No. 12-15913

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jimmy Yamada and Russell Stewart,

Plaintiffs,

A-1 A-Lectrician, Inc.,

Plaintiff-Appellant,

v.

Michael Weaver, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Hawaii,
Case No. 1:10-CV-00497-JMS-RLP

BRIEF *AMICUS CURIAE* FOR THE CAMPAIGN LEGAL CENTER SUPPORTING APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center (CLC) is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Campaign Legal Center neither has a parent corporation nor issues stock.

There are no publicly held corporations that own ten percent or more of the stock of The Campaign Legal Center.

/s/ Paul S. Ryan
Paul S. Ryan

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center (CLC) is a nonprofit, nonpartisan organization that works to strengthen laws governing campaign finance and political disclosure. The CLC has participated in numerous cases addressing campaign finance issues, including *Citizens United v. FEC*, 130 S. Ct. 876 (2010), *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL*"), and *Human Life of Washington v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) ("*HLW*"). *Amicus* thus has a longstanding, demonstrated interest in the laws at issue here.

SUMMARY OF ARGUMENT

Plaintiff-appellant A-1 A-Lectrician, Inc. ("A-1") wishes to spend in Hawaii elections without meaningful disclosure and to contribute money to state candidates while holding state contracts. To this end, it challenges a number of Hawaii's campaign finance disclosure requirements and its ban on contractor contributions. As the district court below found, however, its challenge wholly lacks legal merit. *Yamada v. Weaver*, No. 10-497, 2012 WL 983559 (D. Haw. Mar. 21, 2012).

A-1 styles its disclosure case as a challenge to the definitions of (1) "expenditure" and "non-candidate committee," Haw. Rev. Stat. ("HRS") § 11-302;

[1] Counsel for Appellant and Appellees have been contacted and all parties, through counsel, have consented to the participation of the CLC as *amicus curiae*.

(2) "electioneering communication" ("EC"), HRS § 11-341; and (3) "advertisement," HRS § 11-391. *See* Plaintiff-Appellant A-1's Principal Brief, at 21-22 (July 31, 2012) ("A-1 Br."). But these provisions effectuate only campaign finance reporting, registration and disclaimer requirements in this case. And there is no support in the precedent of the Supreme Court or this Circuit for A-1's attempt to evade such disclosure obligations. *Citizens United*, 130 S. Ct. at 916 (noting that "transparency" "enables the electorate to make informed decisions and give proper weight to different speakers and messages"); *HLW*, 624 F.3d at 1017 (holding that political disclosure is "integral" to "the American ideal of government") (citation omitted).

First, A-1 has no basis for asserting that the inclusion of the "functional equivalent" test in Hawaii's definitions of "EC," "expenditure" and "advertisement" renders the laws unconstitutionally vague. To question the constitutionality of this test—which was created and applied by the Supreme Court in *WRTL* and *Citizens United*—would effectively require this Court to question the Supreme Court. Second, in this case, where only disclosure requirements are at issue, application of the "major purpose" test is not constitutionally required. In *HLW*, this Court unequivocally "rejected the notion that the First Amendment categorically prohibits the government from imposing disclosure requirements on groups with more than one 'major purpose'… ." 624 F.3d at 1011.

A-1's as-applied challenge to Hawaii's contractor contribution ban, HRS § 11-355, fares no better. The ban is more than justified by Hawaii's important interest in preventing political corruption and the appearance thereof, as well as in insulating the procurement process from political influence. Indeed, fueled by similar concerns about corruption, numerous jurisdictions throughout the nation have enacted comparable "pay-to-play" laws, and such laws overwhelmingly have been upheld by the courts.

For all these reasons, the district court's decision below should be affirmed.

ARGUMENT

I. Hawaii's Disclosure Laws Are Not Unconstitutionally Vague.

Several of the disclosure provisions A-1 challenges utilize the test for "the functional equivalent of express advocacy" formulated by the Supreme Court in *WRTL*, either due to their statutory language or as a result of judicial construction. *Yamada*, 2012 WL 983559, at *20 (construing definition of "expenditure" to encompass only express advocacy or its functional equivalent); *id.* at *27 (construing definition of "advertisement" to cover only express advocacy or its functional equivalent); HRS § 11-341(c) (defining "electioneering communication").[2]

[2] *Amicus* agrees with the district court's conclusion that A-1 lacks standing to challenge the EC-related provisions. 2012 WL 983559, at *26. But even if A-1 had standing, its arguments lack legal basis.

A-1 maintains that the inclusion of the Supreme Court's "functional equivalent" test in these Hawaii laws represents a constitutional defect, suggesting that *Citizens United* eliminated the "significance" of the *WRTL* test. A-1 Br. 46-47. In the alternative, A-1 claims that the *WRTL* test is vague when used as a "free-standing" test, arguing that it is unconstitutional insofar as it applies under state law to speech not covered by the federal definition of "EC." A-1 Br. 45-46. These claims have no merit and are at odds with recent Supreme Court precedent.

A. The Constitutionality of the "Functional Equivalent" Definition Is Supported by *WRTL* and *Citizens United*.

The "functional equivalent" test included in Hawaii's statutory definition of "EC" and added to its definitions of "expenditure" and "advertisement" is the product of a Supreme Court decision. A-1's attempt to invalidate this part of the challenged definitions is tantamount to a demand that this Court override the Supreme Court.

In *WRTL*, the Supreme Court reviewed Title II of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which prohibited the use of corporate or union treasury funds to pay for an EC. 2 U.S.C. § 441b(b)(2). Because this Title II funding restriction had been upheld against a facial challenge in *McConnell v. FEC*, 540 U.S. 93, 207 (2003), WRTL brought an as-applied challenge, asserting that the restriction was unconstitutional as applied to its three proposed ECs because the communications did not represent the "functional equivalent of

express advocacy." Chief Justice Roberts agreed with the plaintiff, and interpreted *McConnell* as upholding the Title II funding restriction only insofar as ECs constituted "the functional equivalent of express advocacy." *WRTL*, 551 U.S. at 456. The Chief Justice then formulated a test to delineate speech that would qualify as "the functional equivalent of express advocacy," holding that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70 (emphasis added). Applying this "functional equivalent" test, the Court held that WRTL's ads were not the functional equivalent of express advocacy and accordingly were exempt from the funding restriction. *Id.* at 476.

Far from eliminating *WRTL*'s "functional equivalent" test, as A-1 suggests, the *Citizens United* Court actually applied the test to the communications at issue there. In the district court, Citizens United challenged the federal EC funding restriction as applied to its film, *Hillary: the Movie*, but in its petition for Supreme Court review, it broadened its case to question the constitutionality of the federal restriction on corporate spending in its entirety, *see* 2 U.S.C. § 441b. To determine how broadly the Court would have to rule in order to decide the expanded case, the *Citizens United* Court applied the *WRTL* test to *Hillary*. Had *Hillary* not met *WRTL*'s test for the "functional equivalent of express advocacy," then the film

would not have been prohibited by the EC funding restriction, and the case could have been resolved on these "narrower grounds." *Citizens United*, 130 S. Ct. at 888-89. Instead, the Court determined that "[u]nder the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy," and decided it was obligated to review the broader challenge to section 441b. *Id.* at 890. The fact that the *Citizens United* Court applied the *WRTL* test without difficulty, however, belies A-1's suggestion that the Court considered this test vague. *See also Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 551 (4th Cir. 2012) ("*RTAA*").

In the alternative, A-1 argues that Hawaii's reliance on the *WRTL* test is vague because the test is only permissible when used in conjunction with the federal "EC" definition. More specifically, A-1 claims that the *WRTL* test, as a judicial narrowing gloss of the terms "expenditure" and "advertisement," is unconstitutional because it was not meant to function as a "free-standing" test. A-1 Br. 46. And even when used as a part of Hawaii's statutory definition of "EC," the *WRTL* test is still unconstitutional, A-1 alleges, because the state definition allegedly "reaches beyond" the "boundaries" of the federal definition. A-1 Br. 81.

But Justice Roberts did not condition the validity of his test on its use in conjunction with the federal "EC" definition. To the contrary, the Chief Justice noted that his test met "the imperative for clarity in this area," explaining that the

"express advocacy" standard formulated in *Buckley v. Valeo*, 424 U.S. 1 (1976), was not "the constitutional standard for clarity." *WRTL*, 551 U.S. at 474 n.7.

And even in the abstract, A-1's argument makes no sense. Using the "functional equivalent" test in connection with the federal "EC" definition would only address overbreadth concerns, not vagueness concerns: if the language of the *WRTL* test is not vague within the pre-election period regulated by Title II, as the Chief Justice's opinion holds, it is not vague outside that time frame either. Adding the time frame or other elements of the definition would only cabin the effect of vagueness, not cure it.

Even more tenuous is A-1's argument that the "functional equivalent" test is vague even when used as a part of Hawaii's definition of "EC." Except for its inclusion of the "functional equivalent" test, the definition of "EC" under state law is virtually identical to the definition of "EC" under federal law. *Compare* 2 U.S.C. § 434(f)(3)(A)(i). To be sure, there are a few minor discrepancies between the federal and state definitions of "EC": for instance, the federal definition covers only broadcast, cable and satellite communications, whereas Hawaii law also covers print communications. *See* A-1 Br. 46. But A-1 does not—and cannot—provide any reason why the inclusion of print communications in Hawaii's definition would render the *WRTL* test vague. The language and substance of the

test remains the same regardless of whether an advertisement is distributed via broadcast media or print.

The district court was thus correct in rejecting A-1's vagueness and overbreadth challenges to the use of the "functional equivalent" test in Hawaii's disclosure laws. If the *WRTL* test is constitutional, then the challenged definitions necessarily are too.

B. Lower Court Decisions Following *Citizens United* Have Recognized the Validity of *WRTL*'s "Functional Equivalent of Express Advocacy" Test.

Along with the district court below, the First, Fourth, Ninth and Eleventh Circuits have endorsed *WRTL*'s "functional equivalent" test following the Supreme Court's decisions in *WRTL* and *Citizens United*. A-1 offers only outdated authority to the contrary. A-1 Br. 44.

Indeed, A-1 acknowledges that the controlling case in this Circuit, *HLW*, spoke approvingly of the *WRTL* test, although it attempts to minimize the discussion as "dictum." A-1 Br. 40. But the *HLW* Court applied the *WRTL* test to Human Life's communications at issue in the case, concluding that they "constitute[d] the functional equivalent of express advocacy under *WRTL*," and could therefore be constitutionally subject to disclosure. 624 F.3d at 1015. Thus, while *HLW* did not review a direct challenge to the constitutionality of the *WRTL* test, its decision left little doubt that this Court recognized the test's legitimacy.

A-1 also concedes that the First Circuit Court of Appeals endorsed the *WRTL* test, and applied it—as the district court did here—to narrow a potentially vague state disclosure law. A-1 Br. 51-52. In *National Organization for Marriage (NOM) v. McKee*, 649 F.3d 34 (1st Cir. 2011), the First Circuit reviewed a challenge to the use of the word "influence" in several provisions of Maine's campaign finance law, including the state definition of "non-major-purpose PAC," Me. Rev. Stat. tit. 21–A, § 1052(5)(A)(5). *See* 649 F.3d at 64 n.42. The Court of Appeals expressed concerns that this language was vague, and adopted a narrowing interpretation suggested by the defendant state agency, namely, that the terms "influencing" and "influence" be construed to include only "communications and activities that expressly advocate for or against [a candidate] or that clearly identify a candidate by apparent and unambiguous reference and <u>are susceptible of no reasonable interpretation other than to promote or oppose the candidate</u>." *Id*. at 66-67 (emphasis added).

In addition to using the "functional equivalent" test as a narrowing construction, the court also approved Maine's definition of "expressly advocating," which used language that closely tracked *WRTL*'s "functional equivalent" test. *Id.* at 67-68 (citing Me. Code R. § 10(2)(B)). As A-1 does here, NOM contended that "*Citizens United* eliminated 'the appeal-to-vote test as a constitutional limit on government power,'" and "read[] into this an implicit holding that the test was

unconstitutionally vague." *Id*. at 68-69. The First Circuit rejected this contention, however, holding that *Citizens United* "offered no view on the clarity of the appeal-to-vote test" and noting that the Supreme 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." *Id*. at 69.

In a similar vein, the Fourth Circuit Court of Appeals rejected a vagueness challenge to a federal definition of "expressly advocate," 11 C.F.R. 100.22(b), that is virtually identical to the *WRTL* test. *RTAA*, 681 F.3d at 550-53. A-1 claims that *RTAA* did not address the vagueness arguments raised in this case, but RTAA was represented by the same counsel and advanced virtually identical arguments as A-1 does here.[3] A-1 Br. at 49. The Fourth Circuit rejected RTAA's challenge, highlighting that the challenged rule was consistent with the *WRTL* test, which "the controlling opinion [in *WRTL*] specifically stated was not 'impermissibly vague.'" *RTAA*, 681 F.3d at 552. The Fourth Circuit also found that "*Citizens United* also supports the Commission's use of a functional equivalent test in defining 'express advocacy.'" *Id.* at 551.

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[3] RTAA argued, *inter alia*: the *WRTL* test "is not free-floating and is unconstitutionally vague outside its electioneering-communication context"; and "absent the brightline context of the electioneering-communication definition, *WRTL-II* agrees that the appeal-to-vote test is unconstitutionally vague." Brief of Appellant at 34-35, *RTAA*, 681 F.3d 544 (No. 11-1760), 2011 WL 4352260.

Finally, the Eleventh Circuit Court of Appeals recently upheld Florida's definition of "EC" and related disclosure statute, which incorporates *WRTL*'s "functional equivalent" test. *Nat'l Org. for Marriage v. Roberts*, 753 F. Supp. 2d 1217 (N.D. Fla. 2010), *aff'd per curiam*, No. 11-1493, 2012 WL 1758607 (11th Cir. 2012) ("*NOM*"). *See also* Fla. Stat. § 106.011(18). The district court rejected plaintiffs' contention that inclusion of language drawn from the *WRTL* test rendered the statute vague and overbroad, holding that the test "provides an objective standard that was created and applied by the United States Supreme Court" in *WRTL*. *NOM*, 753 F. Supp. 2d at 1221. The Court also rejected A-1's argument that *Citizens United* cast doubt on the validity of the *WRTL* test, finding that "[f]ar from overruling *WRTL*, the Court [in *Citizens United*] embraced a straightforward application of the appeal to vote test." *Id*. at 1220.

II. Hawaii's Definition of "Non-Candidate Committee" Is Not Overbroad.

In addition to charging that Hawaii's definition of "non-candidate committee" is vague, A-1 also claims that it is overbroad because it may cover groups whose "major purpose" does not relate to the nomination or election of a candidate. A-1 Br., Section VI.F and 74-75, n.49. But the definition here effectuates only registration, reporting and disclaimer requirements, not the contribution limits and source restrictions that often attend federal political

committee status. This Court made clear in *HLW* that the "major purpose" test is not a prerequisite for the application of disclosure requirements.

A. The Major Purpose Test Does Not Apply.

This Court held in *HLW* that a group need not meet the "major purpose" test in order to be subject to disclosure. 624 F.3d at 1009-10.

The Supreme Court first formulated the "major purpose" test in *Buckley* to address the constitutional concern that the definition of "political committee" in the Federal Election Campaign Act ("FECA") was vague and overbroad to the extent it relied upon the statutory definition of "expenditure." FECA defined a "political committee" as a group that "receives contributions" or "makes expenditures" "aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). The statute in turn defined "expenditure" as any spending "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). The Court recognized that this expansive definition of "expenditure" potentially "encompass[ed] both issue discussion and advocacy of a political result." *Buckley*, 424 U.S. at 78-79. Furthermore, it feared that the "political committee" definition "could raise similar vagueness problems," because it relied upon the vague term "expenditure," and thus "could be interpreted to reach groups engaged purely in issue discussion." *Id*. at 79.

To resolve its concerns about the definition of "political committee," the *Buckley* Court narrowed the definition to encompass only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* (emphasis added). For such "major purpose" groups, there was no vagueness concern about the statutory "for the purpose of influencing" definition of "expenditure" because, the Supreme Court held, disbursements by such "major purpose" groups "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.*

The "major purpose" test was thus intended to narrow the federal definition of "political committee" to ensure that political committee requirements would not "reach groups engaged purely in issue discussion." *Id*. (emphasis added). But the Supreme Court did not state that the "major purpose" test was the only method of ensuring that groups engaged purely in issue advocacy would not be captured. This was recognized in *HLW:*

> *Buckley*'s statement that defining groups with "the major purpose" of political advocacy as political committees is sufficient "[t]o fulfill the purposes of the Act," … does not indicate that an entity must have that major purpose to be deemed constitutionally a political committee. … Rather, in stating that disclosure requirements (1) cannot cover "groups engaged purely in issue discussion" and (2) can cover 'groups the major purpose of which is the nomination or election of a candidate,' the *Buckley* Court

> defined the outer limits of permissible political committee regulation.

624 F.3d at 1009-10 (internal citations and quotations omitted). Or, as the district court below explained, the "major purpose" test "articulates only a safe harbor (from a regulatory perspective)." 2012 WL 983559, at *17. Groups meeting the "major purpose" test certainly can "safely" be subject to political committee regulation, but it does not necessarily follow that groups with multiple purposes must be exempt from all regulation, even disclosure requirements, as A-1 claims. Instead, when a group does not fall into the "major purpose" safe harbor, the permissibility of the disclosure regulation will "depend[] on whether the burdens imposed by the disclosure requirements are substantially related to the government's important informational interest." *HLW*, 624 F.3d at 1010. As the district court found, the challenged disclosure requirements are substantially related to the government's interest in informing the electorate and preventing political corruption. 2012 WL 983559, at *21-*24.

A-1 argues, however, that although *HLW* may have approved the application of disclosure to non-major purpose groups, it allowed disclosure only insofar as a group had ballot measure advocacy as "a primary purpose." A-1 Br. 68-69. It then attempts to distinguish Hawaii's law on grounds that it imposes political committee status on organizations that simply have "the purpose of ... making expenditures ... to influence" the election of a candidate. 2012 WL 983559, at *5 (emphasis

added) (quoting HRS § 11-302). But the *HLW* Court did not replace the "major purpose" test with a "primary purpose" test. It focused on groups with "a primary purpose" only because the Washington state law at issue had been construed to require certain groups to register as committees if the "primary or one of the primary purposes" of the group was "to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." 624 F.3d at 997. The Court itself was careful to note that "we do not hold that the word 'primary' or its equivalent is constitutionally necessary." *Id.* at 1011.

Instead, the only requirement articulated by the *HLW* Court for a law imposing political committee status was that it avoid "sweeping into its purview groups that only incidentally engage in such advocacy." *Id.* Here, as the district court found, the "non-candidate committee" definition meets this requirement by explicitly exempting groups devoted exclusively to issue advocacy and establishing a $1,000 monetary threshold for political committee status. 2012 WL 983559, at *23, *citing* HRS § 11-321(g). Further, with respect to A-1's as-applied claim, even if this Court gives credence to A-1's claims that it plans to reduce its political activities in the future, *see* A-1 Br. 26-28, A-1 still admits that it intends to spend at least $9,000 on "expenditures." The district court thus reasonably concluded that A-1 intends to engage in more than incidental campaign activity.

The recent decision by the Eighth Circuit Court of Appeals in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012) ("*MCCL*"), although incorrectly reasoned, does not necessarily compel a different conclusion. There, the Eighth Circuit considered a Minnesota disclosure law that required associations making more than $100 in independent expenditures to register a "political fund," file regular reports and comply with a range of organizational requirements. Minn. Stat. § 10A.12, subdiv. 1a. The Court of Appeals upheld much of the "political fund" disclosure regime, but struck down the "ongoing" reporting requirement as applied to non-major purpose groups, stating that an "event-driven" reporting requirement would adequately address the government's interests in disclosure. 2012 WL 3822216, at *10. *Amicus* believes the Eighth Circuit was unduly stringent in its review of the law: although the Court claimed to apply "exacting scrutiny," it incorrectly held each aspect of Minnesota's disclosure regime to the "least restrictive means" standard that should be reserved for strict scrutiny review. *Id.* at *9. However, even the *MCCL* decision did not purport to establish the "major purpose" test as a prerequisite for all "political committee"-style disclosure requirements, as A-1 urges here. To the contrary, the Court let stand the majority of Minnesota's disclosure requirements applicable to "non-major purpose" political funds. Consequently, although the reasoning of *MCCL* diverges from *HLW*, it is thus unclear whether the Eighth Circuit would

have reached a different result than the Ninth Circuit in *HLW*, or the district court here.

B. "Non-Candidate Committee" Status in This Case Implicates Only Disclosure Requirements.

In a second attempt to differentiate this case from *HLW*, A-1 claims that non-candidate committees in Hawaii are not only subject to disclosure requirements, but also to the following fundraising restrictions:

- Limits on contributions received. HRS.11-358 (limit); HRS.11-359.a (minors); HRS.11-361 (aggregation); HRS.11-364 (refunds/escheat); HRS.11-373 (loans), and

- Contribution-source bans. HRS.11-352 (in another's name); HRS.11-353 (anonymous); HRS.11-355 (state and county contractors); HRS.11-356 (foreign nationals and foreign corporations); 2 U.S.C. 441b.a, 441b.b.2 (2002) (national banks and national corporations), 441e (2002) (foreign nationals, including foreign corporations)

A-1 Br. 62. But A-1 is not subject to most of the "contribution limits" and "contribution-source bans" cited above, and even those provisions that apply to A-1 implement disclosure requirements, not fundraising restrictions.

First, A-1 is currently not subject to the cited contribution limits, and in any event, has not alleged any plans to raise contributions.

Prior to this challenge, Hawaii imposed contribution limits, HRS § 11-358, on non-candidate committees making only independent expenditures. However, this court permanently enjoined those limits on March 21, 2012, and thus

"independent-expenditure-only committees" are subject to no limitations on their fundraising.[4] 2012 WL 983559, at *15. As A-1 concedes, it is currently a governmental contractor, and pursuant to HRS § 11-355, is prohibited from making contributions to any candidates or non-candidate committees. A-1 Br. 25. Thus, at present, A-1 can only engage in independent electoral spending, and is effectively an "independent expenditure committee." Consequently, it is not bound by the contribution limits applicable to non-candidate committees, but only by the relevant non-candidate committee disclosure requirements.

Furthermore, even if A-1 were permitted to make contributions to candidates, it has at no point indicated that it intends to finance such efforts by raising outside contributions, rather than using its own treasury funds. Thus, even if A-1 prevails in its challenge to the contractor contribution restriction, the contribution limits it cites would still have no relevance to its case.

Second, the "contribution-source bans" that A-1 cites either implement disclosure requirements, or likely apply to A-1 notwithstanding whether it qualifies as a non-candidate committee. The provisions prohibiting contributions in the

[4] At the federal level, the D.C. Circuit invalidated the federal contribution limits as applied to federal political committees that make only independent expenditures. *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010). The FEC clarified the impact of this decision by advising that political committees that make only independent expenditures are not subject to the federal contribution limits, nor the corporate and union contribution source restrictions. *See* FEC Advisory Op. 2010-09 (Club for Growth) (July 22, 2010); FEC Advisory Op. 2010-11 (Commonsense Ten) (July 22, 2010).

name of another, HRS § 11-352, and anonymous contributions, HRS § 11-353, are necessary to ensure that committees provide full and accurate disclosure of their fundraising to the voting public. These measures do not bar any person or entity from contributing—but rather simply require contributors to disclose their identities—and thus are properly understood to be disclosure measures, instead of "contribution" bans.

The remaining laws cited by A-1—i.e., the prohibitions on contributions from contractors and foreign nationals[5]—would apply even if A-1 was not deemed a committee because both laws bar the targeted groups from either "directly or indirectly" making contributions to candidates. 2 U.S.C. § 441e(a)(1); HRS § 11-355(a)(1). An effort by a contractor or foreign national to route a contribution to a candidate through another entity—such as A-1—would be a blatant attempt to "indirectly" make a contribution to a candidate, and would likely constitute a violation of the law. These provisions thus prohibit entities from accepting contributions from prohibited sources for political purposes regardless of whether they are political committees.

[5] Inexplicably, A-1 also cites 2 U.S.C. § 441b in their list of "contribution-source bans" but this federal law does not apply to state committees active only in state elections. A-1 Br. 62.

In short, "non-candidate committee status" in this case gives rise only to disclosure obligations, and A-1's attempts to distinguish the challenged provisions from the laws at issue in *HLW* fail.

III. Hawaii's Contractor Contribution Ban Is Constitutional as Applied to A-1's Candidate Contributions.

A-1 next takes aim at Hawaii's prohibition on campaign contributions by state contractors, HRS § 11-355, alleging that the law is unconstitutional as applied to A-1's contributions to candidates. A-1 Br. 92. But A-1 offers no evidence or argument in support of this claim that would justify a reversal of the lower court's decision.

A. HRS § 11-355 Is Consistent with State and Local Efforts to Limit Corruption in Government Contracting.

A growing number of states and municipalities, often prompted by corruption scandals involving attempts by contractors to purchase influence over or otherwise manipulate the procurement process, have enacted pay-to-play measures comparable to HRS § 11-355. At least sixteen other states have enacted limits or prohibitions on campaign contributions from governmental contractors or

licensees.[6] A number of municipalities, including New York and Los Angeles, have followed suit.[7] Although legislative solutions vary considerably from one jurisdiction to the next, the nationwide prevalence of pay-to-play laws demonstrates a shared appreciation that the problem—corruption in the contracting process—demands a response.

In recognition of the anti-corruption purpose of these laws, both federal and state courts have largely sustained these contractor contribution restrictions.[8]

In *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010), the Second Circuit Court of Appeals upheld a Connecticut provision banning

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[6] *See, e.g.*, Cal. Gov't Code § 84308(d); Conn. Gen. Stat. §§ 9-612(g)(1), (2); 30 Ill. Comp. Stat. 500/50-37; Ind. Code §§ 4-30-3-19.5, -19.7; Ky. Rev. Stat. Ann. §121.330; La. Rev. Stat. Ann. § 18:1505.2(L), *id.* § 27:261(D); Mich. Comp. Laws § 432.207b; Neb. Rev. Stat. §§ 9-803, 49-1476.01; N.J. Stat. Ann. §§ 19:44A-20.13, -.14; N.M. Stat. Ann. § 13-1-191.1(E); Ohio Rev. Code § 3517.13(I)-(Z); 53 Pa. Cons. Stat. § 895.704-A(a); S.C. Code Ann. § 8-13-1342; Vt. Stat. Ann. tit. 32, § 109(B); Va. Code Ann. § 2.2-3104.01; W. Va. Code § 3-8-12(d).

[7] N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a), (1-b); L.A., Cal., City Charter § 470(c)(12).

[8] The D.C. Circuit Court of Appeals has twice upheld federal laws restricting campaign contributions from contractors. *FEC v. Weinstein*, 462 F. Supp. 243 (D.C. Cir. 1978) (upholding 2 U.S.C. § 441c); *Blount v. SEC*, 61 F.3d 938, 944–45 (D.C. Cir. 1995) (upholding MSRB Rule G-37, which restricted campaign contributions by participants in municipal bond industry). *See also Wagner v. FEC*, No. 11-1841, 2012 WL 1255145 (D.D.C. Apr. 16, 2012) (upholding 2 U.S.C. § 441c).

contributions from state contractors. Unlike Hawaii's law, the ban considered in *Green Party* applied not just to the contracting individual or entity, but also to certain "principals" and immediate family members of contractors. *Id.* at 202. The Court nevertheless found that Connecticut had a valid anti-corruption interest in banning contributions from principals and immediate family members. *Id.* at 203 (reasoning that "the dangers of corruption associated with contractor contributions are so significant … that the General Assembly should be afforded leeway in its efforts to curb contractors' influence on state lawmakers").

In a subsequent case, *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011), the Second Circuit again recognized that heightened restrictions on state contractors were justified by the governmental interest in preventing the actuality and appearance of corruption. There, the Court upheld a far-reaching New York City restrictions on campaign contributions by entities "doing business" with the City, which covered recipients of City contracts, grants, land use variances, franchises and licenses. Noting the series of pay-to-play scandals in New York City preceding enactment of the law, the Court found that there was "no doubt that [contractor] contributions have a negative impact on the public because they promote the perception that one must 'pay to play.'" *Id.* at 179.

State courts have likewise sustained contractor contribution limits. *See, e.g.*, *In Re Earle Asphalt Co.*, 950 A.2d 918, 325 (N.J. Super. App. Div. 2008) ("[T]he

State's interest in insulat[ing] the negotiation and award of State contracts from political contributions that pose the risk of improper influence, … or the appearance thereof, is a sufficiently important interest to justify a limitation upon political contributions.") (internal citations and quotations omitted), *aff'd per curiam*, 966 A.2d 460 (N.J. 2009). Relatedly, state courts have also upheld a range of contribution limits applicable to certain highly-regulated industries that are deemed to pose a greater threat of political corruption. *See, e.g.*, *Casino Ass'n of La. v. State ex rel. Foster*, 820 So.2d 494 (La. 2002) (upholding prohibition on political contributions from certain casino-industry officers, directors, employees, or their spouses); *Soto v. New Jersey*, 565 A.2d 1088 (N.J. 1989) (upholding similar prohibition on casino-industry contributions); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61 (Ill. 1976) (upholding state law prohibiting political contributions from officers, associates, agents, representatives, or employees of liquor licensees).

A-1's repeated invocations of the Colorado Supreme Court's decision in *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010), which reached a contrary result, are inapposite. In addition to the fact that *Ritter* is not binding authority, the law considered in that decision bears little resemblance to Hawaii's state contractor ban. Indeed, the court specifically distinguished the federal contractor contribution ban, 2 U.S.C. § 441c—which is almost identical to HRS § 11-355—as far less

burdensome than the Colorado law, which applied to the contracting entity as well as to a broadly defined class of family members and associates; remained in effect from the beginning of negotiations until two years after the contract's completion; and imposed harsh penalties for violations. *Id.* at 617. Given the expansive scope of the Colorado law, the *Ritter* decision provides scant support for A-1's constitutional arguments.[9]

The ubiquity of pay-to-play laws indicates that campaign activity by contractors and potential contractors is widely perceived to pose a threat of political corruption—and in a system of democratic self-government such as ours, maintaining public confidence in the integrity of those who perform government work is an interest of the utmost importance.

B. HRS § 11-355 Is Justified by Hawaii's Important Anti-Corruption Interest.

Because government contractors are in a business relationship with the state, they have a heightened financial interest in electoral outcomes, and consequently,

[9] Only a handful of cases have invalidated local pay-to-play laws, but none cast any doubt on the constitutionality of HRS § 11-355. *See, e.g.*, *DePaul v. Commonwealth*, 969 A.2d 536 (Pa. 2009) (invalidating restriction on gaming licensee contributions under Pennsylvania Constitution, but finding that state Constitution "provides broader protections of expression than the related First Amendment guarantee"); *Lavin v. Husted*, No. 11-3908, 2012 WL 3140909, at *3 (6th Cir. Aug. 3, 2012) (striking down law criminalizing contributions from state Medicaid providers to Attorney General and county prosecutor candidates, after state conceded a lack of evidence from Ohio or elsewhere linking campaign contributions to abuse of prosecutorial discretion).

their contributions pose a greater potential for actual and apparent political corruption. Indeed, the challenged provision was directly prompted by pay-to-play scandals in Hawaii elections. 2012 WL 983559, *30 n.27 (describing corruption scandals and practice of contractor contributions to both sides of state elections preceding enactment of predecessor version of HRS § 11-355).

Even if Hawaii had not directly experienced political corruption, the ubiquity of state and municipal laws aimed at pay-to-play corruption further substantiates Hawaii's concerns about the integrity of its contracting process. The popularity of pay-to-play laws at the state and municipal levels demonstrates that campaign activity by contractors and potential contractors is widely perceived to pose a threat of political corruption. Many state and municipal laws were passed in direct response to scandals involving quid pro quo exchanges of campaign contributions or outright bribes for state contracts. For example, the impetus to enact pay-to-play legislation in Connecticut came from a series of high-profile scandals involving state contracting that resulted in criminal guilty pleas by Governor John Rowland and State Treasurer Paul Silvester. *See Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288, 305-07 (D. Conn. 2008), *rev'd in part*, 616 F.3d 189 (2d Cir. 2010). Similarly, Illinois' government contractor contribution ban was also preceded by the criminal conviction of Governor George Ryan for trading government contracts for gifts and campaign contributions. *See United*

States v. Warner, 498 F.3d 666, 675 (7th Cir. 2007). *See also* Eliza Newlin Carney, *Rules of the Game: Congress Should Heed Scandals In The States*, Nat'l J., http://www.nationaljournal.com/columns/rules-of-the-game/congress-should-heed-scandals-in-the-states-20090803 (last updated Feb. 16, 2011).

Nevertheless, A-1 asserts that Hawaii "must show *quid-pro-quo* corruption or its appearance *involving A-1's speech*, *i.e.*, its *contributions*," because that is "how *as-applied* challenges work." A-1 Br. 95. A-1 is flatly mistaken. The state need not show that every person subject to, for example, a contribution limit individually has or will corrupt candidates and officeholders. *See, e.g., Ognibene,* 671 F.3d at 188. Were that the case, a person could evade campaign finance regulations simply by claiming no improper intent, and no campaign finance regulation would survive as-applied review. Instead, the Supreme Court has allowed legislatures to take a prophylactic approach when political corruption is "neither easily detected nor practical to criminalize." *McConnell*, 540 U.S. at 153 (noting that "[t]he best means of prevention is to identify and remove the temptation"). *See also Blount*, 61 F.3d at 945 ("Although the record contains only allegations, no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic.").

Furthermore, A-1's as-applied argument ignores that the state has an interest not only in preventing instances of actual corruption in contracting, but also the

appearance of corruption. *See Buckley*, 424 U.S. at 27 ("Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical … if confidence in the system of representative Government is not to be eroded to a disastrous extent.'") (citation omitted). Recognizing the importance of this interest, the Second Circuit observed in *Ognibene* that recurrent pay-to-play scandals had "created a climate of distrust that feeds the already established public perception of corruption." 671 F.3d at 191 n.15. Similarly, as the Second Circuit emphasized in *Green Party*, "widespread media coverage of Connecticut's recent corruption scandals" created a "manifest need to curtail the appearance of corruption created by contractor contributions." 616 F.3d at 200. Thus, as multiple courts have found, limiting contractor contributions is a key means of avoiding the public perception that public business is for sale to private interests.

The as-applied nature of this challenge does not render invalid the Supreme Court and the lower court's concern about the appearance of corruption. A-1's disavowals of corruptive intent will not be heard by Hawaii citizens, and even if heard, are unlikely to be given credence. The district court could reasonably conclude that A-1's proposal to contribute to a range of state candidates would foster exactly the appearance of corruption that HRS § 11-355 was enacted to prevent.

C. The Contractor Restriction Is Properly Tailored.

Also untenable is A-1's claim that HRS § 11-355 is not closely drawn because it bans contractor contributions and is not limited to contributions to legislators with "oversight responsibility."

First, A-1 makes much of the fact that Hawaii's law takes the form of a ban, not a limit, but overstates the constitutional significance of this distinction. As the court below noted, the decision to employ a ban does not necessarily indicate that the law is overbroad. To the contrary, this choice may reflect better tailoring, because it indicates the "strength" of the state's intent to avoid the appearance of corruption:

> That a ban is total … might "eliminate[ ] *any* notion that contractors can influence state officials by donating to their campaigns," and in that sense indicates *closer* tailoring to the important government interest than if contributions to certain types of Legislators were excepted. The wisdom of 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.

2012 WL 983559, at *32.

Second, A-1 urges this Court to find the ban overbroad because it is not limited to legislators "with oversight authority" over contracting. But, as the

district court observed, identifying such legislators is hardly as simple as A-1 suggests:

> The Legislature routinely holds informational and oversight hearings. Legislators … represent constituents and the public in an appropriate role overseeing administration of State contracts and utilization of appropriated funds … Legislators make decisions and hold power over large infrastructure projects, sometimes involving hundreds of millions of dollars, where government contractors stand to benefit. And Legislators may have power over, or close friendships with, the government employees or others who *do* award or manage [state] contracts.

Id. at *31. Under A-1's logic, analyzing the constitutionality of a contractor contribution limit would require courts "to know which Legislators have 'control' over all types of contractual matters (whether large or small, be they for general electrical work or for a non-bid research study of a particular issue)." *Id.* at *32. The district court rightly recognized that the kind of line-drawing urged by A-1 would be unpredictable, burdensome and fundamentally unsuited to the judicial role. Furthermore, even if a court could correctly and consistently identify candidates who do not and will never serve on a legislative committee with oversight over A-1's contracts, this analysis would overlook the more informal ways officeholders influence the award of contracts. Legislators operate in a political culture with significant professional and social overlap, and consequently

use their political or social capital to influence a contract's award even without explicit statutory authority. Finally, accepting A-1's argument about legislative oversight would eviscerate the statute's ability to guard against the appearance of impropriety in state contracting. Even if a legislator does not have direct oversight over procurement, his receipt of large contributions from contractors gives rise to the appearance of corruption, particularly in light of the informal influence the legislator may be able to exert over state contracts.

Further, in highlighting only that Hawaii's law is a ban and covers contributions to all candidates, A-1 ignores the many ways Hawaii's law is more limited than the federal contractor contribution ban and other state pay-to-play laws that have been upheld by the courts. Unlike the federal ban, Hawaii's law does not reach prospective contractors, *compare* 2 U.S.C. § 441c, and unlike many state pay-to-play restrictions, Hawaii's law covers only the term of the contract. Illinois, by contrast, limits contributions from contractors either two years beyond the contract's termination or upon completion of the elected official's term of office, whichever is later. 30 Ill. Comp. Stat. 500/50-37(b). *See also* Ind. Code § 4-30-3-19.7(i) (prohibiting award of state lottery contracts to anyone who has contributed to a candidate within three years preceding the contract's award). Hawaii's law is also narrower than many state pay-to-play measures because it does not regulate individuals associated with state contractors or political

committees controlled by the contractor. By contrast, Connecticut's ban covers the contracting entity's board members, officers, managers, and those with a 5% ownership stake, as well as their immediate family members. Conn. Gen. Stat. § 9-612(g)(1)(F). *See also* N.J. Stat. Ann. § 19:44A-20.17 (covering those with 10% ownership interest, subsidiaries and any section 527 organizations controlled by the business entity, and the immediate family of individual contractors). Instead, section 11-355 targets the narrow class that the legislature considered most likely to exert improper influence through campaign contributions: namely, the contracting entity itself.

In sum, given the important anticorruption interests at stake and the careful tailoring of Hawaii's statute, the district court was correct in upholding HRS § 11-355 as applied to A-1.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

RESPECTFULLY SUBMITTED this 19th day of September 2012.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,977 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14 point font.

/s/ Paul S. Ryan
Paul S. Ryan

Dated: September 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2012, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all counsel of record in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, counsel of record have been served with copies of the foregoing brief via email (where email addresses are available and known).

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