Appeal 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, in his official capacity as chair and member of the Hawaii Campaign Spending Commission; Dean Robb, in his official capacity as vice chair and member of the Hawaii Campaign Spending Commission; and Tina Pedro Gomes, Mara Miller, and William Snipes, in their official capacities as members of the Hawaii Campaign Spending Commission,

Defendants-Appellees

Plaintiff-Appellant A-1's Principal Brief

Appeal from the United States District Court for the District of Hawaii
Civil Action No. 10-497 JMS/RLP (Michael Seabright, J.)

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Corporate Disclosure Statement

Plaintiff-Appellant A-1 A-Lectrician, Inc. ("A-1") has no parent corporation, and no publicly held corporation owns more than 10 percent of A-1 stock. *Cf.* FED.R.APP.P.26.1.a-b (2002).

Oral Argument Request

Plaintiff-Appellant A-1 A-Lectrician, Inc. ("A-1") requests oral argument. An opportunity to hear all sides and allow them to respond to questions the Court may have would further the cause of justice in this action. *Cf.* FED.R.APP.P.34.a.1 (2005).

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[1] For the readers' convenience, the actual page numbers match the .pdf page numbers. *Cf.* 2D CIR.R.32.1.a.3 (2012), *available at* http://www.ca2.uscourts.gov/clerk/Rules/LRs%20IOPs%20and%20appendices%20effective%2001032012.pdf (all Internet sites visited July 27, 2012).

Table of Authorities[2]

Cases

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[2] Asterisks before citations indicate those on which this brief primarily relies. *Cf.* 11TH CIR.R.28-1.e (2011), *available at* http://www.ca11.uscourts.gov/documents/pdfs/BlueAUG11.pdf.

In addition, the Hawaii Revised Statutes are available at http://hawaii.gov/campaign/law/hawaii-revised-statutes, and the Hawaii Administrative Rules are available at http://hawaii.gov/campaign/law/hawaii-administrative-rules.

Statutes

Other Authorities

Rules

Regulations

I. The district court and this Court have jurisdiction.

The district court has jurisdiction, because Plaintiffs Jimmy Yamada, Russell Stewart, and A-1 A-Lectrician, Inc. ("A-1"), challenge the constitutionality of Hawaii law. *See* 28 U.S.C. 1331 (1980), 1343.a (1979), 2201 (1993), 2202 (1948). EXCERPTS OF RECORD 334 ("ER.334").

On cross-summary-judgment motions, ER.157-65, the district court on March 21, 2012, granted summary judgment for

- Yamada and Stewart on their claims, and

- Defendants on A-1's claims,

ER.91-92; *see* FED.R.CIV.P.56.c (2009), and entered judgment accordingly. ER.93.

A-1 timely filed its notice of appeal on April 19, 2012. ER.144-48; *see* FED.R.APP.P.4.a.1.A (2011). This Court has jurisdiction. *See* 28 U.S.C. 1291 (1982) (final judgments).

II. Statement of Issues

Bank of California, N.A. v. Opie establishes that this Court reviews summary-judgment dispositions *de novo.* 663 F.2d 977, 979 (9th Cir.1981) (citations omitted).

This Court also reviews the constitutionality of law *de novo. E.g., Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1000 (9th Cir.2010) ("*HLW*") (citation omitted), *cert. denied,* 562 U.S. ____, 131 S.Ct. 1477 (2011).

The issues on appeal, *see* ER.161 (citing [ER.381-84].¶¶111-16), which the summary-judgment order addresses, ER.41-92, include whether the following are unconstitutional as applied to A-1's speech and facially:

- Hawaii's noncandidate-committee and expenditure definitions. HAW.REV.STAT. 11-302 (2010) ("HRS.11-302").[3]

[3] ADDENDUM (relevant law).

- Hawaii's electioneering-communication definition and reporting requirements. HRS.11-341.

- Hawaii's advertisement definition. HRS.11-302, and

- Hawaii's disclaimer requirements. HRS.11-391.

The final issue is whether Hawaii's ban on state-government contractors' making contributions, HRS.11-355, is unconstitutional *as applied* to A-1's speech.

III. Statement of the Case

Plaintiffs assert Hawaii law violates the First and Fourteenth Amendments. ER.334. This Court decided *HLW* shortly after the preliminary-injunction hearing. ER.25-26; ER.45. No party sought discovery. After a summary-judgment hearing, ER.99-101, the district court (Seabright, J.), granted summary judgment. ER.91-92.

IV. Statement of Facts

A-1, a for-profit Hawaii corporation with offices on Oahu and the Big Island, is an electrical-construction organization. It is not

connected with any political candidate, political party, or other political committee. Many years ago, A-1 followed the Hawaii Campaign Spending Commission's ("CSC's") direction and registered itself as a noncandidate committee. ER.336-37.¶¶9-10; ER.392-93.[4]

A-1 seeks to engage in two types of political speech: Spending and contributions.

●First, A-1 is "concerned with issues" and fears "we are losing our freedom." ER.313-17. So A-1 bought three small newspaper ads before the September 2010 primary election. ER.439-42; ER.300-01;[5] ER.340-41.¶¶15-21; ER.167-68.¶¶8-9; ER.14-15.

The ads have clearly identified candidates for state office and refer to "PEOPLE WE PUT INTO OFFICE" and "THE REPRESENTATIVES WE PUT INTO OFFICE[.]" ER.352-53.¶36. So Hawaii law regulates them. *See* ER.470.[6]

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[4] ER.264-65.

[5] ER.266-69; ER.298-99.

[6] ER.297.

Yet unlike the Bill Yellowtail ads in *McConnell v. FEC,* these ads are nice, respectful, upstanding "genuine[-]issue" speech. ER.120; 540 U.S. 93, 193 n.78, 206 n.88 (2003), *overruled on other grounds, Citizens United v. FEC,* 558 U.S. ____, 130 S.Ct. 876, 896-914 (2010).

As of Plaintiffs' summary-judgment motion, it was too early for A-1 to plan similar speech for September/October 2012 in detail. ER.168.¶10; ER.150.¶6. Nevertheless, at the time, A-1 in general foresaw:

- Engaging in such speech in September/October 2012.

- Buying no more than three ads, the number it purchased in 2010.

- Buying ads similar in size to those A-1 purchased in 2010.

- Having a clearly identified candidate or candidates for state office, and

> ●Referring to "PEOPLE WE PUT INTO OFFICE" and "THE REPRESENTATIVES WE PUT INTO OFFICE[.]"

ER.150-51.¶7. Political speech – especially newspaper advertising – is expensive, so even three such small Honolulu *Star-Advertiser* ads cost about $3000 apiece at 2010 rates, ER.15, or $9000 altogether.

●Second, A-1 seeks to make contributions. However, A-1 does not, in the district court's and Defendants' words, "pay to play" or "grease the skids." ER.111. A-1 has a policy not to "buy favors" from elected officials: It wants to contribute, while it is a state-government contractor, to Hawaii state-legislature candidates who neither decide whether A-1 receives contracts nor oversee them. ER.339-40.¶14; ER.167.¶¶6-7.

Under the law, A-1 may, while it is a government contractor, "make unlimited contributions to [noncandidate committees] that make only independent expenditures[,]" ER.86, yet it may not contribute to other noncandidate committees or to candidate committees. HRS.11-355.

A-1 was not a government contractor when it made contributions in 2010,[7] yet it now is. ER.167.¶¶4-5; ER.170-261.

In its verified complaint, A-1

- States it does *not* seek to contribute to candidates who decide whether A-1 receives contracts or oversee them, and

- Expresses its desire to make $250 contributions to nine Hawaii state candidates in 2010.

ER.339-40.¶14. A-1 made more and greater contributions in 2010. *See* ER.14. Yet A-1 stands by the commitment, for 2012 and the future, not to contribute to candidates who decide whether A-1 receives contracts or oversee them. ER.167.¶¶4-7; ER.150.¶¶3-4. Nevertheless, Hawaii law – namely the contribution ban – will apply to A-1 in materially similar situations in the future as it does now. *See* ER.358.¶50; ER.150.¶3.

[7] Even if Defendants' previous contrary implication were true, the challenge to HRS.11-355 would remain justiciable. *See New Hampshire Right to Life PAC v. Gardner,* 99 F.3d 8, 13-14 (1st Cir.1996) ("*NHRL*").

What has changed since October 2010 is that A-1 seeks to make only $250 contributions and only to candidates. ER.150.¶¶3-4.

The district court found that A-1 contributed a total of $51,600 to Hawaii candidates, the Hawaii Republican Party, and the Aloha Family Alliance – Political Action Committee ("AFA-PAC") in 2010. *See* ER.14.[8]

However, by changing the law, *HLW* "moved the ball." ER.118. Given A-1's desire not to be a noncandidate committee any longer and *HLW's* *post*-complaint/*post*-preliminary-injunction-motion/*post*-preliminary-injunction-hearing contraction of First Amendment rights in the Ninth Circuit, ER.118-20; ER.137-39, A-1 seeks to make only $250 contributions and only to candidates in 2012 and beyond.

Defendants do not acknowledge this. *See* ER.128 (discussing only ER.167, and not ER.150); ER.130. But having neither sought discovery nor cross-examined A-1 at the summary-judgment hearing, *cf.* ER.306-11 (preliminary-injunction hearing), Defendants cannot disagree.

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[8] The "bureaucratic burden" of keeping track of when A-1 is a government contractor, ER.339-40.¶14, no longer deters A-1's making contributions. *See, e.g.,* ER.14.

The district court acknowledges only the "candidates" part. *See* ER.13-14 ("the amounts are not specified"); ER.66.

These omissions are significant. The deliberately dramatic contraction of A-1's plans after seriously analyzing *HLW* – which required many days[9] – means that even if political advocacy were an A-1 priority in 2010, it no longer is. *See* ER.118-20; ER.137-39.

Given *HLW,* these contributions and small newspaper ads are the only speech in which A-1 seeks to engage in 2012 and in materially similar situations in the future. ER.150.¶5; ER.135-36.[10] Again,

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[9] Therefore, A-1 did not lower its contributions immediately after *HLW*. *See* ER.64-65.

[10] A-1 may consider *forming* a separate noncandidate committee and letting that separate noncandidate committee engage in other speech in which A-1 itself previously engaged, ER.151.¶8, yet that is immaterial here: As a matter of law, any such separate noncandidate committee would be "a separate legal entity" from A-1, *California Med. Ass'n v. FEC,* 453 U.S. 182, 196 (1981), and "a separate association from the corporation." *Citizens United,* 130 S.Ct. at 897.

Forming a separate noncandidate committee would be new for A-1. A-1 has never *formed* a separate political-committee-like organization. Instead, A-1 accepted the CSC's direction many years ago for A-1 itself to *be* a noncandidate committee. ER.336-37.¶10. This means A-1 itself, not some separate noncandidate committee, bears full-fledged political-committee-like burdens. *See Citizens United,* 130 S.Ct. at 897-98.

Hawaii law will apply in materially similar situations in the future as it does in 2012. *See* ER.358.¶50; ER.150.¶3.

Under these circumstances, political advocacy is not one of A-1's reasons for existing. It is not an A-1 "priority": It does not "take precedence" over A-1's business activities, nor does A-1 give it "special attention" as compared to its business activities. *See* http://dictionary.reference.com/browse/priority. It follows that A-1's "political advocacy" is only "incidental[,]" since under *HLW,* "political advocacy" that is not a "priority" is "incidental[.]" 624 F.3d at 1011. Nevertheless, given the unconstitutional vagueness of the *HLW* priority-incidentally test, *see Buckley v. Valeo,* 424 U.S. 1, 42-43 (1976) (holding "advocating" vague); ER.138, A-1 reasonably fears "political advocacy" is an A-1 "priority" under *HLW.* ER.168.¶¶11-13.

Furthermore:

- A-1 is not under the control of a candidate or candidates for state or local office in Hawaii or any other candidate.

> ●A-1's organizational documents – *i.e.,* its articles of incorporation, which A-1 calls articles of association, and by-laws – and public statements do not indicate it has the major purpose of nominating or electing any candidate or candidates, much less those for state or local office in Hawaii, and
>
> ●A-1 does not devote the majority of its spending to contributions to, or independent expenditures for, any candidate or candidates, much less those for state or local office in Hawaii.

ER.346-47.¶27; ER.443-66.[11]

When Plaintiffs' and Defendants' counsel conferred at the district court's direction, Plaintiffs' counsel noted Hawaii law is vague. A

[11] ER.270-93. Under the Constitution, "independent expenditure" means *Buckley* express advocacy that is not coordinated with a candidate, a candidate's committee, a candidate's agent, or a party. 424 U.S. at 46-47, 78; *McConnell,* 540 U.S. at 219-23; *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir.2003) ("*CPLC-I*").

woman from the CSC – whom Plaintiffs' counsel understood to identify herself as CSC executive director Barbara Wong – was present and responded, "You're a lawyer. You can do research." ER.263.¶¶2-3.

But A-1 does not want to bear the burden of having to seek and pay for legal counsel so that A-1 can try to understand and comply with vague campaign-finance law. ER.169.¶14. "The First Amendment does not permit laws that force speakers to retain a campaign[-]finance attorney, conduct demographic[-]marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United,* 130 S.Ct. at 889.

Nor A-1 does want to submit its speech for government officials' review and editing before engaging in the speech – as the CSC executive director suggested – regardless of how willing[12] they may be to review and edit speech. ER.352-53.¶36; ER.470.

A-1 challenges four sets of Hawaii laws. *See* ER.17.

●First, A-1 challenges Hawaii's noncandidate-committee and expenditure definitions, HRS.11-302, because A-1 no longer wants to

[12] Perhaps patronizingly willing. *See* ER.263.¶¶2-3; ER.470.

bear noncandidate-committee burdens; A-1 wants to terminate its noncandidate-committee registration. A-1 reasonably fears that if it engages in its speech as a noncandidate committee, it will have to continue complying with noncandidate-committee burdens: It long ago registered itself as a noncandidate committee, it keeps records, and it complies with extensive, periodic reporting requirements.[13] However, A-1 also reasonably fears it cannot engage in its speech without being a noncandidate committee. ER.344-49.¶¶26-31; ER.308-11.

●Second, if a court holds Hawaii may not or does not define A-1 as a noncandidate committee, then A-1 must comply with electioneering-communication reporting requirements. HRS.11-341. In that case, A-1 reasonably fears its speech is an "electioneering communication" and is subject to reporting that will burden A-1's limited resources. *See id.* This is particularly true of 24 hour reporting, which takes up precious resources. A-1 has limited staff. Having to devote time to preparing and filing reports, particularly 24 hour reports, is a severe burden on A-

[13] *Infra* Part VI.F.

1's resources, including its time to devote to its business. ER.349-54.¶¶32-38.

●Third, A-1's newspaper ads comply with the attribution requirements, *see* HRS.11-391.a.1, and the disclaimer requirements. *See* HRS.11-391.a.2. That is, they include A-1's name and address, and they say they are published without the candidates' approval or authority. Although A-1 is willing to comply with the attribution requirements, it does not want to comply with the disclaimer requirements. A-1 does not want to distract readers with this information, or make them think the speech is electoral-campaign speech when it is not. Nor does A-1 want Hawaii to regulate the content of the speech itself. ER.354-56.¶¶39-42.

●Fourth, since A-1 is a government contractor, Hawaii bans contributions A-1 wants to make to candidates, *see* HRS.11-355, who neither decide whether A-1 receives government contracts nor oversee them. ER.356-57.¶¶43-46; ER.167.¶¶6-7.

V. Summary of Argument

A-1's claims are justiciable.

As applied to A-1's speech and facially, multiple Hawaii-law provisions are unconstitutional. The district court's improper narrowing gloss does not resolve the law's vagueness. The overbroad law includes both law imposing full-fledged political-committee-like burdens and other law imposing non-political-committee disclosure requirements. Believing *Citizens United* allows "disclosure" in any form is the district court's fundamental error on the overbreadth of this law.

Hawaii's ban on government contractors' making contributions is unconstitutionally overbroad as applied to A-1's speech.

VI. Argument

A. A-1's claims are justiciable.

As to A-1's contribution-ban claim, A-1's injury is the chill to speech caused by Defendants' prospective enforcement of Hawaii law or prosecution of A-1. *See* ER.343.¶25; ER.169.¶15. The relief A-1 seeks will redress this chill, thereby allowing A-1 to engage in its speech without fear of enforcement/prosecution. Therefore, A-1 has standing, and the claim is ripe. *See, e.g., HLW,* 624 F.3d at 1000-01.

As to other claims, there is no chill. *See* ER.343.¶25. A-1 will engage in its speech and comply with the law, while asking the Court to declare the law unconstitutional and enjoin enforcement/prosecution so compliance is no longer necessary. Therefore, A-1 has standing, *see Davis v. FEC,* 554 U.S. 724, 734 (2008), and the claims are ripe. *See Peachlum v. City of York, Pa.,* 333 F.3d 429, 435 (3d Cir.2003) (citing *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio,* 40 F.3d 1454, 1467 (3d Cir.1994)); *see also* ER.29-33.

However, Hawaii's electioneering-communication law applies to A-1 only if it is *not* a noncandidate committee, *see* HAW.CODE R. 3-160-48 (2010), *e.g.,* if a court holds Hawaii may *not* define A-1 as such. *See* ER.352.¶35. Only then would A-1 have standing to challenge the electioneering-communication law. ER.68-69.

And although the time for some of A-1's speech at issue in this action has passed, the claims that flow from the speech are not moot, because they "fit comfortably within the established exception to mootness for disputes capable of repetition yet evading review." *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 462 (2007) ("*WRTL-II*") (citations omitted).

Contrary to ER.130, courts may issue constitutional rulings regarding speech in which someone has not yet engaged. *E.g., Citizens United,* 130 S.Ct. at 886-88.

B. Summary Judgment Standard

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P.56.c.

C. First Principles: Freedom of speech is the norm, not the exception.

Under the Fourteenth Amendment, law regulating political speech must not be vague. *See Buckley,* 424 U.S. at 41-43.

Even non-vague law regulating political speech must comply with the First Amendment, which guards against overbreadth. *Id.* at 80 ("impermissibly broad").[14] To ensure law is not "impermissibly broad," *Buckley* establishes that government may, subject to further inquiry,[15] have the power to regulate donations received and spending for political

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[14] "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).

[15] *E.g., infra* Parts VI.D-I.

speech only when they are "unambiguously related to the campaign of a particular … candidate" in the jurisdiction in question, 424 U.S. at 80, or "unambiguously campaign related" for short. *Id.* at 81. This principle, which continues after *Citizens United, see New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 676&n.4 (10th Cir.2010) ("*NMYO*") (quoting *Buckley,* 424 U.S. at 79, *quoted in McConnell,* 540 U.S. at 170 n.64); *Center for Individual Freedom v. Tennant, Inc.,* ____ F.Supp.2d ____, Nos.1:08-cv-00190/01133, manuscript order at 31-33&n.21 (S.D.W.Va. July 18, 2011),[16] *notice of appeal filed,* (4th Cir. Sept. 1, 2011), is part of the larger principle that law regulating political speech must not be overbroad. *See Buckley,* 424 U.S. at 80 ("impermissibly broad").

Since freedom of speech is the norm, not the exception, *see, e.g., Citizens United*, 130 S.Ct. at 911 ("more speech, not less, is the governing rule"); *Buckley*, 424 U.S. at 14-15, *quoted in Arizona Free Enterprise Club's Freedom PAC v. Bennett,* 564 U.S. ____, 131 S.Ct.

[16] *Available at* http://www.jamesmadisoncenter.org/cases/files/2011/07/Doc-233-SJ-Order.pdf.

2806, 2828-29 (2011) ("*AFEC*"), suggesting that any constitutional law on political speech – not just the "unambiguously campaign related" principle *post-Citizens United* – creates a "safe harbor (from a regulatory perspective)" looks at this backwards. ER.46.

D. Hawaii law is unconstitutionally vague as applied to A-1's speech.

Contrary to ER.47-54 and ER.71-74, Hawaii law is unconstitutionally vague. No narrowing gloss saves it.

Three sets of Hawaii-law phrases are unconstitutionally vague as applied to A-1's speech.[17] They do not "provide the kind of notice that will enable ordinary people to understand what conduct" they regulate; furthermore, they "may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)).

[17] Contrary to ER.42-43 and ER.72, vagueness is not basically about overbreadth. While vague laws can reach beyond constitutional boundaries, and in that sense be overbroad, *see* ER.41-42, the basic problem is still vagueness. *See Buckley,* 424 U.S. at 41-43, 76-77.

1. "Influencing" and "for the purpose of influencing" elections

Hawaii's noncandidate-committee and expenditure definitions, HRS.11-302, are unconstitutionally vague, because they refer to "influencing" and "for the purpose of influencing" elections. *Buckley,* 424 U.S. at 77; *North Carolina Right to Life, Inc. v. Bartlett,* 168 F.3d 705, 712-13 (4th Cir.1999) (*"NCRL-I"*), *cert. denied,* 528 U.S. 1153 (2000); *Landell v. Sorrell,* 382 F.3d 91, 161-63&nn.6-7 (2d Cir.2004) (Winter, J., dissenting), *rev'd on other grounds, Randall v. Sorrell,* 548 U.S. 230, 240-62 (2006).[18] *McConnell* does not change this. *See Landell,* 382 F.3d at 162 n.7 (Winter, J., dissenting). Based on this alone, the definitions are unconstitutionally vague, so Hawaii's means of imposing full-fledged noncandidate-committee status are unconstitutionally vague.

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[18] The *Landell* majority does not address this issue. 382 F.3d at 124 n.26. So the statement that the Supreme Court has "upheld" this language, *id.* – while citing part of *Buckley,* 424 U.S. at 145-47, that merely reproduces the federal statute – is *dictum*. It is also incorrect. *See id.* at 77. Language's having "been part of state and federal campaign[-]finance law for decades," *Landell,* 382 F.3d at 124 n.26, does not make it constitutional. *Cf. Brown v. Board of Educ.,* 347 U.S. 483 (1954).

Keeping in mind that the functional equivalent of express advocacy is what the Supreme Court called the appeal-to-vote test, *Citizens United,* 130 S.Ct. at 895 (citing *WRTL-II,* 551 U.S. at 470), and that *HLW* does not rule on the appeal-to-vote test, *see* 624 F.3d at 1015 (stating, in *dictum,* only that the panel "could arguably" apply the appeal-to-vote test), the district court's express-advocacy/appeal-to-vote-test narrowing gloss for "influencing" and "for the purpose of influencing" elections, ER.51-54, presents four problems.

●First, unlike in *Buckley,* 424 U.S. at 44&n.52, 80, no narrowing gloss is proper.

A-1 (a) challenges state law (b) both as applied to its speech and facially.

As for (a), unlike in federal-court challenges to *federal* law, *e.g., Boumediene v. Bush,* 553 U.S. 723, 732, 787 (2008), narrowing glosses apply in federal-court challenges to *state* law only when they are "reasonable and readily apparent." *Stenberg v. Carhart,* 530 U.S. 914, 944 (2000) (quoting *Boos v. Barry,* 485 U.S. 312, 330 (1988)). A federal court does not "rewrite a state law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n, Inc.,* 484 U.S.

383, 397 (1988), *quoted in Colorado Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1154 (10th Cir.2007) ("*CRLC*"), *and Vermont Right to Life Comm., Inc. v. Sorrell,* 221 F.3d 376, 386 (2d Cir.2000) ("*VRLC-I*"); *ACLU of Nev. v. Heller,* 378 F.3d 978, 986 (9th Cir.2004) (quoting *Stenberg,* 530 U.S. at 944); *Florida Right to Life, Inc. v. Lamar,* 273 F.3d 1318, 1326 (11th Cir.2001) (quoting *Dimmitt v. City of Clearwater,* 985 F.2d 1565, 1572 (11th Cir.1993)). As in *VRLC-I,* 221 F.3d at 388-89, 390-91, there is no way to make Hawaii law constitutional without rewriting it: There is nothing "reasonable and readily apparent" in "influencing" or "for the purpose of influencing" that leads to believing it means only express advocacy or the appeal-to-vote test. ER.122.

Regarding express advocacy: These phrases cannot mean only express advocacy, because they include issue advocacy. *Compare NCRL-I,* 168 F.3d at 713, *with FEC v. Central Long Island Tax Reform Immediately Comm.,* 616 F.2d 45, 53 (2d Cir.1980) (*en banc*) (quoting *Buckley,* 424 U.S. at 42 n.50). Besides, Hawaii adopted its current law after *Buckley,* ER.51, so if Hawaii had meant express advocacy, it would have said so. ER.135. It is

> extremely unlikely that the [state legislature], after reading *Buckley* and learning that the term "for the purpose of influencing" was unconstitutionally vague and required a narrowing construction to save it, would then decide to use that term, without explanation, in its statute. If the [state legislature] meant to define "[noncandidate] committee" as an organization which expended funds "for express candidate advocacy" only, it presumably would have said so explicitly.

Virginia Soc'y for Human Life, Inc. v. Caldwell, 152 F.3d 268, 270 (4th Cir.1998) ("*VSHL-I*"). Contrary to ER.51-52's implication,

- ER.152-56 does not address "influencing" or "for the purpose of influencing" in Hawaii law, and

- "*independent* expenditure" (emphasis added) is not the term of art in the noncandidate-committee definition;

"expenditure" is. Hawaii defines them differently. HRS.11-302.

Regarding the appeal-to-vote test: Contrary to ER.52's implication, as a matter of *constitutional* law, which this action turns on, ER.133, this *WRTL-II* holding meant only

- electioneering communications as defined in the Federal Election Campaign Act ("FECA")[19]

- whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate.

[19] FECA electioneering communications (1) are broadcast, 2 U.S.C. 434.f.3.A.i (2002), (2) run in the 30 days before a primary or 60 days before a general election, *id.* 434.f.3.A.i.II, (3) have a clearly identified candidate in the jurisdiction, *see id.* 434.f.3.A.i.I, (4) are targeted to the relevant electorate, *id.* 434.f.3.A.i.III, and (5) do not expressly advocate. *See id.* 434.f.3.B.ii; *see also id.* 434.f.3.B (additional exceptions not material here).

551 U.S. at 457, 469-70, 474 n.7; *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 282 (4th Cir.2008) ("*NCRL-III*"); *Colorado Ethics Watch v. Senate Majority Fund, LLC,* 269 P.3d 1248, 1257-58 (Colo. 2012); *Tennant,* manuscript order at 35-37. It is not "reasonable and readily apparent" under *Stenberg* that "influencing" and "for the purpose of influencing" mean either FECA electioneering communications or speech that passes the appeal-to-vote test. In the alternative, no appeal-to-vote-test narrowing gloss applies beyond FECA electioneering communications. *National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert,* 581 F.Supp.2d 1132, 1149-51 (D.Utah 2008) ("*NRTW*").

As for (b), narrowing glosses generally apply only to facial challenges, not as-applied challenges. *CRLC,* 498 F.3d at 1154 (quoting *American Booksellers,* 484 U.S. at 397). But a narrowing gloss would not apply even to the facial challenges here, because it would not be "reasonable and readily apparent" under *Stenberg*. *Cf. id.* (rejecting a facial challenge and rejecting a narrowing gloss under an as-applied challenge (quoting *Stenberg,* 530 U.S. at 944)). Therefore, no narrowing gloss applies here.

●Second, a federal court's narrowing gloss would not bind a state court – as Defendants acknowledge, ER.126 – so it ultimately would not protect speakers. *VSHL-I,* 152 F.3d at 270 (quoting *Kucharek v. Hanaway,* 902 F.3d 513, 517 (7th Cir.1990)).

●Third, when courts establish narrowing glosses, they must not be unconstitutionally vague, and they themselves ordinarily must have some constitutional significance. ER.106-07; *see, e.g., Buckley,* 424 U.S. at 41-44, 80.

While the express-advocacy part of the district court's narrowing gloss is *not* unconstitutionally vague, *see Buckley,* 424 U.S. at 44, the appeal-to-vote-test part is.

WRTL-II rejects a contention that the appeal-to-vote test is vague by noting it applied *only* to FECA electioneering communications. 551 U.S. at 474 n.7. This responds to the concurrence "on the imperative for clarity[.]" *Id.* The concurrence's point is that the appeal-to-vote test *is* vague. *Id.* at 492-94 (Scalia, J., concurring, joined by Kennedy and Thomas, JJ.). In response, the two-justice plurality/controlling[20]

[20] *See Marks v. United States,* 430 U.S. 188, 193 (1977).

opinion holds "this test is triggered only" for FECA electioneering communications. *Id.* at 474 n.7 (plurality op.), *followed in NCRL-III,* 525 F.3d at 282, *Colorado Ethics,* 269 P.3d at 1258, *and NRTW,* 581 F.Supp.2d at 1050. This means that elsewhere the test *is* vague. *See id.* Elsewhere the test "might ... create an unwieldy standard that would be difficult to apply" and unconstitutionally chill political speech. *Colorado Ethics,* 269 P.3d at 1258 (citing *WRTL-II,* 551 U.S. at 468-69). As a "free-standing" or "stand-alone" test apart from FECA electioneering communications, it is vague under *WRTL-II. Tennant,* manuscript order at 35-37.

The district court does not limit the appeal-to-vote-test narrowing gloss to FECA electioneering communications. Based on this alone, the narrowing gloss is unconstitutionally vague – especially *vis-à-vis* A-1's newspaper ads, because they are not FECA electioneering communications. *See* 2 U.S.C. 434.f.3.A.i (2002) (broadcast).

Moreover, *"Citizens United* eliminate[s] the context in which the appeal-to-vote test has … any significance." *National Org. for Marriage, Inc. v. McKee,* 649 F.3d 34, 69 (1st Cir.2011), *cert. denied,* 565 U.S. ____, 132 S.Ct. 1635 (2012). In other words, after *Citizens United,*

the appeal-to-vote test is no longer a constitutional limit on government power.[21] What remains from *WRTL-II* regarding the test is the conclusion that the test *is* unconstitutionally vague, even *vis-à-vis* FECA electioneering communications. 551 U.S. at 492-94 (Scalia, J., concurring). How is anyone – including a speaker or a law enforcer – to know whether speech passes this test when it is "impermissibly vague"? *Id.* at 492.[22]

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[21] Whether FECA electioneering communications pass the appeal-to-vote test no longer affects whether government may regulate them. *Compare WRTL-II,* 551 U.S. at 457, 469-70, 474 n.7, *with Citizens United,* 130 S.Ct. at 889-90, 915.

Here is why: *Citizens United* holds that regardless of whether FECA electioneering communications pass the test, government (1) may *not* ban them, 130 S.Ct. at 889-90, by persons other than foreign nationals, *see id.* at 911 (citing 2 U.S.C. 441e), and (2) *may,* subject to further inquiry, *see id.* at 915-16, have the power to regulate them by requiring *non-political-committee* disclosure. *Id.* at 915 (upholding *non*-political-committee reporting). Since the test applied *only* to FECA electioneering communications, *WRTL-II,* 551 U.S. at 474 n.7; *NCRL-III,* 525 F.3d at 282; *Colorado Ethics,* 269 P.3d at 1257-58; *NRTW,* 581 F.Supp.2d at 1150, it no longer serves any constitutional purpose.

[22] A word of caution, especially given the incorrect statements that the "functional equivalent" of express advocacy is an extension of express advocacy, ER.44 n.17; ER.52-53 (quoting HAW.CODE R. 3-160-6): As a matter of *constitutional* law – which this action turns on, ER.133 – in assessing independent expenditures, one looks to *Buckley* express advocacy, 424 U.S. at 44&n.52, 80, not the "functional equivalent" of

●Fourth, it is odd to use the appeal-to-vote test to solve vagueness when its purpose was to address overbreadth. ER.106-07; *see WRTL-II,* 551 U.S. at 469-70.

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express advocacy. The "functional equivalent" of express advocacy is speech that passes the appeal-to-vote test, *WRTL-II,* 551 U.S. at 469-70, which applied *only* to FECA electioneering communications, *id.* at 474 n.7, which by definition are *not* express advocacy.

By definition, express advocacy and FECA electioneering communications *cannot* overlap. *Buckley* limits the FECA expenditure and independent-expenditure definitions to express advocacy – with express advocacy being a proper subset of "expenditure" and "independent expenditure." 424 U.S. at 44&n.52, 80. And under FECA, neither expenditures nor independent expenditures are electioneering communications. 2 U.S.C. 434.f.3.B.ii; *see NCRL-III,* 525 F.3d at 282 (stating electioneering communications are "beyond" express advocacy); *Colorado Ethics,* 269 P.3d at 1257-58; *NRTW,* 581 F.Supp.2d at 1150; *see also McConnell,* 540 U.S. at 189 (stating electioneering communications are not limited to express advocacy).

On this subject: It is wrong to say Hawaii's noncandidate-committee definition "excludes organizations doing only issue advocacy." ER.61; *see also* ER.63. Without the district court's narrowing gloss, "influencing" and "for the purpose of influencing" elections include issue advocacy. *Compare NCRL-I,* 168 F.3d at 713, *with Central Long Island,* 616 F.2d at 53 (quoting *Buckley,* 424 U.S. at 42 n.50). Even with the district court's narrowing gloss, the definition reaches speech that passes the appeal-to-vote test, which means FECA electioneering communications, which are not express advocacy, so they are issue advocacy.

Multiple responses would be incorrect.

●First, *Real Truth About Abortion, Inc. v. FEC,* 681 F.3d 544, 552-55 (4th Cir.2012), does not address the foregoing reasons that the appeal-to-vote test is vague.

●Second, like the district court, ER.72, *National Organization for Marriage, Inc. v. Roberts* calls the appeal-to-vote test "objective." 753 F.Supp.2d 1217, 1220, 1221 (N.D.Fla. 2010) (citing *Citizens United,* 130 S.Ct. at 889, 895). But "objective" is not the opposite of "vague." A standard can be both. *National Org. for Marriage, Inc. v. McKee,* 669 F.3d 34, 47 (1st Cir.2012). For example, a standard asking whether a reasonable person would conclude that speech "'advocat[es] the election or defeat' of a candidate" or is "for the purpose of influencing" an election would be both objective, *see WRTL-II,* 551 U.S. at 470 ("reasonable"), and vague. *Buckley,* 424 U.S. at 42-43, 77 (ellipsis omitted); ER.138.

●Third, although Defendants assert A-1's speech *passes* the appeal-to-vote test, *see* ER.470; ER.105-06; *cf. Roberts,* 753 F.Supp.2d at

1220-21,[23] A-1 cannot know what future CSC members will say about other speech, including future materially similar speech. *See Virginia Soc'y for Human Life, Inc. v. FEC,* 263 F.3d 379, 388 (4th Cir.2001) ("*VSHL-II*") (citing *Chamber of Commerce v. FEC,* 69 F.3d 600, 603 (D.C. Cir.1995)). In any event, the test asked whether the only reasonable interpretation of FECA electioneering communications was as an appeal to vote for or against a clearly identified candidate or candidates. *WRTL-II,* 551 U.S. at 470. The test did not include the seven factors in *Roberts,* 753 F.Supp.2d at 1220-21.

These factors help prove the test is vague. How was anyone to know a court would conclude speech passes the appeal-to-vote test just because it (1) takes place just before an election, (2) has a clearly identified candidate, (3) is targeted to the relevant electorate, (4) "state[s] the candidate's view on the issue" at hand, (5) "laud[s] or condemn[s] the view," (6) "states[s] whether the candidate is 'good' or 'bad' for Floridians," (7) "and then exhort[s] them to take action by telling them to call the candidate"? *Id.* Factors (1), (2), and (3) extend

[23] Although unclear due to vagueness, this is doubtful under *WRTL-II,* 551 U.S. at 470.

beyond the FECA electioneering-communication definition, *see* 2 U.S.C. 434.f.3, and therefore beyond where the test applied. *WRTL-II,* 551 U.S. at 474 n.7; *NCRL-III,* 525 F.3d at 282; *Colorado Ethics,* 269 P.3d at 1257-58; *NRTW,* 581 F.Supp.2d at 1150. Factors (4), (5), (6), and (7) – either individually or taken together – do not mean the only reasonable interpretation of speech is as an appeal to vote for or against the clearly identified candidate. *Cf. Citizens United,* 130 S.Ct. at 890; *WRTL-II,* 551 U.S. at 470.

●Fourth, saying that *Citizens United,* 130 S.Ct. at 889-90, applied the appeal-to-vote test would not acknowledge what *follows from Citizens United,* 130 S.Ct. at 889-90, 915.[24]

●Fifth, contrary to ER.53 n.19, in applying a *WRTL-II* appeal-to-vote-test narrowing gloss to similar language, *McKee* replaces vague law with a vague narrowing gloss. *See* 649 F.3d at 66-67, *followed in* 669 F.3d at 44-45; ER.123.

McKee misses the point. The point is not that the "basis for *Citizens United's* holding … had [any]thing to do with the appeal-to-

[24] *Supra* Part VI.D.1.

vote test or the divide between express and issue advocacy." 649 F.3d at 69. The point is not the *Citizens United holding* itself. Instead, the point is what *follows from* the holding.

Contrary to *McKee,* the appeal-to-vote test never was a "divide between express advocacy and issue advocacy." *Id.*[25] Saying the test was a way of "distinguishing between express and issue advocacy" or was *not* a "'constitutional limit on government power[,]'" *id.* at 69 n.48, misunderstands *WRTL-II,* 551 U.S. at 457, 469-70, 474 n.7. *See NCRL-III,* 525 F.3d at 282.

Aside from that, how can *McKee* acknowledge that "*Citizens United* eliminated the context in which the appeal-to-vote test has had any significance[,]" 649 F.3d at 69, and then say the test was *not* a "'constitutional limit on government power'"? *Id.* at 69 n.48. The test was "significan[t,]" because it *was* a "'constitutional limit on government power." *See WRTL-II,* 551 U.S. at 457, 469-70, 474 n.7; *NCRL-III,* 525 F.3d at 282. That government may "regulat[e]" some

[25] *See supra* Part VI.D.1.

"issue advocacy" does not mean the test was something other than a "'constitutional limit on government power.'" 649 F.3d at 69 n.48.[26]

2. The appeal-to-vote test in the electioneering-communications law

Hawaii's electioneering-communication definition is also unconstitutionally vague, because it uses the appeal-to-vote test. HRS.11-341.c.[27]

The electioneering-communications reporting requirements, HRS.11-341, are also unconstitutionally vague, because their only purpose is to implement the electioneering-communication definition. *See Davis,* 554 U.S. 744; *Buckley,* 424 U.S. at 76.

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[26] Instead, it means – *post-Citizens United* – that when it comes to spending for political speech by organizations government may *not* define as political committees – or whatever label a jurisdiction uses – the Supreme Court has established that government may regulate not only *Buckley* express advocacy but also FECA electioneering communications. *Infra* Part VI.G.2. The latter is the only form of such organizations' issue advocacy that the Supreme Court has established government may regulate. *See Citizens United,* 130 S.Ct. at 914-16.

[27] *Supra* Part VI.D.1.

3. "Advocates or supports" and "opposition"

Hawaii's advertisement definition refers to what "advocates or supports" candidates and "opposition" to candidates. HRS.11-302. By extension, these terms arise *via* "advertisement" in the electioneering-communication definition, HRS.11-341.c, the electioneering-communication reporting requirements, HRS.11-341.a-b, and the disclaimer requirements. HRS.11-391.

The district court's express-advocacy/appeal-to-vote-test narrowing gloss is impermissible here for the same reasons it is impermissible for other law.[28] Moreover, by using a *Citizens United* overbreadth analysis, the district court conflates vagueness with overbreadth. *See* ER.73 (citing 130 S.Ct. at 915). As the district court acknowledges, these are "conceptually distinct" challenges. ER.42.

For two reasons, "advocates or supports" and "opposition" are unconstitutionally vague.

●First, "advocates or supports" candidates is unconstitutionally vague, because "advocating" is vague. *Buckley,* 424 U.S. at 42-43;

[28] *Supra* Part VI.D.1.

ER.138. Based on this alone, the challenged law is unconstitutionally vague.

●Second, "advocates or supports" and "opposition" are unconstitutionally vague for additional reasons. While *McConnell* did say – in an entirely facial challenge, *e.g.,* 540 U.S. at 134, 174, 181 – that promote-support-attack-oppose ("PASO") is not unconstitutionally vague *vis-à-vis* party committees and federal candidates, *compare id.* at 170 n.64 *with* 2 U.S.C. 434.e *and id.* 441i (2002) (each citing *id.* 431.20.A), that is different from what is at issue here.

Other courts have held parts of PASO are vague *vis-à-vis* other speech or other speakers. *See WRTL-II,* 551 U.S. at 492 (Scalia, J., concurring) (calling, *inter alia,* PASO "impermissibly vague"); *id.* at 493 (calling PASO "inherently vague"):

> ●*NCRL-I* considers 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 result of an election." *NCRL-I* holds the law

"is unconstitutionally vague[.]" 168 F.3d at 712-13 (ellipsis omitted) (citing *Buckley,* 424 U.S. at 79-80).

●*Center for Individual Freedom v. Carmouche* considers a law requiring disclosure of payments "for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office." 449 F.3d 655, 662-63 (5th Cir.2006), *cert. denied,* 549 U.S. 1112 (2007). *Carmouche's* holding is based on the premise that the law is vague. *See id.* at 665, and

●*Buckley* holds "advocating the election or defeat of a candidate" is vague. 424 U.S. at 42-43; ER.138. Since that is more precise than PASO and the forms thereof at issue here, PASO and the forms thereof at issue here must also be vague. *Cf. WRTL-II,* 551 U.S. at 493 (Scalia, J., concurring) (calling the appeal-to-vote test vague and stating that it "seem[s] tighter" than, *inter alia,* PASO); *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).[29,30]

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[29] Considering whether speech "PASOs" comes close to assessing the intent or purpose behind, or the effect of, political speech to determine its meaning and whether government may regulate it. *WRTL-II,* 551 U.S. at 467-68, all but forecloses this.

WRTL-II was not the first time the Court rejected considering intent, purpose, or effect, *see Buckley,* 424 U.S. at 43 (quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945)), nor was *McConnell* the first time the Court considered the vagueness of parts of PASO. *See Cole v. Richardson,* 405 U.S. 676, 678-85 (1972) (treating oaths to support one's country and "oppose" its enemies as harmless "amenities" merely requiring compliance with other laws, but explaining that "oppose" would be vague elsewhere); *Cramp v. Board of Public Instruction,* 368 U.S. 278, 279 (1971) (holding "support" unconstitutionally vague); *cf. Baggett v. Bullitt,* 377 U.S. 360, 373 (1964) (stating that since some push vague laws to limits, "[w]ell intentioned prosecutors and judicial safeguards do not neutralize the voice of a vague law").

Of course, Hawaii law is no "amenity" merely requiring compliance with other laws. Instead, it has serious penalties. *E.g.,* ER.342-43.¶24.

[30] A vacated opinion missed a crucial point about *NCRL-III.* In approving undefined "support or oppose" language, *Real Truth About Obama, Inc. v. FEC* implied *NCRL-III* holds "support or oppose" is inherently *not* vague. 575 F.3d 342, 349-50 (4th Cir.2009), *cert. granted and judgment vacated,* 559 U.S. ____, 130 S.Ct. 2371 (2010). However, *NCRL-III* has no such holding. It addresses *North Carolina's* "support or oppose" definition, 525 F.3d at 289, 301, which after *NCRL-III, id.* at 281-86, includes *only Buckley* express advocacy.

Besides, political parties and many federal candidates' campaigns are filled with political professionals accustomed to, though not necessarily content with, baroque election law. *Cf. McConnell,* 540 U.S. at 170 n.64 (holding PASO is clear for political parties). PASO leaves in a quandary those speakers, other than political parties and federal candidates, who want to engage in political speech. They cannot know how far they may go before they are "PASOing." Therefore, they will "hedge and trim" their speech out of fear of violating a law that is hard for those outside a party or federal-candidate-campaign apparatus to understand. *Buckley,* 424 U.S. at 42 n.50 (quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945)).[31]

E. Defendants must prove their law survives scrutiny.

Regardless of the level of scrutiny:

●Government must prove law survives scrutiny. *WRTL-II,* 551 U.S. at 464 (strict scrutiny (citing *First Nat'l Bank of*

[31] *National Organization for Marriage v. Daluz* summarily rejects this. 654 F.3d 115, 120 (1st Cir.2011). *McKee,* decided by the same panel, disagrees with the distinction between *McConnell* and other law. 649 F.3d at 63-64.

Boston v. Bellotti, 435 U.S. 765, 786 (1978))), *quoted in Citizens United,* 130 S.Ct. at 898; *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 387 (2000) (intermediate scrutiny (quoting *Buckley,* 424 U.S. at 25)).

●The only interest that suffices to limit[32] "campaign finances" is the prevention of corruption of candidates or officeholders, or its appearance,[33] and

●Where "the First Amendment is implicated, the tie [(if there is one)] goes to the speaker, not the censor." *WRTL-II,* 551 U.S. at 474.

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[32] As opposed to "regulate." *See, e.g., Buckley,* 424 U.S. at 66-68, *followed in* ER.37 n.12.

[33] *FEC v. National Conservative PAC,* 470 U.S. 480, 496-97 (1985) ("*NCPAC*") (citing *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290 (1981); *see Citizens Against Rent Control,* 454 U.S. at 297 (referring to candidates and officeholders).

Given this – and given that freedom of speech is the norm, not the exception[34] – if government wants to regulate political speech in a way beyond what current case law allows, government must prove law survives scrutiny. It is not up to any speaker to prove the negative. *Cf. AFEC,* 131 S.Ct. at 2823 ("it is never easy to prove a negative" (quoting *Elkins v. United States,* 364 U.S. 206, 218 (1960))).

Corruption of candidates or officeholders or its appearance means only *quid-pro-quo* corruption or its appearance. *Citizens United,* 130 S.Ct. at 908-10. As a matter of law, influence over, access to, favoritism by, or gratitude from candidates or officeholders, without *quid-pro-quo* corruption or its appearance, does not suffice. *Id.* at 910; ER.112-13.

F. Hawaii's noncandidate-committee definition fails constitutional scrutiny, and is unconstitutional as applied to A-1's speech.

Burdens that apply when Hawaii defines an organization as noncandidate committee, namely

[34] *Supra* Part VI.C.

(1) Registration (including treasurer-designation and bank-account) and termination requirements. HRS.11-321 (registration); HRS.11-323 (organizational report); HRS.11-324 (treasurer); HRS.11-325 (officer restrictions); HRS.11-326 (termination); HRS.11-351.a (bank account).

(2) Recordkeeping requirements. HRS.11-324; HRS.11-351.b, and

(3) Extensive, periodic reporting requirements. HRS.11-331; HRS.11-335-HRS.11-340; HRS.11-351.c; HRS.11-359.a,

are the very burdens that are "onerous" as a matter of law under *Citizens United,* 130 S.Ct. at 898, and *WRTL-II,* 551 U.S. at 477 n.9 (citing *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 253-55 (1986) ("*MCFL*")). Never mind that Hawaii noncandidate committees must also comply with

(4) 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

(5) 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).[35]

Although *HLW* holds *post-Citizens United* that (1), (2), and (3) in Washington law are "not unconstitutionally burdensome[,]" 624 F.3d at 1013 (incorrectly citing *Citizens United,* 130 S.Ct. at 915-16 (addressing *non*-political-committee disclosure requirements)), this action is different:

[35] Even if requiring a ledger account instead of a separate bank account, HAW.CODE R. 3-160-21 (2010), lessened the burden, it would not remove the "burdensome" or "onerous" nature of being a noncandidate committee.

●Unlike in *HLW, id.* – and as in *Citizens United,* 130 S.Ct. at 897, and *MCFL,* 479 U.S. at 253 – noncandidate committees[36] report in *every* reporting period. HRS.11-336.

●*HLW* does not discuss (2).

●The *HLW* law had neither (4) nor (5). *See* 624 F.3d at 997-98, and

●A-1 is different from the HLW plaintiff.[37]

1. Exacting Scrutiny or Strict Scrutiny

It is wrong to say campaign-finance law is unconstitutional only if it "prohibit[s] a substantial amount of non-electoral speech." ER.46-47 (citation omitted).

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[36] Including A-1. *See, e.g.,* https://nc.csc.hawaii.gov/NCFSPublic/ReportDetail.php?RNO=NC20001

[37] *Supra* Part IV; *infra* Part VI.F.1.

If that were true, no disclosure requirement could ever be unconstitutional. But not even *HLW* cedes that much power to government. *Pre-* and *post-Citizens United,* law need not ban or otherwise limit political speech to be unconstitutional. *See, e.g., Snyder v. Phelps,* 562 U.S. ____, 131 S.Ct. 1207, 1218-19 (2011); *Buckley,* 424 U.S. at 74-82.

Under *HLW* – which supersedes previous Ninth Circuit case law and binds a Ninth Circuit panel, though not the *en-banc* Ninth Circuit, *see, e.g.,* 624 F.3d at 1012-14, exacting scrutiny applies when government defines an organization as a political committee and requires an organization to *be* a political committee – or whatever label a jurisdiction uses – to speak. *Id.* at 1010; *see also NMYO,* 611 F.3d at 677.[38]

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[38] In case they are necessary for consideration beyond a Ninth Circuit panel, *cf. HLW,* 624 F.3d at 1013, A-1 preserves several positions.

A-1 preserves its position that strict scrutiny applies to government's defining organizations as political committees – or whatever label a jurisdiction uses – and thereby imposing political-committee-like burdens. This is so both when government:

- Bans an organization itself from speaking and requires the organization to *form* a separate organization – a political

Exacting scrutiny does not ask whether law is "reasonable[,]" ER.47, or is an "undue burden[.]" ER.68. Nor does it inquire after

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committee, or whatever label a jurisdiction uses – to speak. *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 658 (1990) (holding a state requirement that an organization form a separate segregated fund "must be justified by a compelling state interest"), *overruled on other grounds, Citizens United*, 130 S.Ct. at 896-914; *see Citizens United,* 130 S.Ct. at 897-98 (applying strict scrutiny to a speech ban and noting the burdens of forming a political committee to do the same speech); *MCFL,* 479 U.S. at 252 (considering whether a "compelling state interest" justifies an independent-expenditure ban and noting the burdens of forming a separate segregated fund to do the same speech), and

●Does not ban an organization itself from speaking, *Citizens United,* 130 S.Ct. at 897 (noting that allowing the organization to speak would "not alleviate the First Amendment problems"); *MCFL,* 479 U.S. at 263 (holding there was no "compelling justification" for the "burdens" of corporate independent expenditures, which then included either forming or being a political committee), yet requires it to *be* a political committee – or whatever label a jurisdiction uses – to speak. *CRLC,* 498 F.3d at 1146 (applying strict scrutiny to a state requirement that organizations themselves be political committees); *NCRL-III,* 525 F.3d at 290 (addressing "narrower means" than a state requirement that organizations themselves be political committees). In the less-preferable alternative, exacting scrutiny applies when government requires an organization to *be* a political committee – or whatever label a jurisdiction uses – to speak. *NMYO,* 611 F.3d at 677.

"important government interests." ER.64; ER.68. Instead, a court first asks whether there is a "sufficiently important" government interest in regulating the speech. Only if there is does a court ask whether there is a "substantial relation" between the law and the interest. *Citizens United,* 130 S.Ct. at 914 (quoting *Buckley,* 424 U.S. at 64, 66).[39] "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of … requiring disclosure." *Buckley,* 424 U.S. at 65 (citing *NAACP v. Alabama,* 357 U.S. 449, 461 (1958)). Under exacting scrutiny, "the strength of the government[] interest must reflect the seriousness of the … burden on First Amendment rights." *Davis,* 554 U.S. at 744 (citing *Buckley,* 424 U.S. at 68).

[39] Saying "relevant correlation" is the same as saying "substantial relation" or "substantially related" under exacting scrutiny. *Compare Citizens United,* 130 S.Ct. at 914 (quoting *Buckley,* 424 U.S. at 64, 66), *with Davis,* 554 U.S. at 744 (quoting *Buckley,* 424 U.S. at 64).

Government may impose far greater burdens on organizations it may define as political committees than it may impose on other persons. *See MCFL,* 479 U.S. at 251-56.[40,41,42]

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[40] Contrary to ER.68 ("the *record* does not indicate that the burdens on A-1 are onerous" (emphasis added)), A-1 preserves its position that as a matter of *law,* not fact, political-committee – or, here, noncandidate-committee – status is not only "burdensome[,]" *Citizens United,* 130 S.Ct. at 897, but also "onerous[,]" *id.* at 898; *WRTL-II,* 551 U.S. at 477 n.9 (citing *MCFL,* 479 U.S. at 253-55), because political committees "are expensive and subject to extensive regulations." *Citizens United,* 130 S.Ct. at 897.

The *McKee* district court says this part of *Citizens United* means *only* that when a jurisdiction *bans* speech, letting an organization *form* a political committee does not change the fact that there is a ban. 765 F.Supp.2d 38, 48 (D.Me. 2011). This understates *Citizens United* and is an extension of another error by the same court: It does not recognize that the "First Amendment problems" extend beyond bans. *Citizens United,* 130 S.Ct. at 897.

[41] Federal courts of appeal strike down state laws that – like Hawaii law – do not ban speech but instead require that organizations themselves *be* political committees. *NMYO,* 611 F.3d at 673; *NCRL-III,* 525 F.3d at 279; *CRLC,* 498 F.3d at 1140-41.

McKee misses this point. *See* 649 F.3d at 56, *followed in* 669 F.3d at 39-40.

[42] A-1 preserves its position that while it is one thing to assert that *non*-political-committee disclosure requirements "do not prevent anyone from speaking," *Citizens United,* 130 S.Ct. at 914 (quoting *McConnell,* 540 U.S. at 201), *quoted in* ER.7 *and* ER.71, full-fledged political-

HLW converts a political-committee-*definition* challenge into a political-committee-*disclosure-requirements* challenge, 624 F.3d at 997-98, 1008-09, 1011-12,[43] and establishes a priority-incidentally test for states' imposing political-committee status: *HLW* holds government may impose political-committee status on organizations that have "'a' major purpose of political advocacy"; *HLW* equates this with "a 'primary' purpose of political activity." By this, *HLW* means organizations that "make political advocacy a priority" yet not

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committee burdens are another matter. *See id.* at 897; *MCFL,* 479 U.S. at 255.

Political-committee – or, here, noncandidate-committee – requirements are burdensome and onerous even if they include "only" – so to speak – (1) registration, including treasurer-designation, (2) recordkeeping, or (3) extensive, periodic reporting requirements yet not (4) limits or (5) source bans on contributions received. *See Citizens United,* 130 S.Ct. at 897-98 (mentioning (1), (2), and (3), but not (4) or (5)).

McKee misses this point. *See* 649 F.3d at 56.

Calling full-fledged political-committee-like burdens just another "disclosure requirement[,]" ER.55, misses *Citizens United* and *MCFL*.

[43] *HLW* incorrectly states that HLW challenged the political-committee disclosure requirements. *See* No. 1:08-cv-00590-JCC, VERIFIED COMPL. 10-12 (Count 1) (W.D.Wash. April 16, 2008).

organizations "that only incidentally engage in such advocacy." *Id.* at 1011.[44]

One fundamental difference between HLW and A-1 is that political advocacy is one of HLW's reasons for existing. *See id.* at 995-96. This is not true of A-1. Contrary to ER.65-68, political advocacy is not an A-1 priority, regardless of whether one looks at A-1's political

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[44] A-1 preserves its position that with the burdens of political-committee status in mind, *Buckley* establishes that government may define an organization as a political committee or otherwise impose political-committee-like burdens only if (a) it is "under the control of a candidate" or candidates, or (b) "the major purpose" of the organization is "the nomination or election of a candidate" or candidates, in the jurisdiction. 424 U.S. at 79, *followed in McConnell,* 540 U.S. at 170 n.64, *and MCFL,* 479 U.S. at 252 n.6, 262; *CRLC,* 498 F.3d at 1153-54 (noting *McConnell* did not change the test (citations omitted)); *NCRL-III,* 525 F.3d at 287-90.

Contrary to ER.44-46, the major-purpose test is not a narrowing gloss. *CRLC,* 498 F.3d at 1153.

The *McKee* holding that the test does not even apply to state law, 649 F.3d at 59, cannot be right. If it were, then state governments would have more power than the federal government to impose political-committee-like requirements. Since these requirements are burdensome and onerous as matter of law under *Citizens United* and *WRTL-II, McKee* makes no sense. Political speech needs protection from both federal and state governments. *See Bellotti,* 435 U.S. at 778-79.

advocacy in gross or as a proportion of all its activity. ER.117-18.[45] The fact that "A-1 has substantial and varied recent election-related activity in the 2010 election cycle[,]" ER.65-66, does not mean "political advocacy" is a "priority" for A-1 under *HLW,* 624 F.3d at 1011, *now*.

HLW – under which "political advocacy" that is not a "priority" is "incidental[]" – does not allow Hawaii to impose full-fledged political-committee disclosure requirements on A-1. *Id.* Indeed, the district court errs in not considering that the "deliberately dramatic contraction of A-1's plans after seriously analyzing *HLW* … means that even if political advocacy were a priority for A-1 in 2010, it no longer is."[46] It is wrong to say A-1 *now* does or seeks to do more than "'incidentally' engage[] in political advocacy" under *HLW,* 624 F.3d at 1011. ER.65.

Given the cost of political speech, holding that "political advocacy" is a "priority" for A-1, rather than being "incidental," when A-1 seeks to buy no more than three small $3000 newspaper ads, and make $250

[45] *Supra* Part IV.

[46] *Supra* Part IV.

contributions to Hawaii candidates, leaves little meaning left in "incidental."

Defendants say the total cost of A-1's three small newspaper ads and its contributions makes it constitutional to make A-1 be a noncandidate committee. *See* ER.129. But this reflects no understanding of how expensive even a small amount of political speech is: Three *small* ads cost $9000.

It is even worse to say, as the district court does, that the *HLW* test is whether an organization "actively engages in political activity." ER.66; *see also* ER.63; ER.67 ("political activity").[47] That reaches beyond the *HLW* priority-incidentally test. *See* 624 F.3d at 1011. An organization engaging in *any* political speech by definition "actively engages in political activity." Under an actively-engages-in-political-activity test, no such organization could *ever* avoid being a political-committee-like organization. But that is not the law, not even under *HLW*.

[47] The district court's three criteria, ER.63, include organizations "incidentally" engaging in political *advocacy* under *HLW*.

Contrary to ER.68, A-1's having "been complying with the requirements for several years" cannot mean the law is constitutional. If that were a constitutional-law principle, the *Brown v. Board of Education,* 347 U.S. 483 (1954), plaintiffs would have lost.

And however the three *Buckley* interests in regulating political speech may apply to Hawaii's defining A-1 as a noncandidate committee, *see, e.g.,* ER.56-60,[48] the interests do not trump the fact that political advocacy is not a "priority" for A-1 under *HLW*. Why? Because the *Buckley* interests go to the government-interest part of constitutional scrutiny, *see* 624 F.3d at 1005-08 (section entitled "Government Interest"), while the priority-incidentally test goes to the "tailoring" part of constitutional scrutiny. *See id.* at 1008-12 (section entitled "Tailoring Analysis"). These are different analyses. Law must survive both to survive scrutiny.

This alone suffices to hold Hawaii's noncandidate-committee definition unconstitutional as applied to A-1's speech under *HLW*.

[48] *Infra* Part VI.G.3.

In the alternative, *HLW* does not reach the issue of whether "the word 'primary' or its equivalent is constitutionally necessary" before "purpose" in a political-committee-like definition, because "primary" *is* in the definition *HLW* considers. *Id.* at 997, 1008-11. However, this action presents the issue *HLW* avoids, because Hawaii's noncandidate-committee definition, HRS.11-302, has no such word. Without "'primary' or its equivalent" – even if the phrase were "a primary" purpose (which it should not be) rather than "the primary" purpose – Hawaii law imposes full-fledged political-committee-like requirements in ways beyond what *HLW,* 624 F.3d at 1011-12 – not to mention *Citizens United,* 130 S.Ct. at 897-98, and *MCFL,* 479 U.S. at 251-56 – allows.

A-1 is an electrical-construction organization that engages in a small amount of speech. Regardless of whether one looks at A-1's "political activity" in gross or as a proportion of its all its activity, A-1 does not have "the" or even "a 'primary' purpose of political activity." *HLW,* 624 F.3d at 1011. This is not A-1's "purpose," let alone "a 'primary'" one. *See* ER.443-66.

2. Applying Exacting or Strict Scrutiny

Thus, under *HLW,* Hawaii's noncandidate-committee definition, HRS.11-302 – the challenge to which *HLW* converts into a challenge to noncandidate-committee disclosure requirements – fails exacting scrutiny and is unconstitutional as applied to A-1's speech.[49,50]

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[49] A-1 preserves its position that an organization can have only one major purpose, *see MCFL,* 479 U.S. at 252 n.6 (referring to "the major purpose" of an organization and "its organizational purpose," not purposes), and that A-1 does not have the major purpose of nominating or electing a candidate or candidates for state or local office in Hawaii: (1) It has not indicated this in its organizational documents, *see MCFL,* 479 U.S. at 241-42, 252 n.6, or in its public statements, *FEC v. GOPAC, Inc.,* 917 F.Supp. 851, 859 (D.D.C. 1996), and (2) it does not devote the majority of its spending to contributions to, or independent expenditures for, candidates, *CRLC,* 498 F.3d at 1152, *followed in NMYO,* 611 F.3d at 678; *NCRL-III,* 525 F.3d at 289, in the jurisdiction.

Contrary to *McKee,* there is nothing "perverse" or "pernicious" here. 649 F.3d at 59; 666 F.Supp.2d 193, 210 n.96 (D.Me. 2009). Although the major-purpose test may allow an organization that is active in many jurisdictions not to be a political committee in any jurisdiction, *see id.,* this follows from the twin principles that (1) each jurisdiction may regulate its own elections, *see NCRL-III,* 525 F.3d at 282 (citing *Buckley,* 424 U.S. at 13), and (2) an organization may have only one major purpose. *Supra* Part VI.F.2.

[50] A-1 preserves its position that Hawaii's noncandidate-committee definition fails strict or exacting scrutiny, because it lacks the "under the control of a candidate" and major-purpose tests. *See Buckley,* 424 U.S. at 79; *NCRL-III,* 525 F.3d at 290; *CRLC,* 498 F.3d at 1146; *NMYO,* 611 F.3d at 678.

Dismissing the propriety of the challenge to the noncandidate-committee definition – as opposed to the disclosure requirements – by saying noncandidate-committee status has no significance apart from the disclosure requirements, *see McKee,* 649 F.3d at 56, 58, misses this point: A challenge to a political-committee-like definition is *not* a challenge to *particular* political-committee-like burdens one-by-one. *Cf. Buckley,* 424 U.S. at 74. Rather, it is a challenge when law imposes a *package* of political-committee-like requirements, which together are "burdensome" and "onerous" as a matter of law under *Citizens United* and *WRTL-II*. *Supra* Part VI.F.1. The proper challenge is to the package.

McKee's fundamental disagreement is not over whether the proper challenge is to the definition. Rather, *McKee* disagrees with the *Citizens United* and *WRTL-II* holdings that such requirements are onerous, and then rejects the major-purpose test for state law. 649 F.3d at 56, 58, 59.

It is true that *SpeechNow.org v. FEC* applies exacting scrutiny to political-committee disclosure requirements and upholds them. 599 F.3d 686, 696-98 (D.C. Cir.) (*en banc*), *cert. denied,* 562 U.S. ____, 131 S.Ct. 553 (2010), *cited in* ER.55 *and* ER.58. However, under *MCFL,* 479 U.S. at 262, *quoted in CRLC,* 498 F.3d at 1152, the political-committee definition *is* constitutional as applied to SpeechNow's speech, because SpeechNow *passes* the major-purpose test. *See SpeechNow,* No. 1:08-cv-00248, COMPL.¶¶7, 47 (D.D.C. Feb. 14, 2008), *available at* http://www.fec.gov/law/litigation/speechnow_complaint.pdf. Thus, *SpeechNow* properly reaches the political-committee disclosure requirements.

Sampson v. Buescher correctly applies exacting scrutiny when the plaintiffs challenge *only* political-committee disclosure requirements, not a political-committee definition. *See* 625 F.3d 1247, 1253 (10th Cir.2010); *supra* Part VI.F.1; *infra* Part VI.G.1.

Once this is established, preventing "circumvention" of *invalid* law, ER.58; ER.67, "is not an independent state interest." *Landell v. Sorrell,* 406 F.3d 159, 169 (2d Cir.2005) (Walker, J., dissenting from the denial of rehearing and request for rehearing *en banc*) (citing *McConnell,* 540 U.S. at 161), *rev'd on other grounds,* 548 U.S. at 246-62.

The district court's fundamental error is believing *Citizens United* allows "disclosure" in any form. *See* ER.7-8; *see also Vermont Right to Life Comm., Inc. v. Sorrell,* ____ F.Supp.2d ____, No.2:09-cv-00188, manuscript order at 15-17 (D.Vt. June 21, 2012) ("*VRLC-II*") (same),[51] *notice of appeal filed,* (2d Cir. July 18, 2012).

And to be clear: Contrary to ER.46's and ER.72's implication, it has never been A-1's position that government may not regulate "issue advocacy" in any form or by any means.[52,53]

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[51] *Available at* http://www.atg.state.vt.us/assets/files/194%20VRLC%20MSJ%20Decision.pdf.

[52] *McKee,* 649 F.3d at 52, 54, *Daluz,* 654 F.3d at 118, and *HLW,* 624 F.3d at 1015-16, have similar straw men.

[53] Once it *is* constitutional to impose full-fledged political-committee burdens on an organization, government may, subject to further inquiry, *e.g., Buckley,* 424 U.S. at 74, require disclosure of all donations

G. The electioneering-communication definition, electioneering-communication reporting requirements, and disclaimer requirements fail constitutional scrutiny, and are unconstitutional as applied to A-1's speech.

1. Exacting Scrutiny

Exacting scrutiny applies to disclosure requirements, including attribution, disclaimer, and reporting requirements, both for organizations government *may* define as political committees, *see Davis,* 554 U.S. at 744 (quoting *Buckley,* 424 U.S. at 64), and for those it may *not*. *See Citizens United,* 130 S.Ct. at 914 (quoting *Buckley,* 424 U.S. at 64, 66).[54]

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received and spending by the organization. *See Citizens United,* 130 S.Ct. at 897; *MCFL,* 479 U.S. at 254. However, A-1 preserves its position that in determining *whether* government may impose full-fledged political-committee-like burdens, one asks, *inter alia,* whether the organization devotes the majority of its spending to either contributions to, or independent expenditures – meaning express advocacy not coordinated with a candidate or political party – for, candidates, *CRLC,* 498 F.3d at 1152, *followed in NMYO,* 611 F.3d at 678; *NCRL-III,* 525 F.3d at 289; *but see Real Truth,* 681 F.3d at 557-58, in the jurisdiction.

[54] Government may impose greater disclosure burdens on organizations it *may* define as political committees than it may impose on other organizations. *Supra* Part VI.F.1.

2. Spending for Political Speech

Moving beyond Hawaii's noncandidate-committee definition/disclosure requirements to ways that Hawaii regulates A-1's

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Therefore, it would be incorrect to lump (1) full-fledged political-committee disclosure requirements and (2) other disclosure requirements into one overbreadth analysis. See, e.g., Citizens United, 130 S.Ct. at 897-98, 914-16 (noting the burdens of being a full-fledged political committee, and later upholding disclosure requirements for FECA electioneering communications by an organization that is *not* a political committee); *MCFL,* 479 U.S. at 254-55, 262 (noting the burdens of being a full-fledged political committee, and later upholding *non*-political-committee reporting requirements for *Buckley* express advocacy by an organization that is *not* a political committee); *Buckley,* 424 U.S. at 74-81 (establishing the tests for when government may define organizations as full-fledged political committees and later upholding reporting requirements for *Buckley* express advocacy by persons government may *not* define as political committees).

Not distinguishing (1) from (2) is among a Ninth Circuit panel's mistakes in *ARLC,* 441 F.3d at 786-94, which *WRTL-II* and *Citizens United* supersede.

HLW does not make this mistake. *See* 624 F.3d at 1011-12, 1016-18.

SpeechNow also contradicts *MCFL, WRTL-II,* and *Citizens United: SpeechNow* says political-committee requirements are not that much more burdensome than *non*-political-committee reporting of independent expenditures properly understood. 599 F.3d at 697-98 This is incorrect as a matter of statutory law, *compare* 2 U.S.C. 432, 433, 434 *with id.* 434.c, g; *see also SpeechNow*, 599 F.3d at 691-92 (listing political-committee burdens), and constitutional law. *Supra* Part VI.F.1.

speech *other than* by imposing full-fledged political-committee-like burdens: *HLW* allows regulation of ballot-measure speech *via non*-political-committee disclosure requirements "shortly before the vote" on the ballot measure. *Id.* at 1017. However, the reasons for doing so are not present here. A-1's speech is not about ballot measures, so the recipients of the speech do not "act as legislators," *id.* (quoting *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1093-95 (9th Cir.2003) ("*CPLC-I*")), nor does A-1 present a danger of "special interest groups 'masquerading as proponents of the public weal'" and "misle[a]d[ing]" "the public," *id.* (quoting *United States v. Harriss,* 347 U.S. 612, 625 (1954)), because there is no "masquerading": A-1 complies with Hawaii's attribution requirements and identifies itself on its speech. Thus, the fact that A-1's speech, mentioning people who happen to be candidates, occurs "shortly before the vote" does not suffice to allow Hawaii to regulate the speech. *Id.* at 1017.

Thus, for speech beyond ballot-measure speech one looks beyond *HLW*. And since *HLW* supersedes previous Ninth Circuit law, *see id.* at 1012-14,[55,56] one returns to Supreme Court case law.

When it comes to persons Hawaii may *not* define as political committees, the *only* spending for political speech that Supreme Court precedent has established Hawaii has a sufficiently important interest in regulating is:

- *Buckley* express advocacy, 424 U.S. at 44&n.52, 80, *vis-à-vis* state or local office in Hawaii, and

- Regulable speech "about a candidate shortly before an election." *Citizens United,* 130 S.Ct. at 915: FECA

[55] Including *ARLC,* 441 F.3d at 786-94, because *HLW,* unlike *ARLC,* does not lump together political-committee-like burdens and *non*-political-committee disclosure requirements. *Supra* Part VI.G.1.

[56] If this point applies when it works in government's favor, it must also apply when it works against government. Government cannot have it both ways, especially when it regulates political speech. *See supra* Part VI.C.

> electioneering communications, *id.* at 914-16, having a clearly identified candidate for state or local office in Hawaii.

See NCRL-III, 525 F.3d at 281-82 (addressing these two categories before *Citizens United* removed the appeal-to-vote test as a constitutional limit on government power[57]). The jurisdictional limit – "state or local office in Hawaii" – is because of pre-emption of state law in federal matters, 2 U.S.C. 453.a, and states' power over their own, though not other states', elections. *See NCRL-III,* 525 F.3d at 282 (citing *Buckley,* 424 U.S. at 13). None of A-1's speech is such express advocacy or such an electioneering communication. Contrary to *McConnell,* Hawaii law even reaches "genuine[-]issue" speech. 540 U.S. at 206 n.88; ER.120.

The district court errs by not considering that Hawaii law reaches beyond these boundaries and then requiring Defendants to prove their law survives scrutiny. *See* ER.74-75.[58] Contrary to ER.75's implication,

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[57] *Supra* Part VI.D.1.

[58] *See supra* Part VI.E.

"Hawaii law" does not determine "constitutional law." ER.133. Again, if that were a constitutional-law principle, the *Brown* plaintiffs would have lost.

3. Government's Interest in Disclosure

Looking at the three *Buckley* interests in regulating political speech one at a time, *Buckley* discusses interests in:

> ●Deterring *corruption and its appearance* by revealing large contributions and expenditures. 424 U.S. at 67 (*Buckley* Interest 2). But, contrary to ER.57, and as the district court holds elsewhere, ER.36-40, this interest does not even apply when speech is independent. *Citizens United,* 130 S.Ct. at 908-09. All of the spending for political speech – as opposed to the contributions – at issue here is independent. Therefore, Interest 2 does not even apply to A-1's spending for political speech. *Cf. CPLC-I*, 328 F.3d at 1105 n.23 (rejecting Interest 2, because "the risk of corruption … in cases involving candidate elections simply is not present in a popular vote on" a ballot measure (quoting *Bellotti,* 435 U.S.

at 789-90));[59] *Sampson v. Buescher,* 625 F.3d 1247, 1256 (10th Cir.2010) (rejecting Interest 2, because "quid-pro-quo corruption cannot arise in a ballot-issue campaign" (collecting authorities)), and

●Detecting violations of limits on contributions *received*. 424 U.S. at 68 (*Buckley* Interest 3). But, contrary to ER.57, this interest also does not apply to A-1's spending for political speech. *See Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1032 (9th Cir.2009) (rejecting Interest 3 where no contribution or spending limit was constitutional in the first place (citing *McConnell,* 540 U.S. at 196)); *CPLC-I*, 328 F.3d at 1105 n.23 (rejecting Interest 3 where no contribution or spending limit was at issue). Hawaii limits contributions A-1 receives only by

[59] Although *Buckley's* Interest 2 discussion refers to what "affect[s] elections[,]" 424 U.S. at 67, that is not the standard for what is regulable. *Compare NCRL-I,* 168 F.3d at 713, *with Central Long Island,* 616 F.2d at 53 (quoting *Buckley,* 424 U.S. at 42 n.50).

> defining A-1 as a full-fledged noncandidate committee,[60] which is unconstitutional.[61]

This leaves *Buckley* Interest 1: Providing "information 'as to where political[-]campaign money comes from and how it is spent by the candidate' … to aid the voters in evaluating those who seek … office." This

> allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

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[60] *See supra* Part VI.F.

[61] *Supra* Part VI.F.2.

424 U.S. at 66-67 (*Buckley* Interest 1).

Buckley applies Interest 1 to organizations that government *may* define as political-committees-like organizations. *See id.; see also HLW,* 624 F.3d at 1005-08. However, under *HLW,* Hawaii may not define A-1 as a political-committee-like organization.[62]

When it comes to spending for political speech by organizations government may *not* define as political committees, *Buckley* applies Interest 1 to *Buckley* independent expenditures, 424 U.S. at 80-81, and *Citizens United* applies it to FECA electioneering communications. 130 S.Ct. at 914-15. However, A-1 engages in neither *Buckley* independent expenditures nor FECA electioneering communications.

Government's enthusiasm for information does not justify gathering information by any possible means. It does not trump the *HLW* priority-incidentally test.[63] *See MCFL,* 479 U.S. at 262 (holding *non*-political-committee disclosure requirements for independent expenditures, properly understood, "provide precisely the information

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[62] *Supra* Part VI.F.2.

[63] *Supra* Part VI.F.1. Or the major-purpose test. *Id.*

necessary to monitor MCFL's independent spending activity and its receipt of contributions"); *id.* at 266 (O'Connor., J., concurring) (holding full-fledged political-committee burdens "do not further the [g]overnment's informational interest in campaign disclosure, and, for the reasons given by the Court, cannot be justified"). Nor does government's enthusiasm for information automatically allow it to regulate spending for political speech by means *other than* defining organizations as political committees. *See, e.g., NCRL-III,* 525 F.3d at 281-82.

In short, *Buckley Interest 1 is not a wild card for government to play. It does not let government regulate whatever or however it likes. See Sampson,* 625 F.3d at 1256. After all, government's self-limiting enumerated power to regulate *elections,* a power that other parts of the Constitution further limit,[64] provides *no* power to demand information for information's sake. *See id.*

To the extent *Citizens United,* 130 S.Ct. *at 914-16, quoted in* ER.7 *and* ER.46, addresses disclosure requirements, it addresses only *non-*

[64] *See Citizens Against Rent Control,* 454 U.S. at 296-97; *supra* Part VI.C.

political-committee disclosure requirements, *id.*, not the greater burdens of full-fledged political-committee status, *see id.* at 897-98; *see also MCFL,* 479 U.S. at 251-56, and upholds *non*-political-committee disclosure requirements only for FECA electioneering communications. *Citizens United,* 130 S.Ct. at 914-15; *see also Buckley,* 424 U.S. at 80-81 (same for *Buckley* independent expenditures).

Again, the district court's fundamental error is believing *Citizens United* allows "disclosure" in any form. *See* ER.7-8; *see also VRLC-II,* manuscript order at 15-17 (same).

4. Applying Exacting Scrutiny

Because Hawaii's electioneering-communication definition, electioneering-communication reporting requirements, HRS.11-341, and disclaimer requirements, HRS.11-391.a.2, reach beyond spending for political speech that the Supreme Court has established government may regulate when it comes to organizations government may *not* define as political committees, or here "noncandidate committees," *Defendants must prove their law survives exacting scrutiny.* Like the *Randall* defendants, 548 U.S. at 255-56, they have not met their burden. ER.133-34; ER.319-20.

But there is more. ER.321.

●First, the *24 hour-reporting requirement,* which applies only to electioneering communications, HRS.11-341.a, fails exacting scrutiny under *National Organization for Marriage v. McKee,* 723 F.Supp.2d 245, 266 (D.Me. 2010), *aff'd/rev'd on other grounds,* 649 F.3d 34, 45-46 (1st Cir.2011), *cert. denied,* 565 U.S. ____, 132 S.Ct. 1635 (2012). The 24 hour-reporting requirement is so great that the government's interest does not reflect the burden on the speech. *See Davis,* 554 U.S. at 744 (citing *Buckley,* 424 U.S. at 68). This requirement is "patently unreasonable" and "severely burdens First Amendment rights[.]" *Citizens for Responsible Gov't State PAC v. Davidson,* 236 F.3d 1174, 1197 (10th Cir.2000) (applying strict scrutiny).[65]

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[65] *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake* rejects a challenge to a 24 hour-reporting requirement by saying *McConnell* upheld one. 524 F.3d 427, 439 (4th Cir.) ("*NCRL-FIPE*") (citing *McConnell,* 540 U.S. at 195-96), *cert. denied,* 555 U.S. 994 (2008). However, while the *McConnell* plaintiffs challenged a law with 24 hour reporting, they challenged it for other reasons.

Tennant, which *NCRL-FIPE* binds, rejects a 24 and 48 hour-reporting-requirements challenge. However, unlike Hawaii's 24 hour-reporting-requirement, the *Tennant* requirements:

●Second, *disclaimer requirements,* which apply to electioneering communications and beyond, HRS.11-391.a.2, regulate the content of speech itself, so – as to speech *other than Buckley* express advocacy or FECA electioneering communications, *see, e.g., Citizens United,* 130 S.Ct. at 915 (holding attribution requirements, and by extension disclaimers, for FECA electioneering communications avoid confusion by making clear that neither candidates nor parties are paying for them) – disclaimer requirements are an even greater First Amendment violation than reporting requirements. *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 355 (1995), *quoted in Heller,* 378 F.3d at 992, *and cited in VRLC-I,* 221 F.3d at 386, 387. Nothing in *McConnell* undermines, much less changes, this *McIntyre* holding. *Heller,* 378 F.3d at 987.

> ●After *Tennant* reach only *Buckley* express advocacy and FECA electioneering communications.
>
> ●Have high-dollar thresholds more than two weeks before elections, and
>
> ●Have low-dollar thresholds in the two weeks before elections.

See manuscript order at 76-83.

●Third, the *disclaimer requirements,* HRS.11-391.a.2, are so great that the government's interest does not reflect the burden on speech. *See Davis,* 554 U.S. at 744 (citing *Buckley,* 424 U.S. at 68). Complying with this law takes up precious space, yet even more significantly it distracts readers from A-1's message and misleads them into believing speech is election-related, rather than issue-related.

While the facts of *McIntyre* are different from this action's, courts have applied *McIntyre* beyond its facts. *See Heller,* 378 F.3d at 988-1002; *VRLC-I,* 221 F.3d at 211, 214.

And although some circuits have upheld attribution/disclaimer requirements since *McIntyre, see Heller,* 378 F.3d at 1000-02 (discussing other opinions), almost all those actions – unlike *Heller, see* 378 F.3d at 983-84 – have involved:

●Organizations that government may define as political committees. *See Gable v. Patton,* 142 F.3d 940, 945 (6th Cir.1998) (candidate committee), *cert. denied,* 525 U.S. 1177 (1999).

●Spending for political speech that government may regulate even though it is by persons government may not define as political committees. *See Citizens United,* 130 S.Ct. at 915-16 (FECA electioneering communications); *Majors v. Abell,* 361 F.3d 349, 355 (7th Cir.2004) ("*Majors-II*") (*Buckley* express advocacy); *FEC v. Public Citizen,* 268 F.3d 1283, 1289-90 (11th Cir.2001) (same); *Citizens for Responsible Gov't State PAC,* 236 F.3d at 1197 (same); *Daggett v. Webster,* 74 F.Supp.2d 53, 62 (D.Me. 1999) (same), *aff'd,* 205 F.3d 445, 465-66 (1st Cir.2000); *Kentucky Right to Life, Inc. v. Terry,* 108 F.3d 637, 643&n.18, 646-48 (6th Cir.) ("*KRTL*") (same), *cert. denied,* 522 U.S. 860 (1997),[66] or

●Contributions that government may regulate even though they are received by persons government may not define as political committees. *See Survival Educ. Fund v. FEC,* 65

[66]*ARLC,* 441 F.3d at 786-94, and *McKee,* 649 F.3d at 61, are outliers, yet *ARLC* no longer applies, because subsequent case law supersedes it. *E.g., Citizens United,* 130 S.Ct. at 914-16.

F.3d 285, 295 (2d Cir.1995) (contributions "that will be converted to expenditures[,]" *i.e.,* are earmarked for *Buckley* express advocacy).

Contrary to ER.73, *Citizens United,* 130 S.Ct. at 915-16, does not dispose of all attribution-and-disclaimer-requirement challenges.

H. Hawaii's ban on contributions by government contractors is unconstitutional as applied to A-1's contributions to particular candidates.

A-1 will abide by constitutional *limits* on contributions candidates receive. *Compare* HRS.11-357 *with Randall,* 548 U.S. at 246-62.

While A-1 does not question HRS.11-355's banning government contractors' contributions to candidates or officeholders who decide whether the contractors receive contracts or oversee contracts, *see Dallman v. Ritter,* 225 P.3d 610, 627 n.28 (Colo. 2010), this as-applied challenge presents a different question.

Regardless of whether intermediate scrutiny, *see Beaumont v. FEC,* 539 U.S. 146, 162 (2003) (quoting *Shrink Mo.,* 528 U.S. at 387-88), or strict scrutiny applies, *cf. Long Beach Area Chamber of Commerce v. City of Long Beach,* 603 F.3d 684, 691 n.4, 693 (9th Cir.) (questioning

the scrutiny level *post-Citizens United* and holding it is unnecessary to consider), *cert. denied,* 562 U.S. ____, 131 S.Ct. 392 (2010), government has no compelling or sufficiently important interest in *banning* A-1's contributions when the candidates or officeholders neither decide whether A-1 receives contracts nor oversee them. In the alternative, such a ban is not narrowly tailored or closely drawn to meet a compelling or sufficiently important government interest. Such a ban is not related to "those who have some control over awarding … contracts, which would be directly correlated to its purpose of preventing the appearance of impropriety." *Dallman,* 225 P.3d at 627. Hawaii's ban applies beyond those "with oversight responsibility." *Id.* It applies to "all levels of government." *Id.* at 628.

A ban is limit of zero, and the only interest that suffices to limit campaign finances is the prevention of corruption of candidates or officeholders, or its appearance.[67] Without a connection to candidates or officeholders who decide whether government contractors receive contracts or who oversee contracts, no danger of corruption arises from

[67] *Supra* Part VI.C.

A-1's being a government contractor. *See id.* at 627-28. Because A-1 will contribute only to candidates who neither decide whether A-1 receives contracts nor oversee A-1's contracts, Hawaii's ban, HRS.11-355, is unconstitutional *as applied* to A-1's speech, regardless of the scrutiny level.

This is consistent with *Citizens United,* 130 S.Ct. at 908-10, whose rationale this and other circuits have applied to contribution limits, albeit as applied to contributions for independent spending for political speech. ER.39-40 (collecting authorities). But that is a distinction without a difference here, because those opinions apply *Citizens United's* rationale and hold contribution limits – and by extension, bans – unconstitutional as applied when they prevent neither *quid-pro-quo* corruption nor its appearance. ER.39-40 (collecting authorities). So it is here.

And since this is only an as-applied challenge, facial-challenge-like analyses sprinkled throughout ER.78-84 do not apply. *Cf.* ER.116-17. Rather, Defendants must prove their law survives scrutiny,[68] so

[68] *Supra* Part VI.E.

Defendants must show *quid-pro-quo* corruption or its appearance[69] *involving A-1's speech, i.e.,* its *contributions.* This is how *as-applied* challenges work. *See* ER.36-40 (collecting authorities); *cf. WRTL-II,* 551 U.S. at 457, 469-70, 474 n.7.

Contrary to ER.88, a court's need for information does not justify rejecting an as-applied challenge. Rather, it means Defendants must supply the information.[70] Defendants sought no discovery. A-1 prevails, because Defendants offer insufficient evidence, *see Randall,* 548 U.S. at 255-56, that A-1's contributions will cause *quid-pro-quo* corruption or its appearance.[71]

Contrary to ER.85, other legal persons' ability to speak does not diminish A-1's challenge. As a matter of law, A-1 does not "speak ... through" them. ER.85; *see Citizens United,* 130 S.Ct. at 897 (holding organizations do not "speak" through political committees).

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[69] *Supra* Part VI.C.

[70] *See supra* Part VI.E.

[71] *Supra* Part VI.C.

Contrary to ER.85-86, A-1's ability to engage in other speech does not diminish A-1's challenge. "This argument misses the point." *Yamada v. Kuramoto,* 744 F.Supp.2d 1075, 1084 (D.Haw. 2010), *appeal dismissed,* (9th Cir. June 10, 2011) (rejecting Defendants' parallel argument).

> That argument is akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says "I disagree with the draft," cf. *Cohen v. California,* 403 U.S. 15 (1971), or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices, cf. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). Such notions run afoul of "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 573 (1995).

WRTL-II, 551 U.S. at 477 n.9.

Contrary to ER.86-87, legislators' appropriation powers and related powers do not establish corruption or its appearance. *See Dallman,* 225 P.2d at 627-28. Under *Citizens United,* 130 S.Ct. at 910, "benefit[s]" and "close friendships" are insufficient. ER.86-87. Only *quid-pro-quo* corruption or its appearance suffices. 130 S.Ct. at 908-10. Saying "[l]egislators *may* have power" does not suffice. ER.87 (emphasis added).

Contrary to ER.87 n.30, it is backwards to say "A-1 cannot know in advance whether any particular candidate will *not* be in a position to control or 'oversee' specific contracts [involving A-1] if the candidate is later elected. [(emphasis in original)]" No crystal ball is necessary. Under *Dallman,* A-1 must avoid contributing to those who *do* or definitely *will* (1) decide whether A-1 receives contracts or (2) oversee A-1's contracts.

Contrary to ER.89, as-applied challenges by their very nature invalidate "legislative choices." Law can be facially constitutional and still be unconstitutional as applied to particular speech. *E.g., Wisconsin Right to Life, Inc. v. FEC,* 546 U.S. 410, 411-12 (2006) ("*WRTL-I*"). Courts do strike down contribution limits and bans, *e.g.,*

Randall, 548 U.S. at 246-62, even while acknowledging they lack a "'scalpel to probe' each possible contribution level." *Id.* at 248 (quoting *Buckley,* 424 U.S. at 30). The district court erred in not using the "scalpel" it has. ER.114-16. Scalpels are especially appropriate for as-applied challenges, *see, e.g., WRTL-II,* 551 U.S. at 457, 469-70, 474 n.7, regarding contributions, as this and other circuits recognize. *See, e.g.,* ER.36-40 (collecting authorities). Contrary to ER.90, the "wisdom of these particular choices" *is* for "courts to decide[.]" The district court did "decide"; it just decided incorrectly. *See* ER.90-91.

I. Much, though not all, of the law challenged here is facially unconstitutional.

When a facial challenge is purely a Fifth or Fourteenth Amendment challenge, and thus has no First Amendment component, the challenging party must prove the law is unconstitutionally vague in all its applications. *See United States v. Salerno,* 481 U.S. 739, 745 (1987). However, when law burdens free speech, the challenging party need only meet a lower First Amendment standard for facial unconstitutionality, even when the party also challenges the law as unconstitutionally vague under the Fifth or Fourteenth Amendment.

Id. (recognizing the substantial-overbreadth doctrine under the First Amendment (citing *Schall v. Martin,* 467 U.S. 253, 269 n.18 (1984))).

In "a facial challenge to the overbreadth and vagueness of a law" burdening free speech, a court asks whether the law "reaches a substantial amount of constitutionally protected conduct." *City of Houston v. Hill,* 482 U.S. 451, 458-59 (1987) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 (1982), and citing *Kolender,* 461 U.S. at 358&n.8 (rejecting the dissent's *Salerno*-like burden)); *cf. Holder v. Humanitarian Law Project,* 561 U.S. ____, 130 S.Ct. 2705, 2718-19 (2010) (rejecting a substantial-overbreadth vagueness analysis when the law clearly proscribes plaintiffs' conduct).[72]

In other words, law burdening free speech is facially unconstitutional when it reaches "a substantial amount of protected speech … not only in an absolute sense, but also relative to the [law's]

[72] Besides, *Buckley* holds particular law facially vague. 424 U.S. at 41-43, 76-77. If "unconstitutionally vague in all its applications" were the standard when law burdens free speech, then *Buckley* would have come out differently, because the law is *not* unconstitutionally vague as applied to *Buckley* express advocacy. *Id.* at 44.

plainly legitimate sweep." *United States v. Williams,* 553 U.S. 285, 292-93 (2008) (citing *Board of Trs. of State Univ. of N. Y. v. Fox,* 492 U.S. 469, 485 (1989); *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973)). And when law burdens free speech, courts apply "a more stringent vagueness test" than they apply to other law. *Hoffman Estates,* 455 U.S. at 499.

Challenging parties must prove challenged law is facially unconstitutional. *McConnell,* 540 U.S. at 207 (citing *Broadrick,* 413 U.S. at 613).

All of the law that is unconstitutional as applied to A-1's speech – *except the contribution ban,* HRS.11-355 – is also facially unconstitutional. *See, e.g., NCRL-III,* 525 F.3d at 285-86 ("support or oppose"), 289-90 (political-committee definition).

The Supreme Court has never upheld such sweeping regulation of political speech. Thus, Defendants may not simply cite *McConnell* or *Citizens United*, and claim their law is facially constitutional. *See, e.g., id.* at 286.

As in *NCRL-III, id.* at 285, Hawaii law is full of constitutional flaws.[73] Under such circumstances, a court should embrace a facial holding. "Any other course of decision would prolong the substantial … chilling effect" Hawaii law causes. *Citizens United,* 130 S.Ct. at 894. "It is not judicial restraint to accept a[] narrow argument just so the Court can avoid another argument with broader implications." *Id.* at 892.

Defendants may assert that A-1 has described only its own situation and not others', yet that was all that was in the *Citizens United* record. *See, e.g., id.* at 886-88. For the facial challenge, Citizens United offered not facts but a "theory" of facial unconstitutionality. *Citizens United v. FEC,* 530 F.Supp.2d 274, 278 (D.D.C. 2008). In other words, Citizens United offered the law, *see id.,* to meet its burden of proving the law was facially unconstitutional.[74] That did not prevent a

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[73] *Supra* Parts VI.D-G.

[74] Citizens United later dismissed the facial challenge in the district court, JAMES BOPP, JR. & RICHARD E. COLESON, *Citizens United v. Federal Election Commission:* "Precisely What *WRTL* Sought to Avoid" 45, CATO S.CT. REVIEW 2009-2010, *available at* http://www.cato.org/pubs/scr/2010/Bopp-Coleson-on-Citizens-United.pdf,

facial holding in *Citizens United,* 130 S.Ct. at 892, 894. So if *Citizens United, id.* at 896-914, can enter a facial holding, this Court can as well.

VII. Conclusion

No one doubts Hawaii has the power to regulate some political speech, yet multiple Hawaii-law provisions are unconstitutionally vague, both as applied and facially. Multiple provisions are overbroad, either as applied, or both as applied and facially. For the foregoing reasons, Hawaii law is unconstitutional under binding case law,

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which means the Supreme Court ruled on a facial claim on which the district court did not ultimately rule. *See* 130 S.Ct. at 896-914.

including *HLW*. This Court should reverse the district court on A-1's claims.

VIII. Related Cases Statement

A-1 knows of no related cases.

Respectfully submitted,

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July 30, 2012

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/s/ Randy Elf
Randy Elf

July 30, 2012

[75] *Available at* http://www.ca9.uscourts.gov/rules/.

Addendum

Addendum Table of Contents

Hawaii Administrative Rules

§ 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.

§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.

Hawai'i Revised Statutes
Division 1. Government
Title 2. Elections
Chapter 11. Elections, Generally
Part XIII. Campaign Finance

A. General Provisions

***

➞§ 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 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.

***

C. Registration

→§ 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.

→§ 11-322. Organizational report, candidate committee

(a) The candidate committee organizational report shall include:

(1) The committee's name and

address, including web page address, if any;

(2) The candidate's name, address, and telephone number;

(3) The office being sought by the candidate, district, and party affiliation;

(4) The chairperson's name and address and, if appointed, the deputy chairperson's name and address;

(5) The treasurer's name and address and, if appointed, all deputy treasurers' names and addresses;

(6) The name and address of each depository institution in which the committee will maintain any of its accounts and the applicable account number;

(7) A certification by the candidate and treasurer of the statements in the organizational report; and

(8) The name and address of each contributor who contributed an aggregate amount of more than $100 to the candidate committee since the last election applicable to the office being sought 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)(8) shall be electronically filed with the commission within ten days of the change being brought to the attention of the committee chairperson or treasurer.

→§ 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.

→§ 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.

➞§ 11-325. When an individual may not serve as a committee officer

No candidate committee or noncandidate committee that supports or opposes a candidate shall have an officer who serves as an officer on any other candidate committee or noncandidate committee that supports or opposes the same candidate.

➞§ 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.

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D. Reporting and Filing with the Commission

➞§ 11-331. Filing of reports, generally

(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; 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.

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➞§ 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;

(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 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 11-338 if the committee receives late contributions from any person aggregating more than $500 or makes late contributions aggregating more than $500.

→§ 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 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 11-326.

➞§ 11-337. Reporting expenditures

For purposes of this part, an expenditure is deemed to be made or incurred when the services are rendered or the product is delivered. Services rendered or products delivered for use during a reporting period are deemed delivered or rendered during the period or periods of use; provided that these expenditures shall be reasonably allocated between periods in accordance with the time the services or products are actually used.

➞§ 11-338. Late contributions; report

(a) The candidate, authorized person in the case of a noncandidate committee that is a party, or treasurer in the case of a candidate committee or other noncandidate committee, that, within the period of fourteen calendar days through four calendar days prior to any election, makes contributions aggregating more than $500, or receives contributions from any person aggregating more than $500, shall file a late contribution report by means of the commission's electronic filing system on or before the third calendar day prior to the election.

(b) The late contribution report shall include the following information:

(1) Name, address, occupation, and employer of the contributor;

(2) Name of the candidate, candidate committee, or noncandidate committee making or receiving the contribution;

(3) The amount of the contribution;

(4) The contributor's aggregate

contributions to the candidate, candidate committee, or noncandidate committee; and

(5) The purpose, if any, to which the contribution will be applied.

(c) A late contribution report filed pursuant to this section shall be in addition to any other report required to be filed by this part.

➞§ 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.

➞§ 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 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, 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.

→§ 11-341. Electioneering communications; statement of information

(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 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:

(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.

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E. Contributions; Prohibitions; Limits

➞§ 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.

➞§ 11-352. False name contributions prohibited

(a) No person shall make a contribution to any candidate, candidate committee, or noncandidate committee in any name other than that of the person who owns the money, property, or service.

(b) All contributions made in the name of a person other than the owner of the money, property, or service shall escheat to the Hawaii election campaign fund.

➞§ 11-353. Anonymous contributions prohibited

(a) Except as provided in subsection (d), no person shall make an anonymous contribution to any candidate, candidate committee, or noncandidate committee.

(b) A candidate, candidate committee, or noncandidate committee shall not knowingly receive, accept, or retain an anonymous contribution, or report such contribution as an anonymous contribution, except as provided in this section.

(c) An anonymous contribution shall not be used or expended by the candidate, candidate committee, or noncandidate committee, but shall be returned to the contributor. If the contributor cannot be identified, the contribution shall escheat to the Hawaii election campaign fund.

(d) This section shall not apply to amounts that aggregate to less than $500 that are received from ten or more persons at the same political function. The receipt of these contributions shall be disclosed in a report filed pursuant to sections 11-333 and 11-335.

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→§ 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.

➞§ 11-356. Contributions by foreign national or foreign corporation prohibited

(a) Except as provided in subsection (b), no contributions or expenditures shall be made to or on behalf of a candidate, candidate committee, or noncandidate committee, by a foreign national or foreign corporation, including a domestic subsidiary of a foreign corporation, a domestic corporation that is owned by a foreign national, or a local subsidiary where administrative control is retained by the foreign corporation, and in the same manner prohibited under 2 United States Code section 441e and 11 Code of Federal Regulations section 110.20, as amended.

(b) A foreign-owned domestic corporation may make contributions if:

(1) Foreign national individuals do not participate in election-related activities, including decisions concerning contributions or the administration of a candidate committee or noncandidate committee; or

(2) The contributions are domestically-derived.

➞§ 11-357. Contributions to candidate committees; limits

(a) No person shall make contributions to:

(1) A candidate seeking nomination or election to a two-year office or to a candidate committee in an aggregate amount greater than $2,000 during an election period;

(2) A candidate seeking nomination or election to a four-year nonstatewide office or to a candidate committee in an aggregate amount greater than $4,000 during an election period; or

(3) A candidate seeking nomination or election to a four-year statewide office or to a candidate committee in an aggregate amount greater than $6,000 during an election period.

(b) For purposes of this section, the length of term of an office

shall be the usual length of term of the office as unaffected by reapportionment, a special election to fill a vacancy, or any other factor causing the term of the office the candidate is seeking to be less than the usual length of term of that office.

➞§ 11-358. Contributions to noncandidate committees; limits

No person shall make contributions to a noncandidate committee in an aggregate amount greater than $1,000 in an election. This section shall not apply to ballot issue committees.

➞§ 11-359. Family contributions

(a) A contribution by a dependent minor shall be reported in the name of the minor but included in the aggregate contributions of the minor's parent or guardian.

(b) A contribution by the candidate's immediate family shall be exempt from section 11-355, but shall be limited in the aggregate to $50,000 in any election period; provided that the aggregate amount of loans and contributions received from the candidate's immediate family does not exceed $50,000 during an election period.

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➞§ 11-361. Aggregation of contributions and expenditures

(a) All contributions and expenditures of a person whose contributions or expenditures are financed, maintained, or controlled by any corporation, labor organization, association, party, or any other person, including any parent, subsidiary, branch, division, department, or local unit of the corporation, labor organization, association, party, political committees established and maintained by a national political party, or by any group of those persons shall be considered to be made by a single person.

(b) A contribution by a partnership shall not exceed the limitations in this section

and shall be attributed to the partnership and to each partner in direct proportion to the partner's share of the partnership profits, according to instructions that shall be provided by the partnership to the party, candidate, or committee receiving the contribution.

(c) A contribution by a limited liability company shall be treated as follows:

(1) A contribution by a limited liability company that is treated as a partnership by the Internal Revenue Service shall be considered a contribution from a partnership;

(2) A contribution by a limited liability company that is treated as a corporation by the Internal Revenue Service shall be considered a contribution from a corporation;

(3) A contribution by a limited liability company with a single individual member that is not treated as a corporation by the Internal Revenue Service shall be attributed only to that single individual member; and

(4) A limited liability company that makes a contribution shall, at the time the limited liability company makes the contribution, provide information to the party, committee, or candidate receiving the contribution specifying how the contribution is to be attributed.

(d) A person's contribution to a party that is earmarked for a candidate or candidates shall be included in the aggregate contributions of both the person and the party. The earmarked funds shall be promptly distributed by the party to the candidate.

(e) A contribution by a dependent minor shall be reported in the name of the minor but included in the aggregate contributions of the minor's parent or guardian.

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➞§ 11-364. Excess contribution; return; escheat

(a) Any candidate, candidate committee, or noncandidate committee that receives in the aggregate more than the applicable contribution limit in section 11-357, 11-358, 11-359, or 11-360 shall return any excess contribution to the contributor within thirty days of receipt of the excess contribution. Any excess contribution not returned to the contributor within thirty days shall escheat to the Hawaii election campaign fund.

(b) A candidate, candidate committee, or noncandidate committee that complies with this section prior to the initiation of administrative action shall not be subject to any fine under section 11-410.

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➞§ 11-373. Noncandidate committee loan prohibited

A noncandidate committee shall not receive or make a loan.

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