sound conservation principles.
- State government should perform only core regulatory functions—specifically, making final permit and enforcement decisions, rather than conducting routine administrative tasks that can be performed by the private sector.
- All state regulatory procedures should ensure that law-abiding parties are treated fairly and promptly, rather than being subjected to arbitrary, belated or open-ended decisions by state regulators.
- State regulatory requirements should be set by elected officials—not by state administrative personnel who are not accountable to voters.

## PROPOSALS

### No Regulation Without Representation

When a state legislature passes a bill, it often omits many of the details needed to make the bill complete. To address this shortcoming, the state environmental agency writes regulations to supplement the bill's language.

These regulations are effectively laws, but have never been voted on by the people's representatives in the legislature.

Legislatures should end this unresponsive and undemocratic process for all regulations—not just environmental rules—in the following ways:

#### 1. Legislative approval of regulatory proposals

Legislatures should pass a statute that strips the agencies of the power to propose binding regulations. Instead, the agencies should be directed to draft proposed legislation specifying the details necessary to supplement the original bill. The proposed legislation would then be reviewed, amended and approved—or rejected—by the legislature.

#### 2. Periodic review and sunset of regulations

All regulations that have been promulgated by agencies should include a provision that they will sunset in five years unless they are reviewed and specifically reauthorized by the legislature prior to the expiration date. All existing regulations should be reviewed on a rotating basis to determine if they have achieved their intended results and have been cost-effective.

#### 3. No more stringent than federal requirements

If legislators cannot agree on legislative approval of regulatory proposals, they should at least pass a law that prevents state agencies from promulgating regulations more stringent than federal requirements without approval of the legislature. State regulators frequently generate rules that exceed federal restrictions with little or no oversight from elected officials. While it may be appropriate in certain instances to adopt regulations more stringent than federal law in order to protect human health or the environment, this should be done

only with explicit authorization from the legislature and not be left to the discretion of unelected regulators.

#### 4. Establish permit issuance deadlines

Legislatures should impose permit issuance deadlines. Agencies should be required to issue permits within 30 days for straightforward cases and within 60 to 90 days for the most complex permits. Legislatures should also stipulate that if an agency fails to act within the specified timeframe, permits will be deemed approved and the applicant refunded any permit application fees.

#### 5. Require fiscal note on regulations

A state law should be passed that requires fiscal notes on all proposed regulations similar to what most states require for pending legislation. The notes would estimate the cost of regulatory compliance to business and individuals, thereby making the expense transparent to votes and policymakers.

#### 6. Regulatory Bill of Rights

State law should provide for a regulatory bill of rights. This list should stipulate that if a permit applicant meets the requirements of state law, the permit will be issued in a timely manner by the responsible agency. It should also specify that all permit applicants be treated fairly and their applications be adjudicated without political interference.

#### 7. Single permitting agency

Most states have an environmental or natural resource agency which is responsible for issuing environmental permits. The culture of these agencies often fosters a negligent attitude toward prompt adjudication of permit applications. The mission of protecting the environment often conflicts with the agency's role of fair and timely permitting. Establishment of a single agency responsible for processing all types of permits and licenses would add accountability and transparency to the permitting process. This one-stop permitting agency could be staffed with existing personnel who are responsible for those functions in other state agencies, negating the need to hire additional employees.


#### 8. Privatization opportunities

The private sector should be utilized to assist state agencies in environmental permitting. The state should certify a list of firms approved to prepare and review environmental permit applications to ensure that the applicant meets or exceeds all state and federal regulatory requirements. State officials would still maintain final decision-making authority. Privatization of permit functions would shorten permit review periods, save the state money and provide state officials the flexibility to adapt to changes in future workloads without hiring or laying off employees.

#### 9. State permitting report card

The executive branch of state government should establish a report card that tracks the performance of issuing state-required permits and licenses. Aggressive goals that exceed statutory requirements should be established, tracked and reported to the public on a regular basis.

Cumbersome state regulatory programs that hinder job creation are a serious problem that requires bold action from lawmakers. States that enact serious common-sense regulatory reform will be able to compete much better for future jobs.

A good quality of life requires not just protecting natural resources, but also allowing the state's residents and businesses to prosper as well. In other words, a healthy human environment requires freedom. A state will come closer to that environment by adopting common-sense regulatory reform. 

Russ Harding is Senior Environmental Analyst and Director of the Property Rights



Network at the Mackinac Center for Public Policy, a research and educational institute headquartered in Midland, Mich. Harding is a member of ALEC's Energy, Environment, and Agriculture Task Force.



# The Backdoor Energy Price Hike

BY CLINT WOODS

Despite massive deficits and a staggering unemployment rate, California is moving forward with implementation of environmental policies which include, among other things, cap-and-trade and a low carbon fuel standard (LCFS). In Washington, policymakers have acknowledged that a comprehensive federal climate policy is effectively off the table for the foreseeable future. In response to this political reality, advocates of climate legislation are likely to seek broad emissions reductions via less direct routes, and imposition of a federal low carbon fuel standard is a likely source of such reductions. Some in Congress are already advocating such a move, hunting for the legislative vehicle that gives an LCFS the best odds of gaining passage by amendment.

An LCFS is a government-imposed reduction of the carbon intensity of transportation fuels with the objective of cutting CO<sub>2</sub> emissions. A low carbon fuel standard creates a ceiling on the amount of CO<sub>2</sub> that can be generated in relation to the energy produced. Unfortunately this backdoor climate scheme has real consequences for both the environment and for those living outside the Beltway. A few of the unintended consequences of this policy include higher energy prices, greater reliance on foreign sources of energy and, ironically, increased greenhouse gas emissions.

LCFS mandates would raise gasoline and diesel prices, greatly impacting American households and small businesses that depend on reasonably priced energy. This is especially troubling as the American economy attempts to regain its standing in the global economy. Our policymakers must reject a LCFS policy if America is to maintain a competitive advantage and afford its citizens the opportunity to prosper.

A comprehensive analysis by the Charles River Associates determined that,



“adoption of a nation-wide LCFS will result in a price shock that will dramatically increase the cost of transportation to consumers and have long term effects on the economy by increasing transportation costs for all goods.” Once the LCFS is implemented this price hike is estimated to raise transportation energy costs anywhere from 30 to 80 percent within five years. This price volatility for transportation fuels would cast greater uncertainty over the health of the U.S. economy and cripple business investment.

Countless small businesses around the country rely on stable fuel costs for their shipping fleets to provide consumers with their manufactured goods. Significantly raising prices ensures all materials and services will be more expensive. A price increase on fuels is equivalent to a larger tax burden on the American public. This backdoor approach by Washington would shed millions of jobs while simultaneously

cutting household purchasing power. This LCFS policy is troubling enough without taking into account other major national priorities such as confronting a weakened currency, burgeoning debt crisis and escalating unemployment.

Furthermore, an LCFS would cause major disruptions to existing supply chains because under such a mandate, considerations such as the cost of production and transportation or the stability of a supply would be displaced by concern for the compliance costs with the new mandate. The result would be major international supply “shuffling,” leading U.S. refiners to increase imports of Middle Eastern light sweet crude, in turn causing Asian countries to increase imports of heavier Canadian oil supplies. A June 2010 study found that LCFS compliance shuffling “would double the greenhouse gas emissions associated with crude oil transport to and from regions directly and indirectly impacted by the policy,” thus both undermining the goal of the LCFS by increasing GHG emissions, and undermining U.S. energy security by reducing our use of North American energy supplies.

America’s future is inextricably linked with affordable and reliable sources of energy. In order to have a sustained economic recovery, we must have businesses that can afford to invest in new projects, create new jobs and expand their reach in global markets. Increased energy costs as a result of bureaucratic rulemaking will stagnate growth and force business to use a larger percentage of their budget to pay for energy expenditures. Higher energy prices, major disruptions in supply chains, and reduced energy security are not the hallmarks of good policy. While energy efficiency and diminishing carbon emissions may be laudable goals, an LCFS is simply not the solution. 🌀

Clint Woods is the Director of ALEC’s Energy, Environment, and Agriculture Task Force.



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# The Trans-Pacific Partnership

BY RT HON MIKE MOORE

**T**he Trans-Pacific Partnership (TPP) presents an exciting opportunity for the United States to boost exports and create jobs. The partnership is being negotiated by the United States, Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam. These countries are committed to producing a high standard agreement that will set new benchmarks for trade and economic integration.

TPP affords the U.S. a key role in shaping how business and trade are conducted within Asia over the next 50 years. Participating in TPP will ensure that the U.S. benefits from Asia's strong economic growth, and will level the playing field for U.S. companies in the Asia-Pacific region. TPP will also contribute to President Obama's goals of doubling U.S. exports by 2015 and creating 2 million new U.S. jobs.

The value of the TPP marketplace to the U.S. is significant. It will give the U.S. much improved access to markets with a total population of 190 million people and a collective GDP of nearly \$2 trillion. U.S.

annual exports to these economies now value \$117 billion, with nearly \$4 billion in agricultural exports.<sup>1</sup> These figures will grow as TPP helps make U.S. exporters more competitive, speeds the movement of goods through ports, gives service exporters preferential access in key sectors, and offers a more predictable environment for investors.

## An Ambitious and Inclusive Partnership

What sets TPP apart from other trade agreements? TPP seeks to make trade more seamless, lift the standard for trade agreements, and form an expandable platform so additional countries can join TPP if they are committed to high quality, ambitious agreements.

## Seamless Trade

The TPP countries want to address the issues faced by businesses, be they large companies or small and medium sized enterprises, in today's trading environment. Traditionally, trade agreements focused on removing tariffs on goods. While this remains important, ways of doing business

have changed over the decades. Many companies run production lines that span the Asia-Pacific region and beyond. Investment and trade in services are becoming increasingly important. TPP will address the 'behind the border' issues that add complications and cost to 21st century business. Operating more seamlessly across markets will help businesses to be more productive, robust, and profitable.

## High Quality

The TPP countries are striving to set new high standards in the Asia-Pacific region so that the partnership can make a real and lasting contribution to economic growth. TPP countries are serious players, many with proven experience in negotiating high quality agreements. The aim is for TPP to:

- address 'behind the border' barriers;
- promote efficient and strong supply chains, trade and investment in services, new technologies and emerging sectors;
- encourage the participation of small and medium-sized enterprises;
- enhance trade in environmental goods and services; and

<sup>1</sup> U.S. State Department Country Reports

- promote high standards of transparency and accountability.

### A Model for Expansion

TPP could eventually cover a region that represents more than half of global output and over 40 percent of world trade. Unlike other trade agreements that consciously exclude others, TPP is designed to encompass other countries that share the vision of a high quality, ambitious, and comprehensive regional trade agreement.

TPP's vision for expansion goes right back to its roots. Its predecessor was 'P3,' a high standard agreement negotiated by Chile, Singapore, and New Zealand. Brunei then joined the partnership. Subsequently, these nations invited others to join a Trans-Pacific Partnership. The U.S., Australia, Peru, Vietnam, and Malaysia are now on board, demonstrating that the expansion model works. We are seeing interest from additional countries, including mega-economies like Japan—and this is an exciting trend.

It is hoped that TPP will also provide a boost to the World Trade Organisation Doha Development Round negotiations. New Zealand is committed to these negotiations and they will remain a high priority.

### The U.S.-New Zealand Relationship

In addition to the benefits to both the U.S. and New Zealand from engaging in Asia

through TPP, the U.S.-New Zealand relationship itself will be strengthened by TPP. New Zealand and the U.S. have long shared common values and a commitment to advancing security and prosperity around the world.

Our trade and economic links are sound and mature. Two-way merchandise trade totalled over \$6 billion from July 2008 to June 2009, covering all economic sectors from heavy manufacturing to agriculture. The U.S. is also New Zealand's second largest source and destination of foreign direct investment.

### Boosting U.S. Exports

Despite a strong bilateral relationship, the United States' share of exports has been declining over recent years. Notwithstanding the fact that U.S. exports to New Zealand have grown on average by 2 percent each year since 1990, the U.S.' share of total New Zealand imports over the same period has dropped from nearly 18 percent to 11 percent. This trend—an overall declining market share for U.S. exports, despite increasing value of U.S. exports—is consistent with trends for U.S. trade across Asia as shown in Figure 1 below.

Most economic commentators attribute the declining U.S. share of exports, in part, to the growing network of trade and economic agreements of which the United States has not been a participant. In the

Asia-Pacific, there are about 175 agreements in force and around 70 being negotiated or awaiting implementation.

A decline in the share of U.S. trade in Asia is not inevitable. And TPP can help combat the trend of recent years by establishing a high quality platform linking Asia and the Americas. This will position the U.S. to benefit from the rapid growth in many Asian countries. The International Monetary Fund forecasts that average growth for developing and emerging countries in Asia will be about 8.4 percent in 2011. In contrast, advanced economies are predicted to grow only about 2.2 percent in 2011.

### Crossing the Finish Line

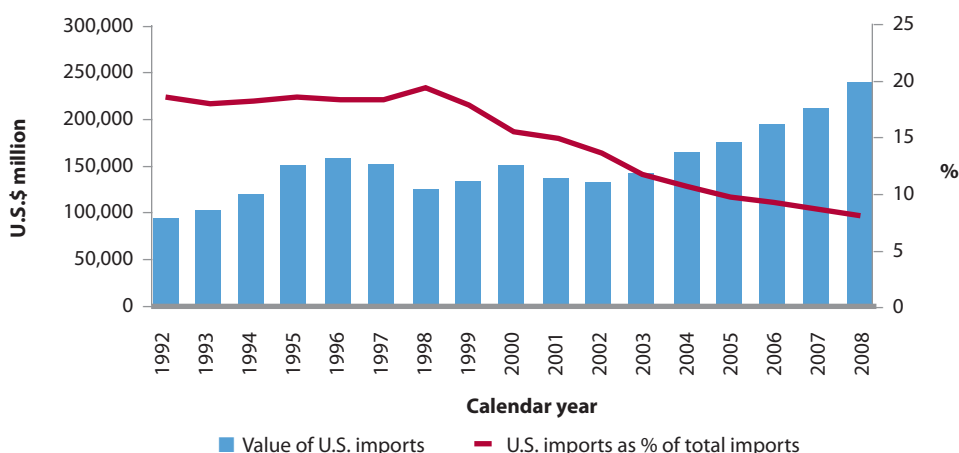
Negotiating high quality trade agreements is hard work, particularly when many countries and complex issues are involved. However, excellent progress is being made toward TPP. The TPP countries have completed four negotiating rounds as well as specialist inter-session meetings, with the latest held in Auckland, New Zealand in December 2010. New Zealand shares America's objective of substantially concluding TPP negotiations by November 2011.

Many U.S. companies want to ensure that the benefits of TPP to the U.S. are well understood. To that end, a TPP Business Coalition has been created. For more information about this group, please contact Stephanie Henry at [shenry@ecatrade.com](mailto:shenry@ecatrade.com).

We invite you to spread the word about the benefits offered by TPP. Every U.S. citizen, business, and elected official who sees value for the U.S. in TPP will contribute to strong momentum to achieve this exciting partnership. ALEC's International Relations Task Force has a resolution supporting final ratification of TPP. If ALEC members are interested in discussing TPP further, they should contact Karla Jones, ALEC International Relations Task Force Director at [kjones@alec.org](mailto:kjones@alec.org) or Ben King at the New Zealand Embassy in Washington, D.C., on [ben.king@mfat.govt.nz](mailto:ben.king@mfat.govt.nz).

### 7 Asia-Pacific Countries\*: Imports from the United States 1992-2008

\* China, Japan, South Korea, Indonesia, Malaysia, Thailand, New Zealand



Source: New Zealand Ministry of Foreign Affairs and Trade

Rt Hon Mike Moore is currently the New Zealand Ambassador to the United States. Ambassador Moore is also a past Director of the World Trade Organization and a former New Zealand Prime Minister and Cabinet Minister.



# A Review of Argentina's GSP Status is a Long Time in Coming

BY DR. ROBERT SHAPIRO

The Generalized System of Preferences (GSP) is a system of legal exemption from general rules of the World Trade Organization (WTO) for certain developing countries. Since 1974, GSP status has allowed select countries to enjoy duty-free treatment on the great majority of their exports to the United States, increasing trade and revenue for those developing nations. The main purpose of GSP is to promote economic growth in less developed countries by granting them trade benefits.

In 2001, Argentina defaulted on more than \$81 billion of sovereign bonds in the largest recorded sovereign debt default in history. In early 2005, the Argentine government announced a restructuring plan for those defaulted bonds. The plan, however, was a highly unusual departure from the norms of international finance. The Argentine government offered creditors just 27 cents on the dollar, when typical restructuring offers provided 40 cents to 50 cents on the dollar. When less than half of the international lenders agreed to these terms, representing about one-quarter of the total debts in default, Argentina repudiated its obligations to those lenders.

What links these two ideas? As a designated Beneficiary Developing Country (BDC), Argentina receives GSP preferences. Argentina, however, has not upheld its GSP obligations. Rather, Argentina has consistently ignored its responsibilities as a beneficiary under the GSP program, including the requirement that recipients of GSP preferences respect the laws of the United States. By repudiating its obligations to U.S. lenders, totaling some \$8.7 billion, refusing to negotiate with those lenders, in good faith, and ignoring more than 100 U.S. court judgments directing Argentina to compensate those lenders, Argentina has violated the terms of its GSP benefits.

The United States has provided Argentina with this preferential tariff treatment

in order to help that nation's economy and improve the lives of its citizens. In return, Argentina has refused to repay billions of dollars lent by U.S. creditors. By refusing to honor these debts, Argentina has imposed some \$20.5 billion in total costs on U.S. lenders, taxpayers and investors. In New York alone, these costs totaled nearly \$2 billion as of December 2008.

Nor does Argentina provide any reciprocal benefits to U.S. exporters. The country's average tariff rate is almost five times that of the United States, and the actual tariff rate, or "bound rate" is as high as nearly 10 times that of the United States. Moreover, in recent years, the Argentine government has raised tariffs and imposed new customs and licensing procedures to further impede access to its market by U.S. exporters. Argentina also has imposed new export taxes on raw materials, relative to those on processed products, which further subsidizes its exports of processed products, and increased the tariffs on imports from the United States.


Argentina also persists in violating other rules and laws of international trade and finance. For example, Argentina ignores widespread violations of U.S. intellectual property rights by countenancing rampant piracy and counterfeiting. These actions have landed Argentina on the USTR's Priority Watch List year after year.

Since its default, Argentina also has refused to take part in the International Monetary Fund's Article IV annual reviews, the only major country in the world to do so. These reviews are a prerequisite for receiving IMF loans and negotiating debts owed to other governments, including more than \$7 billion in default to member nations of the Paris Club. Argentina has consistently refused to cooperate with the IMF out of concern that an IMF review will reveal widespread distor-

tions of basic economic statistics, such as its inflation rate. After years of such intransigence, the Paris Club is now taking steps that will permit the Argentine government to circumvent the traditional IMF consultation required in negotiating a Paris Club settlement. Argentina's lack of respect for its treaty obligations, its creditors and its outstanding court judgments is an ongoing offense to the international community.

*Argentina does not deserve continued preferential treatment from the United States.* The GSP program was created to help developing economies that make good faith efforts to improve their economies and which respect U.S. laws. Today, Argentina is not even a developing economy under the terms of the GSP program. It holds, for example, more than \$50 billion in central bank reserves, making it one of the wealthiest nations to ever receive GSP benefits. And its persistent violations of international norms and U.S. laws should disqualify it from receiving further GSP benefits.

Argentina also faces legal pressure outside of the United States. Argentina accounts for 84 percent of all the cases involving G-20 nations now pending before the World Bank's International Centre for Settlement of Investment Disputes (ICSID). As with its sovereign debts, Argentina has refused to honor adverse judgments from the ICSID, a direct breach of its obligations under the ICSID Convention, a multilateral treaty to which the United States is a party.

As state legislators, there are many ways to take action that will hold Argentina accountable for its actions. You should be encouraged to write letters asking the U.S. Trade Representative to withdraw Argentina's GSP benefits. You should also engage your counterparts in the U.S. Congress, urging their support for a reevaluation of Argentina's preferred trade status under the GSP program. Argentina should be held to account for this long record, beginning with its exclusion from the GSP program. 



Dr. Robert Shapiro is the Co-Chair of American Task Force Argentina, an alliance of more than thirty U.S. organizations united for a just and fair reconciliation of the Argentine government's 2001 debt default and subsequent restructuring. Dr. Shapiro served as Undersecretary of Commerce for Economic Affairs under President Clinton.





# No Trespassing

ALEC Model Legislation Would Promote Trespasser Responsibility and Prevent Activist Judges from Facilitating Lawsuits by Intruders

BY MARK A. BERHRENS

“Trespassers are vermin!” my torts professor used to tell our class in the first semester of law school. This professor, now a successful plaintiffs’ personal injury lawyer, did not harbor any resentment for trespassers. He was just trying to use shock value and humor to give us a tool for remembering a fundamental legal principle that we would need to know for our final exam, and then for the bar exam and to practice law. The professor’s approach worked, as I can still remember his expression more than twenty years later.

The principle he was conveying to us is that a land possessor (whether an owner, lessee, or other occupant) generally has no legal duty to make his or her property safe for trespassers to use or to carry out activities on the land so as not to endanger them. Land owners and possessors are entitled to exclusive enjoyment of their land.

There are a few special situations in which the law permits trespassers to sue

and recover, but these are narrowly circumscribed. First, a land possessor cannot *intentionally* harm a trespasser except in self-defense. For example, law students often read a case in which a homeowner was held liable in battery for injuries caused to a trespasser as a result of the homeowner setting up a spring-gun “booby trap” in an abandoned house on the his property. Second, a land possessor has a duty to use

reasonable care to prevent harm to a *known* trespasser as a result of a dangerous activity or artificial (man-made) condition on the land. For example, if a subway driver sees a homeless person passed out next to the track, the driver cannot just run over that person. Once the driver knows the homeless trespasser is there, the driver must use reasonable care to try to prevent the person from being hurt. Third, a land possessor has a duty to use reasonable care to prevent trespassers that *constantly and persistently* intrude upon a *limited* area from being harmed as result of a dangerous activity or artificial condition on the land. This rule is little more than the extension of the rule preventing harms to certain known trespassers. For example, if residents of a neighborhood frequently cross a bridge (an artificial condition) on private property to access a shopping mall, the land owner must maintain the bridge so it is safe for crossing. Similarly, if hotel guests constant-

ly cross a trolley track at a certain spot to access a nearby restaurant complex, the trolley company land owner would have to exercise care in running the trolley (a dangerous activity) to avoid hitting the hotel guests. Finally, landowners must use reasonable care to prevent harm to child trespassers as a result of highly dangerous

exception may be sharply limited, barring recovery only for a very narrow category of trespassers, such as armed burglars.

Thus, instead of following the historical common law approach and providing that land possessors generally owe no duty to trespassers (subject to a few narrow exceptions), the new Restatement takes a

### The model *Trespasser Responsibility Act* would codify the historical common law approach and “freeze” the law of trespasser liability as it exists today, preempting courts from adopting the non-traditional approach.

artificial conditions—commonly called “attractive nuisances.” Anyone that owns a backyard swimming pool understands this rule. Because a pool is attractive to small children and poses a significant danger, the land possessor must take reasonable steps to prevent injuries, such as by fencing off the yard or pool.

Beyond these very limited situations, however, the general rule is that land possessors are not liable for harms to trespassers. Thus, there is generally no duty to protect the occasional trespasser, such as the person who goes onto another’s land to ride a motorcycle, ATV, snowmobile, or horse and runs into barbed wire. There is also no duty to protect trespassers from harm from natural conditions, such as a lake or a falling tree limb. These standards have been in place for a very long time and continue to be fair, workable, and predictable.


A new Restatement of the Law Third Torts: Liability for Physical and Emotional Harm approved by the American Law Institute (ALI) upends the traditional rule. Section 51 of the Restatement Third begins by imposing on land possessors a duty to exercise reasonable care to *all* entrants, including unwanted trespassers. The only exception to the broad new duty rule would be for harms to “flagrant trespassers”—a concept that is not defined in the new Restatement and that appears in no state’s tort law. The flagrant trespasser concept will likely generate substantial litigation over its meaning. Ultimately, this

“reformist” approach, imposing liability on land possessors for harm to *any* entrant except the “flagrant trespasser.”

The new Restatement, like other “re-statements” of the law adopted by the ALI, does not have the force of law by itself. The Restatement is available as a resource to be adopted by a court the way a legislature may adopt an ALEC model bill. Once the Restatement is adopted by a court, it becomes the law of the state unless overturned or superseded by statute. ALI “re-statements” are highly influential with courts because the ALI is perceived to be objective. The ALI is composed of the nation’s top echelon judges, law professors, and practitioners.

In April 2010, Larry Stewart, a former president of the Association of Trial Lawyers of America (ATLA), now known as the American Association of Justice (AAJ), and the lead Reporter (or “author”) for the new Restatement, Wake Forest Law School Professor Michael Green, co-wrote an article in TRIAL, the monthly magazine of the trial bar, calling the new Restatement a “powerful new tool” for “[trial] lawyers handling tort cases.” They described the new Restatement as “a work that trial lawyers would be well advised to review and use.” In particular, they listed the new duty rule for land possessors as one of the “top 10” provisions in the new Restatement that will benefit trial lawyers. They characterized the new rule as “a major departure from the first and second restatements, which followed the historic approach...”

Overall, the new Restatement’s land possessor provisions are radical, would threaten to bring about fundamental changes that have little or no support in existing law, and would have a substantial adverse impact on land possessors, from the largest companies to the smallest individual homeowners, and their insurers. The Restatement could result in higher insurance premiums for homeowners and businesses.

In August 2010, ALEC’s Civil Justice Task Force unanimously adopted model legislation to prevent the new trespasser duty rule in the Restatement Third from wreaking havoc on land possessors. The model *Trespasser Responsibility Act*, which was approved by the ALEC Board of Directors in September 2010, would codify the historical common law approach and “freeze” the law of trespasser liability as it exists today, preempting courts from adopting the non-traditional approach found in § 51 of the new Restatement. The approach found in the ALEC model is taken from the Restatement (Second) of Torts (1965) and finds additional support in the statutory laws of a number of states. States would be wise to enact the model bill to promote trespasser responsibility and prevent activist judges from giving the green light to lawsuits by intruders that would subject private homeowners and other land possessors to broad new liability. 



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# Sunshine Grows Good Government

The Case for Transparency and Accountability in the Use of Outside Counsel  
by State Attorneys General

BY JERRY W. KILGORE

**As a former attorney general of the Commonwealth of Virginia, it's plain to see that the role that state attorneys general play in our political and legislative landscapes has drastically evolved and expanded over the past decade. Because of this evolution and expansion, attorneys general should place the top of their priority list establishing common-sense policies that govern the office with transparency, disclosure and accountability. Such action will instill in the public confidence that an attorney general is conducting the office in a fair and impartial manner.**

Over the years, the role of state attorneys general offices has grown exponentially in responsibility and influence. Rather than serving simply as legal advisers for governors, state agencies and wronged consumers, today, attorneys general are confronted with major public policy battles that have not only statewide, but more often also national, and even international implications. As chief legal officers of the states, attorneys general have been at the forefront of many hot button political and legislative issues in recent years from health care reform, trade regulation and environmental enforcement, to consumer protection and criminal justice.

The increased roles of states attorneys general have brought about greater work-

loads as well, which has caused many offices to hire outside lawyers to fulfill certain duties.

While there may be a case for hiring outside attorneys to assist with increasing work loads and complex litigation, there is a troubling and growing trend of state attorneys general hiring outside counsel with little or no oversight to pursue lawsuits on behalf of their states. These outside counsels garner highly lucrative contingency fee agreements, which award outside counsel a percentage of judgments or settlements won for the state.

Additionally, all too often these no-bid contracts are regularly awarded to politically-connected personal injury lawyers that have generously underwritten an at-

torney general's election campaign. In fact, the *Wall Street Journal* among other media outlets have noted that these contingency fee contracts commonly serve only the respective political motivations of the attorneys general and the profit-seeking interest of their personal injury lawyer benefactors.

As examples of the kind of abuse that is taking place in connection with these contracts, in Texas, a former attorney general went to jail for falsifying contracts to reward a political ally. But as you might expect, it wasn't sunshine rules or an open and honest hiring process that brought the crime to light, but instead competing trial lawyers who stood to receive less money from the state. In California, the Associat-

ed Press discovered that a former attorney general failed to properly report millions of dollars in contracts to politically-connected lawyers and lobbyists.

With these highly lucrative contracts at stake for private-fee-motivated attorneys, it is essential that the procedures for hiring and managing these outside lawyers on behalf of the state be based on the principles of transparency and accountability in order to better serve the constituents of every state.


Fortunately, The National Association of Attorneys General (NAAG) has recently acknowledged the dangerous pitfalls linked to these outside counsel relationships and

whom, their tax dollars are being spent.

To address these abuses, we are continuing to work at both the national and state level to eliminate or significantly reduce incentives for state attorneys general and members of the personal injury bar to “join forces” in filing speculative litigation. By engaging in parallel national and state-specific campaigns, including a public and stakeholder education program and a concerted effort to pass legislation based on ALEC’s *Private Attorney Retention Sunshine Act* (PARSA), we will help strengthen public disclosure and shine sunlight on these harmful practices.

In addition to instituting this type of

tiny and limits, the interests of the public can be shielded from attorneys whose interests are centered around political gain rather than public benefit. Moreover, targeted defendants can be encouraged that their dealings with state governments are accorded appropriate due process and instilled with an element of basic fairness.

Setting this kind of systemic standard of transparency is a challenge, but action taken to quash backroom deals and support honesty and transparency within these processes is both a significant first step toward important reforms and a challenge worth taking. As corruption continues to plague both our political and legal systems, this type of reform is necessary to maintain confidence in our elected officials at all levels of government. As officials elected by the people of their state, all attorneys general should give thorough consideration to the simple, good-government principles embodied in these reforms to help protect those very people that put them in office. And state legislators should consider working with their attorneys general to codify processes providing oversight and transparency in the hiring of outside counsel to restore a greater level of fairness, trust and predictability to the civil justice system. 

## Attorneys general who want to preserve their newly expanded roles should embrace greater transparency, disclosure and accountability in the hiring of contingency fee outside counsel.

the processes by which they are chosen. Earlier this year, a NAAG task force was specifically charged with developing best practices for the hiring and use of outside counsel. As a result of their efforts, training on the appropriate use of outside counsel was included in an orientation session for new attorneys general this year.

NAAG’s acknowledgement of this issue and decision to develop training on the use of outside counsel are certainly steps in the right direction to safeguarding against future abuses, however, in order to ensure these protections, we must now codify more transparent procedures in each state in order to ensure a more accountable and open process that focuses on common-sense, good-government principles.

It is the current lack of well-crafted policies in most states to govern this practice that has unfortunately led to these all too common and well-documented abuses of the system. Attorneys general who want to preserve their newly expanded roles should embrace greater transparency, disclosure and accountability in the hiring of contingency fee outside counsel. Citizens and taxpayers are entitled to know how, and on

sound policy in their offices, attorneys general can also serve as influential advocates for legislation to permanently codify the principles embodied in this important legislative proposal. PARSA legislation is based on the common-sense, good-government principles of transparency, accountability and disclosure, and seeks to rein in the most abusive practices by:

- Requiring a competitive bid process to procure outside counsel in a manner that is consistent with state procurement policies.
- Requiring legislative approval of most large contingency-fee contracts between government and contingency-fee attorneys.
- Requiring contingency-fee attorneys to keep accurate time records and establish an hourly rate based on recovered damages rather than hours spent on the case.
- Restoring the legislature’s authority in the appropriations process.

By making the retention of outside counsel subject to reasonable public scrutiny



Jerry W. Kilgore is a former state and federal prosecutor and served as the Attorney General of the Commonwealth of Virginia from 2002 to 2005.



# Common Sense for Campaign Finance Reform

BY LAURA RENZ

Campaign finance issues rarely dominate the headlines in an election season the way they did during this past election cycle. Thanks to the Supreme Court decision in *Citizens United*, independent groups were free to participate in important issue debates in all 50 states. While many lawmakers across the country were unsure as to how these new freedoms would manifest themselves in their elections, it is now clear that independent spending mostly served to give challengers a chance by countering incumbent's fundraising advantages. As is usually the case, the 2010 elections turned on individual candidate's ability to connect with and persuade voters to vote for them.

With the outcome of the 2010 elections settled, we look forward to new legislative sessions where lawmakers have the ability to focus on campaign finance proposals that inject common sense into the system and streamline the ability of individuals and associations to participate in the political process.

Many states already have a number of successful pro-speech policies that can be duplicated by other states. In fact, states with few restrictions on the size or source of contributions to candidates, such as Virginia and Utah, consistently rank at the top of lists of well-governed states. Aided by appropriate disclosure regimes, permitting citizens and groups to freely contribute directly to a candidate's campaign is the simplest way to free up our political system while also encouraging supporters to give directly to a candidate instead of donating to independent groups.

States with lower contribution limits often see a higher rate of independent group activity because engaged citizens are not able to support the candidate of their choice beyond an arbitrarily set low amount. Higher contribution limits also



address what many regard as the problem of self-funding candidates. The ability of candidates without personal reserves of wealth to remain competitive improves significantly when limits are higher or nonexistent.

Many lawmakers will also want to address the issue of disclosure. However, just as proper disclosure of contributions to candidates can be useful in signaling to voters which candidate they may want to support, burdensome disclosure regimes discourage participation and put both candidates and individuals at risk of incurring significant penalties for being unable to follow complex guidelines. Legislators should seriously consider raising disclosure thresholds to the point at which a reasonable person might believe a donor could exercise undue influence.

Beyond the costs in privacy, mandatory disclosure at low levels also decreases the usefulness of disclosure reports. These small donations fill page after page in the reports of any major campaign, making it more difficult and time-consuming to find patterns and information that may provide legitimate "voting cues" to the public. The extensive reporting of small contributions also increases the administrative burden on campaigns. This both raises the costs of campaigning and places the heaviest burden on small, grassroots campaigns, and on campaigns that rely more on small donors.

Disclosure of independent groups must also be treated differently than disclosure to a candidate campaign, given the absence of potential corruption inherent in independent spending. Mandating excessive disclosure of contributions to independent organizations presents a serious risk to free speech. Any such disclosure proposals

should be narrowly targeted only at those contributions intended to be used for election-related political activity.

Encouraging small donor participation is a worthy goal for state legislators to consider. A tax credit or deduction for individuals who make a small donation to a candidate's campaign is one way to signal to citizens the importance placed on this form of participation in an election. It would also likely increase the pool of small donations available to candidates, and make fundraising easier and less time consuming. Tax credits and deductions for small donations would encourage more people to become involved in the political process, feel they had a personal connection with campaigns and candidates, and could do far more than contribution limits to restore faith in government. Finally, tax benefits would signal to donors that making contributions is a worthy and public spirited activity, helping to dispel some of the negative connotations created by media coverage of money in politics.

It is our hope at the Center for Competitive Politics that legislators move beyond superficial treatment of campaign finance laws to thoroughly examine the incentives and consequences of current law. This agenda represents a common sense approach to campaign finance law that would do much to improve citizen participation in and treatment of campaigns. 🗳️



Laura Renz is the Research & Government Relations director for the Center for Competitive Politics, a member of ALEC's Public Safety and Elections Task Force.

# Philadelphia Bureaucrats Pardon 19,400 Fugitives and Government-Run Bail

BY MICHAEL HOUGH

Last year, following an expose by the *Philadelphia Inquirer*, ALEC wrote extensively about the complete failure of the government-run bail operation in Philadelphia. At the time it was reported that over a 30-year period the City of Philadelphia had released from jail 47,000 criminals and subsequently lost track of them. Now *The Inquirer* has reported that in order to sweep their mess under the rug, city officials dropped charges against thousands of these fugitives.

The City of Philadelphia effectively abolished commercial bail in the late 1960's and the government took over releasing people from jail and supervising them on bail. In place of commercial bail, Philadelphia established a deposit bond operation where criminals pay 10 percent of their bond up front and are liable for the remaining 90 percent if they fail to show up in court. Unfortunately, a large number of criminals simply abscond and Philadelphia does almost nothing to find them. This system has left the City with almost 50,000 fugitives and \$1 billion in unpaid bail forfeitures.

Now in an attempt to bureaucratically fix this mess, the City of Philadel-

**Over 30 percent of defendants released on government-run bail remain fugitives after one year.**

phia dropped criminal charges against 19,400 fugitives. *The Inquirer* reported many of these fugitives had faced charges for crimes like rape, assault, child molestation, dealing drugs, and theft. Unfortunately now these fugitives will never be brought to justice for their crimes.

One sexual assault victim told *The Inquirer*, "It's terrible. That still bothers me because he escaped from justice. And now they want to clear his record? That's not fair, because the victims, they still hurt. Twenty-five years after, I still think of it."

City officials on the other hand arrogantly said the following about their mass pardoning, "They were clogging up the system. You're never going to find these people. And if you do, are you going to prosecute them? The answer is no."

While Philadelphia is now the poster child for a failed government-run bail operation, there are certainly more examples. In Oregon, which banned commercial bail in 1978, "the failure-to-appear rate has skyrocketed," said District Attorney Joshua Marquis. Oregon's failure-to-appear rate for criminals in court has been reported to be as high as 40 percent.

Thanks to a study by the Department of Justice we know that over 30 percent of defendants released on government-run bail remain fugitives after one year as compared to 19 percent of defendants released by commercial bail. Clearly in this area, like so many others, the private sector operates more efficiently than government.

Worse than the cost to taxpayers and the destruction of private sector jobs in the bail industry, government-run bail operates so inefficiently that it deprives citizens of justice and decreases public safety. With the light of day now being shed on the failure of government-run bail—we can hope that lawmakers will work to end this revolving door of justice.

Last year, ALEC supported legislation which would limit government-funded bail to only those who are ruled as indigent. Under this legislation individuals who can afford to bail themselves out of jail can no longer rely on taxpayer provided criminal welfare programs, but those


who cannot truly afford bail could still use the program. This would save taxpayers money, while at the same time ensuring that jails are not overcrowded with indigent inmates.

ALEC also supports efforts to ensure government-run bail operations are held accountable. Just as a number of states are enacting transparency requirements when it comes to spending, similar laws should be enacted when it comes to state pre-trial release (PTR) agencies that run government bail programs. Unfortunately, information about the effectiveness of PTR agencies is woefully lacking. About half these agencies do not even keep track of their failures to appear.

Furthermore, it is a matter of justice to the taxpayer that PTR agencies should keep records on those they release and make that information available to the public. PTR agencies owe an account of their stewardship to the public who funds them and for whom they work. ALEC's *Citizens Right to Know Act* would right this wrong by demanding that PTR agencies reveal:

- Their budgets and staffing
- Number of and kind of release recommendations made
- Number of defendants released and under which kind of bond
- Number of times a defendant has been released, his or her failure to appear for court, and crimes committed while on release
- Report the above in a timely and intelligible way and make it available to the public.

Both Texas and Florida have enacted the *Citizen's Right to Know Act*.

These efforts will help to ensure that your state does not end up with a revolving door of justice like Philadelphia. Lawmakers need to ensure criminals are released into a system with accountability and one that protects taxpayer dollars. 



Michael Hough,  
ALEC Public Safety  
Resident Fellow.





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