No. 15-_____

In The
Supreme Court of the United States

JIMMY YAMADA, RUSSELL STEWART,
and A-1 A-LECTRICIAN, INC.,

Petitioners,

v.

WILLIAM SNIPES, in his official capacity
as chair and member of the Hawaii
Campaign Spending Commission, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES HOCHBERG
JAMES HOCHBERG,
ATTORNEY AT LAW, LLLC
Topa Financial Center
Suite 2100,
Bishop Street Tower
700 Bishop Street
Honolulu, Hawaii 96813

Post Office Box 3226
Honolulu, Hawaii 96801
Telephone (808) 534-1514
Facsimile (808) 538-3075
Jim@JamesHochbergLaw.com

JAMES BOPP, JR.*
JAMES MADISON CENTER
FOR FREE SPEECH
1 South Sixth Street
Terre Haute, Ind. 47807
Telephone (812) 232-2434
Facsimile (812) 235-3685
JBoppjr@aol.com

RANDY ELF
Post Office Box 525
Lakewood, N. Y. 14750

Counsel for Petitioners
**Counsel of Record*

August 14, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Questions Presented

Citizens United v. FEC establishes that registration, recordkeeping, and extensive and ongoing reporting are "onerous" organizational and administrative political-committee burdens, 558 U.S. 310, 338-39 (2010), while *Buckley v. Valeo* allows government to trigger political-committee burdens only for "organizations" that (a) are "under the control of" candidates or (b) have "the major purpose" of "nominat[ing] or elect[ing]" candidates. 424 U.S. 1, 79 (1976). But circuits are split over whether another part of *Citizens United*, 558 U.S. at 366-71, which approved *non*-political-committee, *i.e.*, simple, one-time event-driven reports for "electioneering communications," allows *state* governments to trigger such PAC-like organizational and administrative burdens regardless of whether the organization is "under the control of" a candidate or has *Buckley's* "major purpose[.]"

Petitioner A-1 A-Lectrician, Inc. ("A-1"), a large for-profit electrical-construction organization, is not "under the control of" any candidate(s) and does not have "the major purpose" under *Buckley*. Nevertheless, Hawaii law triggers PAC-like organizational and administrative burdens for A-1 if it spends more than $1000 on vaguely-described expenditures for the purpose of influencing the nomination or election of any candidate to office, or for or against any question or issue on the ballot. HAW. REV. STAT. 11-302 ("HRS-11-302") (defining "Noncandidate committee" and "Expenditure"); HRS-11-321(g) (establishing $1000 threshold).

Questions Presented – Continued

Furthermore, Hawaii requires vaguely-described "[a]dvertisement[s,]" HRS-11-302, to have an attribution, HRS-11-391(a)(1), and then either a second attribution, HRS-11-391(a)(2)(A), or a disclaimer. HRS-11-391(a)(2)(B).

A-1 challenges Hawaii law as applied and facially under the First and Fourteenth Amendments as follows:

1. Is Hawaii law *triggering* PAC-like organizational and administrative burdens for noncandidate committees constitutional? HRS-11-302 (defining "Noncandidate committee" and "Expenditure").

2. Alternatively, are the PAC-like *burdens* for noncandidate committees constitutional? These include:

- Registration (including treasurer-designation, bank-account, and termination (*i.e.*, deregistration)). HRS-11-321 (registration); HRS-11-323 (organizational report); HRS-11-324 (treasurer); HRS-11-326 (termination); HRS-11-351(a) (bank account).
- Recordkeeping, HRS-11-324; HAW. ADMIN. RULE 3-160-21(c) ("HAR-3-160-21(c)") (requiring "a separate bank account or . . . a ledger account"), and
- Reporting that is both extensive and ongoing. HRS-11-331, 335, 336, 339, 340.

Questions Presented – Continued

3. Are the advertisement definition and the disclaimer requirement constitutional? HRS-11-302 (defining "Advertisement"); HRS-11-391(a)(2)(B) (requiring disclaimer).

4. When the challenged law changes while an appeal is pending, does the court consider the old law or current law?

5. Does A-1 have standing to challenge Hawaii's electioneering-communication law? HRS-11-341.

Parties to the Proceedings

Jimmy Yamada, Russell Stewart, and A-1 filed this action in the United States District Court for the District of Hawaii on August 27, 2010. (D.CT.-DOC.1.) Yamada and Stewart's claims are distinct from A-1's. (CERT. PET. APP. 3-7 ("APP.3-7").) Yamada is A-1's chief-executive officer ("CEO"). (APP.4.)

When the district court granted summary judgment for Yamada and Stewart and against A-1 (APP.64-157), A-1 appealed to the United States Court of Appeals for the Ninth Circuit on April 20, 2012. Yamada and Stewart – having prevailed on the merits – did not join this appeal. (D.CT.-DOC.157.)

However, Yamada and Stewart filed a separate appeal to the Ninth Circuit on December 28, 2012, regarding their petition for costs and attorneys' fees. (D.CT.-DOC.187.)

The Ninth Circuit held separate oral arguments for the separate appeals on October 9, 2013, and addressed the separate appeals in a single opinion/judgment on May 20, 2015. The Ninth Circuit awarded costs and attorneys' fees to Yamada and Stewart and held against A-1. (APP.1-63.)

Yamada and Stewart are Petitioners, because they support A-1's claims. All the claims here are A-1's.

A-1 challenged four sets of Hawaii laws in the lower courts. (APP.6.) A-1 drops one challenge: The

Parties to the Proceedings – Continued

as-applied government-contractor-contribution-ban challenge. (APP.48-55.)

Respondents are William Snipes, in his official capacity as chair and member of the Hawaii Campaign Spending Commission; Tina Pedro Gomes, in her official capacity as vice chair and member of the Hawaii Campaign Spending Commission; and Eldon Ching, Gregory Shoda, and Adrienne Yoshihara in their official capacities as members of the Hawaii Campaign Spending Commission. (APP.1.)

They did not cross appeal the district court's holding on Yamada and Stewart's claims. (APP.7.)

Corporate Disclosure Statement

A-1 has no parent company, and no publicly-held company owns 10 percent or more of A-1 stock.

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Opinion and Orders Below

- Ninth Circuit opinion/judgment. *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir.2015) ("*Yamada*"). (APP.1-63.)
- District-court summary-judgment order and accompanying judgment. *Yamada v. Weaver*, 872 F.Supp.2d 1023 (D.Haw. 2012). (APP.64-157.)

Jurisdiction

The Ninth Circuit entered its opinion/judgment on May 20, 2015. No one sought rehearing. This Court has jurisdiction under 28 U.S.C. 1254(1).

Constitution, Statute, and Administrative Rules

- The First and Fourteenth Amendments. U.S. CONST. amends. I, XIV §1. (APP.158.)
- Pertinent Hawaii political-speech statute sections. HRS-11-302 *et-seq*. (APP.159-202.)
- Hawaii Administrative Rules 3-160-6, 3-160-21, and 3-160-48. (APP.203-05.)

Statement of the Case

Jimmy Yamada's father established A-1 in 1957 and incorporated it in 1962. With Jimmy Yamada as CEO, his son as president, and the dedication of many long-time employees, A-1 has become one of the larger electrical-construction organizations in Hawaii, with more than $40 million in average annual revenues since 2000. (D.CT.-DOC.24-6.) A-1 has offices on Oahu and the Big Island. (D.CT.-DOC.125-2.¶5.)

A-1 believes people are its greatest asset. Because A-1 values and takes care of employees, employee retention, satisfaction, and sense of ownership in their jobs is high. A-1's superintendents, foremen, project managers, and project engineers together have more than 1000 years of experience. A-1's long-time commitment to Hawaii businesses has led to excellent relations with local agencies, including inspectors, the fire-prevention division, and local utilities. (D.CT.-DOC.24-6.)

A-1 has undertaken projects throughout Hawaii, including at the John Burns School of Medicine, the Outrigger Beach Walk, the state-capitol building, the University of Hawaii Frear Hall, and Kaiser Hospital.[1] Another project involves the Hawaii Regional Security Operation Center and includes an operations building and a visitors-control center. A-1's responsibility includes data-center-design work,

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[1] (*See* http://www.a-1-a.com/index.php/component/content/article/13.)

power systems, lighting, a security-conduit system, and communication, telephone, data, and conduit requirements, plus infrastructure support and coordination of the electrical work.[2]

All of this is consistent with A-1's long-established mission to engage in an electrical-construction and general-merchandise business, and related enterprises. (D.CT.-DOC.24-21 at Part-IV.)

As a for-profit electrical-construction organization, A-1 is not connected with any political committee, including any political-party committee or candidate's committee. (D.CT.-DOC.125-2.¶5.) *Cf.* 52 U.S.C. 30101(7) (defining "connected organization" under federal law).

"We take the case as it comes to us." *McCutcheon v. FEC*, 134 S.Ct. 1434, 1447n.4 (2014). Like the First Amendment plaintiffs in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2764-66 (2014), A-1 is "concerned with issues" and fears "we are losing our freedom." (D.CT.-DOC.77 at 59-63.) The undisputed facts are that A-1 previously engaged in political speech in two ways – $56,600 in state contributions and $9000 in newspaper ads in 2010 compared to its large yearly income – and now engages in political speech in only one way: Newspaper ads.

The *only* political speech in which A-1 engages – or even seeks to engage – is no more than three

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[2] (*See* http://www.a-1-a.com/index.php/projects.)

small, "rinky-dink" ads published shortly before elections in the *Honolulu Star Advertiser*, Honolulu's daily newspaper. (*Yamada*, No.12-15913, Oral Arg. at 0:24.53 (9th Cir. Oct. 9, 2013) (Watford, J.);[3] D.CT.-DOC.132-1.¶7; *see* D.CT.-DOC.125-5.¶¶7-8.)[4]

In the district court, A-1 stated in 2011 that its future ads would be "materially similar" to its 2010 ads. (D.CT.-DOC.24.¶50.) They would run in

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[3] *Available at* http://www.ca9.uscourts.gov/media/view.php?pk_id=0000011393.

[4] During 2010, A-1 legally contributed a total of $56,600 to 36 state-candidate committees, one state-political-party committee, and two state-noncandidate committees. (D.CT.-DOCS.-127-5, 127-6, 127-7, 127-8; APP.4.) This was legal, because A-1 was not *then* a state-government contractor, HRS-11-355(a); (D.CT.-DOC.125-2.¶6), although A-1 *then* "often" was one. (D.CT.-DOC.24.¶12; APP.5.)

Since 2011, however, A-1 has been a state-government contractor. (D.CT.-DOCS.125-5.¶¶4-5, 125-6, 125-7.) Thus, on the undisputed facts, A-1 is no longer often but instead *is* a state-government contractor (*id.*), so Hawaii bans A-1 from making *any* contributions. HRS-11-355(a). A-1 has maintained since 2011 that it would "make" its desired "contributions" "only if a court enjoin[ed] the ban" (D.CT.-DOC.125-5.¶7), *which never happened*. (APP.48-55, 136-54.)

Nevertheless, *Yamada* considers A-1's contributions in assessing whether Hawaii may trigger political-committee-like burdens for A-1. (APP.37.) This is wrong. Because *Yamada* did not "enjoin the ban[,]" A-1 cannot legally "make" – and does not seek to "make" – *any* "contributions" at all. (D.CT.-DOC.125-5.¶7.) *Yamada* misses that. (*See* APP.4 ("A-1 . . . plans . . . to make similar contributions to candidates in the future").)

But even if considering A-1's contributions were proper, A-1 would still prevail. *Infra* 27-28.

September or October of even-numbered years, number no more than three (the number A-1 bought in 2010), be similar in size to the 2010 ads, mention people who happen to be candidates for state office, and refer to "PEOPLE WE PUT INTO OFFICE" or "THE REPRESENTATIVES WE PUT INTO OFFICE[.]" (D.CT.-DOC.132-1.¶7 (referring specifically to September or October 2012).) Newspaper ads are expensive, so the three ads cost about $3000 each at 2010 rates (D.CT.-DOC.77 at 63), or $9000 altogether.

The 2010 ads are each entitled "*Freedom Under Siege*" and have both the required attribution ("Paid for by A-1 A-Lectrician, Inc., 2849 Kaihikapu St[.], Hon., HI 96819") and the required disclaimer ("(Published without the approval and authority of the candidates)"). HRS-11-391(a)(1), (a)(2)(B). Behind the text of each ad are American flags in front of monuments in a military cemetery. The ads are "independent" in that A-1 does not "coordinate[ ]" them with candidates. *Buckley*, 424 U.S. at 46-47; (D.CT.-DOC.24.¶21&n.13). Nevertheless, the ads are not independent *expenditures* properly understood, because they have no *Buckley* express advocacy.[5] Moreover, unlike the Bill Yellowtail ads in *McConnell v. FEC*,

[5] Under the Constitution, "independent expenditure" means *Buckley* express advocacy, 424 U.S. at 44&n.52, 80, that is not coordinated with a candidate. *Id.* at 46-47, 78.

A-1's ads are "genuine[-]issue" speech. 540 U.S. 93, 193n.78, 206n.88 (2003).[6] The first ad reads:

> WE HAVE LOST OUR FREEDOM, FROM CONGRESS TO OUR STATE AND LOCAL GOVERNMENTS. THE REPRESENTATIVES WE PUT INTO OFFICE DO NOT UNDERSTAND THE IMPORTANCE OF THE VALUES THAT MADE OUR NATION GREAT. THE GREATEST OF THESE VALUES IS AN ALOHA FOR OUR FELLOW MAN. REPRESENTATIVES SUCH AS BLAKE OSHIRO AND OTHER REPRESENTATIVES DO NOT SHOW THE ALOHA SPIRIT IN THE WAY THEY DISRESPECT THE LEGISLATIVE PROCESS AND THE PEOPLE.
>
> IF OUR REPRESENTATIVES IN THE HIGHEST AND MOST RESPECTED BODIES IN AMERICA AND HAWAII DO NOT HAVE TRUE ALOHA FOR EACH OTHER AND FOR THE PEOPLE, WHAT HOPE DO THE PEOPLE HAVE AS WE GO ABOUT OUR DAILY LIVES.
>
> WE ARE LOSING OUR FREEDOM BECAUSE NO ONE HAS A TRUE ALOHA FOR THE NEXT PERSON. IT MUST START WITH OUR LEADERS IN GOVERNMENT.

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[6] The district-court record closed before A-1's 2012 and 2014 newspaper ads (*see* D.CT.-DOC.125-5.¶10), so A-1 does not rely on them here, yet A-1 has reported them, and they are materially similar to the 2010 ads. (*See* Noncandidate Committee Filing Sys.: A-1 A-[L]ectrcian, Inc., *available at* https://nc.csc.hawaii.gov/NCFSPublic/ReportDetail.php?RNO=NC20001.)

> WE SEE THE FRUITS OF A LACK OF ALOHA IN THE EXTREMELY LOW POLLS IN GOVERNMENT ITSELF.

D.Ct.-Doc.24-18. The second ad reads:

> WE HAVE LOST OUR FREEDOM, FROM CONGRESS TO OUR STATE AND LOCAL GOVERNMENTS. THE REPRESENTATIVES WE PUT INTO OFFICE DO NOT UNDERSTAND THE IMPORTANCE OF THE VALUES THAT MADE OUR NATION GREAT. THE FIRST AND MOST IMPORTANT OF THOSE IS THE FAMILY. REPRESENTATIVES SUCH AS BLAKE OSHIRO AND OTHER REPRESENTATIVES ARE INTENT ON THE DESTRUCTION OF THE FAMILY.
>
> THE FAMILY SHOULD BE PROTECTED AS IT IS THE FOUNDATION OF SOCIETY. ANY SOCIETY OR NATION WHERE THE FAMILY HAS BEEN DESTROYED HAS ITSELF BEEN DESTROYED.
>
> WE ARE LOSING OUR FREEDOM BECAUSE IN THE DESTRUCTION OF THE FAMILY, WE SEE THE FRUITS OF THAT DESTRUCTION: LOSS OF LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS.

D.Ct.-Doc.24-19. The third ad reads:

> WE HAVE LOST OUR FREEDOM. FROM CONGRESS TO OUR STATE AND LOCAL GOVERNMENTS. WE HAVE REPRESENTATIVES WHO DO NOT LISTEN TO THE

> PEOPLE: BLAKE OSHIRO and Bill 444 IS ONE EXAMPLE:
>
> On 1/29/10, House Speaker Calvin Say moved to indefinitely postpone a vote on the bill which was approved. According to House rules, the House then needed 2/3 vote[ ](34 votes) to reconsider the bill, or it would be dead.
>
> On 4/29/10, the last day of the legislative session, Majority Leader Blake Oshiro orchestrated a move to suspend legislative rules, which allowed Bill 444 to come to the floor.
>
> NOW 2/3 VOTE NOT NECESSARY (RULES SUSPENDED-HOW EASY).
>
> The vote was then taken and the bill passed 31 to 20.
>
> THE ISSUE HERE IS NOT ABOUT BILL 444. IT SEEMS SOME [OF] OUR REPRESENTATIVES DO NOT THINK THAT RULES ARE MADE TO BE FOLLOWED, BUT ARE JUST PART OF THE GAME FROM WHICH THEY CAN NEGOTIATE AND PLAY WITH, TO ACCOMPLISH THEIR OWN AGENDAS. THIS IS PART OF THE REASON FOR THE SLOW AND ESCALATING DECAY OF OUR FREEDOM. WE ARE NO LONGER HOME OF THE FREE[.] WE ARE IN BONDAGE TO THE WHIMS OF THE PEOPLE WE PUT INTO OFFICE. WE ARE LOSING OUR FREEDOM, BECAUSE WE ARE GIVING IT UP.

D.CT.-DOC.119-1.

Jimmy Yamada, as A-1's CEO and a pastor, understands in his gut what is at stake and touched on it when responding to cross examination about A-1's newspaper ads:

> Q What was the objective of publishing those ads?
>
> A We have lost – I believe we have lost our freedom in the United States and Hawaii, and we have so m[any] restrictions on us that we are not free to speak. And so the issue, the objective was to let Hawaii know, those that read the papers, that we are losing our freedom. And there are some important issues that are fruits of that. And there [are] some important issues that have caused us to lose our freedom. . . .
>
> And . . . I'm expressing, my freedom of speech, to be able to say that something is wrong with a legislative body that can just take advantage of rules and push forth legislation.
>
> So to me the issue is . . . leaders in our community that the people need to look up to like, George Washington and Abraham Lincoln. And if the people do not have leaders that they can look up to, then they go berserk themselves. This is part of the reason we have drug problems. So there's a disregard and disrespect for the leaders of our communities today. I think something needs to be done. That's why I published the ad. That was the objective.

> Q Was the ad in any way intended to urge the election or the defeat of the individuals named in the ad?
>
> A No.

D.CT.-DOC.77 at 62-63.

On the undisputed facts, A-1 is not under the control of any candidate(s), provides no indication in its organizational documents or public statements that it is a political committee or a political-committee-like organization (D.CT.-DOC.24.¶27&nn.19-23), and neither makes nor seeks to make contributions or independent expenditures properly understood. No ballot-measure speech is even at issue here.

Nevertheless, A-1 fears Hawaii law triggers PAC-like burdens for A-1 itself, because A-1's newspaper ads bring A-1 under the noncandidate-committee definition. Thus, A-1 complies with these burdens. (APP.92-93.) In relevant part:

> "Noncandidate committee" means an organization, association, party, or individual that has the purpose of making or receiving contributions, making *expenditures*, or incurring financial obligations to *influence* the nomination for election, or the election, of any candidate to office, or for or against any question or issue on the ballot; provided that a noncandidate committee does not include: . . .
>
> (3) Any organization that raises or expends funds for the sole purpose of producing and disseminating informational or educational

> communications that are not made to *influence* the outcome of an election, question, or issue on a ballot.

HRS-11-302 (emphasis added). In relevant part and with exceptions not material here,

> "Expenditure" means:
>
> (1) Any purchase or transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, or payment incurred or made, or the use or consumption of a nonmonetary contribution for the purpose of:
>
> (A) *Influencing* the nomination for election, or the election, of any person seeking nomination for election or election to office, whether or not the person has filed the person's nomination papers;
>
> (B) Influencing the outcome of any question or issue that has been certified to appear on the ballot at the next applicable election; or
>
> (C) Use by any party for the purposes set out in subparagraph (A) or (B)[.]

HRS-11-302 (emphasis added).

PAC-like burdens for a noncandidate committee begin with registration, which an organization must undertake

> within ten days of receiving contributions or making or incurring expenditures of more

> than $1,000, in the aggregate, in a two-year election period; provided that within the thirty-day period prior to an election, a non-candidate committee shall register by filing an organizational report within two days of receiving contributions or making or incurring expenditures of more than $1,000, in the aggregate, in a two-year election period.

HRS-11-321(g).

To be clear: Hawaii does *not* require A-1 to *form/have* a noncandidate committee.[7] Instead, A-1 itself must *be* a noncandidate committee. When an organization itself must *be* a political committee to speak, the organization itself speaks and bears PAC burdens. *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 812-16 (7th Cir.2014) ("*Barland-II*"). The same holds when a "fund" or "account" that is part of the organization must *be* a political-committee-like fund/account. *Id.* at 825, 839-40, 844-46 (describing such an account); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 868-72 (8th Cir.2012) ("*MCCL-III*") (*en-banc*) (describing such a fund/account).

Being a Hawaii noncandidate committee triggers "onerous" **Track 1**, PAC-like organizational and administrative burdens for A-1 itself. *Citizens United*, 558 U.S. at 338-39:

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[7] A political committee that an organization *forms/has* is "separate" from the organization. *Citizens United*, 558 U.S. at 337.

- Registration (including treasurer-designation, bank-account, and termination (*i.e.*, deregistration)). HRS-11-321 (registration); HRS-11-323 (organizational report); HRS-11-324 (treasurer); HRS-11-326 (termination); HRS-11-351(a) (bank account).

- Recordkeeping, HRS-11-324; HAR-3-160-21(c) ("The noncandidate committee must segregate contributions and expenditures to Hawaii committees in a separate bank account or by a ledger account in the noncandidate committee's main account"), and

- Reporting that is both extensive, *see Citizens United*, 558 U.S. at 338 (citation omitted); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 253-56&nn.7-9 (1986) ("*MCFL*"), and "ongoing[,]" *MCCL-III*, 692 F.3d at 871, 873-77&nn.7, 9-10, *i.e.,* "periodic[.]" *MCFL*, 479 U.S. at 255. HRS-11-331, 335, 336, 339, 340.

Such **Track 1** burdens are unlike constitutional, **Track 2**, *non*-political-committee, *i.e.*, simple, one-time event-driven reports, which include neither registration, recordkeeping, nor extensive or ongoing reporting. **Track 2** reporting occurs only for reporting periods when particular speech occurs, *and* the reports are simple, *see MCFL*, 479 U.S. at 262 ("less . . . than . . . the full panoply of" PAC-like burdens); 52 U.S.C. 30104(c), (f), (g), compared to extensive reporting.

Registration means A-1 must appoint a noncandidate-committee chair, treasurer, and custodian

of books/accounts, and give their names, addresses, telephone numbers, occupations, and principal places of business; file an organizational report, with the noncandidate committee's name (which must include A-1's name), address, Internet page, and area/scope/jurisdiction, plus A-1's name and address; indicate whether A-1 supports/opposes a specific candidate or ballot measure; indicate it is not a political-party committee; identify its noncandidate-committee depository institution; provide account numbers; itemize contributor and contribution information for each contributor cumulatively exceeding $100 since the previous election; and certify all of this information. HRS-11-321, 323. Only the treasurer or a deputy treasurer (or the chair, if the office of treasurer is vacant) may authorize spending. HRS-11-324. The noncandidate committee must deposit all contributions it receives into its depository account. HRS-11-351(a).

Finally, noncandidate-committee obligations continue indefinitely until termination, which occurs – if the state approves – when the noncandidate committee files a termination-request form, files a final report, has no surplus/deficit, and submits its closing depository-account statement. HRS-11-326.

Recordkeeping means the treasurer must "maintain detailed accounts, bills, receipts, and other records" for five years after the applicable report, HRS-11-324, and "segregate" spending *via* "a separate bank account or by a ledger account in the

noncandidate committee's main account." HAR-3-160-21(c).

Extensive, ongoing reporting means each A-1 report – timely, electronically filed and "certified as complete and accurate" by the chair and treasurer, HRS-11-331 – must include: The noncandidate committee's name; address; cash on hand at the beginning and end of the reporting period and the current election cycle; contributions received, other receipts, and spending for the reporting period and the current election cycle; surplus/deficit at the end of the reporting period; itemized contributor and contribution information for each contributor cumulatively exceeding $100 during the election cycle; itemized other receipts; itemized information for what Hawaii calls "expenditures" and "independent expenditures"; a certification that all "independent expenditures" are independent; and durable-asset details. HRS-11-335.[8] Unless contributions received and spending are less than $1000 for the election cycle (in which case only a final election report is required), HRS-11-339, reports are due each January 31, each July 31 after an election year, 10 days before elections, and 20/30 days afterward. HRS-11-336. Not reporting properly leads to deficiency notices or penalties. HRS-11-340.

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[8] (*See* Noncandidate Committee Filing Sys.: A-1 A-[L]ectrcian, Inc., *available at* https://nc.csc.hawaii.gov/NCFSPublic/ReportDetail.php?RNO=NC20001.)

Hawaii law – rather than requiring constitutional, *non*-political-committee, *i.e.*, simple, one-time event-driven reports – requires a family-owned for-profit business to register, keep records, and file extensive, ongoing reports when it spends more than $1000 on newspaper issue ads.

A-1 has borne noncandidate-committee burdens for many years, because the Hawaii Campaign Spending Commission instructed A-1 to *be* a noncandidate committee. A-1 does not want to bear these burdens any longer. It wants to terminate its noncandidate-committee registration. However, A-1 fears it cannot do so without forgoing its newspaper ads. (D.CT.-DOC.24.¶28; D.CT.-DOC.24-23.) In addition, regardless of whether Hawaii may trigger PAC-like burdens for A-1, A-1 fears its speech is an "advertisement":

> "Advertisement" means any communication, excluding sundry items such as bumper stickers, that:
>
> (1) Identifies a candidate directly or by implication, or identifies an issue or question that will appear on the ballot at the next applicable election; and
>
> (2) *Advocates or supports* the nomination, *opposition*, or election of the candidate, or advocates the passage or defeat of the issue or question on the ballot.

HRS-11-302. Particular advertisements must have an attribution, HRS-11-391(a)(1), and then either a

second attribution, HRS-11-391(a)(2)(A), or a disclaimer. HRS-11-391(a)(2)(B):

> Any advertisement that is broadcast, televised, circulated, published, distributed, or otherwise communicated, including by electronic means, shall:
>
> (1) Contain the name and address of the candidate, candidate committee, noncandidate committee, or other person paying for the advertisement;
>
> (2) Contain a notice in a prominent location stating either that:
>
> > (A) The advertisement has the approval and authority of the candidate; provided that an advertisement paid for by a candidate, candidate committee, or ballot issue committee does not need to include the notice; or
> >
> > (B) The advertisement has not been approved by the candidate[.]

HRS-11-391(a). Because A-1's speech is "not . . . approved by the candidate[,]" the Section 11-391(a)(1) attribution and the Section 11-391(a)(2)(B) disclaimer apply; the Section 11-391(a)(2)(A) attribution does not. *Id.* A-1 challenges the disclaimer. A-1 does not seek to engage in anonymous speech and challenges neither attribution requirement. (*See* D.CT.-DOC.24.¶¶39-42, 113.)

Shortly after the filing of the original complaint (D.CT.-DOC.1), A-1's counsel, Respondents' counsel,

and Hawaii Campaign Spending Commission officials conferred at the district court's direction. When A-1's counsel noted Hawaii law is vague, the commission's executive director responded, "You're a lawyer. You can do research." (D.CT.-DOC.125-8.)

But A-1 does not want to seek and pay for legal counsel so that A-1 can try to understand and comply with vague political-speech law. (D.CT.-DOC.125-5.¶14); *see Citizens United*, 558 U.S. at 324.

And there is more: The commission's executive director also advised A-1 that its newspaper ads are regulable, because they refer to "PEOPLE WE PUT INTO OFFICE" or "THE REPRESENTATIVES WE PUT INTO OFFICE[.]" She said Hawaii law would not regulate A-1's speech with this edit: "~~we put~~ in~~to~~ office." (D.CT.-DOC.24-23.) In other words, those 2½ words bring on Hawaii's regulation of political speech.

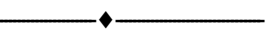
But "a speaker has the autonomy to choose the content of [its] own message." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477n.9 (2007) ("*WRTL-II*") (citation omitted). A-1 does not want to submit its speech for government officials' review and editing. (D.CT.-DOC.24.¶36; *see* D.CT.-DOC.24-23.)

The district court had jurisdiction under 28 U.S.C. 1331, 1343(a), 2201, and 2202, while the Ninth Circuit had jurisdiction under 28 U.S.C. 1291.

As described below, *Yamada* rejects A-1's contentions that the foregoing law fails constitutional

scrutiny under the First Amendment (APP.24-46) and is unconstitutionally vague under the Fourteenth Amendment (APP.8-23), thereby creating many circuits splits.

A-1 also challenged Hawaii's electioneering-communication law. HRS-11-341. But under a Hawaii administrative rule in effect when A-1 filed its complaint, a noncandidate committee need not comply with the electioneering-communication law: "A noncandidate committee registered with the commission is not required to file a statement of information for disbursements for electioneering communications." HAR-3-160-48. While A-1's appeal was pending, Hawaii changed its law so that even noncandidate committees must file electioneering-communication reports: "An electioneering communication statement of information filed pursuant to this section shall be in addition to the filing of any other report required under this part." HRS-11-341(c). However, *because Yamada holds that Hawaii may require A-1 to be a noncandidate committee*, it also holds A-1 lacks standing to challenge the electioneering-communication law, because it did not have standing upon filing its complaint. (APP.46-48.)



Summary of the Argument

Rather than requiring *non*-political-committee, *i.e.*, simple, one-time event-driven reports for occasional political spending, as approved in *Citizens*

United, Hawaii requires a large family-owned for-profit business to register as a noncandidate committee, keep records, and file extensive, ongoing reports if it spends more than $1000 on one newspaper issue ad.

Such organizational and administrative burdens are "onerous" under *Citizens United*, 558 U.S. at 338-39, and therefore cannot be applied to an organization unless it is "under the control of" a candidate or has *Buckley's* "major purpose" of "nominat[ing] or elect[ing]" candidates. 424 U.S. at 79.

Multiple circuit-splitting federal-appellate courts are not complying with these clear mandates of the Court. The promise of *Citizens United*, that organizations can engage freely in political speech, is not being fulfilled. These circuit courts disregard both *Buckley* and *Citizens United's* condemnation of and limit on imposing onerous political-committee organizational and administrative burdens and instead look to the pages of *Citizens United* allowing *non*-political-committee, *i.e.*, simple, one-time event-driven reports, 558 U.S. at 366-71, to justify imposing the same political-committee burdens that *Buckley* and *Citizens United* condemned.

When this happens, the burdens become a parade of horribles. The promise of *Citizens United* that groups are free to engage in political speech, *id.* at 336-66, is frustrated, as many groups simply forgo political speech because of the organizational and administrative burdens imposed by political-committee

status.[9] Many opportunities to lift these unconstitutional burdens on political speech, and resolve the circuit splits, have passed. This Court needs to act.

The constitutional violations do not stop there.

Hawaii's advertisement and disclaimer law violates the First Amendment.

Under the Fourteenth Amendment, Hawaii's advertisement definition is vague, because it uses the words "advocates or supports" and "opposition."

Furthermore, Hawaii's noncandidate-committee and expenditure definitions are vague, because they refer to "influencing" and what "influences" elections. *Yamada's* attempt to impose an express-advocacy and appeal-to-vote-test narrowing gloss was improper for multiple reasons, but in any event would not relieve the vagueness, in part because the appeal-to-vote test is not tied to a bright-line electioneering communication law. *WRTL-II*, 551 U.S. at 474n.7.

And A-1 has standing to challenge Hawaii's electioneering-communication law.

[9] Examples are in the *certiorari* petitions in *VRLC-II, SpeechNow, HLW, Real Truth, Free Speech*, and *ARLC*. *Infra* 24&n.14, 29, 31n.22, 38n.30.

Argument

I. Hawaii law fails constitutional scrutiny under the First Amendment.

Applying constitutional scrutiny, this Court has established the two-track system under which government may regulate[10] political speech.

Under **Track 1**, *Buckley* allows government to trigger PAC-like organizational and administrative burdens only for "organizations" that are "under the control of" candidates or have "the major purpose" of "nominat[ing] or elect[ing]" candidates. 424 U.S. at 79. Even if organizations have the *Buckley* major purpose, government still may not trigger PAC-like burdens if the organizations engage in only small-scale speech. *See Sampson v. Buescher*, 625 F.3d 1247, 1249, 1251, 1261 (10th Cir.2010), *cited in Worley v. Detzner*, 717 F.3d 1238, 1250 (11th Cir.), *cert. denied*, 134 S.Ct. 529 (2013), *and Justice v. Hosemann*, 771 F.3d 285, 295 (5th Cir.2014), *reh'g pet. filed* (5th Cir. Nov. 26, 2014).[11]

Under **Track 2**, even when government may *not* trigger PAC-like burdens, this Court allows government to require attributions, disclaimers, and *non*-political-committee, *i.e.*, simple, one-time event-driven reports for independent expenditures properly

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[10] *I.e.*, require disclosure of, which differs from "limit." (*See* APP.97-98&n.12.)

[11] The *Sampson, Worley*, and *Justice* plaintiffs have the *Buckley* major purpose based on ballot-measure speech.

understood, *Buckley*, 424 U.S. at 79-82,[12] and Federal Election Campaign Act ("FECA") electioneering communications, *Citizens United*, 558 U.S. at 366-71.[13] *Barland-II*, 751 F.3d at 836-37, 841.

However, Hawaii conflates **Tracks 1** and **2**, requiring, as here, a large for-profit electrical-construction organization to be a Hawaii noncandidate committee for spending just $1000 on issue ads, as explained next.

A. Hawaii's noncandidate-committee *definition* is unconstitutional under the First Amendment. Alternatively, the noncandidate-committee *burdens* are unconstitutional under the First Amendment.

1. State political-committee definitions impose political-committee burdens on organizations whose major purpose is not elections. These burdens are onerous under *Citizens United*, but there are multi-faceted circuit splits.

Hawaii law – rather than requiring constitutional, *non*-political-committee, *i.e.*, simple, one-time event-driven reports – requires a large family-owned business to be a noncandidate committee and comply

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[12] *Supra* 5n.5.

[13] *Defined in McConnell*, 540 U.S. at 189-94.

with numerous organizational and administrative burdens, when it spends more than $1000 on newspaper issue ads.

Hawaii's definitions, including its noncandidate-committee definition, "trigger[ ]" PAC-like burdens, *Barland-II*, 751 F.3d at 812, 815, 818, 822, 826, 827, 832&n.20, 834, 837, 840; *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1144, 1153-54 (10th Cir.2007) ("*CRLC*"), including registration, record-keeping, and extensive, ongoing reporting, which are "onerous" as a matter of law under *Citizens United*, 558 U.S. at 338-39.

- *Yamada* joins the Eleventh Circuit's holding that such law is not an "undue burden" on speech. (APP.25, 27-28 (quoting *Worley*, 717 F.3d at 1250).)

And *Yamada* joins the First, Second, and Eleventh Circuits with its holding that PAC-like burdens are not "onerous[.]" (APP.27-29&n.7 (citing *Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 56 (1st Cir.2011), *cert. denied*, 132 S.Ct. 1635 (2012); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 137-38 (2d Cir.2014) ("*VRLC-II*"), *cert. denied*, 135 S.Ct. 949 (2015); *Worley*, 717 F.3d at 1250).)[14] *Yamada* joins the same circuits plus the Fifth Circuit in believing that *Citizens United's* condemnation of political-committee burdens, 558 U.S. at 337-40,

[14] *SpeechNow.org v. FEC*, 599 F.3d 686, 697-98 (D.C. Cir.) (*en-banc*), *cert. denied*, 562 U.S. 1003 (2010), which *Yamada* also cites (APP.28), addresses federal law.

applies *only* to speech bans and other limits, not to other extensive organizational and administrative burdens. *See* (APP.29n.7); *McKee*, 649 F.3d at 54, 56; *VRLC-II*, 758 F.3d at 139; *Worley*, 717 F.3d at 1242, 1244, *followed in Justice*, 771 F.3d at 1297.

Yamada thereby splits with the Eighth Circuit, which correctly holds that state political-committee-like burdens – registration, recordkeeping, and extensive, ongoing reporting – are "onerous" under *Citizens United*. *MCCL-III*, 692 F.3d at 872.

And *Yamada* also splits with the Seventh and Tenth Circuits, which correctly recognize that *Citizens United's* condemnation of political-committee burdens applies not only to speech bans and other limits but also to the organizational and administrative burdens that law imposes on the organization itself. *Barland-II*, 751 F.3d at 840; *Sampson*, 625 F.3d at 1255.

Since *Citizens United*, this Court has held that although "burdens" and "bans" differ, "the 'distinction between [them] is but a matter of degree' and . . . 'content-based[15] burdens must satisfy the same rigorous scrutiny[16] as . . . content-based bans.' Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content."

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[15] Which political-speech law is as a matter of law. *See Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227, 2230 (2015).

[16] The scrutiny *level* does not affect the result here. *Infra* 28.

Sorrell v. IMS Health Inc., 131 S.Ct. 2653, 2664 (2011) (internal citations omitted).

Thus, government "does not alleviate the First Amendment problems" with a "speech" "ban" by allowing organizations to "speak[,]" while triggering PAC-like "burdens[ ]" for them. *Citizens United*, 558 U.S. at 337.

- *Yamada* says A-1 has complied with the challenged law "for several years without difficulty." (APP.30.)

Yamada thereby joins the Second, Fifth, and Eleventh Circuits and Vermont in a factual determination of whether an organization is capable of complying with PAC-like burdens. *VRLC-II*, 758 F.3d at 137n.17; *Justice*, 771 F.3d at 300; *Worley*, 717 F.3d at 1250; *Vermont v. Green Mountain Future*, 86 A.3d 981, 994 (Vt.2013) ("*GMF*").

Yamada thereby splits with the Eighth Circuit, which correctly holds that whether organizations are "*capable*" of complying with the law is irrelevant. *MCCL-III*, 692 F.3d at 874 (emphasis in original).

2. The *Buckley* major-purpose test applies to state law, but there are multi-faceted circuit splits.

a. There is no constitutional way that A-1 is a political committee.

On the undisputed facts (D.CT.-DOC.24.¶27&n.19), A-1 is not "under the control of a[ny] candidate[(s)]" under *Buckley*, 424 U.S. at 79.

Nor does A-1 – on the undisputed facts (D.CT.-DOC.24.¶27&nn.20-23) – have "the major purpose" of "nominat[ing] or elect[ing]" candidates under *Buckley*, 424 U.S. at 79. A-1 does not articulate in any organizational documents, *see MCFL*, 479 U.S. at 241-42, 252n.6, or in its "public statements[,]" *FEC v. GOPAC, Inc.*, 917 F.Supp. 851, 859 (D.D.C. 1996), that it has the *Buckley* major purpose. Nor does A-1 devote the majority of its spending to contributions to candidates, or independent expenditures properly understood. *See Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 584 (8th Cir.2013) (quoting *CRLC*, 498 F.3d at 1152 (citing/quoting, in turn, *MCFL*, 479 U.S. at 252n.6, 262), *followed in N.M. Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir.2010) ("*NMYO*")), *cert. denied*, 134 S.Ct. 1787 (2014).

Indeed, A-1 – like the *NMYO*, 611 F.3d at 678, plaintiffs – presents the easy case under the *Buckley* major-purpose test, because it makes neither contributions nor independent expenditures properly

understood. But even *if* A-1's (past) contributions and current newspaper ads were considered,[17] A-1 still would not have the *Buckley* major purpose, because – on the undisputed facts – A-1 would not devote the majority of its spending to contributions or independent expenditures.

Thus – unlike some other organizations, *see Ariz. Free Enter. Club's Freedom PAC v. Bennett*, 131 S.Ct. 2806, 2813 (2011) ("*AFEC*") – there is no constitutional way that A-1 is a political committee.

Because Hawaii's noncandidate-committee *definition*, HRS-11-302, triggers PAC-like burdens beyond *Buckley* – not only for A-1 but also for other organizations – the definition fails constitutional scrutiny under the First Amendment, even under substantial-relation exacting scrutiny. *See Barland-II*, 751 F.3d at 840-42. However, *Yamada's* holding that substantial-relation exacting scrutiny applies (APP.24) partly splits with the Eighth Circuit's holding that "strict scrutiny" *should* "apply[.]" *MCCL-III*, 692 F.3d at 875 (holding for the plaintiffs-appellants under substantial-relation exacting scrutiny).

Alternatively, Hawaii's noncandidate-committee *burdens*[18] that *Yamada* cites and upholds (APP.26-42)

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[17] *Contra supra* 4n.4 (addressing (past) contributions).

[18] *Supra* 11-15.

fail constitutional scrutiny under the First Amendment. *See IRLC-II*, 717 F.3d at 588 ("consider each challenged disclosure requirement in isolation").[19]

b. PAC-like burdens are not the "disclosure" that *Citizens United* approved.

At the heart of the multi-faceted circuit splits are these questions: Does the *Buckley* major-purpose test apply to *state* law triggering PAC-like burdens? Or does *Citizens United's* approval of *non*-political-committee, *i.e.*, simple, one-time event-driven reports, 558 U.S. at 366-71, permit *state* governments to trigger PAC-like burdens for organizations lacking the *Buckley* major purpose?

Yamada follows *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1005-13 (9th Cir.2010) ("*HLW*"), *cert. denied*, 562 U.S. 1217 (2011), and holds the *Buckley* major-purpose test does not apply to such state law. (APP.33, 40.) *Yamada* holds *Citizens United's* approval of *non*-political-committee, *i.e.*,

[19] In the lower courts, A-1 challenged only the non-candidate-committee *definition* and asserted A-1 is not under the control of any candidate(s) *for state or local office in Hawaii* and does not have the *Buckley* major purpose *in Hawaii. Yamada* converts A-1's noncandidate-committee-definition challenge into a noncandidate-committee-"burdens" challenge (APP.6, 10, 24-30), and rejects the *Buckley* major-purpose test without mentioning any major purpose in Hawaii. (APP.33, 40.) A-1 may address these issues here as *Yamada* "addressed"/"passed on" them. *Citizens United*, 558 U.S. at 323, 330 (citation omitted).

simple, one-time event-driven reports allows state governments – for the sake of "disclosure[,]" "transparency[,]" and "information" – to trigger PAC-like burdens. (APP.31-32, 38-39.)

Yamada thereby joins the First and Second Circuits, Vermont, Ohio, Arizona, Washington, and Maine, none of which apply the *Buckley* major-purpose test to state law and all of which, to varying degrees, cite *Citizens United* pages *366-71* in allowing state governments – for the sake of disclosure/transparency/information – to trigger PAC-like burdens for organizations *without Buckley's* major purpose, *McKee*, 649 F.3d at 55-59 (rejecting the *Buckley* major-purpose test for state law);[20] *VRLC-II*, 758 F.3d at 125n.5, 135-36 (same); *GMF*, 86 A.3d at 989n.5, 994 (same); *Comm. for Justice & Fairness v. Bennett*, 332 P.3d 94, 103, 105, 107 (Ariz. App. Div.1 2014) ("*CJF*") (overlooking the *Buckley* major-purpose test), *review denied* (Ariz. Apr. 21, 2015); *Utter v. Bldg. Indus. Ass'n of Wash.*, 341 P.3d 953, 966-67 (Wash.2015) (equating "primary" with "major," which is incorrect, because what is "primary" can be the plurality rather than the majority), *cert. pet. filed*, No.14-1397 (U.S. May 29, 2015),[21] or for organizations

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[20] *Followed in Nat'l Org. for Marriage, Inc. v. Me. Comm'n on Gov't'l Ethics & Election Practices*, No.BCD-15-525, ___ A.3d ___, Order at 17n.10, 2015-WL-4622818 (Me. Aug. 4, 2015), *available at* http://courts.maine.gov/opinions_orders/supreme/lawcourt/2015/15me103no.pdf.

[21] Even if the Court accepts *Utter*, it should also accept A-1's challenge. Of A-1's issues, the *Utter* petition presents only the major-purpose test, asserting it turns on *influencing* elections

(Continued on following page)

with Buckley's major purpose but only small-scale speech. *Corsi v. Ohio Elections Comm'n*, 981 N.E.2d 919, 925, 927 (Ohio App.2012) (addressing an organization with the *Buckley* major purpose, citing the FEC's we'll-know-it-when-we-see-it major-purpose test,[22] and rejecting a *Sampson* argument), *appeal not allowed*, 984 N.E.2d 29 (Ohio 2013), *cert. denied*, 134 S.Ct. 163 (2013).

Yamada also partly joins the Fifth and Eleventh Circuits, which address organizations that *have* the *Buckley* major purpose and unsuccessfully assert they engage in only small-scale speech. These circuits cite *Citizens United* pages *366-71* to allow state governments – for the sake of disclosure/transparency – to trigger PAC-like burdens. *Justice*, 771 F.3d at 296-97; *Worley*, 717 F.3d at 1243-46, 1249.

Yamada thereby splits with circuits applying the *Buckley* major-purpose test to state law triggering PAC-like burdens. These include the *pre-Citizens United* Fourth, Tenth, and Eleventh Circuits. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287-90 (4th

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and *supporting/opposing* candidates/ballot measures, both of which are vague. *Infra* 40-42.

[22] *See Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556-58 (4th Cir.2012), *cert. denied*, 133 S.Ct. 841 (2013), *followed in Free Speech v. FEC*, 720 F.3d 788, 797-98 (10th Cir.2013), *cert. denied*, 134 S.Ct. 2288 (2014). The D.C., Fourth, and Tenth Circuits cite *Citizens United* pages *366-71* in upholding *federal* law triggering political-committee burdens. *SpeechNow*, 599 F.3d at 696, *followed in Real Truth*, 681 F.3d at 548-49, *followed in Free Speech*, 720 F.3d at 790n.1, 793.

Cir.2008) ("*NCRL-III*"); *CRLC*, 498 F.3d at 1153-55; *Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288, 1289 (11th Cir.2001) ("*FRTL-I*").[23] These also include the *post-Citizens United* Seventh, Eighth, and Tenth Circuits. *Barland-II*, 751 F.3d at 834, 839-40, 842, *superseding Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 487&n.23 (7th Cir.2012); *MCCL-III*, 692 F.3d at 872; *NMYO*, 611 F.3d at 677-78; *cf. IRLC-II*, 717 F.3d at 593-601 (applying the *Buckley* major-purpose test to political-committee-like burdens except registration). Moreover, the *post-Citizens United* Eleventh Circuit discusses the *Buckley* major-purpose test while addressing an organization that *has* the *Buckley* major purpose. *See Worley*, 717 F.3d at 1252&n.7.

Yamada further splits with the Seventh and Eighth Circuits, which correctly hold that *Citizens United* pages *366-71* do *not* apply here, because the reporting they address/support is only **Track 2**, *non*-political-committee, *i.e.*, simple, one-time event-driven reporting. *Barland-II*, 751 F.3d at 824, 836-37, 839, 841, *superseding Madigan*, 697 F.3d at 477, 482, 484, 488-91, 498; *MCCL-III*, 692 F.3d at 875n.9; *but see IRLC-II*, 717 F.3d at 589-91 (not following *MCCL-III* as circuit precedent in this respect).

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[23] *Aff'g Fla. Right to Life, Inc. v. Mortham*, No.98-770CIVORL19A, 1999-WL-33204523, *4 (M.D.Fla. Dec. 15, 1999) (unpublished) (explaining what the Eleventh Circuit later adopts).

• *Yamada*, plus the First and Eleventh Circuits, Vermont, Ohio, and Arizona, cite *Citizens United* pages *366-71* and seize on the statement that "disclosure requirements . . . 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" 558 U.S. at 366 (internal citations omitted). *See* (APP.44 (addressing disclaimers)); *McKee*, 649 F.3d at 56; *Worley*, 717 F.3d at 1242-43; *GMF*, 86 A.3d at 994; *Corsi*, 981 N.E.2d at 923, 925; *CJF*, 332 P.3d at 103.[24]

But under *pre-* and *post-Citizens United* decisions, a political-committee law need *not* ban or otherwise limit political speech to be unconstitutional. *See AFEC*, 131 S.Ct. at 2816-17&n.5; *Buckley*, 424 U.S. at 79-82.

c. Several of the Ninth Circuit holdings are anomalous, thereby splitting with all circuits.

Yamada splits with *all* other circuit and state supreme courts by following *HLW's* watering down of the *Buckley* major-purpose test into "a priority"-"incidentally" test. (APP.34-40.) Under this test, state governments may trigger PAC-like burdens for organizations that "make political advocacy *a priority,*" but not for those that "only *incidentally* engage in such

[24] *Accord Free Speech*, 720 F.3d at 792; *Real Truth*, 681 F.3d at 549; *SpeechNow*, 599 F.3d at 696 (each addressing federal law).

advocacy." (APP.34 (emphasis in *Yamada*) (quoting *HLW*, 624 F.3d at 1011).) This is broader than the *Buckley* major-purpose test, and it is vague, because "advocacy" is vague, *Buckley*, 424 U.S. at 42-43, and because the boundary between "a priority" and "incidentally" is unclear.

Yamada then makes *HLW's* bad, watered-down holding worse: What if an organization does "not make political advocacy a priority"? (APP.39.) Not to worry, says *Yamada:* Government may "nonetheless" trigger PAC-like burdens for any organization that is "a significant participant in [the] electoral process[.]" (APP.39.) This is broader than the *Buckley* major-purpose test and just as vague as "a priority"-"incidentally" test.

If the *Buckley* major-purpose test does not apply to *state* law, state governments would have much greater power to suppress political speech in state elections than does the federal government in federal elections. But political speech needs protection from both federal and state governments. *See Am. Tradition P'ship v. Bullock*, 132 S.Ct. 2490, 2491 (2012); *McDonald v. City of Chicago*, 561 U.S. 742, 765, 786-87 (2010) (rejecting "watered-down" "standards" for state governments under "the Bill of Rights" (citations omitted)).

d. *Yamada* wrongly rejects the *Buckley* major-purpose test.

• *Yamada* rejects the *Buckley* major-purpose test by saying that "most organizations do not have just one major purpose." (APP.38 (quoting *HLW*, 624 F.3d at 1011).) This splits with the Fourth Circuit holding that "the" – not "a" – "major purpose" controls. *NCRL-III*, 525 F.3d at 287-89, 302-04.

• *Yamada* also rejects the *Buckley* major-purpose test, partly because a large organization spending a small percent of its money on "political activity" could spend a significant amount and not have the *Buckley* major purpose. (APP.38.) *Yamada* thereby joins the First Circuit and Washington. (APP.38 (citing *McKee*, 649 F.3d at 59)); *Utter*, 341 P.3d at 966.[25]

Yamada thereby splits with the Eighth and Tenth Circuits, which apply the *Buckley* major-purpose test and correctly focus not on general political activity (whatever *Yamada* might mean by that) but on contributions and independent expenditures properly understood.[26]

• *Yamada* compares PAC-like-registration thresholds to determine whether Hawaii law is constitutional

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[25] *Yamada* also cites *Madigan*, 697 F.3d at 489-90, here, but the Seventh Circuit *Barland-II* opinion supersedes the Seventh Circuit *Madigan* opinion. *Supra* 32.

[26] *Supra* 27.

and notes that organizations can terminate their registration when they "reduce[ ]" their political speech to below the registration threshold. (APP.35-38&n.9.) Just "reduce[ ]" your speech, *Yamada* says.

Yamada thereby joins the Second Circuit, *VRLC-II*, 758 F.3d at 137-38, and splits with the Eighth Circuit, which correctly recognizes that (1) comparing registration thresholds is not the test for the constitutionality of law triggering PAC-like burdens as applied to organizations *lacking* the *Buckley* major purpose, *see IRLC-II*, 717 F.3d at 589,[27] and that (2) the ability to terminate PAC-like burdens solves *nothing* when a law triggering them is unconstitutional. *See id.* at 599-601.

e. The proper challenge is to the definition.

• *Yamada* converts A-1's challenge to the noncandidate-committee *definition* into a challenge to the noncandidate-committee *burdens*. (APP.6, 10, 24-30.) *Yamada* thereby joins the First Circuit, *McKee*, 649 F.3d at 55-59, and partly joins the Second Circuit, Vermont, and Ohio. *VRLC-II*, 758 F.3d at 137; *GMF*, 86 A.3d at 992; *Corsi*, 981 N.E.2d at 924.

[27] Notwithstanding *Yamada* (APP.35n.8), *Barland-II* turns on the *Buckley* major-purpose test, not a registration threshold. 751 F.3d at 839-40, 842.

Yamada thereby splits with the Fourth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits, which address the definition. *NCRL-III*, 525 F.3d at 288-89; *Barland-II*, 751 F.3d at 811, 812, 832-33, 834, 838, 839-40, 843-44; *MCCL-III*, 692 F.3d at 872; *CRLC*, 498 F.3d at 1139, 1153-55; *FEC v. Fla. for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir.1982); *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir.2010) (citation omitted); *but see IRLC-II*, 717 F.3d at 588 ("consider each challenged disclosure requirement in isolation").

The proper challenge is to the definition, *Buckley*, 424 U.S. at 79 (addressing how "political committee" is "defined"), which triggers the burdens.

- Finally, *Yamada* addresses only A-1's as-applied challenge and overlooks A-1's *facial*-overbreadth challenge (APP.41-42), thereby splitting with the Fourth Circuit, which holds such a law facially overbroad. *NCRL-III*, 525 F.3d at 287-90.

B. Hawaii's advertisement definition and disclaimer requirement are unconstitutional under the First Amendment. However, there are circuit splits.

The advertisement definition and the disclaimer requirement apply both to organizations for which Hawaii *may* trigger PAC-like burdens and to organizations for which Hawaii may *not* trigger such burdens. *See* HRS-11-302; HRS-11-391(a)(2)(B). A-1 challenges the advertisement definition and the disclaimer requirement under the *First* Amendment

only as to speakers, such as A-1, for which Hawaii may *not* trigger PAC-like burdens.

In other words, this is a **Track 2** challenge, not a **Track 1** challenge.

• In upholding this law (APP.42-46), *Yamada* joins the First, Second, and Third Circuits. *McKee*, 649 F.3d at 61; *VRLC-II*, 758 F.3d at 133; *Del. Strong Families v. Denn*, ___ F.3d ___, No.14-1887, slip-op. at 13-14, 2015-WL-4289460 (3d Cir. July 16, 2015) ("*DSF*") (addressing reporting under **Track 2**).[28]

However, under **Track 2**, this Court has allowed regulation of only independent expenditures properly understood and FECA electioneering communications.[29]

By not recognizing this, *Yamada* splits with the Fourth and Seventh Circuits, which recognize that this goes not to the government-interest part of constitutional scrutiny but to *tailoring*. *See Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270, 282-85 (4th Cir.2013) (addressing underinclusiveness); *NCRL-III*, 525 F.3d at 281-82 (addressing overbreadth[30] while considering independent expenditures

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[28] *Available at* http://www2.ca3.uscourts.gov/opinarch/141887p.pdf.

[29] *Supra* 22-23.

[30] "Overbreadth" applies to both as-applied and facial claims. *E.g.*, *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 785 (9th Cir.) ("*ARLC*"), *cert. denied*, 549 U.S. 886 (2006).

properly understood and FECA electioneering communications *pre-Citizens United*); *Barland-II*, 751 F.3d at 824 ("closeness of the fit"). Defendants did not prove *tailoring*.

The disclaimer requirement applies to advertisements. HRS-11-391(a)(2)(B). The advertisement definition, HRS-11-302, and the disclaimer requirement reach beyond independent expenditures properly understood, because they reach beyond *Buckley* express advocacy.[31] They reach beyond FECA electioneering communications, because they reach beyond *non-Buckley*-express-advocacy speech that (1) is broadcast, (2) runs in the 30 days before a primary or 60 days before a general election, and (3) is targeted to the relevant electorate. *See McConnell*, 540 U.S. at 190.

• Moreover, the advertisement definition and the disclaimer requirement reach "genuine[-]issue" speech, including A-1's newspaper ads. If anything is beyond what government should regulate with **Track 2** law, then "genuine[-]issue" speech is. *WRTL-II*, 551 U.S. at 470 (addressing a speech ban). Genuine-issue speech is at the opposite end of the issue-advocacy spectrum from "appeal[-]to[-]vote" speech. *Citizens United*, 558 U.S. at 335 (quoting *WRTL-II*, 551 U.S. at 470).

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[31] *Supra* 5n.5.

• Hawaii's disclaimer takes up precious space and distracts readers from A-1's message. Nevertheless, *Yamada* upholds the disclaimer law and splits with the Seventh Circuit's rejection of an attribution and disclaimer requirement as applied to 30-second radio ads. *Barland-II*, 751 F.3d at 832.

II. Hawaii law is unconstitutionally vague under the Fourteenth Amendment.

A. Hawaii's advertisement definition is unconstitutionally vague, but there is a circuit split.

Yamada rejects A-1's vagueness challenge to "[a]dvocates or supports" and "opposition" in the advertisement definition, HRS-11-302, by citing *McConnell*. (APP.20-23 (citing 540 U.S. at 170n.64).)

• However, *McConnell* addresses no form of "advocate"/"advocacy." *See* 540 U.S. at 170n.64 (addressing "promote"-"support"-"attack"-"oppose"). Meanwhile, *Buckley* holds "advocacy" is vague. 424 U.S. at 42-43. *Yamada* acknowledges this but summarily upholds "[a]dvocates" anyway. (APP.22-23.)

• *Yamada* upholds "supports" and "opposition" under *McConnell* (APP.20-22 (citing 540 U.S. at 170n.64)), which upholds "promote"-"support"-"attack"-"oppose" – sometimes called "PASO" – in a *facial* challenge. 540 U.S. at 134, 174, 181.

Yamada thereby joins the First, Second, and *post-NCRL-III* Fourth Circuits. (APP.21-22 (citing *McKee*,

649 F.3d at 64; *VRLC-II*, 758 F.3d at 128-30; *Tennant*, 706 F.3d at 286-87).)[32]

Yamada thereby splits with the Seventh Circuit, which correctly holds similar language – "[s]upports or condemns" in Wisconsin law, *Barland-II*, 751 F.3d at 826 (quoting GAB-1.28(3)(b)) – is unconstitutionally vague as applied *outside* the *McConnell* context, *i.e.*, as applied *other than* to political-party committees, *id.* at 837-38, or federal candidates. *Compare McConnell*, 540 U.S. at 170n.64 *with* 52 U.S.C. 30104(e) *and id.* 30125 (each citing *id.* 30101(20)(A)). "Political-party committees can afford campaign-finance lawyers to advise them about compliance[.]" *Barland-II*, 751 F.3d at 837. Besides, political parties and many federal candidates' campaigns are filled with political professionals accustomed to, though not necessarily content with, baroque election law. Others, such as A-1, are not. *See id.* at 838.

Yamada also splits with the *post-McConnell controlling* Fourth Circuit opinion and the *post-McConnell* Fifth Circuit, which recognize the vagueness of language similar to Hawaii's. *See NCRL-III*, 525 F.3d at 289, 301 (approving "support or oppose" when – after *NCRL-III*, 525 F.3d at 281-86 – its definition included only *Buckley* express advocacy);

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[32] *Yamada* also cites *Madigan*, 697 F.3d at 485-87, 495, here, but the Seventh Circuit *Barland-II* opinion supersedes the Seventh Circuit *Madigan* opinion. *See Barland-II*, 751 F.3d at 837-38.

Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655, 663-66 (5th Cir.2006) (upholding "for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office" after holding it reaches only *Buckley* express advocacy), *cert. denied*, 549 U.S. 1112 (2007).

- Furthermore, "supports" and "opposition" are vague not only as applied to A-1's newspaper ads but also facially, so A-1 also seeks reconsideration of *McConnell's* facial holding. *See WRTL-II*, 551 U.S. at 492 (Scalia, J., concurring) (calling, *inter alia*, PASO "impermissibly vague"); *id.* at 493 (calling PASO "inherently vague").

B. Hawaii noncandidate-committee and expenditure definitions are unconstitutionally vague. *Yamada's* narrowing gloss is improper, but there are multiple circuit splits.

"Influencing" elections in the expenditure definition, HRS-11-302, and "influences" elections in the noncandidate-committee definition, HRS-11-302, are unconstitutionally vague under *Buckley*, 424 U.S. at 77.

Yamada purports to solve this vagueness by narrowing the words to *Buckley* express advocacy and the "functional equivalent" of express advocacy. (APP.11-15.) The latter was the "'appeal[-]to[-]vote' test[.]" *Citizens United*, 558 U.S. at 335 (quoting *WRTL-II*, 551 U.S. at 470).

Yamada thereby joins the First and Seventh Circuits, and Wisconsin. (APP.13 (citing *McKee*, 649 F.3d at 66-67; *Barland-II*, 751 F.3d at 832-34)); *Wisconsin v. Peterson*, 363 Wis.2d 1, 15-17 (Wis.2015).

• However, Hawaii enacted "[i]nfluencing" and "influences" *after Buckley* held "influencing" is vague and narrowed it to *Buckley* express advocacy (APP.13-14), so Hawaii knew its law was vague *upon enactment*. If Hawaii had meant express advocacy, it would have said so. By nevertheless adopting a narrowing gloss with *Buckley* express advocacy, *Yamada* splits with the Fourth Circuit. (APP.14n.2 (citing *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 2[70-]71 (4th Cir.1998) ("*VSHL-I*")).)

• *Yamada* also sends mixed signals on when a federal court may narrow state law. (APP.9 ("readily susceptible"); APP.12, 14 ("reasonable"); APP.14 ("readily apparent").) For "readily susceptible[,]" *Yamada* cites *Reno v. ACLU*, 521 U.S. 844, 884 (1997), which addresses *federal* law. For a federal court to narrow *state* law, the narrowing gloss must be "reasonable and readily apparent." *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (citation omitted). By using the lower readily-susceptible standard in addressing state political-speech law, *Yamada* joins the Second and Eleventh Circuits, *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir.2000) ("*VRLC-I*") (*post-Stenberg*) (citations omitted); *Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1326 (11th Cir.2001) ("*FRTL-II*") (citation omitted), and splits with the Seventh and Tenth Circuits, which correctly look to

the higher *Stenberg* standard. *Barland-II*, 751 F.3d at 833; *CRLC*, 498 F.3d at 1154.

• By holding that a federal-court narrowing gloss binds a state court (APP.14-15), *Yamada* splits with the Fourth and Seventh Circuits. *VSHL-I*, 152 F.3d at 270 (quoting *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir.1990)); *Barland-II*, 751 F.3d at 833-34.

• By holding that the appeal-to-vote test is a form of express advocacy (APP.13) and applying it beyond FECA electioneering communications (APP.12-14, 16-17), *Yamada* joins the First, *post-NCRL-III* Fourth, and Tenth Circuits, and Arizona. *McKee*, 649 F.3d at 69&n.48; *Real Truth*, 681 F.3d at 551; *Free Speech*, 720 F.3d at 795; *CJF*, 332 P.3d at 105.

Yamada thereby splits with the *controlling* Fourth Circuit opinion and Colorado, which correctly hold that under *WRTL-II*, 551 U.S. at 474n.7 ("this test is only triggered if the speech" is a FECA electioneering communication "in the first place"), the appeal-to-vote test applied only to FECA electioneering communications, *NCRL-III*, 525 F.3d at 282; *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1257-58 (Colo.2012), which by definition are not express advocacy, because they are not expenditures/independent expenditures. 52 U.S.C. 30104(f)(3)(B)(ii). Only expenditures/independent expenditures are express advocacy. *Buckley*, 424 U.S. at 44&n.52, 80. Indeed, one point of regulating FECA electioneering

communications was for **Track 2** law to reach beyond express advocacy. *McConnell*, 540 U.S. at 189-94.

• By holding that the appeal-to-vote test remains valid *post-Citizens United* (APP.17-18), *Yamada* joins the Seventh Circuit and Wisconsin, *Barland-II*, 758 F.3d at 838; *Peterson*, 363 Wis.2d at 17n.23, splits with the Second and Third Circuits, *VRLC-II*, 758 F.3d at 132 (quoting *Citizens United*, 558 U.S. at 369); *DSF*, slip-op. at 8 (quoting *Citizens United*, 558 U.S. at 368), and partly splits with the First Circuit, which – though adopting an express-advocacy/appeal-to-vote-test narrowing gloss (APP.13 (citing *McKee*, 649 F.3d at 66-67)) – correctly holds that *Citizens United* "eliminated the context in which the appeal-to-vote test has had any significance" under the Constitution. *McKee*, 649 F.3d at 69.

After *Citizens United*, the appeal-to-vote test no longer affects whether government may ban, otherwise limit, or regulate speech. *See* 558 U.S. at 324-26, 365-66, 368-69 (holding that government may *not ban or otherwise limit* FECA electioneering communications that *are* the functional equivalent, and holding that government may *regulate* FECA electioneering communications that are *not* the functional equivalent).

• By holding the appeal-to-vote test is not vague, *Yamada* joins the First, Fourth, and Tenth Circuits. (APP.17-18 (quoting *McKee*, 649 F.3d at 69); APP.16-17 (citing *Real Truth*, 681 F.3d at 552, 554;

Tennant, 706 F.3d at 280-81; *Free Speech*, 720 F.3d at 795-96[33].)

Yamada thereby splits with Colorado, which holds that under *WRTL-II*, 551 U.S. at 474n.7 (answering a charge that "our test" is "impermissibly vague" partly by saying "this test is only triggered if the speech" is a FECA electioneering communication "in the first place"), the appeal-to-vote test is vague as to speech *other than* FECA electioneering communications. *Colo. Ethics Watch*, 269 P.3d at 1258 (citing *WRTL-II*, 551 U.S. at 468-69).

After *Citizens United*, what remains from *WRTL-II* regarding the test is the conclusion that the test is unconstitutionally vague, even *vis-à-vis* FECA electioneering communications. *WRTL-II*, 551 U.S. at 492-94 (Scalia, J., concurring).

Yamada helps prove the test is vague. How was anyone to know a court would conclude A-1's newspaper ads were appeal-to-vote speech[34] just because they "ran shortly before an election and criticized candidates by name as persons who did not, for example, 'listen to the people'"? (APP.45.) The ads were obviously not broadcast, so the ads extended beyond FECA electioneering communications and therefore

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[33] *Tennant* and *Free Speech* rely on *Real Truth*, which does not consider *the reasons that* the appeal-to-vote test is vague.

[34] Neither Petitioners nor Respondents raised this issue in the lower courts. A-1 may address here what *Yamada* "addressed"/"passed on[.]" *Supra* 29n.19.

beyond where the appeal-to-vote test applied.[35] Besides, even *if* the appeal-to-vote test remained in constitutional law or applied beyond FECA electioneering communications, A-1's newspaper ads would *not* have been appeal-to-vote speech, because they were not meaningfully different from the *WRTL-II* radio ads, 551 U.S. at 458-59&nn.2-3, which were *not* appeal-to-vote speech. *Id.* at 469-70.

III. *Yamada* should have considered only current law, but there is a circuit split.

During the appeal, Hawaii amended the challenged law without affecting the result. (APP.27n.6, 43n.13.) *Yamada* considers both old (APP.27n.6) and current law. (APP.42-43 (quoting HRS-11-391(a)(2)[(B)]).) *Yamada* splits with the Second Circuit, which correctly looks to current law. *VRLC-II*, 758 F.3d at 122.

IV. A-1 has standing to challenge Hawaii's electioneering-communication law.

Yamada's holding that A-1 lacks standing to challenge Hawaii's electioneering-communication law, HRS-11-341, depends on the false premise that Hawaii may trigger noncandidate-committee burdens for A-1. (APP.46-48.) A-1 has standing.

Moreover, holding that the amended law does not confer standing (APP.46-48) splits with the Sixth

[35] *Supra* 44.

Circuit, which correctly holds amended political-speech law confers standing. *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576-77&n.1 (6th Cir.), *cert. dismissed*, 502 U.S. 1022 (1991).

The Court should remand this claim.

Conclusion

Hawaii law – rather than requiring constitutional, *non*-political-committee, *i.e.*, simple, one-time event-driven reports – requires a large family-owned business to comply with onerous organizational and administrative burdens when it spends more than $1000 on newspaper issue ads.

To resolve the many circuit splits, the Court should grant *certiorari.*

Respectfully submitted,

JAMES HOCHBERG
JAMES HOCHBERG,
ATTORNEY AT LAW, LLLC
Topa Financial Center
Suite 2100,
Bishop Street Tower
700 Bishop Street
Honolulu, Hawaii 96813

Post Office Box 3226
Honolulu, Hawaii 96801
Telephone (808) 534-1514
Facsimile (808) 538-3075
Jim@JamesHochbergLaw.com

August 14, 2015

JAMES BOPP, JR.*
JAMES MADISON CENTER
FOR FREE SPEECH
1 South Sixth Street
Terre Haute, Ind. 47807
Telephone (812) 232-2434
Facsimile (812) 235-3685
JBoppjr@aol.com

RANDY ELF
Post Office Box 525
Lakewood, N. Y. 14750

Counsel for Petitioners
**Counsel of Record*

Ninth Circuit Opinion and Judgment

(Single asterisks precede page numbers from the reported opinion, 786 F.3d 1182 (9th Cir.2015), while double asterisks precede page numbers from the slip opinion, which is available at http://cdn.ca9.uscourts.gov/datastore/opinions/2015/05/20/12-15913.pdf.)

***1182 **1** United States Court of Appeals for the Ninth Circuit.

Jimmy YAMADA; Russell Stewart, Plaintiffs,
and
A-1 A-Lectrician, Inc., Plaintiff-Appellant,

v.

William SNIPES, in his official capacity as chair and member of the Hawaii Campaign Spending Commission, Tina Pedro Gomes, in her official capacity as vice chair and member of the Hawaii Campaign Spending Commission; and Eldon Ching, Gregory Shoda and Adrienne Yoshihara, in their official capacities as members of the Hawaii Campaign Spending Commission, Defendants-Appellees.

**2 Jimmy Yamada; Russell Stewart, Plaintiffs-Appellants,

and

A-1 A-Lectrician, Inc., Plaintiff,

v.

William Snipes, in his official capacity as chair and member of the Hawaii Campaign Spending Commission; Tina Pedro Gomes, in her official capacity as vice chair and member of the Hawaii Campaign

Spending Commission; and Eldon Ching, Gregory Shoda and Adrienne Yoshihara, in their official capacities as members of the Hawaii Campaign Spending Commission, Defendants-Appellees.

Nos. 12-15913, 12-17845

Argued and Submitted
Oct. 9, 2013, Honolulu, Hawaii

**3 Filed May 20, 2015

Before: Alex Kozinski, Raymond C. Fisher, and Paul J. Watford, Circuit Judges

Opinion by Judge Fisher

[**4 Summary Omitted]

**5 COUNSEL

*1185 Randy Elf (argued), Lakewood, New York, & James Bopp, Jr., James Madison Center for Free Speech, Terre Haute, Indiana; James Hochberg, Honolulu, Hawaii, for Plaintiff-Appellant.

Justin L. McAdam (argued), Jeffrey P. Gallant & James Bopp, Jr., The Bopp Law Firm, P.C., Terre Haute, Indiana; James Hochberg, Honolulu, Hawaii, for Plaintiffs.

Deirdre Marie-Iha (argued), Deputy Solicitor General, Robyn B. Chun, Deputy Assistant Attorney General & David M. **6 Louie, Attorney General, Department of the Attorney General, Honolulu, Hawaii, for Defendants-Appellees.

Paul S. Ryan, J. Gerald Hebert, Tara Malloy & Megan McAllen, Washington D.C., for Amicus Curiae The Campaign Legal Center.

OPINION

FISHER, Circuit Judge:

This appeal concerns the constitutionality of four provisions of Hawaii's campaign finance laws under *Citizens United v. Federal Election Commission,* 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), and related authority. A-1 A-Lectrician, Inc. (A-1), a for-profit corporation, appeals the district court's summary judgment in favor of members of Hawaii's Campaign Spending Commission ("the Commission"). Relying on *Human Life of Washington Inc. v. Brumsickle,* 624 F.3d 990 (9th Cir.2010), we hold that the challenged laws satisfy the First and Fourteenth Amendments.

I. Background

The plaintiffs are Jimmy Yamada, Russell Stewart and A-1. Before the 2010 general election, Yamada and Stewart each sought to contribute $2,500 to the Aloha Family Alliance-Political Action Committee (AFA-PAC), a registered "noncandidate committee" that makes independent campaign expenditures in Hawaii elections. They were forbidden from doing so, however, by Hawaii Revised Statute (HRS) § 11-358, which prohibits any person from "mak[ing] ****7** contributions to a noncandidate committee in an aggregate amount greater than $1,000 in an election."

Plaintiff A-1 is a Hawaii electrical-construction corporation that makes campaign contributions and engages in political speech. Yamada is its CEO. During the 2010 election, A-1 contributed over $50,000 to candidates, candidate committees and party committees. It also purchased three newspaper advertisements at a cost of $2,000 to $3,000 each. Under the heading "Freedom Under Siege," these advertisements ***1186** declared that Hawaiians had "lost our freedom" because "we have representatives who do not listen to the people." One advertisement asserted State House Majority Leader Blake Oshiro and other representatives were "intent on the destruction of the family." Another accused Oshiro and his colleagues of "disrespect[ing] the legislative process and the people." In accordance with Hawaii law, *see* HRS § 11-391(a)(2)(B), all three advertisements included a disclaimer that they were "[p]ublished without the approval and authority of the candidate."

As a result of these expenditures and contributions, Hawaii law required A-1 to register as a "noncandidate committee" as defined by HRS § 11-302. Section 11-302 imposes reporting and disclosure requirements on any organization that has "the purpose of making or receiving contributions, making expenditures, or incurring financial obligations to influence [elections]" over $1,000 in the aggregate for an election cycle. *Id.*; *see* HRS § 11-321(g). A-1, which plans to run similar advertisements and to make similar contributions to candidates in the future, objects to both the disclaimer requirement and the

noncandidate committee registration and reporting requirements.

**8 If A-1 is relieved of the obligation of registering as a noncandidate committee, it could be subject to reporting requirements associated with "electioneering communications" because it seeks to publish newspaper advertisements that mention candidates by name shortly before an election. *See* HRS § 11-341. Every entity that makes a disbursement for an electioneering communication, such as A-1's newspaper advertisements, must report certain identifying information to the Commission within 24 hours of certain disclosure dates. *See id.* Under the regulations in effect when A-1 filed this action, if A-1 were to remain a noncandidate committee, however, it would not have to file an electioneering communications report or comply with the provisions of HRS § 11-341. *See* Haw. Admin. Rule (HAR) § 3-160-48.[1]

Finally, A-1 is often a state government contractor, and when it has such contracts, Hawaii law prohibits it from making campaign contributions to candidates or candidate committees. *See* HRS § 11-355. A-1 challenges that prohibition as applied to its speech, although it declares it seeks to contribute only to lawmakers who neither award nor oversee its public contracts.

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[1] On November 5, 2014, an amendment to HRS § 11-341 went into effect, requiring registered noncandidate committees to file electioneering communications statements. *See* 2013 Haw. Sess. L. Act 112.

Shortly before the 2010 primary election, Yamada, Stewart and A-1 filed a nine-count complaint challenging the constitutionality of five provisions of Hawaii campaign finance law. Yamada and Stewart challenged the $1,000 limit on contributions to noncandidate committees, HRS § 11-358, and A-1 challenged four other provisions: (1) the ****9** requirement that it register as a noncandidate committee and the associated expenditure definition, HRS § 11-302; (2) if it does not have to register as a noncandidate committee, the requirement that it report identifying information when it makes an electioneering communication, HRS § 11-341; (3) the requirement that its advertisements include certain disclaimers, HRS § 11-391; and (4) the ban on contributions from government contractors to state legislative candidates, HRS § 11-355.

In October 2010, the district court preliminarily enjoined enforcement of the $1,000 contribution limit, HRS § 11-358, as applied to Yamada's and Stewart's proposed ***1187** $2,500 contributions to AFA-PAC, a noncandidate committee. *See Yamada v. Kuramoto,* 744 F.Supp.2d 1075, 1078, 1087 (D.Haw.2010) (*Yamada I*). The court denied A-1's motion for a preliminary injunction on its first, second and third claims. *See Yamada v. Kuramoto,* No. 10-cv-00497, 2010 WL 4603936, at *20 (D.Haw. Oct. 29, 2010) (*Yamada II*). A-1 did not seek to enjoin the government contractor ban. The defendants appealed the preliminary injunction of § 11-358 but dismissed their appeal before argument.

On the parties' cross-motions for summary judgment, the district court permanently enjoined the $1,000 contribution limit, HRS § 11-358, as applied to Yamada's and Stewart's contributions to AFA-PAC and rejected each of A-1's constitutional challenges. *See Yamada v. Weaver,* 872 F.Supp.2d 1023, 1027-28, 1063 (D.Haw.2012) (*Yamada III*). A-1 appeals the denial of summary judgment on its claims. The defendants have not cross-appealed the court's invalidation of § 11-358.

****10** Yamada and Stewart sought their attorney's fees under 42 U.S.C. § 1988 based on their successful constitutional challenge to the $1,000 contribution limit. The district court awarded them $60,152.65 in fees and $3,623.29 in costs. Yamada and Stewart appeal that award in several respects, including the district court's denial of the fees they incurred defending against the defendants' abandoned appeal of the preliminary injunction ruling.

We have jurisdiction under 28 U.S.C. § 1291 and review A-1's constitutional challenges de novo. *See Human Life,* 624 F.3d at 1000. A-1 raises three groups of issues on appeal: (1) whether the expenditure, noncandidate committee and advertisement definitions are unconstitutionally vague; (2) whether the noncandidate committee definition and advertising disclaimer and electioneering communications reporting requirements impose unconstitutional burdens on speech; and (3) whether the ban on contributions by government contractors is unconstitutional as applied to A-1's proposed contributions. Yamada and Stewart

also appeal the partial denial of attorney's fees. We address these issues in turn.

ii. Due Process Vagueness Challenge

We begin by addressing A-1's argument that § 11-302's definitions of "expenditure," "noncandidate committee" and "advertisement" are unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment. A law is unconstitutionally vague when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams,* 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). This doctrine "addresses at least ****11** two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc.,* ___ U.S. ___, 132 S.Ct. 2307, 2317, 183 L.Ed.2d 234 (2012). Where, as here, First Amendment freedoms are involved, "rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* Even for regulations of expressive activity, however, "perfect clarity and precise guidance" are not required, *Ward v. Rock Against Racism,* 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), because "we can never expect mathematical certainty from our language," *Human*

Life, 624 F.3d at 1019 (quoting ***1188** *Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)) (internal quotation marks omitted).

In evaluating A-1's challenges, we must consider "any limiting construction that a state court or enforcement agency has proffered." *Ward,* 491 U.S. at 796, 109 S.Ct. 2746 (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)) (internal quotation marks omitted). We may impose a limiting construction on a statute, however, "only if it is 'readily susceptible' to such a construction." *Reno v. ACLU,* 521 U.S. 844, 884, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (quoting *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)). We will not "insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance." *Foti v. City of Menlo Park,* 146 F.3d 629, 639 (9th Cir.1998).

**12 A. Hawaii's Expenditure and Noncandidate Committee Definitions Are Not Vague Given the Commission's Narrowing Construction

A-1's first vagueness challenge is to the expenditure and noncandidate committee definitions. Section 11-302 defines an "expenditure" to include:

> (1) Any purchase or transfer of money or anything of value, or promise or agreement to purchase or

> transfer money or anything of value, or payment incurred or made, or the use or consumption of a nonmonetary contribution for the purpose of:
>
> > (A) *Influencing* the nomination for election, or the election, of any person seeking nomination for election or election to office, whether or not the person has filed the person's nomination papers;
> >
> > (B) Influencing the outcome of any question or issue that has been certified to appear on the ballot at the next applicable election. . . .

HRS § 11-302 (emphasis added). It defines a "noncandidate committee" as:

> [A]n organization, association, party, or individual that has the purpose of making or receiving contributions, making expenditures, or incurring financial obligations *to influence* ****13** the nomination for election, or the election, of any candidate to office, or for or against any question or issue on the ballot. . . .

Id. (emphasis added). Noncandidate committees are Hawaii's version of independent expenditure committees, similar to the Washington "political committee" definition we addressed in Human Life. See 624 F.3d at 997.

A-1 challenges these definitions under *Buckley v. Valeo,* 424 U.S. 1, 77, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), which held that the terms "influencing" and "for the purpose of influencing" were

unconstitutionally vague when used to delineate types of speech subject to regulation. *Id.* at 77-82, 96 S.Ct. 612. If both definitions are unconstitutionally vague, Hawaii cannot constitutionally impose non-candidate committee status and the accompanying registration and reporting burdens on A-1.

Like the district court, we assume without deciding that the term "influence" may be vague under some circumstances. "Conceivably falling within the meaning of 'influence' are objectives as varied as advocacy for or against a candidate's election; championing an issue for inclusion in a candidate's platform; and encouraging all candidates to embrace public funding." *Nat'l Org. for Marriage v. McKee,* 649 F.3d 34, 65 (1st Cir.2011). But the Commission has offered and the district court ***1189** applied a limiting construction on the term "influence" in § 11-302's definitions of "expenditure" and "noncandidate committee," eliminating this potential vagueness. Under the Commission's interpretation, "influence" refers only to "communications or activities that constitute express advocacy or its functional equivalent." This interpretation significantly narrows the statutory language, because "express advocacy" requires ****14** words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,'" *Buckley,* 424 U.S. at 44 n. 52, 96 S.Ct. 612, and communications are the "functional equivalent of express advocacy" only when they are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *Fed.*

Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 469-70, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of Roberts, C.J.).

A-1 argues that the proffered limiting construction does not render § 11-302 constitutional because (1) it is inconsistent with the plain language of the statute, thus barring us from adopting it, and (2) even if we could adopt it, the challenged definitions remain unconstitutionally vague. We find neither argument persuasive.

1.

The Commission's proffered construction is not inconsistent with the plain language of the statute. We have previously noted that the term "influencing" is susceptible to a narrowing construction, *see ACLU of Nev. v. Heller,* 378 F.3d 979, 986 n. 5 (9th Cir.2004), and the Commission's interpretation of "influence" is consistent with *Buckley,* which construed the phrase "for the purpose of . . . influencing" to mean "communications that expressly advocate the election or defeat of a clearly identified candidate," 424 U.S. at 79, 80, 96 S.Ct. 612 (footnote omitted). Given the substantial similarity between the statutory language in *Buckley* and the language at issue here, the Commission's gloss is entirely reasonable. *Compare* 2 U.S.C. § 431(f) (1971), *with* HRS § 11-302.

Moreover, the Commission reasonably construes the statute as referring not only to express advocacy but also to ****15** its functional equivalent. After

Buckley, case law and Federal Election Commission regulations have broadened the concept of express advocacy to include its "functional equivalent," as defined in *Wisconsin Right to Life,* 551 U.S. at 469-70, 127 S.Ct. 2652. *See* 11 C.F.R. § 100.22; *Real Truth About Abortion, Inc. v. Fed. Election Comm'n,* 681 F.3d 544, 550-53 (4th Cir.2012) (discussing the evolution of the "functional equivalent of express advocacy" concept). Elsewhere, Hawaii's Commission has adopted a regulation defining express advocacy with reference to its functional equivalent, or as communications that are "susceptible to no other reasonable interpretation but as an exhortation to vote for or against a candidate." HAR § 3-160-6. The Commission's proposed construction is consistent with *Buckley,* subsequent Supreme Court decisions, federal regulations and other Commission regulations. The proposed construction, therefore, is neither unreasonable nor foreclosed by the plain language of the statute. *See Wisconsin Right To Life, Inc. v. Barland,* 751 F.3d 804, 832-34 (7th Cir.2014) (limiting "for the purpose of influencing the election or nomination for election of any individual to state or local office" to express advocacy and its functional equivalent); *McKee,* 649 F.3d at 66-67 (construing "influencing" and "influence" in Maine campaign finance statutes to include only communications that constitute express advocacy or its functional equivalent).

The legislative history of Hawaii's noncandidate committee and expenditure definitions ***1190** lends further validity to the Commission's interpretation.

In 1979, the Hawaii legislature revised state campaign finance laws to harmonize them with *Buckley*. *See* 1979 Haw. Sess. L. Act 224; Conf. Comm. Rep. No. 78, in Haw. H.J. 1137, 1140 (1979). The legislature was "mindful" that *Buckley* "narrowly construed the operation of the federal spending and contribution ****16** disclosure requirements" to encompass only "communications that expressly advocate the election or defeat of a clearly identified candidate." Conf. Comm. Rep. No. 78, in Haw. H.J. 1137, 1140 (1979). Thus, as the district court concluded, "[i]t is reasonable to infer . . . that Hawaii's Legislature adopted terminology such as 'to influence' in reliance on the Supreme Court's interpretation of the same terminology in federal law." *Yamada III,* 872 F.Supp.2d at 1046. We agree.[2]

A-1 nonetheless contends we should not adopt the narrowing construction because it would not bind a state court and therefore provides insufficient protection for First Amendment values. We again disagree. By adopting a "'readily apparent' constitutional interpretation," we provide A-1 and other parties not

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[2] A-1 draws a different inference from this legislative history, arguing that the legislature's retention of the word "influence" after *Buckley* suggests that the legislature did not intend to limit the law to express advocacy and its functional equivalent. *See Va. Soc'y for Human Life, Inc. v. Caldwell,* 152 F.3d 268, 271 (4th Cir.1998). We disagree, but even if the legislative history is debatable, the Commission's reasonable limiting interpretation merits our deference. *See Vill. of Hoffman Estates,* 455 U.S. at 504, 102 S.Ct. 1186; *McKee,* 649 F.3d at 66.

before the court "sufficient protection from unconstitutional application of the statute, as it is quite likely nonparty prosecutors and state courts will apply the same interpretation." *Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F.3d 908, 932 (9th Cir.2004); *see also Valle del Sol Inc. v. Whiting,* 732 F.3d 1006, 1022 n. 15 (9th Cir.2013).[3]

****17** We hold that the Commission's proffered construction is neither unreasonable nor the product of "strained statutory construction." *Wasden,* 376 F.3d at 932. We therefore adopt it.

2.

We also reject A-1's argument that § 11-302's definitions of "expenditure" and "noncandidate committee" are unconstitutionally vague even with this limiting construction in place. With the narrowing gloss, these definitions are sufficiently precise to provide "a person of ordinary intelligence fair notice of what is prohibited." *Williams,* 553 U.S. at 304, 128 S.Ct. 1830. Only expenditures for communications that expressly advocate for a candidate or are "susceptible of no reasonable interpretation other than as

[3] Like federal courts, Hawaii courts construe state statutes to avoid constitutional infirmities whenever possible. *See, e.g., Kapiolani Park Pres. Soc'y v. City & Cnty. of Honolulu,* 69 Haw. 569, 751 P.2d 1022, 1028 (1988) ("Legislative acts . . . are not to be held invalid, or unconstitutional, or unconscionable, if such a construction can reasonably be avoided."). We would therefore expect Hawaii courts to adopt the same limiting construction.

an appeal to vote for or against a specific candidate" can trigger noncandidate committee registration, reporting and disclosure requirements under § 11-302. There is no dispute that "express advocacy" is not a vague term, and the controlling opinion in *Wisconsin Right to Life* held the "functional equivalent" or "appeal to vote" component of this test also meets the "imperative for clarity" that due process requires. 551 U.S. at 474 n. 7, 127 S.Ct. 2652. That close cases may arise in applying this test does not make it ***1191** unconstitutional, given there will always be an inherent but permissible degree of uncertainty in applying any standards-based test. *See Williams,* 553 U.S. at 306, 128 S.Ct. 1830 ("Close cases can be imagined under virtually any statute."); *Real Truth,* 681 F.3d at 554-55. We therefore join the First, Fourth and Tenth Circuits in holding that the "appeal to vote" language ****18** is not unconstitutionally vague. *See Free Speech v. Fed. Election Comm'n,* 720 F.3d 788, 795-96 (10th Cir.2013); *Real Truth,* 681 F.3d at 552, 554 ("[T]he test in *Wisconsin Right to Life* is not vague."); *McKee,* 649 F.3d at 70.

A-1 resists this conclusion, advancing two arguments why the "appeal to vote" language is impermissibly vague. Neither is persuasive.

First, A-1 contends the test is unconstitutionally vague because Hawaii's law applies to a broader range of communications than the provision upheld in *Wisconsin Right to Life. Wisconsin Right to Life* sustained the functional equivalent test against a vagueness challenge to the federal definition of electioneering

communications, which covers only broadcast communications, *see* 551 U.S. at 474 n. 7, 127 S.Ct. 2652; 2 U.S.C. § 434(f)(3) (2000 ed., Supp. IV), whereas Hawaii's noncandidate committee and expenditure definitions extend to speech in printed form, *see* HRS § 11-302. The statute at issue in *Wisconsin Right to Life* also regulated only communications run shortly before an election, whereas Hawaii's statute applies to communications without strict temporal limitations. But these differences are immaterial. Regardless of when a communication is aired or printed and whether it appears in print or in a broadcast medium, the purveyor of the advertisement has fair notice that the regulations reach only those ads that clearly advocate for an identified candidate. Like the Fourth Circuit, we hold that the functional equivalent language is not unconstitutionally vague merely because it applies more broadly than the federal provision upheld in *Wisconsin Right to Life*. *See Ctr. for Individual Freedom, Inc. v. Tennant,* 706 F.3d 270, 280-81 (4th Cir.2013).

****19** Second, the validity of the functional equivalent test has not been undermined by *Citizens United,* which struck down the federal electioneering communication definition, *see* 2 U.S.C. § 434(f)(3), for which the test was first developed. As the First Circuit explained in rejecting an identical argument:

> The basis for *Citizens United*'s holding on the constitutionality of the electioneering expenditure statute had nothing to do with the appeal-to-vote test. . . . Instead, the decision

> turned on a reconsideration of prior case law holding that a corporation's political speech may be subjected to greater regulation than an individual's. The opinion offered no view on the clarity of the appeal-to-vote test. In fact, the Court itself relied on the appeal-to-vote test in disposing of a threshold argument that the appeal should be resolved on narrower, as-applied grounds.

McKee, 649 F.3d at 69 (citations omitted); *see also Nat'l Org. for Marriage v. Roberts,* 753 F.Supp.2d 1217, 1220 (N.D.Fla.2010), *aff'd,* 477 Fed.Appx. 584, 585 (11th Cir.2012) (per curiam). We also have relied on the appeal to vote test, albeit in dicta, since *Citizens United. See Human Life,* 624 F.3d at 1015. We could not have done so if the test was unconstitutionally vague.

Accordingly, we sustain Hawaii's noncandidate committee and expenditure definitions from A-1's vagueness challenges. The term "influence" is readily and reasonably interpreted to encompass only "communications or activities ****20** that constitute ***1192** express advocacy or its functional equivalent." As construed, the definitions are not unconstitutionally vague.

B. Hawaii's Advertising Definition is Not Unconstitutionally Vague

A-1 argues that § 11-302's advertising definition is unconstitutionally vague because it uses the terms "advocates," "supports" and "opposition." This

provision spells out when an advertisement must include a disclaimer as to whether the ad was disseminated with or without the approval of a candidate. *See* HRS § 11-391. In relevant part, Hawaii law defines an "advertisement" as:

> any communication, excluding sundry items such as bumper stickers, that:
>
> (1) Identifies a candidate directly or by implication, or identifies an issue or question that will appear on the ballot at the next applicable election; and
>
> (2) *Advocates* or *supports* the nomination, *opposition*, or election of the candidate, or *advocates* the passage or defeat of the issue or question on the ballot.

HRS § 11-302 (emphasis added).

Applying a narrowing construction to this definition, as before, the district court limited the reach of "advocates or supports the nomination, opposition, or election of the candidate" to express advocacy or its functional equivalent. *See Yamada III,* 872 F.Supp.2d at 1054. With this limiting ****21** construction, the district court concluded that Hawaii's definition of an advertisement was not unconstitutionally vague. A-1 contends that the district court impermissibly adopted a limiting construction for the same reasons it argues a limiting construction was inappropriate for the noncandidate committee and expenditure definitions. It further argues that with or without the limiting construction, the challenged definition is

unconstitutionally vague under *Buckley* and *McConnell v. Federal Election Commission,* 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), *overruled on other grounds by Citizens United,* 558 U.S. at 365-66, 130 S.Ct. 876. The Commission responds that the definition is not vague even without a limiting construction.

We agree with the Commission that Hawaii's advertising definition is sufficiently precise without a limiting construction and therefore decline to adopt one. The words "advocates or supports" and "opposition" as used here are substantially similar to the words "promote," "oppose," "attack" and "support" that survived a vagueness challenge in *McConnell.* There, the Court considered a statute defining "Federal election activity" as "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 2 U.S.C. § 431(20)(A)(iii). The Court noted that "[t]he words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision." *McConnell,* 540 U.S. at 170 n. 64, 124 S.Ct. 619. Because "[t]hese words 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,'" the ****22** Court held that the provision was not unconstitutionally

vague. *Id.* (quoting *Grayned,* 408 U.S. at 108-09, 92 S.Ct. 2294).[4] *McConnell* supports ***1193** the conclusion that Hawaii's advertisement definition is not unconstitutionally vague.

Decisions in other circuits also support that conclusion. In *McKee,* the First Circuit turned away a vagueness challenge to a Maine law using the terms "promoting," "support" and "opposition" in several campaign finance provisions. The terms were not impermissibly vague because they were tied to an "election-related object" – either "candidate," "nomination or election of any candidate" or "campaign." *McKee,* 649 F.3d at 64. Maine's expenditure statute, for example, "instructs that reports submitted pursuant to the provision 'must state whether the expenditure is in *support* of or in *opposition* to the candidate.'" *Id.* at 63 n. 41 (quoting Me.Rev.Stat. tit. 21-A, § 1019-B(3)(B)). The Second, Fourth and Seventh Circuits have reached similar conclusions. *See Vermont Right to Life Comm., Inc. v. Sorrell,* 758 F.3d 118, 128-30 (2d Cir.2014) (holding that "promotes," "supports," "attacks" and "opposes" were not vague with reference to a "clearly identified candidate"); *Tennant,* 706 F.3d at 286-87 (holding that "promoting

[4] Joining the First, Second and Fourth Circuits, we reject A-1's argument that *McConnell*'s vagueness holding is limited to laws that regulate campaign finance for political parties. *See Vermont Right to Life Comm., Inc. v. Sorrell,* 758 F.3d 118, 128 (2d Cir.2014); *Tennant,* 706 F.3d at 287 ("[T]he Court . . . did not limit its holding to situations involving political parties."); *McKee,* 649 F.3d at 63.

or opposing" was not vague); *Ctr. for Individual Freedom v. Madigan,* 697 F.3d 464, 485-87, 495 (7th Cir.2012) (holding that "promote" and "oppose" were not vague).

****23** As in *McKee,* Hawaii's statutes are tied to an election-related object – the terms "advocates," "supports" and "opposition" refer only to "the nomination . . . or election of the candidate." HRS § 11-302. So too does the federal law upheld in *McConnell,* which used the words "promote," "oppose," "attack" and "support" only in relation to a "clearly identified candidate for Federal office." 2 U.S.C. § 431(20)(A)(iii). Although the terms "advocate," "support" and "opposition" may not, in isolation, offer sufficient clarity as to what advertisements must include a disclaimer, their proximity to "nomination" or "election of the candidate" make clear the sort of campaign-related advertising for which a disclaimer must be included. Read as a whole and in context, the advertisement definition is sufficiently clear to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned,* 408 U.S. at 108, 92 S.Ct. 2294.

Finally, we reject A-1's argument that "advocates," a term that *McConnell* did not consider, makes Hawaii's advertising definition unconstitutionally vague. A-1 relies on *Buckley,* which considered a provision that prohibited any person or group from making "any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures . . . advocating

the election or defeat of such candidate, exceeds $1,000." 424 U.S. at 42, 96 S.Ct. 612. *Buckley* held that this provision – which imposed a severe restriction on independent spending by all individuals and groups other than political parties and campaign organizations – was impermissibly vague because of its potential breadth, extending to the discussion of public issues untethered from particular candidates. *See id.* at 40, 42, 96 S.Ct. 612. The Court therefore construed the provision "to apply only to expenditures for communications that in express terms **24 advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44, 96 S.Ct. 612.

*1194 A-1's contention that "advocates" is unconstitutionally vague in this context does not survive the Supreme Court's post-*Buckley* discussion of nearly identical language in *McConnell,* 540 U.S. at 170 n. 64, 124 S.Ct. 619. For candidate elections, Hawaii's definition uses the word "advocates" only in relation to a communication that (1) identifies a candidate and (2) "advocates or supports the nomination, opposition, or election of [that] candidate." HRS § 11-302. Although the word "advocates" was not at issue in *McConnell,* there is nothing unconstitutionally vague about "advocate" when used in Hawaii's advertising definition to refer to communications that identify a candidate for state office and "plead in favor of" that candidate's election. Webster's Third New International Dictionary 32 (2002). A-1's vagueness challenge to the Hawaii advertising definition therefore fails.

III. First Amendment Claims

A-1 brings First Amendment challenges to (1) the registration, reporting and disclosure requirements that Hawaii places on "noncandidate committees" and (2) the requirement that political advertisements include a disclaimer stating whether they are broadcast or published with the approval of a candidate. Because the challenged laws provide for the disclosure and reporting of political spending but do not limit or ban contributions or expenditures, we apply exacting scrutiny. *See Family PAC v. McKenna,* 685 F.3d 800, 805-06 (9th Cir.2011); *Human Life,* 624 F.3d at 1005. To survive this scrutiny, a law must bear a substantial relationship to a sufficiently important governmental interest. *See Doe v. Reed,* 561 U.S. 186, 196, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010); *Human Life,* ****25** 624 F.3d at 1008. Put differently, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe,* 561 U.S. at 196, 130 S.Ct. 2811 (quoting *Davis v. Fed. Election Comm'n,* 554 U.S. 724, 744, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008)) (internal quotation marks omitted).

A. The Noncandidate Committee Reporting and Disclosure Requirements Survive Exacting Scrutiny As Applied to A-1

We first consider whether the noncandidate committee reporting and disclosure requirements satisfy exacting scrutiny as applied to A-1. Looking to the burden side of the balance, the district court found

that the "registration and disclosure requirements that come with noncandidate committee status do not present an undue burden on A-1." *Yamada III,* 872 F.Supp.2d at 1052. We agree.

The noncandidate committee is Hawaii's method for monitoring and regulating independent political spending in state elections. In relevant part, a noncandidate committee is broadly defined as an organization "that has the purpose of making or receiving contributions, making expenditures, or incurring financial obligations to influence" Hawaii elections. HRS § 11-302.[5] To paraphrase the statute, and incorporating the Commission's narrowing construction we adopted earlier (see page 20), the noncandidate committee definition is limited to an organization that:

> ****26** Has "the purpose" of making or receiving contributions, or making expenditures, ***1195** for communications or activities that constitute express advocacy or its functional equivalent (i.e., that are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate to office, or for or against any question or issue on the ballot).

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[5] Although noncandidate committee status also extends to an individual who makes contributions or expenditures not of his or her own funds, *see* HRS § 11-302, the parties focus solely on noncandidate committee status for organizations, and we shall do the same.

> Expenditures are further defined as payments or nonmonetary contributions made for the purpose of communications or activities that constitute express advocacy or its functional equivalent. *See id.*; HRS § 11-302.

Noncandidate committee status is triggered only when an organization receives contributions or makes or incurs qualifying expenditures totaling more than $1,000 during a two-year election cycle. *See* HRS § 11-321(g). Within 10 days of reaching this threshold, the organization must register as a noncandidate committee by filing an organizational report with the Commission. *Id.* In addition to registering, the organization must file an organizational report, designate officers, disclose its bank account information, and designate a treasurer responsible for recording contributions and expenditures and maintaining records for five years. *See* HRS §§ 11-321, 11-323, 11-324, 11-351(a). The committee's contributions must be segregated from its other funds. *See* HAR § 3-160-21(c).

Every committee must also comply with reporting requirements tied to election periods. These requirements include disclosing contributions made and received, expenditures by the committee and the assets on hand at the ****27** end of the reporting period. *See* HRS §§ 11-331 (filing of reports), 11-335 (noncandidate committee reports), 11-336 (timing of reports for noncandidate committees), 11-340 (penalties

for failure to file a required report).[6] The reports must be filed no later than 10 days before an election, 20 days after a primary election and 30 days after a general election; additional reports must be filed on January 31 of every year and July 31 after an election year. *See* HRS § 11-336(a)-(d). If a noncandidate committee has aggregate contributions and expenditures of $1,000 or less in an election period, it need only file a single, final election-period report, or it may simply request to terminate its registration. *See* HRS §§ 11-326, 11-339(a).

A-1's argument that these burdens are substantial is foreclosed by *Human Life,* which held that the burdens of compliance with Washington State's materially indistinguishable registration and reporting requirements were "modest" and "not unduly onerous." 624 F.3d at 1013-14. Indeed, the majority of circuits have concluded that such disclosure requirements are not unduly burdensome. *See Sorrell,* 758 F.3d at 137-38 (rejecting the argument that "registration, recordkeeping necessary for reporting, and reporting requirements" are onerous as a matter of law); *Worley v. Fla. Sec'y of State,* 717 F.3d 1238, 1250 (11th Cir.2013) (holding that Florida's analogous

[6] The Hawaii Legislature slightly revised the reporting requirements after the district court granted summary judgment to the Commission. *See* 2013 Haw. Sess. Laws 209-10 (S.B. 31) (amending HRS §§ 11-335, 11-336). We consider the version of the reporting statutes in effect at the time this suit was filed. In any event, the minor amendments do not affect our constitutional analysis.

"PAC regulations do not generally impose an undue burden"); *McKee,* 649 F.3d at **28 56 (holding that Maine's analogous PAC regulations "do not prohibit, limit, or impose any onerous burdens on speech"); *Family PAC,* 685 F.3d at 808 n. 6 (noting the generally "modest" administrative burdens imposed *1196 on ballot committees by Washington law); *SpeechNow.org v. Fed. Election Comm'n,* 599 F.3d 686, 697-98 (D.C.Cir.2010) (holding that the organizational, administrative and continuous reporting requirements applicable to federal political committees were not unduly burdensome); *Alaska Right to Life Comm. v. Miles,* 441 F.3d 773, 789-92 (9th Cir.2006) (holding that registration, reporting and disclosure requirements applicable to Alaskan political committees were not "significantly burdensome" or "particularly onerous").

A-1 would distinguish *Human Life*'s burden analysis on the ground that a noncandidate committee in Hawaii is subject to additional limits on the kinds of contributions it may receive. Specifically, A-1 points to Hawaii law limiting contributions to noncandidate committees (HRS § 11-358), and banning contributions from particular sources, including bans on contributions made in the name of another (HRS § 11-352), anonymous contributions (HRS § 11-353), or prohibitions on contributions from government contractors and foreign nationals (HRS §§ 11-355, 11-356). These differences do not distinguish *Human Life.* First, because A-1 is self-financed and does not receive contributions, any funding limits or bans have

no bearing on our as-applied constitutional analysis. Second, none of these limits imposes a substantial burden. The Commission concedes that the only constitutionally suspect limit A-1 identifies – the $1,000 limit on contributions to noncandidate committees – is unconstitutional as applied to committees making only independent expenditures. The other limits apply to A-1 regardless of its status as a noncandidate committee. Thus, ****29** there are no material differences between the burdens of noncandidate committee status in Hawaii and political committee status in Washington.[7]

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[7] The burdens of noncandidate committee status in Hawaii are also distinguishable from the burdens of federal "PAC status" that A-1 labels "onerous," citing to the Supreme Court's decisions in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 248, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986), and *Citizens United,* 558 U.S. at 337-39, 130 S.Ct. 876. The federal PAC status in *MCFL* required corporations to set up a separate legal entity and create a segregated fund before engaging in any direct political speech, and further prohibited an organization from soliciting contributions beyond its "members." *See McKee,* 649 F.3d at 56; *see also Madigan,* 697 F.3d at 488 (distinguishing *MCFL*'s PAC burdens); *Human Life,* 624 F.3d at 1010 (same); *Alaska Right to Life,* 441 F.3d at 786-87, 791-92 (same). *But see Wisconsin Right To Life, Inc. v. Barland,* 751 F.3d 804, 839-42 (7th Cir.2014) (describing the "heavy administrative burdens" of Wisconsin's analogous, but more detailed, "PAC-like disclosure program," which "in critical respects [was] unchanged from *Buckley*'s day"). Like Maine's political committee provision, Hawaii law "imposes three simple obligations" on a qualifying entity that are not nearly as onerous as those considered in *MCFL*: "filing of a registration form disclosing basic information, . . . reporting of

(Continued on following page)

A-1 has been complying with the noncandidate committee requirements for several years without difficulty. No separate organization need be created, as long as records are kept tracking financial activity by the noncandidate committee, *see* HAR § 3-160-21(c), and filing of the brief, required reports may be performed electronically at infrequent intervals, *see* HRS § 11-336. As the district court concluded, "[a]lthough the requirements might be inconvenient, the record does not indicate the burdens on A-1 are onerous as matters of fact or law." *Yamada III,* 872 F.Supp.2d at 1053.

****30** Turning to the governmental interests side of the equation, there is no question that Hawaii's noncandidate committee requirements serve important government ***1197** interests. The Hawaii legislature created these requirements to "expand the scope of public scrutiny relative to the financial aspects of the campaign process" and to avoid corruption or its appearance in electoral politics. House Stand. Comm. Rep. No. 188, H.B. No. 22, in Haw. H.J. 840 (1973). Subsequent amendments to Hawaii's disclosure scheme reaffirmed the important "informational value" served by reporting and disclosure requirements, as well as the state's interest in "deterr[ing] . . . corruption" and "gathering data necessary to detect violations" of

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election-related contributions and expenditures, and simple recordkeeping." *McKee,* 649 F.3d at 56.

campaign finance laws. Conf. Comm. Rep. No. 78, in Haw. H.J. 1137, 1140 (1979). When Hawaii revised its campaign finance laws in 1995, the legislature cited the importance of "reforming the campaign spending law . . . to restor[e] the public's confidence in the political process." S. Stand. Comm. Rep. No. 1344, H.B. No. 2094, Haw. S.J. 1346 (1995). The legislature found that "[m]aking candidates, contributors, and others more accountable by requiring the filing of reports . . . and specifying what information must appear in these reports go[es] a long way to accomplishing these goals." *Id.*

Thus, Hawaii's noncandidate committee regulations serve all three interests that the Supreme Court has recognized as "important" in the context of reporting and disclosure requirements: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth,* 556 F.3d ****31** 1021, 1031 (9th Cir.2009) (quoting *McConnell,* 540 U.S. at 196, 124 S.Ct. 619).

First, the reporting and disclosure obligations provide information to the electorate about who is speaking – information that "is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." *Human Life,* 624 F.3d at 1005; *see also McCutcheon v. Fed. Election Comm'n,* ___ U.S. ___, 134 S.Ct. 1434, 1459-60, 188 L.Ed.2d 468 (2014);

Citizens United, 558 U.S. at 368-69, 130 S.Ct. 876; *Family PAC,* 685 F.3d at 806, 808. "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages," *Citizens United,* 558 U.S. at 371, 130 S.Ct. 876, making disclosure of this information a "sufficiently important, if not compelling, governmental interest," *Human Life,* 624 F.3d at 1005-06. Second, Hawaii's reporting and disclosure obligations "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley,* 424 U.S. at 67, 96 S.Ct. 612; *see also McCutcheon,* 134 S.Ct. at 1459. Third, the registration, record keeping, reporting and disclosure requirements provide a means of detecting violations of valid contribution limitations, preventing circumvention of Hawaii's campaign spending limitations, including rules that bar contributions by foreign corporations or individuals, *see* HRS § 11-356, or that prohibit contributions from government contractors, *see* HRS § 11-355. *See Buckley,* 424 U.S. at 67-68, 96 S.Ct. 612; *SpeechNow.org,* 599 F.3d at 698 (holding that "requiring disclosure . . . deters and helps expose violations of other campaign finance restrictions"). Thus, Hawaii's noncandidate committee reporting and disclosure requirements indisputably serve important governmental interests.

****32** A-1 nonetheless contends these reporting and disclosure requirements are not sufficiently tailored to survive exacting scrutiny because they apply to any organization that has "the purpose" of

engaging ***1198** in political advocacy, HRS § 11-302, rather than applying more narrowly to organizations having a *primary* purpose of engaging in such activity. A-1 concedes that Hawaii may impose reporting and disclosure requirements on organizations that make political advocacy a priority but argues that it only incidentally engages in such advocacy.

A-1's argument rests on *Human Life,* which considered the Washington disclosure regime whereby an organization qualifies as a political committee if its "primary or one of [its] primary purposes is to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." 624 F.3d at 1008 (internal quotation marks and citation omitted). First, *Human Life* rejected the argument that this definition was facially overbroad because "it covers groups with '*a*' primary purpose of political advocacy, instead of being limited to groups with '*the*' primary purpose of political advocacy." 624 F.3d at 1008-11 (emphasis added). It explained that *Buckley* and *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986), did not hold that an entity must have the sole, major purpose of political advocacy "to be deemed constitutionally a political committee." *Human Life,* 624 F.3d at 1009-10 (citing *Buckley,* 424 U.S. at 79, 96 S.Ct. 612). Next, *Human Life* held that Washington's political committee definition withstood exacting scrutiny because there was "a substantial relationship between Washington State's informational interest and its decision

to impose disclosure requirements on organizations with a primary **33 purpose of political advocacy." *Id.* at 1011. We reasoned that the definition:

> does not extend to all groups with "a purpose" of political advocacy, but instead is tailored to reach only those groups with a "primary" purpose of political activity. This limitation ensures that the electorate has information about groups that make political advocacy *a priority,* without sweeping into its purview groups that only *incidentally* engage in such advocacy. Under *this* statutory scheme, the word "primary" – not the words "a" or "the" – is what is constitutionally significant.

Id. at 1011 (emphasis added).

A-1 correctly points out that the provision at issue in *Human Life* applied to organizations with a primary purpose of political advocacy, whereas Hawaii's law applies to an organization with "the purpose" of political advocacy. *Human Life,* however, did not "hold that the word 'primary' or its equivalent [was] constitutionally necessary." *Id.* It held only that this limitation was "sufficient" for Washington's political committee definition to withstand First Amendment scrutiny. *Id. Human Life* is therefore not controlling, and, reaching an issue we did not address there, we conclude that Hawaii's noncandidate committee reporting and disclosure requirements are sufficiently tailored as applied to A-1 even without a "primary" modifier.

First, because Hawaii's definition extends only to organizations having "the purpose" of political advocacy, it avoids reaching organizations engaged in only incidental ****34** advocacy. Under the Commission's narrowing construction, noncandidate committee status applies to organizations that have the purpose of making or receiving contributions, or making expenditures, for express advocacy or its functional equivalent. *Cf. Madigan,* 697 F.3d at 488 (holding that Illinois' political committee definition's "limit of 'on behalf of or in opposition to' confines the realm of regulated activity to expenditures and ***1199** contributions within the core area of genuinely campaign-related transactions").[8]

Second, Hawaii's registration and reporting requirements are not triggered until an organization makes more than $1,000 in aggregate contributions and expenditures during a two-year election period. *See* HRS § 11-321(g); HAR § 3-160-21(a). This threshold also ensures that an organization must be more

[8] Hawaii's definition is distinguishable from the Wisconsin regulation struck down in Barland, 751 F.3d at 822, 834-37, which treated an organization as a political committee if it, inter alia, spent more than $300 to communicate "almost anything . . . about a candidate within 30 days of a primary and 60 days of a general election." Hawaii's more tailored disclosure regime only extends to organizations with the purpose of engaging in express advocacy or its functional equivalent. See *Sorrell,* 758 F.3d at 137-38 (distinguishing Barland and upholding Vermont's political committee regime, which applied only to groups that accepted contributions and made expenditures over $1,000 "for the purpose of supporting or opposing one or more candidates").

than incidentally engaged in political advocacy before it will be required to register and file reports as a noncandidate committee. Third, an organization that "raises or expends funds for the sole purpose of producing and disseminating informational or educational communications" – even if it also engages in limited political advocacy costing less than $1,000 in the aggregate – need not register as a noncandidate committee. *See* HRS §§ 11-302; 11-321(g). ****35** Fourth, if an organization registers as a noncandidate committee, but subsequently reduces its advocacy activity below the $1,000 threshold, it need only file a single report per election period or can terminate its registration. HRS § 11-339.[9]

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[9] The reporting requirements of Hawaii law are more narrowly tailored than the "onerous" and "potentially perpetual" reporting requirement preliminary [sic] enjoined in *Minnesota Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 873-74 (8th Cir.2012) (en banc). In Minnesota, an organization must register as a political committee once it spends $100 in the aggregate on political advocacy, and once registered, it must "file five reports during a general election year" even if the committee makes no further expenditures. *Id.* at 873, 876; *see also Iowa Right to Life Comm., Inc. v. Tooker,* 717 F.3d 576, 596-98 (8th Cir.2013) (striking down Iowa's ongoing reporting requirements that were untethered to any future political spending). We do not agree that such reporting requirements are "onerous" as a general matter. *See Human Life,* 624 F.3d at 1013-14. Moreover, unlike in Minnesota, an organization need not register as a noncandidate committee in Hawaii until it crosses the $1,000 threshold for a two-year election cycle, *see* HRS § 11-321(g), and a committee with aggregate contributions and expenditures of $1,000 or less in any subsequent election cycle need only file a single, final election-period report, *see* HRS § 11-326. Hawaii's

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Given these limits and the extent of A-1's past and planned political advocacy, we have little trouble concluding that the regulations are constitutional as applied to A-1. A-1, which made more than $50,000 in contributions and spent more than $6,000 on political ads in 2010, clearly engages in more than incidental political advocacy. Although A-1 now pledges to limit its individual contributions to $250 and to contribute only to candidates, these proposed activities – combined with A-1's expenditures on its political ads – ****36** plainly exceed incidental activity. Hawaii thus has a strong interest in regulating A-1.

Hawaii's choice of a $1,000 registration and reporting threshold is also a far cry from the zero dollar threshold invalidated in *Canyon Ferry,* 556 F.3d at 1033-34. *See also Worley,* 717 F.3d at 1251 (noting that "federal PAC requirements kick in ***1200** once a group has raised $1000 during a calendar year to influence elections and . . . these requirements have not been held unconstitutional" (citing 2 U.S.C. § 431(4)(a) (2012))). Although we carefully scrutinize the constitutionality of a legislature's chosen threshold for imposing registration and reporting requirements, *see Randall v. Sorrell,* 548 U.S. 230, 248-49, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (plurality opinion), the precise "line is necessarily a judgmental

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reporting regime is thus contingent on an organization's ongoing contributions and expenditures, reflecting its closer tailoring to Hawaii's informational interest than Minnesota's analogous regime.

decision, best left in the context of this complex legislation to [legislative] discretion," *Family PAC,* 685 F.3d at 811 (quoting *Buckley,* 424 U.S. at 83, 96 S.Ct. 612); *see also Worley,* 717 F.3d at 1253 ("Challengers are free to petition the legislature to reset the reporting requirements for Florida's PAC regulations, but we decline to do so here."). At least as applied to A-1, Hawaii's $1,000 threshold adequately ensures that political committee burdens are not imposed on "groups that only incidentally engage" in political advocacy. *Human Life,* 624 F.3d at 1011.

A-1's argument that regulations should reach only organizations with a primary purpose of political advocacy also ignores the "fundamental organizational reality that most organizations do not have just one major purpose." *Human Life,* 624 F.3d at 1011 (internal quotation marks and citation omitted). Large organizations that spend only one percent of their funds on political advocacy likely have many other, more important purposes – but this small percentage could ****37** amount to tens or hundreds of thousands of dollars in political activity, depending on the size of the organization. *See id.*; *see also Madigan,* 697 F.3d at 489-90; *McKee,* 649 F.3d at 59. The $1,000 threshold appropriately reaches these multipurpose organizations' participation in the political process.

A-1's political advocacy underscores this point. Although A-1's political spending may be limited in proportion to its overall activities, the strength of Hawaii's informational interest does not fluctuate based on the diversity of the speaker's activities.

Hawaii has an interest in ensuring the public can follow the money in an election cycle, regardless of whether it comes from a single-issue, political advocacy organization or a for-profit corporation such as A-1. The Commission makes the reported information freely available in searchable databases on its website, which provides Hawaiians with a vital window into the flow of campaign dollars.[10] This prompt, electronic disclosure of contributions and expenditures "can provide . . . citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters," *Citizens United,* 558 U.S. at 370, 130 S.Ct. 876, and "given the Internet, disclosure offers much more robust protections against corruption," *McCutcheon,* 134 S.Ct. at 1460. Thus, the distinction between A-1, a for-profit electrical contractor, and a group like Human Life of Washington, a "nonprofit, pro-life advocacy corporation," 624 F.3d at 994, is not constitutionally significant here. A-1 may not make political advocacy a priority, but it nonetheless has been a significant participant in Hawaii's electoral process, justifying the state's imposition of registration and reporting burdens.

****38** Furthermore, Hawaii's noncandidate committee definition, by extending beyond organizations making political advocacy a priority, avoids the circumvention of valid campaign finance laws and

[10] *See* http://ags.hawaii.gov/campaign/nc/.

disclosure requirements. *See Human Life,* 624 F.3d at 1011-12. As the Seventh Circuit has explained:

> ***1201** [L]imiting disclosure requirements to groups with the major purpose of influencing elections would allow even those very groups to circumvent the law with ease. Any organization dedicated primarily to electing candidates or promoting ballot measures could easily dilute that major purpose by just increasing its non-electioneering activities or better yet by merging with a sympathetic organization that engaged in activities unrelated to campaigning.

Madigan, 697 F.3d at 489. Hawaii's definition addresses the "hard lesson of circumvention" in the campaign finance arena, by including within its reach any entity that has political advocacy as one of its goals. *McConnell,* 540 U.S. at 165, 124 S.Ct. 619. As the district court explained:

> [A-1] has purposely not created a separate organizational structure for election-related activity, choosing instead to register itself (A-1 A-Lectrician, Inc.) as a noncandidate committee. If it were allowed to avoid registration merely because its political activity is small proportionally to its overall activities (as an electrical contractor and perhaps as a pure issue advocacy ****39** organization), it would encourage any affiliated noncandidate committee to avoid disclosure requirements by merging its activities into a larger affiliated organization.

Yamada III, 872 F.Supp.2d at 1052 (citation omitted).[11]

In sum, the noncandidate committee definition and accompanying reporting and disclosure requirements are substantially related to Hawaii's important interests in informing the electorate, preventing corruption or its appearance, and avoiding the circumvention of valid campaign finance laws. Because the burden of complying with this disclosure scheme is modest compared to the significance of the interests being served, we uphold Hawaii's noncandidate committee reporting and disclosure requirements as applied to A-1.

In doing so on an as-applied basis, we have no occasion to consider whether Hawaii law would withstand exacting scrutiny as applied to another business or nonprofit group that seeks to engage in less substantial political advocacy than A-1. We decline to "speculate about 'hypothetical' or **40 'imaginary'

[11] Although not directly relevant to A-1's challenge – because A-1's political activities are self-financed and it receives no contributions – we also note the heightened importance of noncandidate committee disclosure requirements now that the limit on contributions to noncandidate committees has been permanently enjoined. A single contributor may provide thousands of dollars to independent committees, and yet avoid disclosing its identity if the committee makes all the expenditures itself. The noncandidate committee definition acts to ensure that the contributor's identity will be disclosed to the voting public. Hawaii's efforts to provide transparency would be incomplete if disclosure was not required in such circumstances.

cases." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). Based on the record before us, we hold only that noncandidate committee status may be extended to organizations, such as A-1, even though their primary purpose is not political advocacy. The burdens attending such a status are modest and substantially related to important government interests.

B. The Disclaimer Requirement for Advertisements is Constitutional Under *Citizens United*

A-1 contends that Hawaii's requirement that political advertising include a disclaimer as to the affiliation of the advertiser with a candidate or candidate committee cannot survive exacting scrutiny. "Advertisements" for purposes of Hawaii election ***1202** law are print and broadcast communications that (1) identify a candidate or ballot issue directly or by implication and (2) "advocate[ ] or support[ ] the nomination, opposition, or election of the candidate, or advocate[ ] the passage or defeat of the issue or question on the ballot." HRS § 11-302. The challenged disclaimer rule provides that an advertisement must include a "notice in a prominent location" that "[t]he advertisement has the approval and authority of the candidate" or "has not been approved by the

candidate." HRS § 11-391(a)(2).[12,13] The rule thus advises voters whether an advertisement is coordinated with or independent **41 from a candidate for elected office. The fine for violating this section is $25 per advertisement, not to exceed $5,000 in the aggregate. *See* HRS § 11-391(b).

A-1 seeks to place advertisements that (1) mention a candidate by name; (2) run in close proximity to an election; and (3) include language stating that particular candidates "are representatives who do not listen to the people," "do not understand the importance of the values that made our nation great" or "do not show the aloha spirit." It argues the disclaimer requirement is unconstitutional because it regulates the content of speech itself and is therefore an even greater incursion on its First Amendment rights than reporting requirements. A-1 further contends a disclaimer can be mandated only for speech that is a federal electioneering communication, as defined by federal law, or that is express advocacy, not including its functional equivalent.

We agree with the district court that the disclaimer requirement survives exacting scrutiny as applied to A-1's newspaper advertisements. Like the

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[12] A-1 does not challenge the related requirement that all political advertisements disclose the name and address of the person or entity paying for the ad. *See* HRS § 11-391(a)(1).

[13] This provision was amended during the pendency of this appeal, but the minor changes are immaterial. *See* 2014 Hawaii Laws Act 128 (H.B. 452).

noncandidate committee requirements, the disclaimer serves an important governmental interest by informing the public about who is speaking in favor or against a candidate before the election and imposes only a modest burden on First Amendment rights. A-1's arguments to the contrary are all but foreclosed by *Citizens United,* 558 U.S. at 366-69, 130 S.Ct. 876.

First, the disclaimer requirement imposes only a modest burden on A-1's First Amendment rights. Like disclosure requirements, "[d]isclaimer . . . requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking." ****42** *Id.* at 366, 130 S.Ct. 876 (citation and internal quotation marks omitted). Hawaii's disclaimer requirement is no more burdensome than the one for televised electioneering communications upheld in *Citizens United. See id.* at 366-69, 130 S.Ct. 876. That rule required a statement as to who was responsible for the content of the advertisement "be made in a 'clearly spoken manner,' and displayed on the screen in a 'clearly readable manner' for at least four seconds," along with a further statement that "the communication 'is not authorized by any candidate or candidate's committee.'" *Id.* at 366, 130 S.Ct. 876 (quoting 2 U.S.C. § 441d(d)(2), (a)(3)). Similarly, all that is required here is a short statement stating that the advertisement is published, broadcast, televised, or circulated with or without the approval and authority of the candidate. *See* HRS § 11-391(a).

Second, requiring a disclaimer is closely related to Hawaii's important governmental ***1203** interest in "dissemination of information regarding the financing of political messages." *McKee,* 649 F.3d at 61. A-1's past advertisements ran shortly before an election and criticized candidates by name as persons who did not, for example, "listen to the people." As the district court found, these advertisements – published on or shortly before election day – are not susceptible to any reasonable interpretation other than as an appeal to vote against a candidate. *Yamada III,* 872 F.Supp.2d at 1055. Such ads are the very kind for which "the public has an interest in knowing who is speaking," *Citizens United,* 558 U.S. at 369, 130 S.Ct. 876, and where disclaimers can "avoid confusion by making clear that the ads are not funded by a candidate or political party," *id.* at 368, 130 S.Ct. 876. *See also Worley,* 717 F.3d at 1253-55 (rejecting a challenge to an analogous disclaimer requirement); *McKee,* 649 F.3d at 61 (same); *Alaska Right to Life,* 441 F.3d at 792-93 (same). And contrary to A-1's ****43** argument, nothing in *Citizens United* suggests that a state may not require disclaimers for political advertising that is not the functional equivalent of a federal electioneering communication. In applying the federal disclaimer requirement to an advertisement urging voters to see a short film about a presidential candidate, *Citizens United* explained that "[e]ven if the ads only pertain to a commercial transaction, the public

has an interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369, 130 S.Ct. 876.[14]

Accordingly, the disclaimer requirement does not violate the First Amendment as applied to A-1's political advertisements.

**44 C. A-1 Lacks Standing to Challenge the Electioneering Communications Reporting Requirements

A-1 acknowledges that, at the time it filed this action, it lacked standing to challenge the electioneering communications law if it must continue to

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[14] We reject A-1's comparison to the disclaimer invalidated by the Supreme Court in *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 340, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), which prohibited the distribution of pamphlets without the name and address of the person responsible for the materials, or to the disclosure provision invalidated by this court in *ACLU of Nev. v. Heller,* 378 F.3d 979, 981-82 (9th Cir.2004), which required persons paying for publication of any material "relating to an election" to include their names and addresses. *Citizens United*'s post-*McIntyre,* post-*Heller* discussion makes clear that disclaimer laws such as Hawaii's may be imposed on political advertisements that discuss a candidate shortly before an election. *See* 558 U.S. at 368-69, 130 S.Ct. 876; *see also Worley,* 717 F.3d at 1254 (rejecting the argument that *McIntyre* dictated the demise of Florida's analogous disclaimer requirement). An individual pamphleteer may have an interest in maintaining anonymity, but "[l]eaving aside *McIntyre*-type communications . . . there is a compelling state interest in informing voters who or what entity is trying to persuade them to vote in a certain way." *Alaska Right to Life,* 441 F.3d at 793.

register as a noncandidate committee. *See Washington Envtl. Council v. Bellon,* 732 F.3d 1131, 1139 (9th Cir.2013) ("A plaintiff must demonstrate standing for each claim he or she seeks to press and for each form of relief sought.") (citing *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006)). A-1 argues, however, that it now has standing because Hawaii law was amended as of November 5, 2014, to require registered noncandidate committees to comply with electioneering communications reporting requirements. *See* 2013 Haw. Sess. L. Act 112. But, "[s]tanding is determined as of the commencement of litigation." *Biodiversity Legal Found. v. Badgley,* 309 F.3d 1166, 1171 (9th Cir.2002); *see also Wilbur v. Locke,* 423 F.3d 1101, 1107 (9th Cir.2005) ("As with all questions of subject ***1204** matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint. . . . The party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint to establish its standing." (alteration in original) (internal quotation marks omitted)), *abrogated on other grounds by Levin v. Commerce Energy, Inc.,* 560 U.S. 413, 130 S.Ct. 2323, 176 L.Ed.2d 1131 (2010); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 569 n. 4, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed. It cannot be that, by later participating in the suit, the State Department and AID retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset."

(citation and internal quotation marks omitted)). Accordingly, because we conclude the noncandidate **45 committee requirements can be constitutionally applied to A-1, and A-1 was not subject to the "electioneering communication" reporting requirements as of the date the complaint was filed, we do not consider A-1's constitutional challenge to those requirements. *See* HRS § 11-341.[15]

D. The Contractor Contribution Ban is Constitutional Even As Applied to Contributions to Legislators Who Neither Award nor Oversee Contracts

A-1's final First Amendment challenge is to Hawaii's ban on contributions by government contractors. The challenged provision makes it

> unlawful for any person who enters into any contract with the State, any of the counties, or any department or agency thereof either for the rendition of personal services, the buying of property, or furnishing of any material, supplies, or equipment to the State, any of the counties, any department or agency thereof, or for selling any land or building to the State, any of the counties, or any department or agency thereof, if payment for

[15] Nothing we say today (other than as a matter of stare decisis) precludes A-1 from bringing a future challenge to the electioneering communication reporting requirements to which, it claims, it is now subject.

> the performance of the contract or payment for material, supplies, equipment, land, property, or building is to be made in whole or in part from funds appropriated by the legislative body, at any time between the execution of **46 the contract through the completion of the contract, to:
>
> . . . Directly or indirectly make any contribution, or promise expressly or impliedly to make any contribution to any candidate committee or noncandidate committee, or to any candidate or to any person for any political purpose or use;

HRS § 11-355(a).

A-1 does not challenge the ban as applied to contributions it makes to lawmakers or legislative candidates who either decide whether it will receive a contract or oversee its performance of a contract. Instead, A-1 asserts it intends to make contributions only to lawmakers or candidates who will neither award nor oversee its contracts, and it argues the government contractor contribution ban is unconstitutional solely as applied to those intended contributions.[16]

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[16] A-1 challenges only its right to make contributions to state legislative candidates while acting as a state government contractor. It does not distinctly argue, for example, that § 11-355(a) impermissibly infringes its right to contribute to county or municipal officials while serving as a state contractor. We therefore have no occasion to decide whether the ban would

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***1205** Contribution bans are subject to "closely drawn" scrutiny. *See Fed. Election Comm'n v. Beaumont,* 539 U.S. 146, 161-63, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003) (applying the closely drawn standard in upholding a federal law banning campaign contributions made by corporations); *Thalheimer v. City of San Diego,* 645 F.3d 1109, 1124 & n. 4 (9th Cir.2011) (applying closely ****47** drawn scrutiny to a city ordinance making it unlawful for "non-individuals" to contribute directly to candidates). A regulation satisfies closely drawn scrutiny when "the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon,* 134 S.Ct. at 1444 (quoting *Buckley,* 424 U.S. at 25, 96 S.Ct. 612) (internal quotation marks omitted).[17]

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survive First Amendment scrutiny as applied to those circumstances.

[17] We previously noted that *Beaumont* and other cases applying the closely drawn standard to contribution limits remained good law after *Citizens United. See Thalheimer,* 645 F.3d at 1124-25. This remains true after *McCutcheon.* There, the Supreme Court considered the constitutionality of "aggregate limits" under federal law, which "restrict [ed] how much money a donor [could] contribute in total to all candidates or committees" in a given election period. *See* 134 S.Ct. at 1442 (citing 2 U.S.C. § 441a(a)(3)). Because the Court held that the aggregate limit for federal elections failed even under less stringent, "closely drawn" scrutiny, the Court declined to revisit the proper standard of review for contribution limits. *See id.* at 1445-46.

A-1 does not argue that Hawaii's government contractor contribution ban is unconstitutional as a general matter. The Second Circuit confronted a similar ban in *Green Party of Connecticut v. Garfield,* 616 F.3d 189 (2d Cir.2010). There, the court turned away a First Amendment challenge to Connecticut's ban on campaign contributions by state contractors, holding that it furthered a "'sufficiently important' government interest[ ]" by "combat[ing] both actual corruption and the appearance of corruption caused by contractor contributions." *Id.* at 200. The court further held that the ban was "closely drawn" because it targeted contributions by current and prospective state contractors – the contributions associated most strongly with actual and perceived corruption. *See id.* at 202. Recognizing a *ban* on ****48** contributions by government contractors, rather than a mere *limit* on the amount of those contributions, was "a drastic measure," the court held that the ban was closely drawn because it addressed a perception of corruption brought about by recent government-contractor-related corruption scandals in Connecticut. *See id.* at 193-94, 204-05. The ban "unequivocally addresses the perception of corruption" because, "[b]y totally shutting off the flow of money from contractors to state officials, it eliminates any notion that contractors can influence state officials by donating to their campaigns." *Id.* at 205; *see also Ognibene v. Parkes,* 671 F.3d 174, 185 (2d Cir.2011) ("When the appearance of corruption is particularly strong due to recent scandals . . . a ban may be appropriate.").

The same reasoning applies here. Hawaii's government contractor contribution ban serves sufficiently important governmental interests by combating both actual and the appearance of quid pro quo corruption. *Green Party,* 616 F.3d at 200; *see also McCutcheon,* 134 S.Ct. at 1450 (reaffirming that a legislature may limit contributions to prevent actual quid pro quo corruption or its appearance); *cf. Preston v. Leake,* 660 F.3d 726, 736-37 (4th Cir.2011) (upholding a complete ban on contributions by lobbyists "as a prophylactic to prevent not only actual corruption but also the appearance of corruption in future state political campaigns"). It is ***1206** closely drawn because it targets direct contributions from contractors to officeholders and candidates, the contributions most closely linked to actual and perceived quid pro quo corruption. *See Green Party,* 616 F.3d at 202; *see also McCutcheon,* 134 S.Ct. at 1452 (noting that the "risk of *quid pro quo* corruption or its appearance" is greatest when "a donor contributes to a ****49** candidate directly").[18] And as in Connecticut, Hawaii's

[18] Hawaii's contractor contribution ban is narrower than many others. The ban upheld in *Green Party,* for example, applied not only to contractors but also to principals of that contractor and to family members of a contractor or of a principal of a contractor. *See Green Party,* 616 F.3d at 202-03. The federal ban is also broader than the Hawaii ban; it applies not only to existing contractors but also to prospective contractors. *See* 2 U.S.C. § 441c. Hawaii's law does not prohibit A-1 from making contributions as a prospective contractor, A-1's principals (such as plaintiff Yamada) from making contributions or A-1 from making independent expenditures on behalf of the

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decision to adopt an outright ban rather than mere restrictions on how much contractors could contribute was justified in light of past "pay to play" scandals and the widespread appearance of corruption that existed at the time of the legislature's actions. *See Yamada III,* 872 F.Supp.2d at 1058-59 nn. 26-27 (summarizing the evidence of past scandals and the perception of corruption). Thus, as a general matter, Hawaii's ban on contributions by government contractors satisfies closely drawn scrutiny.

A-1's narrower argument that the contractor contribution ban is unconstitutional as applied to its contributions to lawmakers and candidates *who neither award nor oversee its contracts* is also without merit. Hawaii's interest in preventing actual or the appearance of quid pro quo corruption is no less potent as applied to A-1's proposed contributions because the Hawaii legislature *as a whole* considers all bills concerning procurement. Thus, although an individual legislator may not be closely involved in awarding or overseeing a particular contract, state money can ****50** be spent only with an appropriation by the entire legislature. *See* Haw. Const. art. VII, §§ 5, 9. Hawaii reasonably concluded that contributions to

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candidates it seeks to support. *Cf. Beaumont,* 539 U.S. at 161 n. 8, 123 S.Ct. 2200 ("A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.").

any legislator could give rise to the appearance of corruption.

In essence, A-1 contends that Hawaii's contractor ban should be tailored more narrowly, but narrower tailoring is not required here. There is no question the ban is closely drawn to the state's anticorruption interest as a general matter, and we decline to revisit the legislature's judgment not to craft a still narrower provision. Closely drawn scrutiny requires "a fit that is not necessarily perfect, but reasonable," and Hawaii's contractor contribution ban is a reasonable response to the strong appearance of corruption that existed at the time of the legislature's actions. *McCutcheon,* 134 S.Ct. at 1456 (quoting *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)) (internal quotation marks omitted). We need not "determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives" to uphold the contribution ban. *Randall,* 548 U.S. at 248, 126 S.Ct. 2479.

Even if narrower tailoring were required, A-1's proposal for a narrower ban is unworkable. A-1 does not explain how it would determine, before the election, which candidates would neither award nor oversee any of its contracts. The membership of the various legislative committees ***1207** can change with each election, and a different committee – whether the Education Committee or Public Safety, Government Operations, and Military Affairs Committee – may serve a greater or lesser oversight role on a

particular project. There is, therefore, a "clear fallacy" in A-1's logic:

> ****51** [During the 2011 Legislative Session], A-1 testified . . . in favor of a construction and procurement-related bill regarding the University of Hawaii. At least three Legislators that served on committees that considered the bill (and voted in favor of it) also received campaign contributions from A-1 in the 2010 elections. And A-1 made contributions to opponents of fifteen other Legislators who considered the bill.

Yamada III, 872 F.Supp.2d at 1061 n. 30 (citation omitted). Simply put, A-1 cannot predict with certainty which candidates will not become involved in the contract award or oversight process when it makes its contributions. Moreover, A-1's contributions to candidates who do not become directly involved in contract award and oversight could still create the appearance of "the financial quid pro quo: dollars for political favors." *Citizens United,* 558 U.S. at 359, 130 S.Ct. 876 (quoting *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 497, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985)) (internal quotation marks omitted).

For these reasons, we hold that Hawaii's government contractor contribution ban survives closely drawn scrutiny even as applied to A-1's proposed contributions to candidates who neither decide whether A-1 receives contracts nor oversee A-1's contracts.

IV. Attorney's Fees

Finally, we consider the district court's fee award to Yamada and Stewart (the plaintiffs) for their successful constitutional challenge to the $1,000 limit on contributions **52 to noncandidate committees, HRS § 11-358. Under 42 U.S.C. § 1988(b), the district court had discretion to award "the prevailing party . . . a reasonable attorney's fee." We review the award for an abuse of discretion, but any element of legal analysis that figures into the district court's decision is reviewed de novo. *See Watson v. Cnty. of Riverside,* 300 F.3d 1092, 1095 (9th Cir.2002). The plaintiffs' primary contention, with which we agree, is that the district court erred by refusing to award the fees they incurred in successfully defending against the defendants' interlocutory appeal. We address the plaintiffs' other contentions in a concurrently filed memorandum disposition.

In October 2010, the district court granted a preliminary injunction in favor of the plaintiffs on their claim that HRS § 11-358, limiting to $1,000 contributions to noncandidate committees, violates the First Amendment. The defendants then filed an interlocutory appeal. After the parties finished briefing in this court, however, the defendants dismissed the appeal, presumably in light of an intervening decision upholding a preliminary injunction of a similar contribution limit. *See Thalheimer,* 645 F.3d at 1117-21. In subsequent district court proceedings, the defendants offered to stipulate to a permanent injunction against § 11-358. The parties, however, were unable to reach

agreement on the form of an injunction, and on the parties' subsequent cross-motions for summary judgment, the district court permanently enjoined § 11-358 as applied to the plaintiffs' proposed contributions.

Based on their successful constitutional challenge to § 11-358, Yamada and Stewart sought attorney's fees and costs, including those fees incurred in defending against ***1208** the defendants' interlocutory appeal, under § 1988. The district court granted in part and denied in part their fee request. As ****53** relevant here, it concluded it had "no authority" to award fees pertaining to the interlocutory appeal because (1) the plaintiffs became prevailing parties when the defendants abandoned their appeal of the preliminary injunction, *see Watson,* 300 F.3d at 1095 (stating that, under certain circumstances, "a plaintiff who obtains a preliminary injunction is a prevailing party for purposes of § 1988"), and (2) under Ninth Circuit Rule 39-1.6 and *Cummings v. Connell,* 402 F.3d 936, 940 (9th Cir.2005) (*Cummings II*), "[a] district court is not authorized to award attorney's fees for an appeal unless we transfer the fee request to the district court for consideration." Because it assumed the plaintiffs could have requested fees from the Ninth Circuit as prevailing parties when the defendants dismissed their appeal, the court concluded it had no authority to award fees for the appeal.

The plaintiffs contend, and we agree, that the district court's analysis was flawed for two reasons. First, contrary to the district court's analysis, Yamada and Stewart were not yet prevailing parties when the

defendants dismissed their interlocutory appeal and could not have requested fees at that time. A court may award attorney's fees under § 1988 only to a "prevailing party," and a plaintiff prevails for purposes of § 1988 only "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Higher Taste, Inc. v. City of Tacoma,* 717 F.3d 712, 715 (9th Cir.2013) (quoting *Farrar v. Hobby,* 506 U.S. 103, 111-12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)) (internal quotation marks omitted). This requires an "enduring" change in the parties' relationship, *Sole v. Wyner,* 551 U.S. 74, 86, 127 S.Ct. 2188, 167 L.Ed.2d 1069 (2007), that has "'judicial imprimatur' . . . such as a judgment on the merits or a court-ordered consent decree," *Watson,* 300 F.3d at 1096 ****54** (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.,* 532 U.S. 598, 600, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001)).

The district court concluded that the plaintiffs were prevailing parties under *Watson,* but *Watson* is distinguishable. As explained in *Higher Taste, Watson* stands for the proposition that, "when a plaintiff wins a preliminary injunction *and the case is rendered moot before final judgment,* either by the passage of time or other circumstances beyond the parties' control, the plaintiff is a prevailing party eligible for a fee award." *Higher Taste,* 717 F.3d at 717 (emphasis added). Here, the plaintiffs' challenge to HRS § 11-358 was not "rendered moot" until the district court

entered final judgment against the Commission on that claim. A plaintiff does not become a prevailing party until it obtains relief that is "no longer subject to being 'reversed, dissolved, or otherwise undone by the final decision in the same case.'" *Id.* (quoting *Sole,* 551 U.S. at 83, 127 S.Ct. 2188). Here, that occurred when the district court entered a final judgment on the plaintiffs' § 11-358 claim, not when the Commission abandoned its appeal of the adverse preliminary injunction ruling.[19]

***1209** The defendants argue Yamada and Stewart were nonetheless prevailing parties at the time the defendants dismissed their interlocutory appeal because the preliminary ****55** injunction issued by the district court was not an "ephemeral" victory at all, but "a published opinion, resolving a constitutional question, enjoining a campaign finance law weeks before an election." That the preliminary injunction would be converted into a permanent one appeared to be a "foregone conclusion" to the parties and the district court, particularly once we issued our decision in *Thalheimer.*

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[19] *Higher Taste* extended *Watson*'s prevailing party analysis to circumstances in which a plaintiff obtains a preliminary injunction and then the case is dismissed upon the parties' stipulation following settlement, when the settlement agreement provides the plaintiff with "what it had hoped to obtain through a permanent injunction." 717 F.3d at 717-18. Here, however, the parties did not reach a settlement agreement at the time of the preliminary injunction appeal or any time thereafter.

We disagree. Because the preliminary injunction order could be negated by a final decision on the merits, it was an interlocutory order that did not confer prevailing party status on the plaintiffs when the defendants dismissed their appeal.

Furthermore, because the plaintiffs were not yet prevailing parties when the defendants dismissed the interlocutory appeal, the district court erred by relying on *Cummings II* to deny them attorney's fees for the appeal. *Cummings II* was the second appeal before this court in a case proceeding under § 1983. The district court granted summary judgment to the plaintiffs in the underlying case, and the defendant appealed that final order. In *Cummings v. Connell,* 316 F.3d 886, 898-99 (9th Cir.2003) (*Cummings I*), we upheld the grant of summary judgment as to the defendant's liability, thus preserving the plaintiffs' status as prevailing parties on the merits, but remanded for reconsideration of damages. On remand, the district court awarded an additional $30,000 in attorney's fees the plaintiffs had incurred defending against the defendant's prior appeal in *Cummings I. Cummings II,* 402 F.3d at 942, 947. The parties cross-appealed again. We held that the fees related to the first appeal were improperly awarded "because plaintiffs failed to file their request with the court of appeals as required by Ninth Circuit Rule 39-1.6." *Id.* at 947. In short,

> ****56** [p]laintiffs' application for attorneys' fees and expenses incurred on appeal in *Cummings I* should have been filed with the

> Clerk of the Ninth Circuit. Ninth Circuit Rule 39-1.8 authorizes us to transfer a timely-filed fees-on-appeal request to the district court for consideration, but the decision to permit the district court to handle the matter rests with the court of appeals. In the absence of such a transfer, the district court was not authorized to rule on the request for appellate attorney's fees.

Id. at 947-48.[20] *See Natural Res. Def. Council, Inc. v. Winter,* 543 F.3d 1152, 1164 (9th Cir.2008) ("In *Cummings* [*II*], we held that appellate fees requested pursuant to 42 U.S.C. § 1988 must be filed with the Clerk of the Ninth Circuit in the first instance, not with the district court."). Accordingly, we reversed the attorney's fees award for the first appeal, holding that the plaintiffs' request for fees was ***1210** untimely. *See Cummings II,* 402 F.3d at 948.

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[20] Ninth Circuit Rule 39-1.6(a) reads:

> Absent a statutory provision to the contrary, a request for attorneys' fees shall be filed no later than 14 days after the expiration of the period within which a petition for rehearing may be filed, unless a timely petition for rehearing is filed. If a timely petition for rehearing is filed, the request for attorneys fees shall be filed no later than 14 days after the Court's disposition of the petition.

This amended version of Ninth Circuit Rule 39-1.6 omits the "shall be filed with the Clerk" language of the prior version, but as the district court correctly concluded, the amendment did not alter the substance of the rule.

**57 *Cummings II,* however, did not consider a situation in which a party prevails on interlocutory review and only *subsequently* becomes entitled to attorney's fees under a fee-shifting statute such as § 1988. When a plaintiff is not entitled to attorney's fees after an interlocutory appeal, as was the case here, it cannot immediately request attorney's fees from this court. Should the plaintiff subsequently become a prevailing party, however, it should presumptively be eligible for attorney's fees incurred during the first appeal, because that appeal likely contributed to the success of the underlying litigation. *See Crumpacker v. Kansas, Dep't of Human Res.,* 474 F.3d 747, 756 (10th Cir.2007) (Title VII) (holding that "parties who prevail on interlocutory review in this court, and who subsequently become prevailing parties . . . are implicitly entitled to reasonable attorneys' fees related to the interlocutory appeal"); *cf. Cabrales v. Cnty. of L.A.,* 935 F.2d 1050, 1053 (9th Cir.1991) (holding that "a plaintiff who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage").

Here, because Yamada and Stewart prevailed in an interlocutory appeal, and subsequently became prevailing parties after the district court entered judgment in their favor, the district court erred by failing to consider whether to award them reasonable appellate attorney's fees. We hold that Yamada and Stewart are entitled to attorney's fees arising from the prior appeal. The matter is referred to the Ninth

Circuit Appellate Commissioner to determine the amount of fees to be awarded.[21]

****58 V. Conclusion**

We affirm the judgment of the district court on the merits of A-1's constitutional claims. We vacate the district court's fee award to Yamada and Stewart in part and refer the matter to the Ninth Circuit Appellate Commissioner for a determination of the proper fee award arising out of the interlocutory appeal. Each party shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART; REFERRED TO THE APPELLATE COMMISSIONER WITH INSTRUCTIONS.

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[21] The plaintiffs further argue Ninth Circuit Rule 39-1.6 cannot restrict the jurisdiction of the district court to award attorney's fees related to a prior appeal where a fee-shifting statute, such as § 1988, does not preclude the district court from awarding such fees. The Eighth Circuit agreed with this position in *Little Rock School District v. State of Arkansas,* 127 F.3d 693, 696 (8th Cir.1997), where it held that, despite an analogous Eighth Circuit rule to our Rule 39-1.6, "the district courts retain jurisdiction to decide attorneys' fees issues that we have not ourselves undertaken to decide." Although the plaintiffs' argument has some appeal, we are bound by our contrary holding in *Cummings II*.

District Court Summary Judgment Order

(Single asterisks precede page numbers from the reported order, 872 F.Supp.2d 1023 (D.Haw. 2012), while double asterisks precede page numbers from the manuscript order.)

***1023 **1** In the United States District Court for the District of Hawaii

Jimmy YAMADA, Russell Stewart, and A-1 A-Lectrician, Inc., Plaintiffs,
v.
Michael WEAVER, in his official capacity as Chair and Member of the Hawaii Campaign Spending Commission; Dean Robb, Calmentina Gomes, and G. William Snipes, in their official capacities as Members of the Hawaii Campaign Spending Commission, Defendants.

Civil No. 10-00497 JMS-RLP

March 21, 2012

Counsel

***1027** Randy Elf, James Bopp, Jr., James Madison Center for Free Speech, Terre Haute, Indiana, Lloyd James Hochberg, Jr., Honolulu, Hawaii, for Plaintiffs.

Charleen M. Aina, Robyn B. Chun, Deirdre Marie-Iha, Office of the Attorney General – Hawaii, Honolulu, Hawaii, for Defendants.

ORDER (1) PERMANENTLY ENJOINING DEFENDANTS FROM ENFORCING HRS § 11-358 AS-APPLIED TO SPECIFIED CONTRIBUTIONS TO AFA-PAC, A COMMITTEE MAKING ONLY INDEPENDENT CAMPAIGN EXPENDITURES: AND (2) UPHOLDING THE CONSTITUTIONALITY, AS CHALLENGED, OF PROVISIONS OF HRS §§ 11-302, 355 & 391

I. *INTRODUCTION*

Plaintiffs Jimmy Yamada ("Yamada"), Russell Stewart ("Stewart"), and A-1 A-Lectrician, Inc. ("A-1") (collectively "Plaintiffs") filed this action in **2 August 2010, challenging the constitutionality of several Hawaii campaign finance laws in the wake of *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), which (among other matters) invalidated limitations on amounts of corporate independent campaign expenditures.

In October 2010, the court addressed most of Plaintiffs' challenges at a preliminary-injunction stage of the proceedings, and issued two comprehensive Orders granting in part and denying in part Plaintiffs' Amended Motion for Preliminary Injunction. *See* Doc. Nos. 71, 91; *Yamada v. Kuramoto*, 744 F.Supp.2d 1075 (D.Haw.2010) ("*Yamada I*"); and *Yamada v. Kuramoto*, 2010 WL 4603936 (D.Haw. Oct.29, 2010) ("*Yamada II*"). Campaign finance law has continued to evolve since then, and the record in this action has been further developed. The court now faces the same, or similar, issues on Cross Motions for Summary Judgment. Where appropriate, the court

draws upon and incorporates parts of *Yamada I* and *Yamada II* in ruling on the current Cross Motions.

Citizens United held that limitations on independent campaign expenditures violate the First Amendment because no sufficient government interest justifies suppressing corporate independent speech. 130 S.Ct. at 913. Applying that logic, Courts of Appeals subsequently invalidated restrictions on amounts of *contributions* to organizations that make only independent campaign ****3** expenditures. *See, e.g.*, *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121-22 (9th Cir.2011) (upholding injunction against enforcement of San Diego ordinance limiting fundraising of independent political committees); *Wisc. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 154-55 (7th Cir.2011) (holding campaign contribution limit unconstitutional as applied to organizations that engage only in independent expenditures for political speech). Likewise, *Yamada I* preliminarily enjoined enforcement of ***1028** Hawaii Revised Statutes ("HRS") § 11-358 as applied to Yamada's and Stewart's then-proposed contributions to Aloha Family Alliance-Political Action Committee ("AFA-PAC") – an entity that engages in solely independent expenditures. *See* 744 F.Supp.2d at 1087. This Order now makes that injunction permanent.

Citizens United also embraced disclosure and transparency in elections – organizations that engage in independent campaign spending can do so freely, but should also do so openly. Although disclosure requirements "may burden the ability to speak . . .

they impose no ceiling on campaign-related activities and do not prevent anyone from speaking[.]" 130 S.Ct. at 914 (citations and quotation marks omitted). "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make **4 informed decisions and give proper weight to different speakers and messages." *Id.* at 916. Accordingly, *Yamada II* upheld (again, at the preliminary injunction phase) Hawaii campaign finance laws that enable and require disclosure of certain activities that, for example, have the purpose of influencing the nomination or election of candidates. *See* 2010 WL 4603936, at *20 (finding Plaintiffs were unlikely to succeed in their challenges to requirements now codified at HRS §§ 11-302 and 391). This Order now confirms that, as challenged, Hawaii's noncandidate committee, expenditure, and advertisement requirements in HRS §§ 11-302 and 391 are constitutional.

Finally, *Citizens United* did not address whether campaign contributions directly to *candidates* may be limited, and did not change the principle that such restrictions may be justified to prevent corruption or its appearance. *See, e.g.*, *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 154-55, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003). This Order (addressing an issue not previously pursued by Plaintiffs) upholds Hawaii's ban on direct campaign contributions by government contractors set forth in HRS § 11-355, as applied to A-1, given A-1's past and proposed donations

to candidates and its status as a government contractor. Hawaii's "pay-to-play" ban in § 11-355 is constitutional as applied to A-1.

In sum, based on the following, the Cross Motions for Summary **5 Judgment are GRANTED in PART and DENIED in PART.

II. *BACKGROUND*

A. Factual Background

Plaintiffs' First Amended Verified Complaint, Doc. No. 24 ("FAC"), seeks declaratory and injunctive relief pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983, and challenges the constitutionality of five Hawaii campaign finance laws (or sets of laws) that regulate Plaintiffs' actual or proposed activities. Specifically, Plaintiffs challenge Hawaii's: (1) restrictions on contributions to noncandidate committees (HRS § 11-358), (2) "noncandidate committee" and related "expenditure" definitions (HRS § 11-302), (3) "electioneering communication" disclosure requirements (HRS § 11-341), (4) disclaimer-language requirements for an "advertisement" (HRS § 11-391), and (5) ban on contributions to candidates by government contractors (HRS § 11-355).[1] The FAC was

[1] Hawaii's campaign finance laws were updated and recodified in 2010 by Act 211, 2010 Haw. Sess. L. ("Act 211"). *See* Act 211 § 13. The purpose of Act 211 was to "update, organize, and clarify current [pre-July 2010] campaign finance laws." Act 211 § 1. The FAC and this court's prior Orders refer to the

(Continued on following page)

***1029** verified by Yamada and Stewart (as individuals), by A-1 (through Yamada, as A-1's chief executive officer), and by AFA-PAC (through its Chair Andrew Gerakas).[2] FAC at 59-60.

****6** Defendant Michael Weaver is the current Hawaii Campaign Spending Commission ("the Commission") chairperson. Defendants Dean Robb, Calmentina Gomes, and G. William Snipes are current members of the Commission. All Defendants are sued in their official capacities as Commission members. FAC ¶ 23; Defs.' Mot. at 2 n. 1.[3]

Because the FAC was verified, the court treats it as an affidavit. *See, e.g.*, *Thalheimer*, 645 F.3d at 1116 ("A verified complaint may be treated as an affidavit, and, as such, it is evidence that may support injunctive relief.") (citations omitted). Yamada also submitted declarations, and testified at a preliminary injunction hearing on October 1, 2010 (both individually and as A-1's representative). Stewart and

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challenged provisions as they were temporarily numbered in Act 211. The sections were subsequently codified in HRS Chapter 11, and this Order now refers to them as they are presently codified.

[2] AFA-PAC is not a Plaintiff, but its status is important in this action.

[3] The FAC names the Commission members, in their official capacities, as of September 2010. Pursuant to Federal Rule of Civil Procedure 25(d), current Commission members (as of December 2011) Michael Weaver, Calmentina Gomes and G. William Snipes are automatically substituted as Defendants. Dean Robb, whose term has continued throughout the litigation, remains as a Defendant.

Gerakas also testified and submitted declarations. Given the FAC's verified allegations, testimony at the October 1, 2010 hearing, and the evidence most recently submitted with the Cross Motions, the court finds the facts as described below are essentially undisputed. That is, the parties agree that there are no genuine issues of material fact in dispute, and that the court should decide the legal issues based upon the Cross Motions.

**7 Yamada and Stewart are Hawaii residents. As individuals, they each sought to contribute $2,500 to AFA-PAC before the 2010 general election. FAC ¶ 7. Doing so, however, would have exceeded the $1,000 per election contribution limitation contained in HRS § 11-358. In October 2010, after the court preliminarily enjoined enforcement of § 11-358 as to their proposed contributions, they both contributed $2,500 to AFA-PAC. And they both seek to contribute $2,500 to AFA-PAC again in 2012. Pls.' Mot. Exs. 3-4.

AFA-PAC is a Hawaii registered noncandidate committee[4] that makes only "independent expenditures."[5] It does not contribute directly to candidates,

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[4] *See* State of Hawaii, Campaign Spending Commission, Organizational Report of AFA-PAC, *available at* https://nc.csc.hawaii.gov/NCFSPublic/ORG_Report.php?OR_ID=20274 (last visited March 12, 2012).

[5] HRS § 11-302 defines an "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate that is not made in concert or cooperation with or at the request or suggestion of the candidate, the candidate committee, a party, or their agents." In

(Continued on following page)

and does ***1030** not coordinate spending for political speech with candidates or political ****8** parties. FAC ¶ 8. Gerakas confirmed at the preliminary injunction hearing that he is chairman of AFA-PAC, and that it "operates like any other independent political action committee." Transcript of Oct. 1, 2010 Hearing ("Tr.") at 11. AFA-PAC was created in July 2010, and was formed to "influence passage of legislation that supports traditional marriage, the right to life against such things as physician-assisted suicide, and promoting the issue of life in our community." *Id.* AFA-PAC is "committed to endorsing and financially supporting candidates, no matter what their party affiliation, who will stand up in the public square for Hawaii's families." FAC Ex. 1. Its goal is to "identify, endorse and elect county, state, and federal officials who favor policies that strengthen and nourish Hawaii's families." *Id.* It asks people to "register to vote" and make contributions to AFA-PAC so that "[m]onies

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turn, § 11-302 defines a "person" as "an individual, a partnership, a candidate committee or noncandidate committee, a party, an association, a corporation, a business entity, an organization, or a labor union and its auxiliary committees."

Federal law defines "independent expenditure" similarly, as:

> [A]n expenditure by a person –
>
> (A) expressly advocating the election or defeat of a clearly identified candidate; and
>
> (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

2 U.S.C. § 431(17).

will be used to support candidates who share and reflect our values." *Id.* Defendants have not challenged Gerakas's testimony that AFA-PAC makes only independent expenditures.

A-1 is an electrical contractor that is "often a government contractor" – it previously worked as a contractor for State organizations, provides services for past jobs, and expected to have State contracts in the near future when Plaintiffs filed the FAC in September 2010. FAC ¶¶ 11-12. And, as of December 2011, A-1 in fact had State contracts. Pls.' Mot. Exs. 5-7. A-1 is registered as a noncandidate **9 committee, FAC ¶¶ 9-10, but no longer wants to face burdens such as registration and record-keeping associated with such a classification. *Id.* ¶ 28. A-1 wants to make (and has made) contributions to candidates, and has run advertisements that identify candidates, but wants to do so without including a disclaimer otherwise required by Hawaii law. According to Yamada, A-1 "wants to make contributions, while it is a government contractor, to candidates – like those to whom it contributed in 2010 – who do not decide whether A-1 receives contracts and who do not oversee the contracts." Pls.' Mot. Ex. 5 ¶ 7. A-1 is not connected with any political candidate or political party, nor with any political committee. A-1 did not form a distinct noncandidate committee to register with the Commission. Rather, it registered itself (as a noncandidate committee) with the Commission "many years ago" pursuant to direction it received from the Commission. FAC ¶ 10; Tr. 30, 35, 37.

A-1 contends it need not comply with non-candidate committee requirements because it does not have "the major purpose of nominating or electing a candidate or candidates for state or local office in Hawaii." FAC ¶ 27. Yamada states that "[p]olitical advocacy is not one of A-1's reasons for existing," and that political advocacy "is not a 'priority' for A-1, in the sense that it does not 'take precedence' over A-1's business activities." Pls.' Mot. Ex. 5 ¶¶ 11-12. It ****10** "reasonably fear[ed] that if it [did] its 2010 speech as a noncandidate committee, it [would] have to continue complying with noncandidate-committee burdens[.]" FAC ¶ 28. It also reasonably fears having to comply with burdens associated with noncandidate committee status, and with burdens associated with making electioneering communications. Tr. 60. Thus, A-1 seeks a declaration that it need not comply with noncandidate committee burdens, and may lawfully terminate its registration.

A-1 contributed $20,100 in total to fourteen different State office candidates before the September 18, 2010 primary election. Defs.' Mot. Ex. 2. The FAC also states that A-1 wanted to make nine separate $250 contributions to Hawaii State-legislative candidates before the 2010 general ***1031** election. FAC ¶ 11. As of September 3, 2010, A-1 had also contributed $12,500 to the Hawaii Republican Party. Defs.' Mot. Ex. 2. Further, as of September 13, 2010, A-1 had contributed $1,000 to AFA-PAC. Tr. 65; *see also* Defs.' Mot. Ex. 3. And, by October 19, 2010 (for the November 2010 general election), A-1 contributed an

additional $18,000 in total to thirty-one candidates for State office. Defs.' Mot. Exs. 4-5. Although the amounts are not specified, it seeks to contribute to "several Hawaii state-legislature candidates . . . again in 2012." Defs.' Mot. Ex. 5 ¶ 4.

During the 2010 election cycle, A-1 published three newspaper ****11** advertisements identifying candidates. They ran in the Honolulu Star-Advertiser immediately before, and the day of, the 2010 primary election – on September 16, 17, and 18, 2010. Tr. 51, 55; FAC Exs. 14, 15, & Doc. No. 119-1 (substituting FAC Ex. 16).[6] Yamada testified that the advertisements cost "roughly $3,000 each," Tr. 63, and later attested that A-1 spent "more than $2,000 on these ads." Pls.' Mot. Ex. 5 ¶ 9. According to Yamada, "[t]he ads have clearly identified candidates for state office and refer to "PEOPLE WE PUT INTO OFFICE" and "THE REPRESENTATIVES WE PUT INTO OFFICE"[.]" *Id.*

All three advertisements state that they are "paid for by A-1 A-Lectrician, Inc.," and contain disclaimer language "published without the approval and authority of the candidate," as required in HRS § 11-391(a)(2)(B). A-1 did not want to include the disclaimer language, and does not want to add disclaimers to future advertisements. FAC ¶ 40; Tr. 60, 63-64. Although Yamada indicates that "it is too early

[6] Exhibit 14 of the FAC is published as an Appendix to *Yamada II*, 2010 WL 4603936, at *20.

for A-1 to plan similar speech for September or October 2012," Pls.' Mot. Ex. 5 ¶ 10, Plaintiffs also assert that "[i]n materially similar situations in the future, Plaintiffs intend to engage in speech materially similar to all of the speech at issue in this action, such that Hawaii law will apply to them as it does now." ****12** Pls.' Concise Statement of Facts ¶ 19 (citing FAC ¶ 50). More specifically, Yamada attests that

> A-1 will engage in such speech in September or October 2012 and will buy no more than three ads, the number it purchased in 2010. They will be similar in size to those A-1 purchased in 2010. Like A-1's previous ads, this speech will cost more than $2000 in the aggregate, will have a clearly identified candidate or candidates for state office, and will refer to "PEOPLE WE PUT INTO OFFICE" and "THE REPRESENTATIVES WE PUT INTO OFFICE[.]"

Pls.' Reply, Attachment One (Yamada Decl. ¶ 7, Jan. 6, 2012).

Yamada considers A-1's advertisements to be "issue ads." Tr. 59-60. Specifically, Yamada testified that the purpose of the advertisements was to express opinions regarding the loss of freedom in the United States. Tr. 62. Yamada explained that he included the name of a candidate (Blake Oshiro) as "an example of how we have lost our freedom. . . . [T]he issue is not against Blake or any particular person – I [also] mentioned [candidate] Calvin Say – but it's against leaders in our community that the people need to look

up to. . . . I think something needs to be done."[7] Tr. 62-63.

*1032 **13 B. The Challenged Provisions of Hawaii Campaign Finance Law

As summarized above, Plaintiffs challenge five sets of Hawaii campaign finance laws: (1) restrictions on contributions to noncandidate committees; (2) "non-candidate committee" and related "expenditure" definitions; (3) "electioneering communication" disclosure requirements; (4) disclaimer-language requirements for an "advertisement"; and (5) a ban on contributions to candidates by government contractors. The provisions are detailed as follows (with certain key terms and phrases at issue in this action emphasized in bold and italics):

1. Limitations on Contributions to Noncandidate Committees

Yamada's and Stewart's contributions to AFA-PAC implicate HRS § 11-358, which provides:

> No person shall make contributions to a ***noncandidate committee*** in an aggregate

[7] Blake Oshiro and Calvin Say were Hawaii State representative candidates in the 2010 primary and general elections. *See* Final Summary Report, General Election – State of Hawaii – City and County of Honolulu (Nov. 2, 2010), *available at* http://hawaii.gov/elections/results/2010/general/files/cch.pdf (last visited March 15, 2012).

> amount greater than $1,000 in an election. This section shall not apply to ballot issue committees.

(Emphasis added.)

The corresponding term "noncandidate committee" is defined in HRS § 11-302 (which defines many terms in HRS Ch. 11), and that definition in itself is challenged, as set forth next.

**** 14** ***2. The Definitions of "Noncandidate Committee" and "Expenditure"***

Section 11-302 defines a "noncandidate committee" as follows:

> "Noncandidate committee" means an organization, association, party, or individual that has ***the purpose*** of making or receiving contributions, making ***expenditures,*** or incurring financial obligations ***to influence*** the nomination for election, or the election, of any candidate to office, or for or against any question or issue on the ballot; provided that a noncandidate committee does ***not*** include:
>
> (1) A candidate committee;
>
> (2) Any individual making a contribution or making an expenditure of the individual's own funds or anything of value that the individual originally acquired for the individual's own use and not for the purpose of evading any provision of this part; or

> (3) Any organization that raises or expends funds for the sole purpose of producing and disseminating informational or educational communications that are not made ***to influence*** the outcome of an election, question, or issue on a ballot.

(Emphasis added.) In turn, § 11-302 defines "expenditure" to mean:

> (1) Any purchase or transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, or payment incurred or made, or the use or consumption of a nonmonetary contribution ***for the purpose of:***
>
> (A) ***Influencing*** the nomination for election, or ****15** the election, of any person seeking nomination for election or election to office, whether or not the person has filed the person's nomination papers;
>
> (B) ***Influencing*** the outcome of any question or issue that has been certified to appear on the ballot at the next applicable election; or
>
> (C) Use by any party for the purposes set out in subparagraph (A) or (B)[.]

(Emphasis added.)

Although a "noncandidate committee" must comply with several other provisions in HRS Ch. 11, A-1 does not challenge any of those particular provisions as unconstitutional. Rather, A-1 characterizes

its challenge as one to the noncandidate committee ***1033** definition itself, arguing that the law imposes unconstitutional burdens such that A-1 should not have to register at all. It understands that if an organization is properly a noncandidate committee, then that status comes with acceptable burdens. (As an example, AFA-PAC is a noncandidate committee that makes only independent expenditures.)

A noncandidate committee must (1) register with the Commission by filing an organizational report as set forth in § 11-323 (including (a) designating a name and address, (b) disclosing a chairperson, treasurer, and officers, (c) requiring "depository institution" account information, and (d) providing names ****16** and addresses of contributors who contributed an aggregate amount of more than $100); (2) have a treasurer as set forth in § 11-324, who shall keep records regarding contributions; (3) comply with reporting requirements set forth in § 11-335, which include schedules disclosing aggregate contributions of over $100, expenditures, receipts, and assets; and (4) comply with other requirements limiting, regulating, or prohibiting contributions – such as prohibitions on receiving false-name contributions (§ 11-352), anonymous contributions (§ 11-353), government contractor contributions (§ 11-355), and foreign corporations (§ 11-356). A-1 describes these noncandidate committee requirements collectively as "burdensome" and "onerous" as a matter of law. Pls.' Mot. at 54 n. 39.

3. Electioneering Communications

If A-1 does not have to register as a noncandidate committee, it could still be subject to certain requirements if it makes "electioneering communications." A-1 thus challenges the constitutionality of these requirements in the alternative.

These electioneering-communication disclosure requirements may be implicated because A-1 has published, and desires to publish, newspaper advertisements that mention candidates. Specifically, if a person makes an "advertisement" that is an "electioneering communication" it must comply with ****17** requirements set forth in HRS § 11-341(a) (and related terms), as follows:

> [e]ach person who makes a disbursement for electioneering communications in an aggregate amount of more than $2,000 during any calendar year shall file with the commission a statement of information within twenty-four hours of each disclosure date provided in this section.[8]

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[8] An electioneering communication "statement of information" requires:

> (1) The name of the person making the disbursement, name of any person or entity sharing or exercising discretion or control over such person, and the custodian of the books and accounts of the person making the disbursement;

(Continued on following page)

***1034 **18** In turn, "electioneering communication" means:

> any advertisement that is broadcast from a cable, satellite, television, or radio broadcast station; published in any periodical or newspaper; or sent by mail at a bulk rate, and that:

> (2) The state of incorporation and principal place of business or, for an individual, the address of the person making the disbursement;
>
> (3) The amount of each disbursement during the period covered by the statement and the identification of the person to whom the disbursement was made;
>
> (4) The elections to which the electioneering communications pertain and the names, if known, of the candidates identified or to be identified;
>
> (5) If the disbursements were made by a candidate committee or noncandidate committee, the names and addresses of all persons who contributed to the candidate committee or noncandidate committee for the purpose of publishing or broadcasting the electioneering communications;
>
> (6) If the disbursements were made by an organization other than a candidate committee or noncandidate committee, the names and addresses of all persons who contributed to the organization for the purpose of publishing or broadcasting the electioneering communications; and
>
> (7) Whether or not any electioneering communication is made in coordination, cooperation, or concert with or at the request or suggestion of any candidate, candidate committee, or noncandidate committee, or agent of any candidate if any, and if so, the identification of the candidate, a candidate committee or a noncandidate committee, or agent involved.

HRS § 11-341(b).

> (1) Refers to a clearly identifiable candidate;
>
> (2) Is made, or scheduled to be made, either within thirty days prior to a primary or initial special election or within sixty days prior to a general or special election; and
>
> (3) ***Is not susceptible to any reasonable interpretation other than as an appeal to vote for or against a specific candidate.***

HRS § 11-341(c) (emphasis added).

"Electioneering communication" shall not include communications:

> (1) In a news story or editorial disseminated by any broadcast station or publisher of periodicals or newspapers, unless the facilities are owned or controlled by a candidate, candidate committee, or noncandidate committee;
>
> (2) That constitute expenditures by the disbursing ****19** organization;
>
> (3) In house bulletins; or
>
> (4) That constitute a candidate debate or forum, or solely promote a debate or forum and are made by or on behalf of the person sponsoring the debate or forum.

Id. And § 11-302 defines "advertisement" as:

> . . . any communication, excluding sundry items such as bumper stickers, that:

> (1) Identifies a candidate directly or by implication, or identifies an issue or question that will appear on the ballot at the next applicable election; and
>
> (2) ***Advocates or supports*** the nomination, opposition, or election of the candidate, or advocates the passage or defeat of the issue or question on the ballot.

(Emphasis added.)

4. Disclaimer Requirements in Advertisements

A-1 next challenges the requirement to include a "disclaimer" on advertisements. The requirement is set forth in HRS § 11-391(a)(2), which provides (with the challenged disclaimer language emphasized):

> (a) Any advertisement shall contain:
>
> (1) The name and address of the candidate, candidate committee, noncandidate committee, or other person paying for the advertisement; and
>
> ****20** (2) A notice in a prominent location stating either that:
>
> (A) The advertisement is published, broadcast, televised, or circulated with the approval and authority of the candidate; provided that an advertisement paid for by a candidate, candidate committee, or ballot issue committee does not need to include the notice; or

> ***(B) The advertisement is published, broadcast, televised, or circulated without the approval and authority of the candidate.***
>
> (b) The fine for violation of this section, if assessed by the commission, shall not exceed $25 for each advertisement that lacks the information required by this ***1035** section, and shall not exceed an aggregate amount of $5,000.

(Emphasis added.)

5. Contribution Ban by Government Contractors

Finally, A-1 challenges the constitutionality of Hawaii's ban on direct campaign contributions by government contractors. The challenged statute reads:

> (a) It shall be unlawful for any person who enters into any contract with the State, any of the counties, or any department or agency thereof either for the rendition of personal services, the buying of property, or furnishing of any material, supplies, or equipment to the State, any of the counties, any department or agency thereof, or for selling any land or building to the State, any of the counties, or any department or agency thereof, if payment for the performance of the contract or payment for material, supplies, equipment, land, property, or building is to be made in whole or in part from funds appropriated by the legislative body, at any time between the

execution of the **21 contract through the completion of the contract, to:

(1) Directly or indirectly make any contribution, or promise expressly or impliedly to make any contribution to any candidate committee or noncandidate committee, or to any candidate or to any person for any political purpose or use; or

(2) Knowingly solicit any contribution from any person for any purpose during any period.

(b) Except as provided in subsection (a), this section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any noncandidate committee by any person other than the state or county contractor for the purpose of influencing the nomination for election, or the election of any person to office.

(c) For purposes of this section, "completion of the contract" means that the parties to the government contract have either terminated the contract prior to completion of performance or fully performed the duties and obligations under the contract, no disputes relating to the performance and payment remain under the contract, and all disputed claims have been adjudicated and are final.

HRS § 11-355.

C. Procedural Background

Plaintiffs initially filed this action on August 27, 2010. They followed with the FAC on September 3, 2010, Doc. No. 24, and an Amended Motion for Preliminary Injunction. Doc. No. 25. The court held an evidentiary hearing on the preliminary injunction on October 1, 2010, and issued *Yamada I* on October 7, ****22** 2010, preliminarily enjoining enforcement of § 11-358 as applied to Yamada's and Stewart's then-proposed contributions to AFA-PAC. Doc. No. 71. Defendants appealed that preliminary injunction to the Ninth Circuit Court of Appeals, but withdrew the appeal after *Thalheimer* was released. Doc. No. 113.

Meanwhile, on October 12, 2010, the Ninth Circuit issued a key opinion, *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir.2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 1477, 179 L.Ed.2d 302 (2011), which addressed several of the issues involved in this action. After receiving supplemental briefing regarding *Human Life*, the court issued *Yamada II* on October 29, 2010, denying the remaining issues pursued in the preliminary injunction Motion. Doc. No. 91. Thereafter, the challenging entity in *Human Life* (represented by the same law firm that represents Plaintiffs in this action) ***1036** filed a writ of certiorari, seeking Supreme Court review. Given *Human Life's* importance to this action, the parties agreed to stay this case pending Supreme Court action on the writ of certiorari. Doc. No. 97. After the Supreme Court denied the writ, the stay was lifted on June 16, 2011. Doc. No. 115.

Accordingly, the parties filed Cross Motions for Summary Judgment on all issues on December 5, 2011. Doc. Nos. 125 & 126. On December 19, 2011, Oppositions were filed, Doc. Nos. 129 & 130, followed by Replies on January 6, ****23** 2012. Doc. Nos. 132 & 133. The court heard the Cross Motions on February 6, 2012. The parties also filed various Notices of Uncited or Supplemental Authority, including relevant argument or responses. *See* Doc. Nos. 134, 135, 139, 140, 142, 143, 145, 147 & 148. The court has reviewed and considered all written submissions and oral arguments, and now issues this Order ruling on the constitutionality of the provisions, as challenged by Plaintiffs.

III. *STANDARD OF REVIEW*

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). Rule 56(a) mandates summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also Broussard v. Univ. of Cal. at Berkeley*, 192 F.3d 1252, 1258 (9th Cir.1999).

"A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the

pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.2007) (citing *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548); *see also Jespersen v. Harrah's* ****24** *Operating Co.*, 392 F.3d 1076, 1079 (9th Cir.2004). "When the moving party has carried its burden under Rule 56[(a)] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts [and] come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation and internal quotation signals omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (stating that a party cannot "rest upon the mere allegations or denials of his pleading" in opposing summary judgment).

"An issue is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is 'material' only if it could affect the outcome of the suit under the governing law." *In re Barboza*, 545 F.3d 702, 707 (9th Cir.2008) (citing *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505). When considering the evidence on a motion for summary judgment, the court must draw all reasonable inferences on behalf of the nonmoving party. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S.Ct. 1348; *see also Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th

Cir.2008) (stating that "the evidence of [the nonmovant] is to be believed, and all justifiable inferences are to be drawn in his favor." (citations omitted)).

**25 IV. *DISCUSSION*

The court first addresses whether Plaintiffs have standing to make their claims, and then (satisfied that Plaintiffs have ***1037** standing) analyzes the claims on their merits.

A. Standing

Although Defendants' Motion does not challenge Plaintiffs' standing, at the preliminary injunction phase Defendants questioned whether Plaintiffs had standing to challenge the electioneering communications and advertisement definitions (and the court addressed those arguments, and standing more generally, in *Yamada II*). The court reiterates its analysis here, based on an updated record, because the court has an independent duty to address jurisdiction and standing "even when not otherwise suggested." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (citation omitted); *see also Bernhardt v. Cnty. of L.A.*, 279 F.3d 862, 868 (9th Cir.2002) ("[F]ederal courts are required sua sponte to examine jurisdictional issues such as standing.") (citations omitted).

"Article III restricts federal courts to the resolution of cases and controversies." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (citation omitted). "To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the ****26** complaint is filed." *Id.* at 732-33, 128 S.Ct. 2759 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997)). "[A] claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Id.* at 733, 128 S.Ct. 2759 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Id.* at 734, 128 S.Ct. 2759 (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). "Courts have long recognized that '[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1094 (9th Cir.2003) (citation omitted).

Constitutional challenges alleging freedom of speech violations require a less exacting review of standing. "In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has endorsed what might be called a 'hold your tongue and

challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir.2003) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) (recognizing the "sensitive nature of constitutionally protected expression," in permitting a pre-enforcement action ****27** involving the First Amendment) and *Bland v. Fessler*, 88 F.3d 729, 736-37 (9th Cir.1996) ("That one should not have to risk prosecution to challenge a statute is especially true in First Amendment cases[.]")). "Thus, 'when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing.'" *Ariz. Right to Life*, 320 F.3d at 1006 (quoting *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir.2000)).

Applying these standards, Yamada and Stewart have standing to challenge § 11-358. They desired to and eventually made contributions to AFA-PAC that exceeded the statutory limitations, giving rise to an actual controversy. *See Davis*, 554 U.S. at 732-33, 128 S.Ct. 2759. If § 11-358 is constitutional as applied, they could have been subject to administrative fines or misdemeanor criminal prosecution. *See* HRS § 11-410(a)(1) (providing for possible ***1038** fines up to $1,000 per occurrence, or three times the amount of unlawful contribution) & § 11-412(a) ("Any person who recklessly, knowingly, or intentionally violates any provision of this part shall be guilty of a misdemeanor."). And they indicate a legitimate desire to

make similar contributions in 2012. A favorable ruling would allow them to make further contributions to AFA-PAC in 2012 without violating the law. *Davis*, 554 U.S. at 732-33, 128 S.Ct. 2759.

Similarly, A-1 has standing to challenge the "noncandidate ****28** committee" and "expenditure" definitions, "advertising" requirements, and contribution restrictions by government contractors.[9] A-1 is presently registered as a noncandidate committee, but has a good faith basis for believing it should not have to register, giving rise to an actual controversy. *See id.* If A-1 ceases registration, either by affirmatively withdrawing from registration or by failing to comply with various reporting requirements (because it believes it no longer needs to register), but engages in campaign-related activities, it could subject itself to possible fines or actions. *See* HRS §§ 11-410(a)(1) & 11-412(a). A-1 need not actually violate the statutes

[9] As explained below, A-1's standing specifically to challenge the requirement of an "electioneering communication" statement of information is contingent upon prevailing on its challenge to the noncandidate committee provision. If A-1 has to register as a noncandidate committee, it discloses its electioneering communications through those noncandidate committee requirements. *See* Haw. Admin. R. § 3-160-48 (effective May 29, 2010) ("A noncandidate committee registered with the commission is not required to file a statement of information for disbursements for electioneering communications."). Ultimately, the court need not reach this aspect of the electioneering-communications challenge because A-1's challenge to the noncandidate committee definition fails. That is, in the end, A-1 lacks standing to challenge the requirements of HRS § 11-341(a).

to challenge their terms. *See, e.g.*, *Cal. Pro-Life Council*, 328 F.3d at 1094; *Bland*, 88 F.3d at 736-37. There is enough of an "injury," particularly in the First Amendment context, to allow it to seek a declaratory judgment so that, if successful, it can cease registration without fear of fine or prosecution. That is, a favorable ruling would allow A-1 to cease registration without violating the law. *See Davis*, 554 U.S. at 732-33, 128 S.Ct. 2759.

****29** As to its challenge to the disclaimer provisions for an "advertisement," even if A-1 already published the advertisements with the disclaimers does not mean A-1 faces no injury. A-1 sought, and seeks, a declaration that it need not include disclaimer language in the future. Tr. at 60.[10] And it challenges those statutes facially as well. A-1 does not have to publish the advertisements *without* the disclaimer language (and risk a fine or other enforcement action) in order to give itself standing. *See Bland*, 88 F.3d at 736-37. Again, a favorable ruling will enable A-1 to publish its advertisements without the disclaimer language and without fear of violating the law. *See Davis*, 554 U.S. at 732-33, 128 S.Ct. 2759.

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[10] Even if A-1 sought only to run the advertisements before the 2010 primary election, and no longer has specific plans to run the same advertisements, the challenge is not moot – "there is a reasonable expectation that [A-1] will face the prospect of enforcement of the [challenged provisions] again." *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1002 (9th Cir.2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 1477, 179 L.Ed.2d 302 (2011).

Finally, A-1 has standing to challenge HRS § 11-355. It is presently a government contractor. It has made substantial contributions to candidates in the past (presumably, while not a contractor), and seeks to make future contributions ***1039** while it is a contractor. It need not violate the statute to challenge its terms. *See Bland*, 88 F.3d at 736-37. A favorable ruling would allow it to make contributions as a contractor without violating the law. *See Davis*, 554 U.S. at 732-33, 128 S.Ct. 2759.

****30 B. Section 11-358's Contribution Limitation to Noncandidate Committees**

The court first addresses Hawaii's $1,000 per-election limitation on contributions to noncandidate committees in § 11-358. In this regard, *Yamada I* preliminarily enjoined Defendants from enforcing § 11-358 as to Yamada's and Stewart's proposed contributions to AFA-PAC. *See* 744 F.Supp.2d at 1087. *Yamada I* relied primarily on *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir.), *cert. denied*, ___ U.S. ___, 131 S.Ct. 392, 178 L.Ed.2d 146 (2010), and *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C.Cir.) (en banc), *cert. denied*, ___ U.S. ___, 131 S.Ct. 553, 178 L.Ed.2d 371 (2010), which both held that *contribution* limitations to organizations that make only independent campaign expenditures are invalid.

Defendants appealed *Yamada I* to the Ninth Circuit, but withdrew the appeal after the Ninth

Circuit reiterated that such contribution limitations are invalid. *See Thalheimer*, 645 F.3d at 1121-22. The Seventh Circuit has since also held the same. *See Barland*, 664 F.3d at 154-55. And the Ninth Circuit recently applied the same rationale in striking a Washington state law that limited contributions to recall committees, which by definition also do not coordinate or prearrange their independent expenditures with candidates. *See Farris v. Seabrook*, 677 F.3d 858, 866-67 (9th Cir.2012).

****31** Given the strength of Plaintiffs' position, Defendants do not oppose Plaintiffs' Motion to the extent it challenges § 11-358 as applied to Yamada's and Stewart's contributions to AFA-PAC. That is, Defendants agree that, given binding precedent, the court should make permanent the preliminary injunction entered in *Yamada I*. In doing so here, the court incorporates and updates some of its analysis from *Yamada I*, which is important not only for analyzing § 11-358, but also for analyzing the other challenges to follow.

1. Level of Scrutiny

Since *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court has distinguished between restrictions on *contributions* to candidates and restrictions on *expenditures* for political speech. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, ___ U.S. ___, 131 S.Ct. 2806, 2817, 180 L.Ed.2d 664 (2011); *Thalheimer*, 645 F.3d

at 1117. Although campaign contribution limitations "operate in an area of the most fundamental First Amendment activities," *Buckley*, 424 U.S. at 15, 96 S.Ct. 612, contribution limitations generally "entail[ ] only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20, 96 S.Ct. 612. And so, the court analyzes the constitutional validity of campaign contribution limitations by applying "closely drawn scrutiny." Under this test, "[c]ontribution limitations are permissible as long as the Government demonstrates that the limits are 'closely drawn' to match a ****32** 'sufficiently important [government] interest.' " *City of Long Beach*, 603 F.3d at 691 (quoting *Randall v. Sorrell*, 548 U.S. 230, 247, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006)) (other citation omitted); *see also Thalheimer*, 645 F.3d at 1117-18.

Unlike contributions, *expenditure* limitations directly inhibit speech. *See Citizens United*, 130 S.Ct. at 910 ("[A]n independent expenditure is political ***1040** speech[.]"). "Expenditure limitations may restrict the breadth and depth of political dialogue and they 'preclude[ ] most associations from effectively amplifying the voice of their adherents, the original basis for recognition of First Amendment protection of the freedom of association.' " *City of Long Beach*, 603 F.3d at 692 (quoting *Buckley*, 424 U.S. at 22, 96 S.Ct. 612) (other citation omitted). As a result, limitations on campaign expenditures must pass strict scrutiny –

they are valid only if narrowly tailored to a compelling government interest. *Id.*[11]

2. The Government Interest

Therefore, the court's First Amendment analysis of campaign finance provisions starts by examining the possible government interests justifying a limitation, whether it be an expenditure or contribution limitation. If there is no valid interest (whether it needs to be "compelling" or "sufficiently important"), the ****33** court need not reach whether a regulation is "narrowly tailored" or "closely drawn" to that interest. And *Citizens United* largely answers that question here. Although *Citizens United* struck down an expenditure (and not a contribution) limitation, its discussion of valid government interests provides direct insight in analyzing whether § 11-358's *contribution* limitation can constitutionally apply to limit Yamada's and Stewart's contributions to AFA-PAC.

"The Supreme Court has concluded that preventing corruption or the appearance of corruption are the *only* legitimate and compelling government interests thus far identified for restricting campaign finances." *City of Long Beach*, 603 F.3d at 694 (citations and

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[11] "*Citizens United*, rather than overruling *Buckley*, noted and reinforced the distinction between independent expenditures on behalf of candidates and direct contributions to candidates." *Siefert v. Alexander*, 608 F.3d 974, 988 (7th Cir.2010). Last term, *Bennett* reaffirmed these dual levels of scrutiny. *See* 131 S.Ct. at 2816-17.

internal quotation marks omitted) (emphasis added).[12] *Citizens United* rejected (by overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)) an "anti-distortion" interest – the government's preventing the "corrosive and distorting effects [in elections] of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's ****34** political ideas." 130 S.Ct. at 903 (quoting *Austin*, 494 U.S. at 660, 110 S.Ct. 1391). Although *Citizens United* reiterated that "ensur[ing] against the reality or appearance of [*quid pro quo*] corruption" could justify certain limits on direct contributions, *id.* at 908, it concluded that "*[n]o* sufficient government interest justifies limits on the political speech of . . . corporations." *Id.* at 913 (emphasis added). That is, no interest can justify limits on amounts of independent corporate campaign expenditures.

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[12] Other government interests, however, can apply to justify certain *regulation* (*e.g.*, disclosure) of campaign-related speech – such as an interest in "'providing the electorate with information' about the sources of political campaign funds." *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 696 (D.C.Cir.2010) (quoting *Buckley*, 424 U.S. at 66, 96 S.Ct. 612 (brackets omitted)); *see also Human Life*, 624 F.3d at 1008 ("Campaign finance disclosure requirements . . . advance the important and well-recognized interest of providing the voting public with information with which to assess the various messages vying for their attention in the marketplace of ideas.").

However specifically defined by statute, an independent expenditure is not coordinated with a candidate or a candidate's campaign. It is neither prearranged ***1041** nor done at the suggestion of a candidate. It is "independent." *Citizens United* therefore reasoned that such independent expenditures could not give rise to corruption or the appearance of corruption. *Id.* at 908-09. Under *Citizens United*, even if independent expenditures could lead to "influence" or "access," it does not follow that "corruption" exists – "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy." *Id.* at 910. Therefore, a government interest in preventing the reality or appearance of corruption cannot justify limiting amounts of independent expenditures for political speech, even by a corporate entity. *Id.* at 913.

Courts after *Citizens United* have addressed the next logical question: ****35** whether *contribution* limitations to organizations that make only independent campaign expenditures are valid – precisely the situation with § 11-358 and Yamada's and Stewart's contributions to AFA-PAC. As analyzed in *Yamada I, City of Long Beach* applied *Citizens United's* rationale – that an anti-corruption interest cannot apply where only independent expenditures are involved – and specifically held that there is no legitimate government interest in restricting contributions to organizations that engage only in independent spending. *See* 744 F.Supp.2d at 1083 (citing *City of Long Beach*, 603 F.3d at 696-99). Under such

precedent, prevention of corruption or its appearance cannot justify limiting campaign contributions if those contributions can lead only to independent campaign expenditures. *See City of Long Beach*, 603 F.3d at 699 (concluding that "the City's anti-corruption rationale does not support the [City's campaign reform act's] limitations on contributions").

Further, as mentioned above, the Ninth Circuit reaffirmed the logic of *City of Long Beach in Thalheimer*, 645 F.3d at 1121-22, and, most recently, in *Farris*, 677 F.3d at 866-67. And the District of Columbia and Seventh Circuits agree. *See, e.g.*, *SpeechNow.org*, 599 F.3d at 694-95 ("In light of the Court's holding [in *Citizens United*] as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to ****36** groups that make only independent expenditures also cannot corrupt or create the appearance of corruption."); *Barland*, 664 F.3d at 154 ("[T]he anticorruption rationale cannot serve as a justification for limiting fundraising by groups that engage in independent spending on political speech.").

Although the government can still limit contributions made directly to candidates or parties, "the need for contribution limitations to combat corruption or the appearance thereof tends to decrease as the link between the candidate and the regulated entity becomes more attenuated." *City of Long Beach*, 603 F.3d at 696. If the organization receiving contributions truly engages in only independent expenditures, the link is not only attenuated – it is broken. Under

the logic of this precedent, an anti-corruption or appearance of corruption rationale is nonexistent. It follows that contribution limitations to such organizations violate the First Amendment.

Section 11-358 limits the amount of contributions a person can make to a noncandidate committee. If that noncandidate committee makes only independent expenditures – as is true with AFA-PAC – then, under *Citizens United*, Hawaii cannot limit those expenditures. Yamada's and Stewart's contributions to AFA-PAC can only lead to independent expenditures. The record contains no evidence contradicting AFA-PAC's assertion that it "operates like any ****37** other independent political action committee." There is "no basis on which to conclude that [AFA-PAC] ha[s] the sort of close relationship with candidates that ***1042** supports a plausible threat of corruption or the appearance thereof." *City of Long Beach*, 603 F.3d at 698. Therefore, § 11-358 is unconstitutional as applied to Yamada's and Stewart's contributions to AFA-PAC.[13] Defendants are permanently enjoined from enforcing § 11-358's contribution limitation in that situation.[14]

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[13] Because an anti-corruption interest is invalid under these circumstances, the court need not reach whether the limitation is sufficiently tailored to that interest.

[14] *Yamada I* also addressed at the preliminary-injunction phase what the court perceived as a *facial* challenge to § 11-358. 744 F.Supp.2d at 1084-85. Plaintiffs have now clarified that they

(Continued on following page)

C. The Noncandidate Committee and Expenditure Definitions

A-1 next challenges Hawaii's definitions in § 11-302 of "noncandidate committee" and "expenditure" – primarily taking issue with their incorporation of the terms "to influence" or "for the purpose of influencing," and a perceived requirement that a committee must have a campaign-related "major purpose" before being subject to such regulation. A-1 challenges the definitions both facially and as-applied to its activities. It contends that the terms are "unconstitutionally vague, and therefore overbroad." FAC ¶ 72. Although courts ****38** "have traditionally viewed vagueness and overbreadth as logically related and similar doctrines," *Kolender v. Lawson*, 461 U.S. 352, 358 n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), A-1 makes conceptually distinct overbreadth and vagueness arguments. *See* FAC at 42-44; Pls.' Mot. at 30-32, 34 (distinguishing A-1's overbreadth and vagueness challenges). Therefore, the court first separately addresses A-1's overbreadth and vagueness arguments, and then analyzes whether the definitions survive a First Amendment challenge under an "exacting scrutiny" test.

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do not challenge § 11-358 facially. Accordingly, this Order does not address whether § 11-358 is facially unconstitutional.

1. Overbreadth

A-1 argues that, in an electoral context, government may not constitutionally regulate an organization's speech unless it is "unambiguously [campaign] related." *Buckley*, 424 U.S. at 80, 96 S.Ct. 612. The definitions are problematic, it reasons, because they rely on the term "to influence" – they regulate organizations having "the purpose of . . . making expenditures . . . ***to influence***" the election of a candidate (where "expenditure" is then defined as including payments "for the purpose of . . . ***influencing***" an election). According to A-1, the term "influencing" is overbroad because it can reasonably be read to reach a significant amount of non-campaign-related speech (*i.e.*, pure issue discussion), imposing regulatory burdens such as registration, reporting, and disclosure, implicating the First Amendment. *See Buckley*, 424 U.S. at 77, 96 S.Ct. 612 ("It is the ambiguity of this phrase ****39** [("for the purpose of influencing the nomination or election of candidates" in federal statutes)] that poses constitutional problems.").[15]

Buckley addressed the concern that a Federal Election Campaign Act ("FECA") definition of a "political committee" – referring to expenditures "for the purpose of influencing" a federal election – was

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[15] And, as discussed in detail below, ambiguity or "vagueness" can raise Fourteenth Amendment due process concerns, if a speaker cannot reasonably understand what is proscribed. *See, e.g.*, *Buckley*, 424 U.S. at 76-77, 96 S.Ct. 612.

unconstitutionally "vague." *Id.* at 79, 96 S.Ct. 612. And, although *Buckley* formulated its analysis in terms of "vagueness," "there ***1043** are hints in *Buckley* that the constitutional basis for the Court's concern lay more in overbreadth – i.e., that statutes that reached issue discussion might be deemed to regulate impermissibly a substantial amount of speech protected by the First Amendment[.]" *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 53 (1st Cir.2011) (citing cases), *cert. denied*, ___ U.S. ___, 132 S.Ct. 1635, 182 L.Ed.2d 233 (2012). "[T]he dividing line between issue discussion and express advocacy, as it evolved, came to be associated more strongly with First Amendment overbreadth analysis than with due process vagueness concerns." *Id.* (footnote omitted).

In applying the doctrine of "constitutional avoidance,"[16] *Buckley* ****40** narrowly construed the terms as follows:

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[16] The canon of constitutional avoidance is described as "the elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 550 U.S. 124, 153, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988)). "Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness." *Buckley*, 424 U.S. at 77-78, 96 S.Ct. 612 (citations omitted).

> To fulfill the purposes of [FECA] [the words "political committee"] need only encompass organizations that are *under the control of a candidate or the major purpose of which is the nomination or election of a candidate.* Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. (emphasis added). And "to insure that the reach . . . is not impermissibly broad," *Buckley* also narrowly construed "expenditure" (defined in terms of "for the purpose of influencing") so as "to reach only funds used for communications that *expressly advocate* the election or defeat of a clearly identified candidate." *Id.* at 80, 96 S.Ct. 612 (emphasis added).[17]

Given *Buckley*, A-1 argues that Hawaii's definition of a noncandidate ****41** committee unconstitutionally imposes "political committee" status, with its

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[17] "[*Buckley's*] examples of words of express advocacy, such as 'vote for,' 'elect,' 'support,' . . . 'defeat,' and 'reject,' . . . gave rise to what is now known as the 'magic words' requirement." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 191, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (some editorial marks omitted) (referring to *Buckley*, 424 U.S. at 44 n. 52, 96 S.Ct. 612), *overruled on other grounds by Citizens United*, 130 S.Ct. at 913. "Express advocacy" was later extended to its "functional equivalent" (that is, communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"). *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469-70, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007). Thus, the "functional equivalent of express advocacy" is synonymous with this "appeal to vote" test.

accompanying burdens, on organizations that engage in only limited political activity (*i.e.*, do not have the "major purpose" of which is political advocacy). The premise is that government constitutionally can *only* require an organization to register as a "political committee" if that organization is "under control of a candidate" or has the nomination or election of candidates (political advocacy) as its major purpose. *See Buckley*, 424 U.S. at 79, 96 S.Ct. 612. If so, A-1 argues, Hawaii's noncandidate committee definition is too broad; it impermissibly regulates organizations that do not meet the "major purpose" test and thus "sweeps up" and regulates organizations that only advocate "issues" outside a campaign-related ***1044** context, and thereby violates the First Amendment.

But *Human Life* (decided after this action was filed) rejected this very argument. The Ninth Circuit rejected a bright line rule that "unless the sole major purpose of a group is political advocacy, any regulation of that group will automatically be too burdensome[.]" 624 F.3d at 1009. The narrowing constructions the Supreme Court applied in *Buckley* "defined the outer limits of permissible political committee regulation." *Id.* at 1010 (quoting *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 327 (4th Cir.2008) (Michael, J., dissenting)). Organizations often have more than one "major" or "primary" purpose, and the ****42** First Amendment does not categorically prohibit government from imposing disclosure requirements – such as those accompanying

noncandidate committee status – on such groups. *Id.* at 1011. *See also McKee*, 649 F.3d at 59 ("We find no reason to believe that this so-called 'major purpose' test, like the other narrowing constructions adopted in *Buckley*, is anything more than an artifact of the Court's construction of a federal statute. . . . The [Supreme] Court has never applied a 'major purpose' test to a state's regulation of [political action committees.]").

Indeed, *Citizens United* rejected the contention that "disclosure requirements *must* be limited to speech that is the functional equivalent of express advocacy." 130 S.Ct. at 915 (emphasis added). "Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable." *Human Life*, 624 F.3d at 1016.

In essence, after *Citizens United*, the "unambiguously campaign related" standard from *Buckley* – including its "major purpose" test – articulates only a safe harbor (from a regulatory perspective). "*Buckley* left room for legislative judgment . . . so long as the resulting regulation does not prohibit a ****43** substantial amount of non-electoral speech." *Leake*, 525 F.3d at 327 (Michael, J., dissenting).

Stated another way, that some issue advocacy may fall within a disclosure requirement is not necessarily fatal to the regulation itself. Government may

impose reasonable disclosure requirements, but must be careful to avoid "sweeping into its purview groups that only incidentally engage in [political] advocacy" or "only occasionally engage[ ] in activities on behalf of political candidates and whose central organizational purpose is issue advocacy." *Human Life*, 624 F.3d at 1011 (citations and internal quotation marks omitted). For, as reiterated in *Human Life*, the Supreme Court has rejected the notion that "speakers possess an inviolable First Amendment right to engage in [issue advocacy]." *Id.* at 1016 (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 190, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), *overruled on other grounds by Citizens United*, 130 S.Ct. at 913). "[I]mposing disclosure obligations on communicators engaged in issue advocacy is not per se unconstitutional[.]" *Id.* Rather, the more fundamental question is whether a regulation burdening such speech satisfies the appropriate level of scrutiny – a question the court addresses after considering A-1's vagueness challenge.

2. Vagueness

A-1 also attacks the terms "for the purpose of influencing" and "to ****44** influence" as unconstitutionally vague, in violation of the Fourteenth Amendment. "A law is unconstitutionally vague if it fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." ***1045** *Human Life*, 624 F.3d at 1019 (quoting *Tucson*

Woman's Clinic v. Eden, 379 F.3d 531, 555 (9th Cir.2004)). Nevertheless, "[m]any statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.'" *Rose v. Locke*, 423 U.S. 48, 49-50, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975) (per curiam) (quoting *Robinson v. United States*, 324 U.S. 282, 286, 65 S.Ct. 666, 89 L.Ed. 944 (1945)). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). That is, "[t]he touchstone of a facial vagueness challenge in the First Amendment context . . . is not whether *some* amount of legitimate speech will be chilled; it is whether a *substantial* amount of legitimate speech will be chilled." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir.2001) (citing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)).

A-1's vagueness challenge to the term "influence" is similar to that discussed above regarding overbreadth – the term "raise[s] serious problems of vagueness" in that it has the "potential for encompassing both issue discussion and advocacy of a political result." *Buckley*, 424 U.S. at 76-77, 79, 96 S.Ct. 612; *see also McKee*, ****45** 649 F.3d at 65 ("Conceivably falling within the meaning of 'influence' are objectives as varied as advocacy for or against a candidate's election; championing an issue for inclusion in a candidate's platform; and encouraging all candidates to embrace public funding. Without more

context, we believe the intended meaning of 'influence' to be uncertain enough that a person of average intelligence would be forced to guess at its meaning and modes of application.") (quotation marks and citation omitted).

In opposing A-1's argument, Defendants – in their briefing and again during oral argument – ask the court to apply a "narrowing gloss" to the term "influence." Specifically, they request the court to construe the meaning of "influence" to communications or activities that constitute express advocacy or its functional equivalent. *See Buckley*, 424 U.S. at 80, 96 S.Ct. 612; *McKee*, 649 F.3d at 66-67. It is not clear to the court that such a narrowing construction is necessary, given *Citizens United's* rejection of the view that disclosure requirements must be limited to express advocacy or its functional equivalent. Nevertheless, to avoid any lingering vagueness doubts, the court addresses Defendants' request to apply a "narrowing gloss."[18]

****46** Initially, the court rejects A-1's argument that the court in this situation should not adopt a narrowing construction of a *state* statute (as opposed to a federal provision). Federal courts may use such a

[18] The court reads "to influence" and "influencing" in this election context as clearly referring to actions attempting to affect the outcome of an election, either in favor of, or against, a candidate or ballot issue. Nevertheless, the court recognizes the terms could "present some vagueness problems." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 65 (1st Cir.2011).

narrowing gloss if such a construction is "reasonable and readily apparent." *See Boos v. Barry*, 485 U.S. 312, 330, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) ("[F]ederal courts are without power to adopt a narrowing construction of a state statute *unless such a construction is reasonable and readily apparent.*") (emphasis added). "When federal courts rely on a 'readily apparent' constitutional interpretation, plaintiffs receive sufficient protection from unconstitutional application of the [state] ***1046** statute, as it is quite likely nonparty prosecutors and state courts will apply the same interpretation." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 932 (9th Cir.2004).

Moreover, "[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). Here, Defendants encourage the court to apply a narrowing gloss, and offer convincing arguments why such a construction is "reasonable and readily ***47** apparent." *See White v. City of Norwalk*, 900 F.2d 1421, 1424 (9th Cir.1990) (adopting narrow construction of an ordinance to avoid constitutional concerns, concluding that the ordinance was "readily susceptible" to the interpretation presented by the City's counsel during the litigation)

(citing *Frisby v. Schultz*, 487 U.S. 474, 480-84, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)).

The term "to influence" in the challenged State statutes is "reasonably and readily" interpreted to refer to express advocacy or its functional equivalent for two reasons. First, Hawaii's campaign statutes were substantially re-codified and revised in 1979, in form and terminology similar to the current provisions. *See* Defs.' Mot. Ex. 10 (setting forth Act 224, 1979 Haw. Sess. L.). And Hawaii specifically enacted Act 224 in 1979 in reaction to (and to conform, in large part, with) *Buckley*. *See* Defs.' Mot. Ex. 11 (providing Conf. Comm. Rep. No. 78, in 1979 House J. 1137, 1140). Hawaii's Legislature was "mindful of" *Buckley's* "narrowing construction" and its use of the term "express advocacy." *Id.* It is reasonable to infer, as Defendants argue, that Hawaii's Legislature adopted terminology such as "to influence" in reliance on the Supreme Court's interpretation of the same terminology in federal law.

Second, Hawaii's provisions are identical to the federal provisions analyzed in *Buckley*. Hawaii's Legislature specifically defined "independent ****48** expenditures" in terms of "express advocacy." *See* HRS § 11-302 ("'Independent expenditure' means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate that is not made in concert or cooperation with . . . the candidate[.]"). And when the Supreme Court subsequently adopted a test for the "functional equivalent" of express advocacy (*i.e.*, the "appeal to vote" test), it

is reasonable to construe Hawaii statutes similarly. Indeed, the Hawaii Legislature codified the "appeal to vote" test in defining "electioneering communications." *See* HRS § 11-341(c)(3). Further, the Commission has adopted – by regulation – a definition of "express advocacy" that *includes* that "appeal to vote" test. Hawaii Administrative Rule § 3-160-6 defines "expressly advocating" as follows:

> "Expressly advocating" means a communication when taken as a whole and with limited reference to external events, could be susceptible to no other reasonable interpretation but as an exhortation to vote for or against a candidate because:
>
> > (1) The communication is unmistakable, unambiguous, and suggestive of only one meaning;
> >
> > (2) The communication presents a clear plea for action and is not merely informative; and
> >
> > (3) Reasonable minds could not differ as to whether the communication encourages actions to elect or defeat a clearly identified candidate or encourages some other kind of action.

***1047 **49** It is therefore "reasonable and readily apparent" that this court may narrowly construe relevant Hawaii campaign provisions, as in *Buckley* and other cases, to avoid constitutional vagueness concerns. *See, e.g.*, *McKee*, 649 F.3d at 66-67 (limiting meaning of "to influence" to "include only 'communications and activities which expressly advocate for or

against [a candidate] or that clearly identify a candidate by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the candidate'" as the Maine Commission on Governmental Ethics and Election Practices had proposed);[19] *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 44 (1st Cir. ****50** 2012) (addressing ballot question committees in a "second

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[19] The court also disagrees with A-1 that, after *Citizens United*, the appeal to vote test is itself unconstitutionally vague. Rather, the court agrees with *McKee*, which rejected the same argument, as follows:

> . . . . [National Organization for Marriage ("NOM")] contends that *Citizens United* eliminated "the appeal-to-vote test as a constitutional limit on government power," and reads into this an implicit holding that the test was unconstitutionally vague.
>
> NOM's reading finds no support in the text of *Citizens United*, though we agree with NOM that, in striking down the federal electioneering expenditure statute, *Citizens United* eliminated the context in which the appeal-to-vote test has had any significance. It is a large and unsubstantiated jump, however, to read *Citizens United* as casting doubt on the constitutionality of any statute or regulation using language similar to the appeal-to-vote test to define the scope of its coverage. The basis for *Citizens United's* holding on the constitutionality of the electioneering expenditure statute had nothing to do with the appeal-to-vote test or the divide between express and issue advocacy. Instead, the decision turned on a reconsideration of prior case law holding that a corporation's political speech may be subjected to greater regulation than an individual's.

McKee, 649 F.3d at 69 (footnote omitted).

chapter" of a challenge to Maine's campaign laws, and following *McKee* regarding vagueness and the meaning of "influence").

The court therefore applies the narrowing construction sought by Defendants, and interprets the terms "to influence" and "for the purpose of influencing" as referring to express advocacy or its functional equivalent. So construed, the meaning of "influence" is "considerably more precise," and "ensures that persons of average intelligence will have reasonable notice of the provisions' coverage" so as not to offend due process. *McKee*, 649 F.3d at 67 (citing *Grayned*, 408 U.S. at 108, 92 S.Ct. 2294).

Having addressed A-1's overbreadth and vagueness arguments, the court now turns to whether the noncandidate committee and expenditure definitions otherwise survive a First Amendment challenge under an ****51** "exacting scrutiny" test.

3. Hawaii's Definition of Noncandidate Committee Survives Exacting Scrutiny

Distinct from its facial overbreadth and vagueness challenges, A-1 also contends that Hawaii's definition of noncandidate committee cannot be justified by government interests, and, even if it could, it is not sufficiently tailored to any such interests. In this context – under binding caselaw – the court applies "exacting" scrutiny (not strict scrutiny) in analyzing the noncandidate committee definition.

See Human Life, 624 F.3d at 1005 ("The [Supreme] Court has clarified that a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important governmental interest") (citing *Doe v. Reed*, 561 U.S. 186, 130 S.Ct. 2811, 2818, 177 L.Ed.2d 493 (2010)); ***1048** *Family PAC v. McKenna*, 685 F.3d 800, 805-06, 2012 WL 266111, at *3 (9th Cir. Jan. 31, 2012) ("Disclosure requirements are subject to exacting scrutiny.").

Importantly, the definition of noncandidate committee itself is a "disclosure requirement" for purposes of this analysis. Many decisions since *Citizens United have* analyzed various definitions of a "political committee," which include the burdens associated with such classification, and considered them to be "disclosure requirements." *See Human Life*, 624 F.3d at 1012 (concluding that "the definition of 'political committee' does not violate the First Amendment," analyzing "the disclosure requirements attached to political committee status"); *see also McKee*, 649 F.3d at 54 n. 29 ("Maine's requirement that non-major-purpose PACs register with the Commission is . . . first and foremost a disclosure provision"); *SpeechNow.org*, 599 F.3d at 696 (characterizing political committee organizational and reporting requirements as "disclosure requirements"); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir.2010) (indicating that a ****52** challenge to regulations defining a political committee is a challenge to disclosure regulations); *Minn. Citizens*

Concerned for Life, Inc. v. Swanson, 741 F.Supp.2d 1115, 1128 (D.Minn.2010) ("The law to which Plaintiffs object is, in fact, a disclosure law – a method of requiring corporations desiring to make independent expenditures to disclose their activities."); *Ctr. for Individual Freedom v. Madigan*, 735 F.Supp.2d 994, 1000 (N.D.Ill.2010) (equating "election law disclosure requirements" as discussed in *Citizens United* with "registration requirements, including related reporting, recordkeeping, and disclosure requirements"); *Iowa Right To Life Comm., Inc. v. Smithson*, 750 F.Supp.2d 1020, 1039 (S.D.Iowa 2010) (similar). This makes sense – the purpose of requiring registration as a noncandidate committee is transparency and to enable disclosure.

a. "Sufficiently important" governmental interests

The next step under exacting scrutiny is to identify the governmental interests at stake. In this regard, *Human Life* reiterated the primary interest: providing information to the electorate. "[B]y revealing information about the contributors to and participants in public discourse and debate, disclosure laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention." 624 F.3d at 1005. This is a "sufficiently important, if not compelling, governmental interest." *Id.* at 1005-06.

> ****53** Campaign finance disclosure requirements thus advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another.

Id. at 1008.

And the importance of this informational interest "is only likely to increase" given recent jurisprudence – as exemplified above by this court's permanent injunction – striking limits on independent expenditures. *Id.* at 1007-08 (citing *Citizens United*, 130 S.Ct. at 911, and *City of Long Beach*, 603 F.3d at 695-99).

There are other sufficiently important interests. "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . . A public armed with information about a candidate's most generous supporters is better able to detect any ***1049** post-election special favors that may be given in return." *Buckley*, 424 U.S. at 67, 96 S.Ct. 612. And, "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of . . . contribution limitations[.]" *Id.* at 67-68, 96 S.Ct. 612.

> ****54** [T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether . . . contributions were made towards administrative expenses or independent expenditures. Further, requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.

SpeechNow.org, 599 F.3d at 698.

Another related interest is anti-circumvention. "[C]ircumvention of valid contribution limits . . . is a valid theory of corruption[.]" *Fed. Election Comm'n v. Colo. Republican Fed. Campaign*, 533 U.S. 431, 456, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001). *Human Life* also discussed this interest in analyzing and upholding Washington's Disclosure Law, reasoning that if the Washington law exempted groups having only "a" primary purpose of political advocacy (*i.e.*, only regulated groups having "the" (sole) primary purpose of advocacy), political action groups affiliated with a larger, multipurpose organization could circumvent the law simply by merging with the affiliated organization. 624 F.3d at 1011-12.

The legislative history of Hawaii's campaign finance laws confirms that the Hawaii Legislature considered these same interests in enacting Hawaii's campaign disclosure provisions. As summarized

above, Hawaii's Legislature adopted Hawaii's "comprehensive disclosure and reporting requirements" specifically to meet the goals identified in *Buckley:*

> ****55** (1) its informational value, with the "sources of a candidate's financial support" alerting the voters "to the interests to which the candidate is most likely to be responsive," (2) its deterrence of corruption "by exposing large contributions and expenditures to the light of publicity[,]" and (3) its value as "an essential means of gathering data necessary to detect violations[.]"

Defs.' Mot. Ex. 11, Conf. Comm. Rept. No. 78, Haw. H.J. 1137, 1140 (1979) (quoting *Buckley*). Further, although commenting specifically about ballot issues, the legislative committee also emphasized more generally Hawaii's "informational interest" and that disclosure requirements were a method of "furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.*

Similar legislative intent was demonstrated in 1995, when Hawaii's campaign finance laws were revised. *See, e.g.*, Defs.' Mot. Ex. 17, Haw. H.J. 853 (Floor Speech of Representative Tom ("The bill before us today seeks to ensure fair election practices by closing the loopholes in the current law and by mandating full disclosure. . . . [I]t increases the effectiveness . . . of the Campaign Spending Commission in the areas of enforcement and disclosure[.]")); Defs.' Mot. Ex. 15, S. Stand. Comm. Rpt. No. 1344 on H.B. No. 2094, Haw. S.J. 1346 (1995) ("[R]eforming the

campaign spending law is important to restoring the public's confidence in the political process. Making candidates, contributors, and others **56 more accountable by requiring the filing of reports . . . and specifying what information must appear in these reports go[es] a long way to accomplishing these goals.").

Accordingly, the court has little difficulty concluding that Hawaii has sufficient government interests in imposing disclosure *1050 requirements such as registration as a noncandidate committee for organizations that participate in the political process on a more than an "incidental" basis (*i.e.*, that have a "purpose" of political advocacy).

b. "Substantial relationship"

Given sufficiently important government interests, the court next analyzes whether the disclosure requirement is substantially related to those interests. In this regard, Hawaii's definition of noncandidate committee imposes registration, reporting, and other disclosure requirements on groups having "the purpose of making or receiving contributions, making expenditures, or incurring financial obligations to influence the nomination for election, or the election, of any candidate." HRS § 11-302. It does not require groups to have *only* the purpose of conducting activities to influence an election. It specifically *excludes* from its definition "[a]ny organization that raises or expends funds for the sole purpose of producing and

disseminating informational or educational **57 communications that are not made to influence the outcome of an election, question, or issue on a ballot." *Id.* In conformity with *Buckley*, it excludes organizations doing only issue advocacy. And HRS § 11-321(g) requires $1,000 of contributions or expenditures in a two-year election period before noncandidate committee disclosure requirements are triggered.

Addressing a similar issue under Washington law, *Human Life* reasoned that most organizations have more that one "primary" purpose, and so a "political committee" need not be confined only to organizations having political advocacy as their singular purpose. 624 F.3d at 1011. That is, there is a substantial relationship between government's important interests and the disclosure requirements it imposes on groups engaged in multiple purposes including political advocacy. *Id.*

And so, even though Hawaii's definition of noncandidate committee refers to "the" purpose of an organization, it can cover organizations with multiple "purposes." As long as the organization's nonincidental activities include "making or receiving contributions, making expenditures, or incurring financial obligations to influence the nomination for election, or the election, of any candidate," it falls within the purview of a noncandidate committee. If an organization has multiple purposes, as in *Human Life*, "[b]y applying the **58 disclosure requirements attached to [noncandidate committee] status to organizations with a primary purpose of political

advocacy, its coverage vindicates the government's interest in an informed electorate without imposing on nonpolitical organizations unnecessarily." *Id.* at 1012.

Washington's version of "political committee" includes the modifier "primary" before "purpose." This modifier, however, was born of judicial construction – a political committee was interpreted to mean "only an organization that has as its 'primary or one of the primary purposes' to 'affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions.'" *Id.* at 997 (quoting *Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wash.App. 586, 49 P.3d 894, 903 (2002)). Such a limitation ("primary") "ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy." *Id.* at 1011.

Because Hawaii's definition does not include "primary," it does not automatically fall within *Human Life's* analysis finding that Washington's definition does not "impos[e] on nonpolitical organizations unnecessarily." *Id.* at 1012. The Ninth Circuit, however, was careful to comment that it ***1051** was *not* holding that "the word 'primary' or its equivalent is constitutionally necessary," just that it ****59** was "sufficient" to ensure the disclosure law was "appropriately tailored to the government's informational interest." *Id.* at 1011. That is, Hawaii's definition presents a closer call.

The court thus turns to whether Hawaii's limitation improperly "imposes on nonpolitical organizations," *id.* at 1012, by "unnecessarily sweeping into its purview groups that only incidentally engage in such advocacy." *Id.* at 1011. The court could read into or infer a similar meaning (*e.g.*, "primary" or "meaningful") into the kind of "purpose" necessary to require registration as a noncandidate committee in Hawaii. While such meaning might be implicit, it is not necessary to do so. An organization having "the purpose" of political advocacy necessarily means activity that is not "incidental." Thus, it is enough to survive a facial First Amendment challenge – *i.e.*, the limitation is sufficiently tailored – where Hawaii's definition: (1) specifically excludes groups engaged exclusively in issue advocacy, (2) can cover organizations with multiple purposes, including political advocacy, and (3) requires that an organization make contributions or expenditures "of more than $1,000, in the aggregate, in a two-year election period[.]" HRS § 11-321(g). These provisions suffice to assure that Hawaii does not unconstitutionally impose on nonpolitical groups or those with incidental political activity. *See Human Life*, 624 F.3d at 1012; *N.C. Right to Life*, ****60** *Inc. v. Bartlett*, 168 F.3d 705, 712 (4th Cir.1999) (finding unconstitutional a definition regulating organizations with a "primary *or incidental*" purpose of political advocacy, reasoning that "unlike the provisions of FECA, North Carolina's definition expressly sweeps within its ambit those groups that only *incidentally* engage in express advocacy. This is

a much broader definition of political committee than that at issue in *Buckley* [.]").

Thus, A-1's challenge to Hawaii's definition of noncandidate committee fails. The statute is substantially related to the important governmental interests. "[I]ts coverage vindicates the government's interest in an informed electorate without imposing on nonpolitical organizations unnecessarily." *Human Life*, 624 F.3d at 1012. This conclusion squares with *Citizens United's* emphasis on transparency and the public's "interest in knowing who is speaking about a candidate," 130 S.Ct. at 915, and the Court's approval of disclosure requirements that serve to inform the electorate about organizations active in electoral politics, even if "influencing" elections is not their major or primary purpose. *See McKee*, 649 F.3d at 59 ("Because we find a substantial relation between Maine's disclosure-oriented regulation of non-major-purpose PACs and its interest in the dissemination of information regarding the financing of political speech, we conclude that the law does not, on its face, offend the First Amendment."). ****61** Hawaii's noncandidate committee requirements do not facially violate the First Amendment.

4. A-1's As-Applied Challenge to the Noncandidate Committee Definition

A-1 also contends that Hawaii's noncandidate committee definition is unconstitutional as-applied to A-1's speech because it does not have a "major

purpose" of political advocacy. It is not "under the control of a candidate" nor does it pass a "major purpose" test, either by (1) assessing its central organizational purpose, or (2) comparing its electioneering spending with its overall spending. *See Herrera*, 611 F.3d at 678. A-1 has also claimed that it "only incidentally engages in [political] advocacy" and thus cannot constitutionally be required to register as a noncandidate committee.

***1052** As explained above, however, A-1's argument that it does not meet a "major purpose" test is misplaced, and largely irrelevant. Falling outside the major purpose test does not mean an organization cannot be regulated as a noncandidate committee. *See Human Life*, 624 F.3d at 1009 (rejecting a bright line rule that "unless the sole major purpose of a group is political advocacy, any regulation of that group will automatically be too burdensome").

The court also rejects the argument that A-1 only "incidentally" engages in political advocacy. As set forth above, A-1 had substantial and varied ****62** election-related activity in the 2010 election cycle. To reiterate, A-1 (1) contributed a total of $20,100 to fourteen different State office candidates and $12,500 to the Hawaii Republican Party before the 2010 primary election; (2) published three advertisements (the day of the primary election and the two days prior) costing $2,000 to $3000 each, identifying candidates and otherwise meeting the definition of an "electioneering communication" under Hawaii law; (3) contributed $1,000 to AFA-PAC; and (4) contributed

an additional $18,000 in total to thirty-one State-office candidates before the 2010 general election. It seeks to make contributions "[i]n 2012 and in materially similar situations in the future," and plans to run advertisements "in September or October 2012" that will be similar to those it ran in 2010. Doc. No. 132-1, Fourth Decl. of A-1 ¶¶ 5, 7, Jan. 6, 2012.

A-1, of course, may participate in our democratic process by making its views known and by supporting candidates. But such participation means it must also comply with Hawaii's valid campaign finance laws. Hawaii has a substantial interest in imposing noncandidate committee disclosure requirements on an organization – like A-1 – that actively engages in political activity. Indeed, ironically, A-1's very activities exemplify other government interests as well.

For example, as explained in *Human Life*, government has an interest ****63** in "anti-circumvention" – preventing or minimizing opportunities for speakers to find ways to circumvent campaign finance laws. 624 F.3d at 1011-12. The Ninth Circuit explained that by exempting groups with only "a" primary purpose of political advocacy (*e.g.*, a group that spends significant amounts on political spending, but a small amount proportionally to its overall activity) from registration, it would "effectively encourage[ ] [affiliated] advocacy groups to circumvent the law by *not* creating political action committees and instead to hide their electoral advocacy from view by pulling it into the fold of their larger organizational structure." *Id.* at 1012 (quoting *Leake*, 525 F.3d at

332 (Michael, J., dissenting) (emphasis in original)). Whether it intended to or not, A-1 is such an example. It has purposely not created a separate organizational structure for election-related activity, choosing instead to register itself (A-1 A-Lectrician, Inc.) as a noncandidate committee. Tr. 30, 37. If it were allowed to avoid registration merely because its political activity is small proportionally to its overall activities (as an electrical contractor and perhaps as a pure issue advocacy organization), it would encourage any affiliated noncandidate committee to avoid disclosure requirements by merging its activities into a larger affiliated organization. (This exemplifies why the noncandidate committee definition is construed to be able to regulate "multipurpose" organizations.)

****64** The court is also satisfied that the registration and disclosure requirements that come with noncandidate committee status do not present an undue burden on A-1. It has apparently been complying with the requirements for several years. The requirements ***1053** satisfy a facial challenge (they are not out of proportion for organizations that have "the purpose" of political advocacy). Although the requirements might be inconvenient, the record does not indicate the burdens on A-1 are onerous as matters of fact or law. *See, e.g.*, Tr. 58-59 ("[W]e do not want to be a noncandidate committee because the registrations are burdened as we are going forward. There's a tough economy. . . . [W]e need to be free to speak.").

And so, A-1's as-applied challenge to the noncandidate committee definition also fails. A-1 actively participates in our democracy; it is not unconstitutional to require it to comply with campaign finance laws that are substantially related to important government interests.

D. "Electioneering Communication" Registration Requirements

The court has found that A-1 is not likely to succeed on the merits of its challenge, either facially or as-applied, to Hawaii's noncandidate committee definition. As noted earlier, an organization registering as a "noncandidate committee" does not have to file an electioneering communications report or **65 otherwise comply with most of the other provisions set forth in HRS § 11-341. *See* Haw. Admin. R. § 3-160-48 ("A noncandidate committee registered with the commission is not required to file a statement of information for disbursements for electioneering communications."). Any required reporting of "electioneering communications" would be included as part of the noncandidate committee provisions.

Because A-1 is not relieved of complying with the requirements of registering as a noncandidate committee, the court need not fully address A-1's alternate challenge to § 11-341 (*e.g.*, a challenge to the requirement of providing a statement of information within twenty-four hours of each "disclosure date," which is the date disbursements for electioneering

communications exceed $2,000). A-1 agrees that, if it must register as a noncandidate committee, it lacks standing to challenge the "electioneering communications" disclosure regime. (The definition of "electioneering communications" remains relevant, however, in the next challenge to the disclaimer requirement in an advertisement.)

E. The "Disclaimer" Requirement in an "Advertisement"

The court next addresses A-1's challenge to the statutory requirement that "disclaimer" language be included in any "advertisement" that identifies a candidate and "advocates or supports the nomination, opposition, or election of a **66 candidate[.]" *See* HRS § 11-391(a)(2)(B) (requiring a "notice in a prominent location stating" that "[t]he advertisement is published . . . without the approval and authority of the candidate"). As set forth earlier, A-1 published advertisements (what it calls "issue ads") on September 16, 17, and 18, 2010. Those advertisements contained the disclaimer language "published without the approval and authority of the candidate." A-1 did not want to include the disclaimers in those advertisements, and does not want to include them in future advertisements.

Section 11-302 defines "advertisement" as:

> . . . any communication, excluding sundry items such as bumper stickers, that:

> (1) Identifies a candidate directly or by implication, or identifies an issue or question that will appear on the ballot at the next applicable election; and
>
> (2) ***Advocates or supports*** the nomination, ***opposition*,** or election of the candidate, ***1054** or advocates the passage or defeat of the issue or question on the ballot.

(Emphasis added.)

A-1 contends the language "advocates or supports" and "opposition" is unconstitutionally "vague, and therefore overbroad." FAC at 40. It also contends the disclaimer language distracts from its message, and gives the wrong impression that the advertisement is campaign speech, rather than issue advocacy.

"Disclaimer . . . requirements may burden the ability to speak, but ****67** they impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Citizens United*, 130 S.Ct. at 914 (citations and internal quotation marks omitted). Disclaimer requirements are therefore subjected to "exacting scrutiny," which requires a "substantial relation" between the disclaimer requirement and a "sufficiently important" government interest. *Id.*

1. "Advocates and Supports" and "Opposes" – the Facial Vagueness Challenge

A-1 contends the terms "advocates," "supports," and "opposes" are unconstitutionally vague. Pls.' Mot.

at 40-41. This challenge, however, is substantially similar to the challenge (rejected earlier) that A-1 made regarding the use of the term "to influence" in the "noncandidate committee" and "expenditure" definitions. A-1 cites, for example, cases addressing whether a state law defining "political committee" as any group "the primary or incidental purpose of which is to support or oppose any candidate or to influence or attempt to influence the results of an election"[20] and requiring disclosure of payments "for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office."[21] The concern with terms "support or oppose" or "supporting or opposing or otherwise influencing" is the same concern as with the **68 term "influence" – the concern is that the phrases "could be interpreted to reach both express advocacy and issue advocacy." *Carmouche*, 449 F.3d at 663. *See also Bartlett*, 168 F.3d at 712-13 ("[T]he North Carolina definition of political committee covers groups engaging in issue advocacy by explicitly juxtaposing express and issue advocacy, and thereby indicating that it encompasses both[.]").

And, as with the term "to influence," courts avoided such vagueness concerns by applying a narrowing construction, limiting the reach only to

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[20] *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir.1999).

[21] *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662-63 (5th Cir.2006).

"communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80, 96 S.Ct. 612. Again, "express advocacy" was later extended to its "functional equivalent" ("susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"). *Wisc. Right to Life, Inc.*, 551 U.S. at 469-70, 127 S.Ct. 2652. This functional equivalent test is objective, and (although "contextual factors . . . should seldom play a significant role in the inquiry") "basic background information that may be necessary to put an ad in context" may be considered in determining whether a communication falls within its meaning. *Id.* at 473-74, 127 S.Ct. 2652. As explained above, so construed, the definition of an "advertisement" like Hawaii's, which uses "advocates or supports the nomination, opposition, or election of the candidate," is not unconstitutionally vague.

***1055 **69** Perhaps more importantly, *Citizens United* rejected a similar challenge to disclaimer requirements under federal law. It specifically refused to import the "express advocacy and its functional equivalent" test from an "expenditure" context into the disclaimer and disclosure regime under federal law: "[W]e reject *Citizens United's* contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." 130 S.Ct. at 915.[22] "Even if the ads only

[22] Even if disclosure requirements are not "*limited to* speech that is the functional equivalent of express advocacy," it is still

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pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* Essentially, disclosure requirements can apply to issue advocacy, so long as the exacting scrutiny test is otherwise met. *Human Life*, 624 F.3d at 1015-16. And disclosure and disclaimer requirements – such as requiring a disclaimer under federal law that a communication "is not authorized by any candidate or candidate's committee" – satisfy the exacting scrutiny analysis. *Citizens United*, 130 S.Ct. at 914-16. "*Citizens United* has effectively disposed of any attack on . . . attribution and disclaimer requirements." *McKee*, 649 F.3d at 61. ****70** Accordingly, A-1's facial challenge to the disclaimer requirement in § 11-391(a)(2)(B) fails.

2. Disclaimer Requirement – the As-Applied Challenge

A-1 argues that the disclaimer requirement is unconstitutional as applied to its advertisements. But the court concludes that the advertisements fit within a regulatory "safe harbor" – they are an "advertisement" that is an "electioneering communication" and

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true that speech that *is* the functional equivalent (*i.e.*, is not susceptible of any reasonable interpretation other than an appeal to vote for or against a candidate) is subject to disclosure and disclaimer requirements. As with a noncandidate committee definition, the express advocacy or its functional equivalent test functions as a kind of "safe harbor" (from a regulator's perspective). In other words, even if it might be superfluous, it is not irrelevant.

are the functional equivalent of express advocacy under § 11-341(c). The advertisements mention a candidate (Blake Oshiro or Calvin Say or both). The advertisements ran on primary election day (and the two days prior). They state that those candidates, for example, "are representatives who do not listen to the people." FAC Exs. 14, 15, & Doc. No. 119-1 (substituting FAC Ex. 16). One advertisement states that "the representatives we put into office do not understand the importance of the values that made our nation great" and that "Blake Oshiro and other representatives do not show the aloha spirit in the way they disrespect the legislative process." FAC Ex. 15. One states "Blake Oshiro and other representatives are intent on the destruction of the family." FAC Ex. 16. These advertisements – running on election day or the day or two prior – are not susceptible to any reasonable interpretation other than as an appeal to vote against a candidate. *See Wisc. Right* ****71** *to Life*, 551 U.S. at 474, 127 S.Ct. 2652 (allowing courts to consider basic background information necessary to put an advertisement in context). That is, they fit the definition of "electioneering communications" as defined by Hawaii law in § 11-341(c) – they refer to a clearly identifiable candidate, within thirty days prior to a primary election or sixty days prior to a general election, and are the "functional equivalent of express advocacy."

And, in any event, *Citizens United* rejected an as-applied challenge to a disclaimer requirement for "commercial advertisements" that otherwise fall

within a ***1056** proper definition of "electioneering communications" (as do the advertisements at issue here). *See* 130 S.Ct. at 915-16. Essentially, advertisements that might include at least some "issue advocacy" can nevertheless be regulated if they mention a candidate shortly before an election. "[D]isclaimers . . . provide the electorate with information, and insure that the voters are fully informed about the person or group who is speaking." *Id.* at 915 (citations and editorial marks omitted). "At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party." *Id.*

For these reasons, the court rejects A-1's as-applied challenge to the disclaimer requirement in § 11-391(a)(2)(B) and the corresponding definition of advertisement in § 11-302, which includes the electioneering communications ****72** definition in § 11-341(c).

F. Hawaii's Ban on Contributions by Government Contractors

A-1 next challenges the constitutionality of Hawaii's ban on direct campaign contributions by government contractors set forth in HRS § 11-355. As detailed above, A-1 has made numerous contributions to candidates in the past and "seeks to do so again in 2012." Pls.' Mot. Ex. 5 ¶ 4. A-1 was a government contractor before, and is one now. A-1 claims it is forced to choose between engaging in its business and

engaging in its speech. Doc. No. 42-1, A-1 Decl. ¶ 8, Sept. 16, 2010. The candidates it wants to support are Legislators or prospective Legislators who, A-1 contends, "do not decide whether A-1 receives government contracts or oversee the contracts." Pls.' Reply Ex. G ¶ 3.

A-1 thus makes an "as-applied" challenge to Hawaii law. It argues not that § 11-355 is *facially* unconstitutional, but rather that the statute, as applied, violates its First Amendment right to contribute to candidates it believes would not later award or oversee contracts. Given no perceived connection between a contractor's donations to Legislators who would not award or oversee contracts, A-1 argues there is no plausible justification for banning its contributions.[23]

**73 *1. The Court Applies "Closely Drawn" Scrutiny*

Although *Citizens United* applied strict scrutiny in holding that limitations on independent campaign expenditures are unconstitutional, the action squarely presented no issue regarding contributions. *See* 130 S.Ct. at 909 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution

[23] A-1's challenge is limited to § 11-355's contribution ban by government contractors. Any other part of § 11-355 is not before the court as part of this action.

limits should be subjected to rigorous First Amendment scrutiny."). Accordingly, as explained above when addressing contribution limitations to non-candidate committees (HRS § 11-358), courts still apply "closely drawn scrutiny" in analyzing contribution restrictions. *See Thalheimer*, 645 F.3d at 1117-18 (setting forth traditional distinction between limitations on expenditures and contributions). And the court does so here in analyzing Hawaii's ban on campaign contributions by government contractors. *See Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir.2010) (specifically applying closely drawn scrutiny after *Citizens United* and observing that "[t]he [Supreme] Court has applied the closely drawn standard even when the law in question imposed an outright *ban* on contributions") (citing *Beaumont*, ***1057** 539 U.S. at 162, 123 S.Ct. 2200); *Ognibene v. Parkes*, 671 F.3d 174, 185 (2d Cir.2012) (analyzing a campaign contribution ban on entities "doing business" with New York City, observing that "*Bennett*[, 131 S.Ct. at ****74** 2817,] reaffirmed . . . that the lower closely drawn standard applies to contribution limits[.]"). Under this test, "[c]ontribution limits . . . need only be 'closely drawn' to match a sufficiently important [government] interest to survive a constitutional challenge." *Thalheimer*, 645 F.3d at 1117-18 (quoting *Randall*, 548 U.S. at 247, 126 S.Ct. 2479) (other citation omitted).[24]

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[24] Although A-1 is not challenging § 11-355 facially, the court still examines the government interests that justify the

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2. Sufficiently Important Interests – Safeguarding Against Quid Pro Quo *Corruption and its Appearance*

Laws banning direct corporate campaign contributions are hardly new. *See Citizens United*, 130 S.Ct. at 900 ("At least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates.") (citation omitted); *see also Beaumont*, 539 U.S. at 152-54 & 159-60, 123 S.Ct. 2200 (detailing the history of corporate contribution limitations, and upholding a federal statute barring corporate contributions to candidates). In the federal context, "[a]ny attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially 'deleterious ****75** influences on federal elections[.]'" *Beaumont*, 539 U.S. at 152, 123 S.Ct. 2200.[25] Contribution limits (and corporate

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contribution ban and determines whether it is closely drawn to meet those interests, as applied to A-1's proposed activities. *See, e.g.*, *Preston v. Leake*, 660 F.3d 726, 735-37 (4th Cir.2011) (discussing government's anti-corruption interests in analyzing whether a ban on contributions by lobbyists survives an as-applied challenge).

[25] *Beaumont* relied in part on an "anti-distortion" interest previously articulated in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), *overruled by Citizens United*, 130 S.Ct. at 913. *Beaumont*, however, was decided before *Citizens United*, which overruled Austin. Nevertheless, *Beaumont* remains binding precedent. Even if *Citizens United* undermined some of its reasoning, it remains good law for present purposes because it had other

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contribution limits in particular) are justified by a paradigmatic government interest – prevention of corruption or its appearance in elections. *See, e.g.*, *Buckley*, 424 U.S. at 27, 96 S.Ct. 612; *McConnell*, 540 U.S. at 143, 124 S.Ct. 619; *Thalheimer*, 645 F.3d at 1124 (discussing an anti-circumvention interest as "part of the familiar anti-corruption rationale"). Such limitations make the most sense when they restrict *direct* candidate contributions. *See, e.g.*, *City of Long Beach*, 603 F.3d at 696 ("[T]he state's interest in the prevention of corruption – and, therefore, its power to impose contribution limits – is strongest when the state limits contributions made directly to political candidates.") (quoting *Leake*, 525 F.3d at 291).

More specifically, "contribution limits . . . unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption." *Citizens United*, 130 S.Ct. at 909. Further, eliminating the *appearance* of *quid pro quo* corruption is, by itself, a sufficiently important ****76** interest. "Since neither candidate nor contributor is likely to announce a *quid pro quo*, the appearance of corruption has always been an accepted justification for a campaign contribution limitations." ***1058** *Ognibene*, 671 F.3d at 187 (citation omitted).

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justifications for upholding the federal ban. *See Garfield*, 616 F.3d at 199 ("*Beaumont* and other cases applying the closely drawn standard to contribution limits remain good law.").

> In other words, because the scope of *quid pro quo* corruption can never be reliably ascertained, the legislature may regulate certain indicators of such corruption or its appearance, such as when donors make large contributions because they have business with the City, hope to do business with the City, or are expending money on behalf of others who do business with the City. Furthermore, such donations certainly feed the public perception of *quid pro quo* corruption, and this alone justifies limitations or perhaps an outright ban.

Id. (citing *Citizens United*, 130 S.Ct. at 908, 910).

The legislative history of HRS § 11-205.5 (§ 11-355's predecessor) confirms that Hawaii's Legislature passed the government contractor contribution ban in large part precisely because of these concerns – prevention of both actual corruption and its appearance.[26]

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[26] Act 203 of the 2005 Hawaii Session Laws amended several sections of Hawaii's campaign finance laws, including the prior HRS § 11-205.5. Act 203 was derived from that session's House Bill ("H.B.") 1747 and a companion Senate Bill ("S.B.") 440. The legislative history of H.B. 1747 and S.B. 440 contains several references to an "anti-corruption" interest. For example, Senator Trimble, speaking in favor of S.B. 440 stated:

> Colleagues, corruption is the cruelest tax. It warps the decision-making process. It demoralizes the public sector, and it reflects poorly on us as a society. . . . I urge that you consider that corruption of money in the political process should not, and does not, distinguish

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> between whether it comes from a corporation or a **77 union.

2005 Senate Journal, at 349 (statement of Sen. Trimble). Likewise, Senator Hemmings spoke in support of S.B. 440:

> [I]f the Majority Party is really interested in a level playing field that benefits the people that sent us here, they would pass this amendment to do just what the Senator who's proposing this amendment wants – eliminate money from corrupting the election process.

Id. at 350 (statement of Sen. Hemmings).

Statements from Representatives supporting H.B. 1747 spoke specifically about government contractors. Representative Blake Oshiro, who introduced H.B. 1747 spoke about the constitutionality of contribution limitations, and addressed contractor limitations:

> . . . . [U]nder *Buckley v.* [*Valeo*], the distinction is made that contributions can be limited because the affinity to free speech is not nearly as close [as with expenditure limitations]. And that's what this bill is doing. . . . The idea behind this is, we are tired of tinkering around the edges. We're tired of just providing transparency by saying everything has to go through a separate, segregated fund, and blah, blah, blah. We're tired of saying that contractors cannot give except for these exceptions in these periods of time. So we're just going to say that we're going to lower campaign contributions across the board. . . . [W]hen you look at what other states have done, we're actually not doing anything that's not really that drastic.

2005 House Journal, at 476-77 (statement of Rep. B. Oshiro). Representative Oshiro understood the necessity of tailoring contribution limits to an anti-corruption government interest:

> And for anyone that is fearful of a constitutional challenge, there was a specific court case called *Montana Right to Life Association v. Eddleman*, where the Montana contribution limits were actually lower than

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> the ones in the bill and yet, the Ninth Circuit Court of Appeals held that we hold Montana's interest in purging corruption and the appearance of corruption from its electoral system is sufficiently important to withstand constitutional scrutiny. . . . So we are on very firm constitutional grounds moving forward.

Id.

Other Representatives also spoke in support of the bill regarding government contractor contributions, and sought – as was eventually codified – to simply ban contributions, rather than lower the threshold:

> It's such a complete disappointment for me, Session after Session, year after year, not to see us go after the heart of the problem, which is the "pay-to-play" game. We should simply outlaw, ban contributions from people who do work with government. We ought to do it. It should have been done long ago. It's done in thirty states. It's done by the federal government.

Id. at 477 (statement of Rep. Fox).

Representative Lee quoted then-Hawaii County Mayor Harry Kim's comments into the legislative record:

> If I may, I'd like to quote the words of Hawaii County Mayor, Harry Kim when he testified in support of this measure. He said, "I know this is a difficult area and the details can be mind boggling so I defer to the wisdom of the Legislature as to how best to set up a program that levels the playing field, enables candidates of limited means to participate meaningfully in the electoral process, and recognizes the cynicism and frustration that have been caused rightfully or not by the appearance of influence that money has on the electoral process. But whether or not House Bill [1747] is the perfect answer, do not let the perfect be the enemy of the good."

Id. (statement of Rep. Lee).

***1059 **78** Section 11-355 is directed at government (State and county) contractors and the *perception* that they donate money to receive favorable treatment in the awarding of contracts, *i.e.*, the perception that they "pay to play."[27]

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[27] Defendants submit evidence of the type of contributions that were made before § 11-205.5 was enacted in 2005-indicative of the political climate in which the government contractor ban was passed. According to Commission records, in the 2004 election numerous contractors made contributions to both sides of the Honolulu Mayoral race. "At least 100 of the almost 850 individuals, businesses, and organizations who contributed to [Duke] Bainum's campaign also contributed to [Mufi] Hannemann's campaign." Doc. No. 127-1, Baldomero Decl. ¶ 9, Dec. 5, 2011. Further, "[a]t least 44 of the 100 contributors who gave to both campaigns [including A-1] . . . were businesses (or principals of businesses) that sold goods or services, or engaged in construction that the City would regularly purchase." *Id.* ¶¶ 10, 12.

> As further indication of the climate and perception of a "pay to play" system in the 2005 time frame, media reports also suggest that § 11-205.5 was established to combat not only actual corruption, but its appearance, and that it was enacted at least partly in response to a series of well-publicized investigations by the Commission involving politicians and State contractors. As summarized by the Honolulu Advertiser in March 2010:
>
> The law was enacted in 2005 in response to the campaign finance scandals involving [former Honolulu Mayor] Harris and other Democrats. More than 30 local engineers, architects and other donors pleaded no contest to misdemeanor charges of violating the state's campaign law between 2003 and 2005 while another 90 architects, engineers and other donors paid out more than $1.8 million in fines to the state

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Campaign Spending Commission for making illegal donations.

Rick Daysog, *Contract-linked Donations Soar*, Honolulu Advertiser, March 7, 2010.

More recent attempts to change the law were unsuccessful, reportedly because of the memory of the prior "pay to play" scandals:

Wary of public perception, the House amended a campaign finance bill to preserve a ban on political donations by state and county contractors. The bill would have relaxed the ban for contractors who have smaller government contracts. State Rep. Barbara Marumoto, R-19th (Kaimuki, Waialae, Kahala), said there should be "no return to pay-to-play in any form."

Derrick DePledge, *Furlough Bills Move Forward*, Honolulu Advertiser, March 3, 2010. As reported in 2003, when versions of the current law were being debated, reasons for a total ban (including Legislators) were argued:

Proponents say the changes are long overdue and would restore integrity to a system that many view as inherently corrupt. "It's clear that the current system of campaign finance doesn't make the public confident that decisions are made on their merits," said House Majority Whip Brian Schatz, D-25th (Makiki, Tantalus).

. . .

If you're getting a benefit from a government contract and taxpayer money, you shouldn't be paying your way in to get that money," [Bob Watada, former head of the Commission] said. "That's the evil we're trying to stop: pay to play."

. . .

The Legislature last year approved a ban on direct contributions from businesses and unions, and barred awarding of government contracts to people who

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***1060 **79** Indeed, A-1 does not seriously question that Hawaii has a sufficiently important governmental interest in prevention of corruption or its appearance in the electoral process. Rather, A-1 argues that the restriction (a *ban* on contributions to *any* candidate, including those candidates that do not select and do not oversee government contracts) is unconstitutional, either because there is no sufficient ****80** interest in banning such contributions, or because a ban is not "closely drawn" to the government interest of preventing corruption. There can be no connection, it argues, between its proposed contributions and corruption if the candidates that it contributes to do not award or oversee a contract. The court disagrees, and explains below why the ban is closely drawn to the sufficiently important interest.

3. The Ban Is Closely Drawn to A-1's Past and Proposed Activities

First, A-1 supports its as-applied challenge by arguing that, because it does not itself "pay to play" or does not "grease the skids," § 11-355 regulates too

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> donated to candidates for certain offices. But former Gov. Ben Cayetano vetoed the measure, saying lawmakers had unfairly exempted themselves from the ban on money from contractors. The present bill does not allow that exception. "We wanted to make sure we included ourselves, although the reality is that legislators don't give out contracts[.]" Schatz said.

Campaign Finance Legislation off to Senate after House OK, Honolulu Advertiser, March 31, 2003.

broadly and is therefore not closely drawn. The Second Circuit, however, recently rejected a similar argument: *Ognibene* upheld (facially) a New York City ban on campaign contributions from organizations "doing business" with the City, rejecting the argument that such a ban was "overbroad because [it] ban[ned] legitimate as well as corrupt acts." 671 F.3d at 191.

> [N]ot only is it difficult to isolate suspect contributions, but more importantly . . . the interest in safeguarding against the *appearance* of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.

Id. (quoting *Buckley*, 424 U.S. at 30, 96 S.Ct. 612) (emphasis added). Again, "[such] provisions aim at eliminating, not only corrupt acts, but the appearance of corruption." *Id.* Applying *Ognibene* (which the court finds persuasive), even if A-1 is not corrupt, ****81** its contributions may have the appearance of impropriety and may thus be barred.

Second, Defendants point out that A-1 has other means of speaking. Any burden on A-1 caused by the contribution ban is lessened because A-1's officers or employees (*e.g.*, Yamada or his family members) may themselves make contributions. *See* HRS § 11-355(b) ("[T]his section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any noncandidate committee by any person other than the state or county

contractor for the purpose of influencing the nomination for election, or the election of any person to office.").[28] That is, to the extent A-1's desired contributions to particular legislative candidates are speech, A-1 may speak at least indirectly through those individuals.[29] *See* ***1061** *Beaumont*, 539 U.S. at 161 n. 8, 123 S.Ct. 2200 ("A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information."). Moreover, A-1 may also lawfully make its own independent ****82** *expenditures* in support of or against particular candidates – and, following *Citizens United*, it may make *unlimited* expenditures, so long as they are not coordinated with a candidate or party. A-1 may also make unlimited contributions to organizations that make only independent expenditures. *See Thalheimer*, 645 F.3d at 1125.

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[28] *See also* Defs.' Mot. Ex. 19, Hse. Conf. Comm. Rep. No. 185, in 2004 House Journal, at 1828 ("[T]he prohibition on contributions by state and county contractors applies to the specific contracting entity and not to individuals associated with the contractor, such as the individual owners of a contracting entity.").

[29] Other jurisdictions have gone *further* than Hawaii and enacted similar provisions – upheld against constitutional challenge – against contributions by certain "principals" and family members of government contractors. *See Green Party of Conn. v. Garfield*, 616 F.3d 189, 202-04 (2d Cir.2010) (upholding Connecticut ban on campaign contributions made by "principals" of state contractors or prospective state contractors, as well as spouses and children of contractors).

Third, as Defendants emphasize, although individual Legislators might not themselves award or manage contracts, the Legislature itself must appropriate funds for State contracts. The Legislature routinely holds informational and oversight hearings. Legislators ask questions, request audits, and otherwise represent constituents and the public in an appropriate role overseeing administration of State contracts and utilization of appropriated funds – they might criticize, scrutinize, or support contractor performance. *See, e.g.*, Defs.' Mot. Exs. 24-26 (samples of legislative committee meetings or briefings on State contracts); Defs.' Mot. Ex. 33 (providing a legislative committee report explaining that "it is the function of the Legislature to hold agencies accountable for expenditures of public funds, and therefore the Legislature needs to be provided with certain information regarding . . . construction projects"). Legislators make decisions and hold power over large infrastructure projects, sometimes involving hundreds of millions of dollars, where government contractors stand to benefit. ****83** And Legislators may have power over, or close friendships with, the government employees or others who *do* award or manage A-1's contracts.[30]

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[30] Defendants also point out a clear fallacy in A-1's logic. A-1 cannot know in advance whether any particular candidate will *not* be in a position to control or "oversee" specific contracts if the candidate is later elected. Certain committees have stronger oversight roles, and these (and all) legislative committee assignments change each session, *after* the election. (And *all*

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Thus, even more than deterring Legislators from actual corruption in awarding contracts, the government has an interest in alleviating a public perception that Legislators or others in public office have power to influence who is awarded government contracts. The appearance of "quid pro quo" is more than appearance of straight "dollars for contracts." It is also the appearance of "dollars for political favors." *Citizens United*, 130 S.Ct. at 910 (quoting *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985)). Again, even if individual Legislators do not ***1062** directly award contracts, it does not mean

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Legislators vote on many bills concerning procurement and budgetary issues). Defendants offer an example from the 2011 Legislative Session: A-1 testified – through Yamada's son Jason (an A-1 officer) – in favor of a construction and procurement-related bill regarding the University of Hawaii. Defs.' Exs. 34-35. At least three Legislators that served on committees that considered the bill (and voted in favor of it) also received campaign contributions from A-1 in the 2010 elections. Defs.' Mot. at 53; Defs.' Exs. 28, 31. And A-1 made contributions to opponents of fifteen other Legislators who considered the bill. Defs.' Mot. Ex. 31. A-1 cannot have known in advance that candidates would *not* consider contractual oversight issues when it made its contributions in 2010, and likewise cannot know that if it makes contributions to candidates in 2012. This situation exemplifies the Second Circuit's reasoning in *Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir.2012) ("Contributions to candidates for [government] office from persons with a particularly direct financial interest in these officials' policy decisions pose a heightened risk of actual and apparent corruption, and merit heightened government regulation.").

contributions by contractors do not have the *appearance* of corruption. That **84 a Legislator might not have the power to award a contract directly does not make the connection to the interest any less "closely drawn."

Under A-1's logic, a contractor-contribution limitation would need to be drawn narrowly enough to restrict contributions *only* to those candidates for offices that actually award or oversee specific contracts. Under its logic, to analyze whether § 11-355 is applied constitutionally, a court would have to know which Legislators have "control" over all types of contractual matters (whether large or small, be them for general electrical work or for a non-bid research study of a particular issue). But drawing these lines is not the court's role. As the Second Circuit recognized in upholding a Connecticut ban on government contractor contributions, "we, as judges, cannot consider each possible permutation of a law limiting contributions, and thus we 'cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives.'" *Garfield*, 616 F.3d at 203 (quoting *Randall*, 548 U.S. at 248, 126 S.Ct. 2479). *Garfield* concluded that, in light of Connecticut's past political contractor scandals, a ban on contributions by any current state contractor "is, without question, 'closely drawn' to

meet the state's interest in combating corruption and the **85 appearance of corruption." *Id.* at 202.[31]

Moreover, a complete ban on contractor contributions – as opposed to a mere limit on the amount or a restriction on the type of contract – is also closely tailored. Hawaii's Legislature made a judgment to eliminate *any* contribution to alleviate a perception of government contractors receiving benefits for dollars. Questions such as whether to apply the ban only to non-bid contractors or only large contractors, whether to allow small contributions or allow *no* contributions, or whether principals of contractors may contribute, are all legislative choices. *Cf. Preston*, 660 F.3d at 737 ("[W]e find no reason to second-guess the legislative judgment that a ban on all contributions from lobbyists was the best response."). A choice to completely ban direct government contractor contributions indicates, at some level, the strength of the Legislature's intended message combating a perception that government contracts are awarded to friends based on corruption (*i.e.*, indicative of the tailoring of the restriction to the government interest). That a ban is total, that it has no dollar exceptions, might "eliminate[ ] *any* notion that contractors can influence state

[31] *Garfield* is consistent with Ninth Circuit caselaw upholding other corporate contribution bans. *See Jacobus v. Alaska*, 338 F.3d 1095, 1122 (9th Cir.2003) (upholding corporate soft money bans); *cf. Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1094 (9th Cir.2003) (finding statutory limits on campaign contributions by individuals and political action committees were closely drawn to further state's interests).

officials by donating to their campaigns," *Garfield*, ****86** 616 F.3d at 205, and in that sense indicates *closer* tailoring to the important government interest than if contributions to certain types of Legislators were excepted.[32] The wisdom of ***1063** these particular choices (the scope of the ban or any exceptions) is not for courts to decide; courts decide whether the choices are closely tailored to sufficiently important government interests. And this court upholds Hawaii's choice.

In sum, the court concludes that, as applied to A-1's proposed campaign contributions to State Legislators, § 11-355 is closely tailored to an important government interest. Given the public role of Legislators and the power (or perceived power) they can have in contractual matters, applying the contribution ban is closely connected to the governmental interest in refuting at least the perception of corruption in the electoral process. It functions to alleviate even the appearance of a connection (a *quid pro quo*)

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[32] As *Garfield* reasoned,

> [Connecticut's] *ban* on contractor contributions . . . unequivocally addresses the perception of corruption brought about by Connecticut's recent scandals. By totally shutting off the flow of money from contractors to state officials, it eliminates any notion that contractors can influence state officials by donating to their campaigns. . . . [A]n outright ban on contributions by contractors . . . is closely drawn to the state's interest in combating the appearance of corruption.

616 F.3d at 205.

between a government contractor and a candidate for public office. Hawaii's government-contractor ban on direct campaign contributions set forth in § 11-355 is constitutional as applied **87 to A-1's proposed contributions.

V. *CONCLUSION*

The Cross Motions for Summary Judgment are GRANTED in PART and DENIED in PART, as follows:

1. Plaintiffs' Motion as to HRS § 11-358 is GRANTED.

Accordingly, the court enters the following permanent injunction:

> The contribution limit in HRS § 11-358 is unconstitutional as applied to Jimmy Yamada's and Russell Stewart's past and proposed contributions to AFA-PAC (an entity that engages in solely independent expenditures) in excess of the statutory limit. Defendants are permanently ENJOINED from enforcing § 11-358's monetary contribution limit as to Jimmy Yamada's and Russell Stewart's past and proposed campaign donations to AFA-PAC.

2. In all other respects, Plaintiff's Motion is DENIED and Defendants' Motion is GRANTED. As challenged, HRS §§ 11-302 and 391 are constitutionally valid disclosure requirements, and HRS § 11-355 is upheld as applied to A-1 as a constitutionally valid

contribution limit. These provisions of Hawaii's campaign finance laws – Hawaii's definition of noncandidate committee (and a related term "expenditure"), the disclaimer provision for an electioneering-communication advertisement, and the ban on campaign contributions by government contractors – all withstand Plaintiffs' constitutional challenges. These Hawaii provisions promote disclosure and transparency in elections – values **88 endorsed, embraced and extended in *Citizens United.*

3. There being no other issues remaining, the Clerk of Court shall close the case file.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 21, 2012

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge

District Court Judgment

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

JIMMY YAMADA,
RUSSELL STEWART, ET AL.,
Plaintiff(s),
V.
MICHAEL WEAVER, ET AL.,
Defendant(s).

JUDGMENT IN A CIVIL CASE

Case: CV 10-00497 JMS RLP

(Filed Mar. 21, 2012)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this case is CLOSED pursuant to, "ORDER (1) PERMANENTLY ENJOINING DEFENDANTS FROM ENFORCING HRS § 11-358 AS-APPLIED TO SPECIFIED CONTRIBUTIONS TO AFA-PAC, A COMMITTEE MAKING ONLY INDEPENDENT CAMPAIGN EXPENDITURES; AND (2) UPHOLDING THE CONSTITUTIONALITY, AS CHALLENGED, OF PROVISIONS OF HRS §§ 11-302, 355 & 391", by the

Honorable J. MICHAEL SEABRIGHT, U.S. District Judge, and filed on, March 21, 2012.

March 21, 2012	SUE BEITIA
Date	Clerk
	/s/ Sue Beitia by GS
	(By) Deputy Clerk

Constitutional Provisions

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pertinent Hawaii Revised Statutes Sections from Westlaw, July 13, 2015[1]

(For those sections that according to Westlaw have changed since A-1 filed its complaint in 2010, the sections then in effect are in footnotes. *Cf.* APP.27n.6, 43n.13. The text in the footnotes is from the Hawaii 2010 Session Laws Act 211 (H.B. 2013) (Westlaw Aug. 16, 2010).

HRS-11-302

Definitions

When used in this part:

"Advertisement" means any communication, excluding sundry items such as bumper stickers, that:

(1) Identifies a candidate directly or by implication, or identifies an issue or question that will appear on the ballot at the next applicable election; and

(2) Advocates or supports the nomination, opposition, or election of the candidate, or advocates

[1] At http://ags.hawaii.gov/campaign/files/2014/03/HRS.pdf, Respondents have a version of the statute and caution that it is not "legal advice or authority." As of July 13, 2015, the version indicated it was current through March 2014, yet it appeared not to be entirely accurate. As of July 15, 2015, a new version was at the same hyperlink, with this one indicating it was current through July 2015. Petitioners have not reviewed the new version. Instead, they include the Westlaw version here.

the passage or defeat of the issue or question on the ballot.

"Ballot issue committee" means a noncandidate committee that has the exclusive purpose of making or receiving contributions, making expenditures, or incurring financial obligations for or against any question or issue appearing on the ballot at the next applicable election.

"Campaign funds" means contributions, interest, rebates, refunds, loans, or advances received by a candidate committee or noncandidate committee.

"Candidate" means an individual who seeks nomination for election or seeks election to office. An individual remains a candidate until the individual's candidate committee terminates registration with the commission. An individual is a candidate if the individual does any of the following:

(1) Files nomination papers for an office for the individual with the county clerk's office or with the chief election officer's office, whichever is applicable;

(2) Receives contributions, makes expenditures, or incurs financial obligations of more than $100 to bring about the individual's nomination for election, or to bring about the individual's election to office;

(3) Gives consent for any other person to receive contributions, make expenditures, or incur financial obligations to aid the individual's nomination

for election, or the individual's election, to office; or

(4) Is certified to be a candidate by the chief election officer or county clerk.

"Candidate committee" means an organization, association, or individual that receives campaign funds, makes expenditures, or incurs financial obligations on behalf of a candidate with the candidate's authorization.

"Clearly identified" means the inclusion of name, photograph or other similar image, or other unambiguous identification of a candidate.

"Commission" means the campaign spending commission.

"Commissioner" means any person appointed to the commission.

"Contribution" means:

(1) A gift, subscription, deposit of money or anything of value, or cancellation of a debt or legal obligation and includes the purchase of tickets to fundraisers, for the purpose of:

(A) Influencing the nomination for election, or the election, of any person to office;

(B) Influencing the outcome of any question or issue that has been certified to appear on the ballot at the next applicable election; or

(C) Use by any candidate committee or noncandidate committee for the purpose of subparagraph (A) or (B);

(2) The payment, by any person or party other than a candidate, candidate committee, or noncandidate committee, of compensation for the services of another person that are rendered to the candidate, candidate committee, or noncandidate committee without charge or at an unreasonably low charge for a purpose listed in paragraph (1);

(3) A contract, promise, or agreement to make a contribution; or

(4) Any loans or advances that are not documented or disclosed to the commission as provided in section 11-372;

"Contribution" does not include:

(1) Services voluntarily provided without compensation by individuals to or on behalf of a candidate, candidate committee, or noncandidate committee;

(2) A candidate's expenditure of the candidate's own funds; provided that this expenditure shall be reportable as other receipts and expenditures;

(3) Any loans or advances to the candidate committee; provided that these loans or advances shall be reported as loans; or

(4) An individual, candidate committee, or noncandidate committee engaging in internet

activities for the purpose of influencing an election if:

(A) The individual, candidate committee, or noncandidate committee is uncompensated for the internet activities; or

(B) The individual, candidate committee, or noncandidate committee uses equipment or services for uncompensated internet activities, regardless of who owns the equipment and services.

"Earmarked funds" means contributions received by a candidate committee or noncandidate committee on the condition that the funds be contributed to or expended on certain candidates, issues, or questions.

"Election" means any election for office or for determining a question or issue provided by law or ordinance.

"Election period" means:

(1) The two-year time period between the day after the general election through the day of the next general election, if a candidate is seeking nomination or election to a two-year office;

(2) The four-year time period between the day after the general election through the day of the next general election, if a candidate is seeking nomination or election to a four-year office; or

(3) For a special election, the period between the day after the general election for that office through the day of the special election.

"Equipment and services" includes computers, software, internet domain names, internet service providers, and any other technology that is used to provide access to or use of the Internet.

"Expenditure" means:

(1) Any purchase or transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, or payment incurred or made, or the use or consumption of a nonmonetary contribution for the purpose of:

(A) Influencing the nomination for election, or the election, of any person seeking nomination for election or election to office, whether or not the person has filed the person's nomination papers;

(B) Influencing the outcome of any question or issue that has been certified to appear on the ballot at the next applicable election; or

(C) Use by any party for the purposes set out in subparagraph (A) or (B);

(2) Any payment, by any person other than a candidate, candidate committee, or noncandidate committee, of compensation for the services of another person that are rendered to the candidate, candidate committee, or noncandidate committee for any of the purposes mentioned in paragraph (1)(A); provided that payment under this paragraph shall include provision of services without charge; or

(3) The expenditure by a candidate of the candidate's own funds for the purposes set out in paragraph (1)(A).

"Expenditure" does not include:

(1) Services voluntarily provided without compensation by individuals to or on behalf of a candidate, candidate committee, or noncandidate committee;

(2) Voter registration efforts that are nonpartisan; or

(3) An individual, candidate committee, or noncandidate committee engaging in internet activities for the purpose of influencing an election if:

(A) The individual, candidate committee, or noncandidate committee is uncompensated for internet activities; or

(B) The individual, candidate committee, or noncandidate committee uses equipment or services for uncompensated internet activities, regardless of who owns the equipment and services;

provided that the internet activity exclusion does not apply to any payment for an advertisement other than a nominal fee; the purchase or rental of an electronic address list made at the direction of a candidate committee or noncandidate committee; or an electronic mail address list that is transferred to a candidate committee or noncandidate committee.

"House bulletin" means a communication sponsored by any person in the regular course of publication for limited distribution primarily to its employees or members.

"Immediate family" means a candidate's spouse or reciprocal beneficiary, as defined in section 572C-3, and any child, parent, grandparent, brother, or sister of the candidate, and the spouses or reciprocal beneficiaries of such persons.

"Independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate that is not made in concert or cooperation with or at the request or suggestion of the candidate, the candidate committee, a party, or their agents.

"Individual" means a natural person.

"Internet activities" include:

(1) Sending or forwarding electronic messages;

(2) Providing a hyperlink or other direct access to another person's website;

(3) Blogging;

(4) Creating, maintaining, or hosting a website;

(5) Paying a nominal fee for the use of another person's website; and

(6) Any other form of communication distributed over the Internet.

"Limited liability company" means a business entity that is recognized as a limited liability company under the laws of the state in which it is established.

"Loan" means an advance of money, goods, or services, with a promise to repay in full or in part within a specified period of time. A loan does not include expenditures made on behalf of a candidate committee or noncandidate committee by a candidate, volunteer, or employee if:

(1) The candidate, volunteer, or employee's aggregate expenditures do not exceed $1,500 within a thirty-day period;

(2) A dated receipt and a written description of the name and address of each payee and the amount, date, and purpose of each expenditure is provided to the candidate committee or noncandidate committee before the candidate committee or noncandidate committee reimburses the candidate, volunteer, or employee; and

(3) The candidate committee or noncandidate committee reimburses the candidate, volunteer, or employee within forty-five days of the expenditure being made.

"Newspaper" means a publication of general distribution in the State issued once or more per month, which is written and published in the State.

"Noncandidate committee" means an organization, association, party, or individual that has the purpose of making or receiving contributions, making expenditures, or incurring financial obligations to influence

the nomination for election, or the election, of any candidate to office, or for or against any question or issue on the ballot; provided that a noncandidate committee does not include:

(1) A candidate committee;

(2) Any individual making a contribution or making an expenditure of the individual's own funds or anything of value that the individual originally acquired for the individual's own use and not for the purpose of evading any provision of this part; or

(3) Any organization that raises or expends funds for the sole purpose of producing and disseminating informational or educational communications that are not made to influence the outcome of an election, question, or issue on a ballot.

"Office" means any Hawaii elective public or constitutional office, excluding county neighborhood board and federal elective offices.

"Other receipts" means the candidate's own funds, interest, rebates, refunds, and any other funds received by a candidate committee or noncandidate committee, but does not include contributions received from other persons or loans.

"Party" means any political party that satisfies the requirements of section 11-61.

"Person" means an individual, a partnership, a candidate committee or noncandidate committee, a party,

an association, a corporation, a business entity, an organization, or a labor union and its auxiliary committees.

"Political committees established and maintained by a national political party" means:

(1) The National Committee;

(2) The House Campaign Committee; and

(3) The Senate Campaign Committee.

"Qualifying contribution" means an aggregate monetary contribution of $100 or less by an individual Hawaii resident during a matching payment period that is received after a candidate files a statement of intent to seek public funds. A qualifying contribution does not include a loan, an in-kind contribution, or the candidate's own funds.

"Special election" means any election other than a primary or general election.

"Treasurer" means a person appointed under section 11-324 and unless expressly indicated otherwise, includes deputy treasurers.

HRS-11-321

Registration of candidate committee or noncandidate committee

(a) Each candidate committee or noncandidate committee shall register with the commission by filing an organizational report as set forth in section 11-322 or 11-323, as applicable.

(b) Before filing the organizational report, each candidate committee or noncandidate committee shall mail or deliver an electronic filing form to the commission.

(c) The electronic filing form shall include a written acceptance of appointment and certification of each report, as follows:

(1) A candidate committee shall file a written acceptance of appointment by the chairperson and treasurer and a certification by the candidate and treasurer of each filed report; or

(2) A noncandidate committee shall file a written acceptance of appointment by the chairperson and treasurer and a certification by the chairperson and treasurer of each filed report.

(d) The organizational report for a candidate committee shall be filed within ten days of the earlier of:

(1) The date the candidate files nomination papers for office; or

(2) The date the candidate or candidate committee receives contributions or makes or incurs

expenditures of more than $100 in the aggregate during the applicable election period.

(e) An organizational report need not be filed under this section by an elected official who is a candidate for reelection to the same office in successive elections and has not sought election to any other office during the period between elections, unless the candidate is required to report a change in information pursuant to section 11-323.

(f) A candidate shall have only one candidate committee.

(g) The organizational report for a noncandidate committee shall be filed within ten days of receiving contributions or making or incurring expenditures of more than $1,000, in the aggregate, in a two-year election period; provided that within the thirty-day period prior to an election, a noncandidate committee shall register by filing an organizational report within two days of receiving contributions or making or incurring expenditures of more than $1,000, in the aggregate, in a two-year election period.

HRS-11-323

Organizational report, noncandidate committee

(a) The noncandidate committee organizational report shall include:

(1) The committee's name, which shall incorporate the full name of the sponsoring entity, if any. An acronym or abbreviation may be used in other communications if the acronym or abbreviation is commonly known or clearly recognized by the general public. The committee's name shall not include the name of a candidate;

(2) The committee's address, including web page address, if any;

(3) The area, scope, or jurisdiction of the committee;

(4) The name and address of the committee's sponsoring entity. If the committee does not have a sponsoring entity, the committee shall specify the trade, profession, or primary interest of contributors to the committee;

(5) The name, address, telephone number, occupation, and principal place of business of the chairperson;

(6) The name, address, telephone number, occupation, and principal place of business of the treasurer and any other officers;

(7) An indication as to whether the committee was formed to support or oppose a specific ballot

question or candidate and, if so, a brief description of the question or the name of the candidate;

(8) An indication as to whether the committee is a political party committee;

(9) The name, address, telephone number, occupation, and principal place of business of the custodian of the books and accounts;

(10) The name and address of the depository institution in which the committee will maintain its campaign account and each applicable account number;

(11) A certification by the chairperson and treasurer of the statements in the organizational report; and

(12) The name, address, employer, and occupation of each contributor who contributed an aggregate amount of more than $100 to the noncandidate committee since the last election and the amount and date of deposit of each such contribution.

(b) Any change in information previously reported in the organizational report, with the exception of subsection (a)(12), shall be electronically filed with the commission within ten days of the change being brought to the attention of the committee chairperson or treasurer.

HRS-11-324

Treasurer

(a) Every candidate committee or noncandidate committee shall appoint a treasurer on or before the day it files an organizational report. The following shall be permissible:

(1) Up to five deputy treasurers may be appointed;

(2) A candidate may be appointed as the treasurer or deputy treasurer; and

(3) An individual who is not an officer or treasurer may be appointed by the candidate, on a fee or voluntary basis, to specifically prepare and file reports with the commission.

(b) A treasurer may resign or be removed at any time.

(c) In case of death, resignation, or removal of the treasurer, the candidate, candidate committee, or noncandidate committee shall promptly appoint a successor. During the period that the office of treasurer is vacant, the candidate, candidate committee, or chairperson, or party chairperson in the case of a party, whichever is applicable, shall serve as treasurer.

(d) Only the treasurer and deputy treasurers shall be authorized to receive contributions or to make or incur expenditures on behalf of the candidate committee or noncandidate committee.

(e) The treasurer shall establish and maintain itemized records showing:

(1) The amount of each monetary contribution;

(2) The description and value of each nonmonetary contribution; and

(3) The name and address of each contributor making a contribution of more than $25 in value; provided that information regarding the employer and occupation of contributors shall also be collected and maintained for a noncandidate committee.

(f) The treasurer shall maintain detailed accounts, bills, receipts, and other records to establish that reports were properly prepared and filed.

(g) The records shall be retained for at least five years after the report is filed.

HRS-11-326

Termination of candidate committee's or noncandidate committee's registration

A candidate committee or noncandidate committee may terminate its registration if:

(1) The candidate committee or noncandidate committee:

(A) Files a request for registration termination form;

(B) Files a report disclosing contributions and expenditures not previously reported by the committee, and the committee has no surplus or deficit; and

(C) Mails or delivers to the commission a copy of the committee's closing bank statement; and

(2) The request is approved by the commission.

HRS-11-331

Filing of reports, generally

(a) Every report required to be filed by a candidate or candidate committee shall be certified as complete and accurate by the candidate and treasurer.

(b) Every report required to be filed by a noncandidate committee shall be certified as complete and accurate by the chairperson and treasurer.

(c) All reports required to be filed under this part shall be filed on the commission's electronic filing system.

(d) For purposes of this part, whenever a report is required to be filed with the commission, "filed" means that a report shall be filed with the commission's electronic filing system by the date and time specified for the filing of the report by:

(1) The candidate or candidate committee of a candidate who is seeking election to the:

(A) Office of governor;

(B) Office of lieutenant governor;

(C) Office of mayor;

(D) Office of prosecuting attorney;

(E) County council;

(F) Senate;

(G) House of representatives; or

(H) Office of Hawaiian affairs; or

(2) A noncandidate committee required to be registered with the commission pursuant to section 11-323.

(e) To be timely filed, a committee's reports shall be filed with the commission's electronic filing system on or before 11:59 p.m. Hawaiian standard time on the filing date specified.

(f) All reports filed under this part are public records and shall be made available for public inspection on the commission's website in a searchable database.[1]

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[1] In the 2010 Act, this section reads:

(a) Every report required to be filed by a candidate or candidate committee shall be certified by the candidate and treasurer.

(b) Every report required to be filed by a noncandidate committee shall be certified by the chairperson and treasurer.

(c) All reports required to be filed under this part shall be filed on the commission's electronic filing system.

(d) For purposes of this part, whenever a report is required to be filed with the commission, "filed" means that a report shall be filed with the commission's electronic filing system by the date and time specified for the filing of the report by:

(1) The candidate or candidate committee of a candidate who is seeking election to the:

(A) Office of governor;

(B) Office of lieutenant governor;

(C) Office of mayor;

(D) Office of prosecuting attorney;

(E) County council;

(F) Senate;

(G) House of representatives;

(Continued on following page)

(H) Office of Hawaiian affairs; or

(I) Board of education; or

(2) A noncandidate committee required to be registered with the commission pursuant to section 11-L.

(e) To be timely filed, a committee's reports shall be filed with the commission's electronic filing system on or before 11:59 p.m. Hawaiian standard time on the filing date specified.

(f) All reports filed under this part are public records.

HRS-11-335

Noncandidate committee reports

(a) The authorized person in the case of a party, or treasurer in the case of a noncandidate committee that is not a party, shall file preliminary, final, and supplemental reports that disclose the following information:

(1) The noncandidate committee's name and address;

(2) The cash on hand at the beginning of the reporting period and election period;

(3) The reporting period and election period aggregate totals for each of the following categories:

(A) Contributions received;

(B) Contributions made;

(C) Expenditures; and

(D) Other receipts;

(4) The cash on hand at the end of the reporting period; and

(5) The surplus or deficit at the end of the reporting period.

(b) Schedules filed with the reports shall include the following additional information:

(1) The amount and date of deposit of each contribution received and the name, address, occupation, and employer of each contributor making a contribution aggregating more than $100

during an election period, which was not previously reported; provided that if all the information is not on file, the contribution shall be returned to the contributor within thirty days of deposit;

(2) The amount and date of each contribution made and the name and address of the candidate, candidate committee, or noncandidate committee to which the contribution was made;

(3) All expenditures, including the name and address of each payee and the amount, date, and purpose of each expenditure; provided that:

(A) Expenditures for advertisements or electioneering communications shall include the names of the candidates supported, opposed, or clearly identified;

(B) Expenditures for consultants, advertising agencies and similar firms, credit card payments, salaries, and candidate reimbursements shall be itemized to permit a reasonable person to determine the ultimate intended recipient of the expenditure and its purpose;

(C) Independent expenditures shall include the name of any candidate supported, opposed, or clearly identified; and

[(D)] The purpose of an independent expenditure shall include the name of the candidate who is supported or opposed by the expenditure, and whether the expenditure supports or opposes the candidate;

(4) For noncandidate committees making only independent expenditures, certification that no expenditures have been coordinated with a candidate, candidate committee, or any agent of a candidate or candidate committee;

(5) The amount, date of deposit, and description of other receipts and the name and address of the source of each of the other receipts;

(6) A description of each durable asset, the date of acquisition, value at the time of acquisition, and the name and address of the vendor or contributor of the asset; and

(7) The date of disposition of a durable asset, value at the time of disposition, method of disposition, and name and address of the person receiving the asset.

(c) No loan may be made or received by a noncandidate committee.

(d) The authorized person in the case of a party, or treasurer in the case of a noncandidate committee that is not a party, shall file a late contribution report as provided in section 11-338 if the committee receives late contributions from any person aggregating more than $500 or makes late contributions aggregating more than $500.

(e) For purposes of this section, "electioneering communication" means the same as defined in section 11-341.[2]

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[2] In the 2010 Act, this section reads:

(a) The authorized person in the case of a party, or treasurer in the case of a noncandidate committee that is not a party, shall file preliminary, final, and supplemental reports that disclose the following information:

(1) The noncandidate committee's name and address;

(2) The cash on hand at the beginning of the reporting period and election period;

(3) The reporting period and election period aggregate totals for each of the following categories:

(A) Contributions;

(B) Expenditures; and

(C) Other receipts;

(4) The cash on hand at the end of the reporting period; and

(5) The surplus or deficit at the end of the reporting period.

(b) Schedules filed with the reports shall include the following additional information:

(1) The amount and date of deposit of each contribution and the name, address, occupation, and employer of each contributor making a contribution aggregating more than $100 during an election period, which was not previously reported; provided that if all the information is not on file, the contribution shall be returned to the contributor within thirty days of deposit;

(2) All expenditures, including the name and address of each payee and the amount, date, and purpose of each expenditure. Expenditures for consultants, advertising agencies and similar firms, credit card payments, salaries, and candidate reimbursements shall be itemized to permit a

(Continued on following page)

reasonable person to determine the ultimate intended recipient of the expenditure and its purpose;

(3) The amount, date of deposit, and description of other receipts and the name and address of the source of each of the other receipts;

(4) A description of each durable asset, the date of acquisition, value at the time of acquisition, and the name and address of the vendor or contributor of the asset; and

(5) The date of disposition of a durable asset, value at the time of disposition, method of disposition, and name and address of the person receiving the asset.

(c) No loan may be made or received by a noncandidate committee.

(d) The authorized person in the case of a party, or treasurer in the case of a noncandidate committee that is not a party, shall file a late contribution report as provided in section 11-W if the committee receives late contributions from any person aggregating more than $500 or makes late contributions aggregating more than $500.

HRS-11-336

Time for noncandidate committee to file preliminary, final, and supplemental reports

(a) The filing dates for preliminary reports are:

(1) Ten calendar days prior to a primary, special, or nonpartisan election; and

(2) Ten calendar days prior to a general election.

Each preliminary report shall be current through the fifth calendar day prior to the filing of the report.

(b) The filing date for the final primary report is twenty calendar days after the primary, initial special, or initial nonpartisan election. The report shall be current through the day of the applicable election.

(c) The filing date for the final election period report is thirty calendar days after a general, subsequent special, or subsequent nonpartisan election. The report shall be current through the day of the applicable election.

(d) The filing dates for supplemental reports are:

(1) January 31; and

(2) July 31 after an election year.

The report shall be current through December 31 for the report filed on January 31 and current through June 30 for the report filed on July 31.

(e) The authorized person in the case of a party, or treasurer in the case of any other noncandidate committee, shall continue to file all reports until the committee's registration is terminated as provided in section 11-326.[3]

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[3] In the 2010 Act, this section reads:

(a) The filing dates for preliminary reports are:

(1) Ten calendar days prior to a primary, special, or nonpartisan election; and

(2) Ten calendar days prior to a general election.

Each preliminary report shall be current through the fifth calendar day prior to the filing of the report.

(b) The filing date for the final primary report is twenty calendar days after the primary, initial special, or initial nonpartisan election. The report shall be current through the day of the applicable election.

(c) The filing date for the final election period report is thirty calendar days after a general, subsequent special, or subsequent nonpartisan election. The report shall be current through the day of the applicable election.

(d) The filing dates for supplemental reports are:

(1) January 31 after an election year; and

(2) July 31 after an election year.

The report shall be current through December 31 for the report filed on January 31 and current through June 30 for the report filed on July 31.

(e) The authorized person in the case of a party, or treasurer in the case of any other noncandidate committee, shall continue to file all reports until the committee's registration is terminated as provided in section 11-O.

HRS-11-339

Final election period report for candidate committee or noncandidate committee receiving and expending $1,000 or less during the election period

(a) Any provision of law to the contrary notwithstanding, a candidate committee or noncandidate committee whose aggregate contributions and aggregate expenditures for the election period total $1,000 or less, shall electronically file only a final election period report, and need not file a preliminary and final primary report, a preliminary and final general report, or a special election report.

(b) Until the candidate committee's or noncandidate committee's registration is terminated as provided in section 11-326, supplemental reports and other reports required by this part shall be filed.

HRS-11-340

Failure to file report; filing a substantially defective or deficient report

(a) True and accurate reports shall be filed with the commission on or before the due dates specified in this part. The commission may assess a fine against a person that is required to file a report under this part if the report is not filed by the due date or if the report is substantially defective or deficient, as determined by the commission.

(b) The fine for not filing a report by the due date, if assessed, shall not exceed $50 per day for the first seven days, beginning with the day after the due date of the report, and shall not exceed $200 per day thereafter; provided that:

(1) In aggregate, the fine shall not exceed twenty-five per cent of the total amount of contributions or expenditures, whichever is greater, for the period covered by the report; and

(2) The minimum fine for a report filed more than four days after the due date, if assessed, shall be $200.

(c) Subsection (b) notwithstanding, if a candidate committee does not file the second preliminary primary report or the preliminary general report, or if a noncandidate committee does not file the preliminary primary report or the preliminary general report by the due date, the fine, if assessed, shall not exceed $300 per day; provided that:

(1) In aggregate, the fine shall not exceed twenty-five per cent of the total amount of contributions or expenditures, whichever is greater, for the period covered by the report; and

(2) The minimum fine, if assessed, shall be $300.

(d) If the commission determines that a report is substantially defective or deficient, the commission shall notify the candidate committee by first class mail that:

(1) The report is substantially defective or deficient; and

(2) A fine may be assessed.

(e) If the corrected report is not filed with the commission's electronic filing system on or before the fourteenth day after the notice of defect or deficiency has been mailed, the fine, if assessed, for a substantially defective or deficient report shall not exceed $50 per day for the first seven days, beginning with the fifteenth day after the notice was sent, and shall not exceed $200 per day thereafter; provided that:

(1) In aggregate, the fine shall not exceed twenty-five per cent of the total amount of contributions or expenditures, whichever is greater, for the period covered by the report; and

(2) The minimum fine for not filing a corrected report more than eighteen days after the notice, if assessed, shall be $200.

(f) The commission shall publish on its website the names of all candidate committees that have failed to:

(1) File a report; or

(2) Correct a report within the time allowed by the commission.

(g) All fines collected under this section shall be deposited into the general fund.[4]

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[4] In the 2010 Act, this section reads:

(a) True and accurate reports shall be filed with the commission on or before the due dates specified in this part. The commission may assess a fine against a candidate committee or noncandidate committee that is required to file a report under this part if the report is not filed by the due date or if the report is substantially defective or deficient, as determined by the commission.

(b) The fine for not filing a report by the due date, if assessed, shall not exceed $50 per day for the first seven days, beginning with the day after the due date of the report, and shall not exceed $200 per day thereafter; provided that:

(1) In aggregate, the fine shall not exceed twenty-five per cent of the total amount of contributions or expenditures, whichever is greater, for the period covered by the report; and

(2) The minimum fine for a report filed more than four days after the due date, if assessed, shall be $200.

(c) Subsection (b) notwithstanding, if a candidate committee does not file the second preliminary primary report or the preliminary general report, or if a noncandidate committee does not file the preliminary primary report or the preliminary general report by the due date, the fine, if assessed, shall not exceed $300 per day; provided that:

(1) In aggregate, the fine shall not exceed twenty-five per cent of the total amount of contributions or expenditures,

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whichever is greater, for the period covered by the report; and

(2) The minimum fine, if assessed, shall be $300.

(d) If the commission determines that a report is substantially defective or deficient, the commission shall notify the candidate committee by first class mail that:

(1) The report is substantially defective or deficient; and

(2) A fine may be assessed.

(e) If the corrected report is not filed with the commission's electronic filing system on or before the fourteenth day after the notice of defect or deficiency has been mailed, the fine, if assessed, for a substantially defective or deficient report shall not exceed $50 per day for the first seven days, beginning with the fifteenth day after the notice was sent, and shall not exceed $200 per day thereafter; provided that:

(1) In aggregate, the fine shall not exceed twenty-five per cent of the total amount of contributions or expenditures, whichever is greater, for the period covered by the report; and

(2) The minimum fine for not filing a corrected report more than eighteen days after the notice, if assessed, shall be $200.

(f) The commission shall publish on its website the names of all candidate committees that have failed to:

(1) File a report; or

(2) Correct a report within the time allowed by the commission.

(g) All fines collected under this section shall be deposited into the general fund.

HRS-11-341

Electioneering communications; statement of information

(a) Each person who makes an expenditure for electioneering communications in an aggregate amount of more than $2,000 during any calendar year shall file with the commission a statement of information within twenty-four hours of each disclosure date provided in this section.

(b) Each statement of information shall contain the following:

(1) The name of the person making the expenditure, name of any person or entity sharing or exercising discretion or control over the person, and the custodian of the books and accounts of the person making the expenditure;

(2) The names and titles of the executives or board of directors who authorized the expenditure, if the expenditure was made by a noncandidate committee, business entity, or an organization;

(3) The state of incorporation or formation and principal address of the noncandidate committee, business entity, or organization or for an individual, the name, address, occupation, and employer of the individual making the expenditure;

(4) The amount of each expenditure during the period covered by the statement and the identification of the person to whom the expenditure was made;

(5) The elections to which the electioneering communications pertain and the names of any clearly identifiable candidates and whether those candidates are supported or opposed;

(6) If the expenditures were made by a candidate committee or noncandidate committee, the names and addresses of all persons who contributed to the candidate committee or noncandidate committee for the purpose of publishing or broadcasting the electioneering communications;

(7) If the expenditures were made by an organization other than a candidate committee or noncandidate committee, the names and addresses of all persons who contributed to the organization for the purpose of publishing or broadcasting the electioneering communications;

(8) Whether or not any electioneering communication is made in coordination, cooperation, or concert with or at the request or suggestion of any candidate, candidate committee, or noncandidate committee, or agent of any candidate if any, and if so, the identification of the candidate, candidate committee, or noncandidate committee, or agent involved; and

(9) The three top contributors as required under section 11-393, if applicable.

(c) An electioneering communication statement of information filed pursuant to this section shall be in addition to the filing of any other report required under this part.

(d) For purposes of this section:

"Disclosure date" means, for every calendar year, the first date by which a person has made expenditures during that same year of more than $2,000 in the aggregate for electioneering communications, and the date of any subsequent expenditures by that person for electioneering communications.

"Electioneering communication" means any advertisement that is broadcast from a cable, satellite, television, or radio broadcast station; published in any periodical or newspaper or by electronic means; or sent by mail at a bulk rate, and that:

(1) Refers to a clearly identifiable candidate;

(2) Is made, or scheduled to be made, either within thirty days prior to a primary or initial special election or within sixty days prior to a general or special election; and

(3) Is not susceptible to any reasonable interpretation other than as an appeal to vote for or against a specific candidate.

"Electioneering communication" shall not include communications:

(1) In a news story or editorial disseminated by any broadcast station or publisher of periodicals or newspapers, unless the facilities are owned or controlled by a candidate, candidate committee, or noncandidate committee;

(2) That constitute expenditures by the expending organization;

(3) In house bulletins; or

(4) That constitute a candidate debate or forum, or solely promote a debate or forum and are made by or on behalf of the person sponsoring the debate or forum.

(e) For purposes of this section, a person shall be treated as having made an expenditure if the person has executed a contract to make the expenditure.[5]

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[5] In the 2010 Act, this section reads:

(a) Each person who makes a disbursement for electioneering communications in an aggregate amount of more than $2,000 during any calendar year shall file with the commission a statement of information within twenty-four hours of each disclosure date provided in this section.

(b) Each statement of information shall contain the following:

(1) The name of the person making the disbursement, name of any person or entity sharing or exercising discretion or control over such person, and the custodian of the books and accounts of the person making the disbursement;

(2) The state of incorporation and principal place of business or, for an individual, the address of the person making the disbursement;

(3) The amount of each disbursement during the period covered by the statement and the identification of the person to whom the disbursement was made;

(4) The elections to which the electioneering communications pertain and the names, if known, of the candidates identified or to be identified;

(5) If the disbursements were made by a candidate committee or noncandidate committee, the names and addresses of all persons who contributed to the candidate committee or noncandidate committee for the

(Continued on following page)

purpose of publishing or broadcasting the electioneering communications;

(6) If the disbursements were made by an organization other than a candidate committee or noncandidate committee, the names and addresses of all persons who contributed to the organization for the purpose of publishing or broadcasting the electioneering communications; and

(7) Whether or not any electioneering communication is made in coordination, cooperation, or concert with or at the request or suggestion of any candidate, candidate committee, or noncandidate committee, or agent of any candidate if any, and if so, the identification of the candidate, a candidate committee or a noncandidate committee, or agent involved.

(c) For purposes of this section:

"Disclosure date" means, for every calendar year, the first date by which a person has made disbursements during that same year of more than $2,000 in the aggregate for electioneering communications, and the date of any subsequent disbursements by that person for electioneering communications.

"Electioneering communication" means any advertisement that is broadcast from a cable, satellite, television, or radio broadcast station; published in any periodical or newspaper; or sent by mail at a bulk rate, and that:

(1) Refers to a clearly identifiable candidate;

(2) Is made, or scheduled to be made, either within thirty days prior to a primary or initial special election or within sixty days prior to a general or special election; and

(3) Is not susceptible to any reasonable interpretation other than as an appeal to vote for or against a specific candidate.

"Electioneering communication" shall not include communications:

(Continued on following page)

(1) In a news story or editorial disseminated by any broadcast station or publisher of periodicals or newspapers, unless the facilities are owned or controlled by a candidate, candidate committee, or noncandidate committee;

(2) That constitute expenditures by the disbursing organization;

(3) In house bulletins; or

(4) That constitute a candidate debate or forum, or solely promote a debate or forum and are made by or on behalf of the person sponsoring the debate or forum.

(d) For purposes of this section, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

HRS-11-351

Contributions, generally

(a) Monetary contributions and other campaign funds shall be promptly deposited in a depository institution, as defined by section 412:1-109, duly authorized to do business in the State, including a bank, savings bank, savings and loan association, depository financial services loan company, credit union, intra-Pacific bank, or similar financial institution, the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration in the name of the candidate, candidate committee, or noncandidate committee, whichever is applicable.

(b) A candidate, candidate committee, or noncandidate committee, shall not accept a contribution of more than $100 in cash from a single person without issuing a receipt to the contributor and keeping a record of the contribution.

(c) Each candidate committee or noncandidate committee shall disclose the original source of all earmarked funds, the ultimate recipient of the earmarked funds, and the fact that the funds are earmarked.

HRS-11-355

Contributions by state and county contractors prohibited

(a) It shall be unlawful for any person who enters into any contract with the State, any of the counties, or any department or agency thereof either for the rendition of personal services, the buying of property, or furnishing of any material, supplies, or equipment to the State, any of the counties, any department or agency thereof, or for selling any land or building to the State, any of the counties, or any department or agency thereof, if payment for the performance of the contract or payment for material, supplies, equipment, land, property, or building is to be made in whole or in part from funds appropriated by the legislative body, at any time between the execution of the contract through the completion of the contract, to:

(1) Directly or indirectly make any contribution, or promise expressly or impliedly to make any contribution to any candidate committee or noncandidate committee, or to any candidate or to any person for any political purpose or use; or

(2) Knowingly solicit any contribution from any person for any purpose during any period.

(b) Except as provided in subsection (a), this section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any noncandidate committee by any person other than the state or county contractor for the

purpose of influencing the nomination for election, or the election of any person to office.

(c) For purposes of this section, "completion of the contract" means that the parties to the government contract have either terminated the contract prior to completion of performance or fully performed the duties and obligations under the contract, no disputes relating to the performance and payment remain under the contract, and all disputed claims have been adjudicated and are final.

HRS-11-391

Advertisements

(a) Any advertisement that is broadcast, televised, circulated, published, distributed, or otherwise communicated, including by electronic means, shall:

(1) Contain the name and address of the candidate, candidate committee, noncandidate committee, or other person paying for the advertisement;

(2) Contain a notice in a prominent location stating either that:

(A) The advertisement has the approval and authority of the candidate; provided that an advertisement paid for by a candidate, candidate committee, or ballot issue committee does not need to include the notice; or

(B) The advertisement has not been approved by the candidate; and

(3) Not contain false information about the time, date, place, or means of voting.

(b) The fine for violation of this section, if assessed by the commission, shall not exceed $25 for each advertisement that lacks the information required by

this section or provides prohibited information, and shall not exceed an aggregate amount of $5,000.[6]

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[6] In the 2010 Act, this section reads:

(a) Any advertisement shall contain:

(1) The name and address of the candidate, candidate committee, noncandidate committee, or other person paying for the advertisement; and

(2) A notice in a prominent location stating either that:

(A) The advertisement is published, broadcast, televised, or circulated with the approval and authority of the candidate; provided that an advertisement paid for by a candidate, candidate committee, or ballot issue committee does not need to include the notice; or

(B) The advertisement is published, broadcast, televised, or circulated without the approval and authority of the candidate.

(b) The fine for violation of this section, if assessed by the commission, shall not exceed $25 for each advertisement that lacks the information required by this section, and shall not exceed an aggregate amount of $5,000.

Hawaii Administrative Rules
from Westlaw, July 13, 2015

HAR-3-160-6

"Expressly advocating", defined.

"Expressly advocating" means a communication when taken as a whole and with limited reference to external events, could be susceptible to no other reasonable interpretation but as an exhortation to vote for or against a candidate because:

(1) The communication is unmistakable, unambiguous, and suggestive of only one meaning;

(2) The communication presents a clear plea for action and is not merely informative; and

(3) Reasonable minds could not differ as to whether the communication encourages actions to elect or defeat a clearly identified candidate or encourages some other kind of action.

HAR-3-160-21

Noncandidate committee registration and reports.

(a) Any committee, including a federal political action committee or a committee registered in another state, must register as a noncandidate committee if it receives contributions or makes expenditures, the aggregate amount of which is more than $1,000, in a two-year election period.

(b) The noncandidate committee's reports must include information about: its (1) expenditures (e.g., contributions to Hawaii state and local candidates) and; (2)[ ]contributions received by the noncandidate committee that are equal to or greater than the expenditures.

(c) The noncandidate committee must segregate contributions and expenditures to Hawaii committees in a separate bank account or by a ledger account in the noncandidate committee's main account.

HAR-3-160-48

Electioneering communications.

A noncandidate committee registered with the commission is not required to file a statement of information for disbursements for electioneering communications.