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* *Pro hac vice* application granted September 8, 2010

In the United States District Court
for the District of Hawaii

Jimmy Yamada, Russell Stewart, and A-1 A-Lectrician, Inc., ***Plaintiffs*** ***v.*** **Paul Kuramoto,** in his official capacity as chair and member of the Hawaii Campaign Spending Commission; Steven Olbrich, in his official capacity as vice chair and member of the Hawaii Campaign Spending Commission; Gino Gabrio, Dean Robb, and Michael Weaver, in their official capacities as members of the Hawaii Campaign Spending Commission, ***Defendants***	Civil Action No. 10-497 JMS/RLP

Plaintiffs' Summary Judgment Brief

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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 (2010), *available at* http://www.ca2.uscourts.gov/clerk/Rules/LR/Local_Rule_32_1.htm (all Internet sites visited Dec. 1, 2011).

Table of Authorities[2]

Cases

[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.

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

Plaintiffs Jimmy Yamada, Russell Stewart, and A-1 A-Lectrician, Inc. ("A-1"), file this summary-judgment brief.

I. Background

Yamada and Stewart each sought to contribute $2500 to the Aloha Family Alliance – Political Action Committee ("AFA-PAC") before the 2010 general election. FIRST AM. VERIFIED COMPL. ("FAVC") (Doc.24[3]) ¶7.

AFA-PAC is a Hawaii noncandidate committee that engages in only independent spending for political speech. It does not make direct contributions to, or coordinate any spending for political speech with, any candidate for state or local office in Hawaii or other candidates, the candidate's agents, or the candidate's committee, or a state or local political party in Hawaii or other parties. AFA-PAC wants to receive Yamada's and Stewart's contributions, but the contributions would violate Hawaii law. FAVC.¶8; HAW. REV. STAT. 11-358 (2010) ("HRS.11-358").[4]

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[3] PLS.' SUMM. J. MOT. Exh.9 ("PSJM.Exh.9").

[4] *Available at* http://hawaii.gov/campaign/law/hawaii-revised-statutes.

However, Yamada and Stewart made these contributions in 2010, *see* AFA-PAC Report, Schedule A (Sept. 19 to Oct. 18, 2010),[5] after this Court preliminarily enjoined Hawaii law as applied to their speech. Doc.71, *appeal dismissed,* (9th Cir. June 10, 2011).

Yamada and Stewart are United States citizens and will each contribute $2500 to AFA-PAC again in 2012 but only if an injunction is in place. YAMADA.DEC.¶¶1-4;[6] STEWART.DEC.¶¶1-4.[7]

Plaintiff 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 or political party. Nor is it connected with any political committee. Consistent with direction from the Hawaii Campaign Spending Commission ("CSC"), A-1 many years

[5] *Available at* https://nc.csc.hawaii.gov/NCFSReport/RPT2010/20101027212930NC20274SA.html.

[6] PSJM.Exh.3.

[7] PSJM.Exh.4.

ago registered itself as a noncandidate committee. FAVC.¶¶9-10 & Exh.2.[8]

Before the 2010 general election, when A-1 was not a government contractor, it contributed to several Hawaii state-legislature candidates and seeks to do so again in 2012. However, now A-1 is a state contractor. A-1.DEC.¶¶4-5.[9]

A-1 has a policy not to "buy favors" from elected officials, and it wants to make contributions, while it is a government contractor, to candidates – like those to whom it contributed in 2010 – who do *not* decide whether A-1 receives contracts and who do *not* oversee the contracts. However, Hawaii's ban on candidate and noncandidate committees' receiving contributions from government contractors, HRS.11-355, means A-1 may not contribute to candidates. A-1 will contribute to candidates only if a court enjoins the ban. FAVC.¶14; A-1.DEC.¶¶6-7.

[8] PSJM.Exh.10.

[9] PSJM.Exhs.5-7.

A-1 also sought to buy, and did buy, three newspaper ads. FAVC.Exhs.14-15; Doc. 119-1,[10] in September 2010. A-1 spent more than $2000 on these ads. The ads have clearly identified candidates for state office and refer to "PEOPLE WE PUT INTO OFFICE" and "THE REPRESENTATIVES WE PUT INTO OFFICE[.]" *See* FAVC.¶36 & Exh.19 at 3.[11] At this point, it is too early for A-1 to plan similar speech for September or October 2012. FAVC.¶¶15-21; Doc. 91 at 7-8 ("Doc.91.7-8"); A-1.DEC.¶¶8-10.

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

[10] PSJM.Exhs.11-12, 16.

[11] PSJM.Exhs.15.

candidates, much less those for state or local office in Hawaii. FAVC.¶27; FAVC.Exhs.17-18.[12]

Moreover, political advocacy is not one of A-1's reasons for existing. It is not it a "priority" for A-1, in the sense that 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 *Human Life of Washington, Inc. v. Brumsickle* establishes "priority" and "incidental[]" as opposites. 624 F.3d 990, 1011 (9th Cir. 2010) ("*HLW*"), *cert. denied,* 562 U.S. ____, 131 S.Ct. 1477 (2011). Nevertheless, given the uncertain boundaries of the *HLW* priority-incidentally test, *see id.,* A-1 reasonably fears political advocacy is a "priority" for A-1 under *HLW.* A-1.DEC.¶¶11-13; *see* FAVC.Exhs.17-18.

[12] PSJM.Exhs.13-14. "Independent expenditure" means express advocacy as defined in *Buckley v. Valeo* and not coordinated with a candidate, a candidate's committee, a candidate's agent, or a party, which is the standard under the Constitution. 424 U.S. 1 , 39-51 (1976); *McConnell v. FEC,* 540 U.S. 93, 219-23 (2003); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) ("*CPLC-I*").

Plaintiffs challenge five sets of Hawaii laws. A-1 challenges four, while Yamada and Stewart challenge one. FAVC.¶25.

●First, A-1 challenges Hawaii's noncandidate-committee definition, HRS.11-302, because A-1 no longer wants to 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 as the CSC has conveyed them to A-1 over the years: It long ago registered itself as a noncandidate committee, it keeps records, and it complies with extensive reporting requirements. However, A-1 also reasonably fears it cannot engage in its political speech without being a noncandidate committee.

Moreover, the noncandidate-committee burdens the CSC has conveyed to A-1 are not Hawaii's only noncandidate-committee burdens. The burdens include (1) registration (including treasurer-designation and bank-account) and termination requirements, (2) recordkeeping requirements, (3) extensive reporting requirements, (4) limits on

contributions received, and (5) contribution-source bans.[13] A-1 reasonably fears it must bear all these burdens. FAVC.¶¶26-31 & Exhs.17-18.

●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 – which refers to "PEOPLE WE PUT INTO OFFICE" and "THE REPRESENTATIVES WE PUT INTO OFFICE" – 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-1's resources, including its time to devote to its business. A-1 does not want to submit its speech to government officials for their review and editing before engaging in the speech – as the CSC's executive director suggested on

[13] *Infra* Part II.F (citations omitted).

September, 1, 2010 – regardless of how willing they may be to review and edit speech. FAVC.¶¶32-38 & Exh.19 at 3.

Moreover, when Plaintiffs' and Defendants' counsel, at this Court's direction, conferred before Plaintiffs filed their first amended verified complaint, Plaintiffs' counsel noted that Hawaii law is vague. A woman from the CSC – whom Plaintiffs' counsel understood to identify herself as CSC executive director Barbara Wong – was at the conference and responded, "You're a lawyer. You can do research." ELF.DEC.¶¶2-3.[14]

But A-1 does not wish to bear to 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. A-1.DEC.¶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 v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 889 (2010).

[14] PSJM.Exh.8.

●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 will include A-1's name and address, and they will 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. FAVC.¶¶39-42.

●Fourth, since A-1 is a state contractor, Hawaii bans the contributions A-1 wants to make to candidates. *See* HRS.11-355. These candidates do *not* decide whether A-1 receives government contracts. Nor do they oversee the contracts. FAVC.¶¶43-46; A-1.DEC.¶¶6-7.

●Fifth, Yamada's and Stewart's $2500 contributions to AFA-PAC exceed Hawaii's $1000 per-election limit on contributions AFA-PAC receives. *See* HRS.11-358. FAVC.¶¶47-49.

In materially similar situations in the future, Plaintiffs intend to engage speech materially similar to all of the speech at issue in this

action, such that Hawaii law will apply to them as it does now. FAVC.¶50.

II. Discussion

A. Plaintiffs' claims are justiciable.

1. Standing

Plaintiffs have standing as to each part of this pre-enforcement challenge.

First, Yamada and Stewart's injury, and A-1's injury from some of the law it challenges, is the chill[15] to speech caused by Defendants' prospective enforcement of Hawaii law or prosecution of Plaintiffs. *See* FAVC.¶25; A-1.DEC.¶15. The relief they seek will redress this chill, thereby allowing them to engage in their speech without fear of enforcement or prosecution. Therefore, they have standing to seek relief from the chill. *See, e.g., Human Life of Wash., Inc. v. Brumsickle,*

[15] The term "pre-enforcement" applies before civil enforcement or criminal prosecution. The term "chill" is a proper subset of "pre-enforcement" and applies in the First Amendment context when speakers, fearing civil enforcement or criminal prosecution, will not engage in their speech. *See New Hampshire Right to Life PAC v. Gardner,* 99 F.3d 8, 13-14 (1st Cir. 1996) ("*NHRL*"). Thus, "pre-enforcement" applies to all of the speech at issue here, and "chill" applies to some of them.

624 F.3d 990, 1000-01 (9th Cir. 2010) ("*HLW*"), *cert. denied,* 562 U.S. ____, 131 S.Ct. 1477 (2011).

Second, A-1 has standing as to other law it challenges, *see* FAVC.¶25, because A-1 will engage in its speech and comply with the law, as opposed to being chilled and therefore not doing what the law forbids. A-1 will continue complying with the law while asking the Court to declare the law unconstitutional and enjoin its enforcement so compliance is no longer necessary. *See Davis v. FEC,* 554 U.S. 724, 734 (2008).

2. Ripeness

Pre-enforcement challenges are ripe when they address laws chilling political speech. *See, e.g., HLW,* 624 F.3d at 1000-01.

Pre-enforcement challenges are also ripe when a speaker is already complying or will comply with the challenged law but asks a court to declare the law unconstitutional and enjoin its enforcement so compliance is no longer necessary. *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)).

3. Mootness

Although the time for some of Plaintiffs' 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).

A-1 does not "agree" that the challenges to electioneering-communication law are "moot." Doc.91.42. This law would apply to A-1 *only if* it is *not* a noncandidate committee, *see* HAW. CODE R. 3-160-48 (2010),[16] *cited in* Doc.91.12, *e.g.,* if a court holds Hawaii may *not* define A-1 as such. *See* FAVC.¶35. Then A-1 would have standing to challenge the electioneering-communication law. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *cf.* Doc.91.12 n.7; Doc.91.42.

[16] *Available at* http://hawaii.gov/campaign/law/hawaii-administrative-rules.

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 (2009). This action meets these criteria for Plaintiffs.

C. First Principles

Freedom of speech is the norm, not the exception. *See, e.g., Citizens United v. FEC*, 558 U.S. ____, ____, 130 S.Ct. 876, 911 (2010) ("more speech, not less, is the governing rule"); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976), *quoted in Arizona Free Enterprise Club's Freedom PAC v. Bennett,* 564 U.S. ____, ____, 131 S.Ct. 2806, 2828-29 (2011) ("*AFEC*").

The framers established government with the consent of the governed, *see, e.g.,* U.S. CONST. preamble (1787) ("We the People of the United States"); HAWAII CONST. preamble ("We, the people of Hawaii, grateful for Divine Guidance"), and government has only those powers that the governed surrendered to it in the first place.

This power – including the "constitutional power of Congress to regulate federal elections[,]" *Buckley*, 424 U.S. at 13 & n.16, and each

state's parallel power over its own, though not other states', elections, *see, e.g., North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 281 (4th Cir. 2008) ("*NCRL-III*") (citing *Buckley,* 424 U.S. at 13); HAWAII CONST. art. II – is further constrained by other law.

Under the Fourteenth Amendment, U.S. CONST. amend. XIV (1868), state law regulating political speech must not be vague. *See Buckley,* 424 U.S. at 41-43, 76-77. To avoid the problems vagueness causes, law regulating political speech must also be simple and concise. *See Citizens United,* 130 S.Ct. at 889.

Even non-vague law regulating political speech must comply with the First Amendment, U.S. CONST. amend. I (1791), which guards against overbreadth, *Buckley,* 424 U.S. at 80 ("impermissibly broad"), and applies to the states. *Gitlow v. New York,* 268 U.S. 652, 666 (1925).

The government's power to regulate *elections* is an exception to the norm of freedom of speech. *See Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 296-97 (1981). The power to regulate *elections* is also self-limiting. To ensure law is not "impermissibly broad," *Buckley* establishes that government may, subject to further

inquiry,[17] have the power to regulate donations received and spending for political 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*") (holding, *inter alia,* that spending by [organizations government may define as] political committees *is* unambiguously campaign related (quoting *Buckley,* 424 U.S. at 79 ("Expenditures of candidates and of 'political committees' so construed … are, by definition, campaign related"), *quoted in McConnell v. FEC,* 540 U.S. 93, 170 n.64 (2003))), helps ensure government regulates only speech that government has the "power to regulate," *NCRL-III,* 525 F.3d at 282, *i.e.,* speech that government has a constitutional interest in regulating. *See id.* at 281 (citing *Buckley,* 424 U.S. at 80). It is part of the larger principle that law regulating political speech must not be overbroad. *See Buckley,* 424 U.S. at 80 ("impermissibly broad").

[17] *E.g., infra* Parts II.F-J.

Given this, Plaintiffs submit that suggesting any constitutional law on political speech – not just the "unambiguously campaign related" principle *post-Citizens United*, *see NMYO,* 611 F.3d at 676 & n.4; *Center for Individual Freedom v. Tennant,* ____ F.Supp.2d ____, ____, manuscript order at 31-33 & n.21 (S.D.W.Va. July 18, 2011),[18] *notice of appeal filed,* (4th Cir. Sept. 1, 2011) – creates a "safe harbor" "from a regulator's perspective" looks at this backwards. Doc.91.22, 91.46 n.16; *see also* Doc.91.47.

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

However *Human Life of Washington, Inc. v. Brumsickle* affects the as-applied and facial *overbreadth*[19] claims here, it does *not* affect the as-applied or facial *vagueness* claims, because its vagueness holdings do not address language anyone challenges as vague in this action. *See*

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

[19] "Overbreadth" applies not only to facial claims but also to as-applied ones. *See, e.g., Alaska Right to Life Comm. v. Miles,* 441 F.3d 773, 785 (9th Cir.) ("*ARLC*"), *cert. denied,* 549 U.S. 886 (2006).

624 F.3d 990, 1019-21 (9th Cir. 2010) ("*HLW*"), *cert. denied,* 562 U.S. ____, 131 S.Ct. 1477 (2011).

In addressing whether a jurisdiction may define an organization as a political committee – or whatever label a jurisdiction uses – the law considers vagueness and overbreadth in that order. *See Buckley v. Valeo,* 424 U.S. 1, 74-79 (1976).

Hawaii law uses:

- "[I]nfluencing" and "for the purpose of influencing" elections in the noncandidate-committee and expenditure definitions. HRS.11-302.
- What the Supreme Court called the appeal-to-vote test in the electioneering-communication definition. *Compare* HRS.11-341.c.3 ("[i]s not susceptible to any reasonable interpretation other than as an appeal to vote"), *with Citizens United v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 895 (2010) (citing *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 470 (2007) ("*WRTL-II*") ("susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate")), and

> ●"[A]dvocates or supports" candidates and "opposition" to candidates in the advertisement definition, HRS.11-302, and by extension 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.

This language is unconstitutionally vague.

●First, "influencing" and "for the purpose of influencing" elections are unconstitutionally vague. *Buckley,* 424 U.S. at 77 (ellipsis omitted); *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).[20] *McConnell v. FEC,* 540 U.S. 93 (2003), does not change

[20] 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 Education,* 347 U.S. 483 (1954).

this. *See Landell,* 382 F.3d at 162 n.7 (Winter, J., dissenting). Besides, discussing public issues that are also electoral-campaign issues "naturally and inexorably" influences elections, *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), and "influencing elections" is a "classic form of issue advocacy[,]" *NCRL-I,* 168 F.3d at 713, only one form of which the Supreme Court has permitted government to regulate. *See Citizens United,* 130 S.Ct. at 914-16 (electioneering communications as defined in the Federal Election Campaign Act ("FECA")).[21]

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[21] *National Organization for Marriage, Inc. v. McKee* applies a *WRTL-II* appeal-to-vote-test narrowing gloss to similar language. 649 F.3d 34, 66-67 (1st Cir. 2011), *pet. for cert. filed,* (U.S. Nov. 2, 2011), *available at* http://www.jamesmadisoncenter.org/cases/files/2011/11/Cert-Petition-final.pdf. However, such a narrowing gloss is not "reasonable and readily apparent" under *Stenberg v. Carhart,* 530 U.S. 914, 944 (2000) (quoting *Boos v. Barry,* 485 U.S. 312, 330 (1988)). Furthermore, *WRTL-II* itself acknowledges that the appeal-to-vote test is vague as to speech other than electioneering communications as defined in FECA, 551 U.S. at 474 n.7, which the law challenged in *McKee* and here extends beyond. *See* 2 U.S.C. 434.f.3 (2002). So the panel has replaced vague law with other law that the Supreme Court has already held is vague apart from electioneering communications as defined in FECA; as explained below, *infra* Part II.D, the appeal-to-vote test is now vague as to all speech.

On this point: A-1 submits that the preliminary-injunction denial runs the vagueness analysis and the as-applied or facial overbreadth analysis into one analysis without considering the inherent vagueness of the challenged language. *See* Doc.91.21-22. Vagueness and overbreadth are separate inquires. *See, e.g., Buckley,* 424 U.S. at 74-81. Vagueness concerns go *not* to the boundary between "express advocacy and issue advocacy[,]" Doc.91.45 (citation omitted); *cf. Citizens United,* 130 S.Ct. at 915, but to the speaker's inability to know when the law applies. *See Buckley,* 424 U.S. at 41-43, 76-77.

●Second, *WRTL-II* rejects a contention that the appeal-to-vote test is vague by noting it applied *only* to electioneering communications as defined in FECA. 551 U.S. at 474 n.7.[22] Elsewhere the test *is* vague. *See id.; Center for Individual Freedom v. Tennant,* ____ F.Supp.2d ____,

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Thus, even if the panel's narrowing gloss were permissible under *Stenberg,* the narrowing gloss would not do away with vagueness.

[22] 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).

____, manuscript order at 35-36 (S.D.W.Va. July 18, 2011),[23] *notice of appeal filed,* (4th Cir. Sept. 1, 2011). The Hawaii electioneering-communication definition reaches beyond FECA electioneering communications, because it reaches beyond broadcast speech and beyond speech targeted to the relevant electorate. *See* HRS.11-341.c. Based on this alone, Hawaii's electioneering-communication definition, and by extension its electioneering-communication reporting requirements, are unconstitutionally vague as applied to speech other than FECA electioneering communications. *See WRTL-II,* 551 U.S. at 474 n.7; *Tennant,* manuscript order at 35-36. None of A-1's speech is a FECA electioneering communication, because it is not broadcast. *See* 2 U.S.C. 434.f.3.A.i.

Moreover, *Citizens United* removes the appeal-to-vote test as a constitutional limit on government power.[24] What remains from *WRTL-*

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

[24] Whether electioneering communications as defined in FECA 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. In other words, *"Citizens*

II regarding the appeal-to-vote test is the conclusion that the test *is* unconstitutionally vague, even *vis-à-vis* FECA electioneering

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United eliminate[s] the context in which the appeal-to-vote test has any significance." *McKee,* 649 F.3d at 69.

Here is why: *WRTL-II* holds that government may ban electioneering communications as defined in FECA – and implies that government may otherwise regulate them, *see* 551 U.S. at 457, 465, 471, 476-77, 477, 478, 478-79, 479, 480, 481 – only when they pass the test. *Id.* at 457, 469-70, 474 n.7. They pass the test when their only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate in the jurisdiction. *See id.* at 457, 469-70, 474 n.7. But *Citizens United* holds that regardless of whether they pass the test, government may *not* ban electioneering communications as defined in FECA, *e.g.,* 130 S.Ct. at 889-90, by persons other than foreign nationals. *See id.* at 911 (citing 2 U.S.C. 441e). And regardless of whether electioneering communications as defined in FECA pass the test, government *may,* subject to further inquiry, *see, e.g., id.* at 915-16 (giving an example of when disclosure is unconstitutional), have the power to regulate them by requiring *non-political-committee-like* disclosure. *Id.* at 915 (upholding non-political-committee reporting). *Infra* Part II.G.2. Since the appeal-to-vote test applied *only* to electioneering communications as defined in FECA, *WRTL-II,* 551 U.S. at 474 n.7; *see also North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 282 (4th Cir. 2008) ("*NCRL-III*") (citing *WRTL-II,* 127 S.Ct. 2652, 2667 (2007)), *cited in Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning,* No. 08-445, 2009 WL 1457972 at *5 (N.D. Fla. May 22, 2009) (unpublished) (Doc. 26-2), *Broward,* 2008 WL 4791004 at *7 (N.D. Fla. Oct. 29, 2008), *clarified on other grounds,* 2008 WL 4878917 (N.D. Fla. Nov. 2, 2008) (electioneering-communications definition") (unpublished) (Doc. 26-3), *and National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert,* 581 F.Supp.2d 1132, 1144, 1150 (D. Utah 2008), it no longer serves any constitutional purpose.

communications. *See* 551 U.S. at 492-94 (Scalia, J., concurring in part and concurring in the judgment).

So *Citizens United* does not just remove the appeal-to-vote test as a constitutional limit on government power. It renders the test unconstitutionally vague. How is anyone – including a speaker or a law enforcer – to know whether speech is "not susceptible to any reasonable interpretation other than as an appeal to vote for or against a specific candidate"? HRS.11-341.c.3. Such a standard is "impermissibly vague[.]" *WRTL-II,* 551 U.S. at 492 (Scalia, J., concurring in part and concurring in the judgment); *see also Tennant,* manuscript order at 35-36.

While the preliminary-injunction denial does not address electioneering-communication-law claims, *e.g.,* Doc.91.12 n.7, it calls the appeal-to-vote test "objective[.]" Doc.91.45.[25] But "objective" is not the

[25] *National Organization for Marriage, Inc. v. Roberts* also asserts this. 753 F.Supp.2d 1217, 1220, 1221 (N.D. Fla. 2010) (preliminary-injunction denial); *id.*, SUMM. J. ORDER at 6 (N.D. Fla. Aug. 8, 2011) (unpublished) ("SJO.6") (PSJM.Exh.17), *notice of appeal filed,* (11th Cir. Sept. 2, 2011).

opposite of "vague." A standard can be both.[26] The fact that the Supreme Court *thought* it was establishing an "objective" appeal-to-vote test, *Citizens United,* 130 S.Ct. at 895-96, does not mean that the test in hindsight is not vague. From the get-go, it was vague as applied to speech other than FECA electioneering communications. *See WRTL-II,* 551 U.S. at 474 n.7; *Tennant,* manuscript order at 35-36. After *Citizens United* removed the *WRTL-II* appeal-to-vote test as a constitutional limit on government power, what remains of the test is the conclusion that it is unconstitutionally vague as to other speech as well. *See* 551 U.S. at 492-94 (Scalia, J., concurring in part and concurring in the judgment).[27,28]

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[26] 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).

[27] *Roberts* says *Citizens United,* 130 S.Ct. at 895-96, does not abolish the appeal-to-vote test. 753 F.Supp.2d at 1220. However, it is not these pages that remove the test as a constitutional limit on government power. It is the part of *Citizens United* noted above. *See* 130 S.Ct. at 889-90, 915.

After incorrectly asserting the appeal-to-vote test is not vague, *Roberts* asserts speech *passes* the appeal-to-vote test. SJO.5; 753 F.Supp.2d at

●Third, "advocates or supports" candidates is unconstitutionally vague. *Buckley,* 424 U.S. at 42 ("advocating"). Based on this alone, the advertisement definition, and by extension the electioneering-

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1220-21. However, the test did not include *Roberts's* list of factors. *See* 753 F.Supp.2d at 1220-21, *followed in* SJO.5.

These factors help prove A-1's point that 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" people in the jurisdiction, (7) "and then exhort[s] them to take action by telling them to call the candidate"? 753 F.Supp.2d at 1220-21, *followed in* SJO.5. Factors (1), (2), and (3) extend 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 457, 469-70, 474 n.7; *NCRL-III,* 525 F.3d at 281-82. Factors (4), (5), and (6) – 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.

[28] Since the appeal-to-vote test is no longer a constitutional limit on government power, it is unnecessary to consider whether in applying the appeal-to-vote test, "'basic background information that may be necessary to put an ad in context' may be considered in determining whether a communication falls within its meaning." Doc.91.45 (quoting *WRTL-II,* 551 U.S. at 473-74). Yet if this were necessary to consider, one should note this reference to "context" is more about con*tent* than con*text,* which *WRTL-II,* 551 U.S. at 467-68, all but forecloses considering in determining the meaning of speech and whether government may regulate it.

communication definition, the electioneering-communication reporting requirements, and the disclaimer requirements are unconstitutionally vague as applied to A-1's speech.

The phrase "advocates or supports" candidates is unconstitutionally vague for additional reasons. So is "opposition" to candidates. While *McConnell* did say promote-support-attack-oppose ("PASO") is not unconstitutionally vague *vis-à-vis* party committees and federal candidates, *compare* 540 U.S. at 170 n.64 *with* 2 U.S.C. 434.e (2002) *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 in part and concurring in the judgment) (calling, *inter alia,* PASO "impermissibly vague"); *id.* at 493 (calling PASO "inherently vague"). One court considered 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." The court held the law "is unconstitutionally vague[.]" *NCRL-I,* 168 F.3d at 712-13 (ellipsis omitted) (citing *Buckley,* 424 U.S. at 79-80). Another court considered 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." *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662-63 (5th Cir. 2006), *cert. denied,* 549 U.S. 1112 (2007). The court's holding was based on the premise that the law is vague. *See id.* at 665. And *Buckley* holds the phrase "advocating the election or defeat of a candidate" is vague. 424 U.S. at 42-44. Since "advocating the election or defeat of a candidate" 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 in part and concurring in the judgment) (calling the appeal-to-vote test vague and stating that it "seem[s] tighter" than, *inter alia,* PASO); *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 289, 301 (4th Cir. 2008) ("*NCRL-III*") (approving "support or oppose" when – after *NCRL-III,* 525 F.3d at 281-86 – its definition included only express advocacy as defined in *Buckley*).[29,30]

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[29] Moreover, 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* all but forecloses this. 551 U.S. at 467-68. *WRTL-II* was not

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 that PASO is clear for political parties). PASO leaves in a quandary those speakers, other than political parties and

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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" requiring compliance with other laws. Instead, it is law with serious penalties. *E.g.,* FAVC.¶24.

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

federal candidates, who want to engage in political speech. They cannot know how far they may go before they are "PASOing." As a result, they will "hedge and trim" their speech out of fear of violating a law that is hard for those outside a party or candidate-campaign apparatus to understand. *Buckley,* 424 U.S. at 42 n.50 (quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945)).[31]

On this point: A-1 again submits that the preliminary-injunction denial runs the vagueness analysis and the as-applied or facial overbreadth analysis into one analysis without considering the inherent vagueness of the challenged language. *See* Doc.91.44-47.

All of the foregoing are unconstitutionally vague as applied to A-1's speech. 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)).

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[31] *National Organization for Marriage, Inc. 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.

The electioneering-communications reporting requirements are also unconstitutional as applied to A-1's speech, because their only purpose is to implement the unconstitutional electioneering-communication definition. *See Davis v. FEC,* 554 U.S. 724, 744 (2008); *Buckley,* 424 U.S. at 76.

Because a narrowing gloss is not an option, *see Stenberg v. Carhart,* 530 U.S. 914, 944 (2000) (not "reasonable and readily apparent" (quoting *Boos v. Barry,* 485 U.S. 312, 330 (1988)),[32] Hawaii may not regulate A-1's speech *via* this law.

E. Defendants must prove their law survives scrutiny.

Regardless of the level of scrutiny, government has the burden of proving law survives scrutiny, *Wisconsin Right to Life, Inc.,* 551 U.S.

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[32] Federal courts have narrowed the *federal* political-committee definition by narrowing the *federal* expenditure and contribution definitions for organizations that are not, or are not yet, political committees. *See Buckley,* 424 U.S. at 23 n.24 (contribution); *id.* at 80 (expenditure); *FEC v. Survival Educ. Fund,* 65 F.3d 285, 295 (2d Cir. 1995) (contribution). But that does not mean federal courts may narrow *state* law.

Besides, a federal court's narrowing gloss would not bind the state, so it would not protect speakers. *See, e.g., Virginia Soc'y for Human Life, Inc. v. Caldwell,* 152 F.3d 268, 271 (4th Cir. 1998) ("*VSHL-I*") (quoting *Kucharek v. Hanaway,* 902 F.3d 513, 517 (7th Cir. 1990)).

449, 464 (2007) ("*WRTL-II*") (strict scrutiny (citing *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978))), *quoted in Citizens United v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 898 (2010); *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 387 (2000) (intermediate scrutiny (quoting *Buckley v. Valeo,* 424 U.S. 1, 25 (1976))), the only interest that suffices to limit[33] "campaign finances" is the prevention of corruption of candidates or officeholders, or its appearance,[34] 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. Given this – and given that freedom of speech is the norm, not the exception[35] – if government wants to regulate political speech in a way beyond what current case law allows, government must prove the law survives scrutiny. It is not up to Plaintiffs to prove the negative. *Cf. Arizona Free Enterprise Club's Freedom PAC v. Bennett,* 564 U.S. ____, ____, 131 S.Ct. 2806,

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[33] As opposed to "regulate." *See, e.g., Buckley,* 424 U.S. at 66-68.

[34] *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).

[35] *Supra* Part II.C.

2823 (2011) ("*AFEC*") ("it is never easy to prove a negative" (quoting *Elkins v. United States,* 364 U.S. 206, 218 (1960))).

Citizens United provides further insight on assessing corruption or its appearance:

> The absence of prearrangement and coordination of [spending for political speech] with the candidate[s] or [their] agent[s] not only undermines the value of the [spending] to the candidate[s], but also alleviates the danger that [spending] will be … a *quid pro quo* for improper commitments from the candidate[s].

130 S.Ct. at 908 (quoting *Buckley,* 424 U.S. at 47). "[I]ndependent expenditures … do not give rise to corruption or the appearance of corruption." *Id.* at 909. The Supreme Court has just reaffirmed this point. *See AFEC,* 131 S.Ct. at 2826 (quoting *Citizens United,* 130 S.Ct. at 909). *AFEC* holds that when organizations' speech is independent, the

> candidate-funding circuit is broken. The separation between candidates and [organizations engaging in only independent spending for political speech] negates the possibility that

> independent [spending] will result in the sort of *quid pro quo* corruption with which our case law is concerned.

131 S.Ct. at 2826-27 (citing *Citizens United,* 130 S.Ct. at 909-11).[36]

Since independent expenditures – *i.e.,* noncoordinated express advocacy as defined in *Buckley,* 424 U.S. at 39-51, 74-81[37] – are the highest grade of independent spending for political speech, *cf. id.* at 44 & n.52, 80, it follows that when a person's independent expenditures "do not give rise to corruption or the appearance of corruption[,]" *Citizens United,* 130 S.Ct. at 909, then no independent spending for political speech by the same person "give[s] rise to corruption or the

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[36] *AFEC under*states its point here. When organizations' speech is independent, *there is no* corrupting link between (1) candidates or officeholders and (2) the organizations' spending for political speech. It is not so much that the corrupting link is "broken." 131 S.Ct. at 2826. It is just not there. *See, e.g., Citizens United,* 130 S.Ct. at 908-10.

[37] "Independent expenditure" means express advocacy as defined in *Buckley,* 424 U.S. at 44 & n.52, 80, and not coordinated with a candidate, a candidate's committee, a candidate's agent, or a party, which is the standard under the Constitution. *Id.* at 39-51; *McConnell v. FEC,* 540 U.S. 93, 219-23 (2003), *overruled on other grounds, Citizens United*, 130 S.Ct. at 896-914; *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) ("*CPLC-I*"). Thus, noncoordinated spending for political speech that is not express advocacy as defined in *Buckley* is not an independent expenditure.

appearance of corruption." *Id.* Thus, a person who has a First Amendment right to engage in independent expenditures has a First Amendment right to engage in any independent spending for political speech.

Furthermore, when "*Buckley* identified a … government[] interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." *Citizens United,* 130 S.Ct. at 909-10 (citing *McConnell v. FEC,* 540 U.S. 93, 296-98 (2003) (opinion of Kennedy, J.); *FEC v. National Conservative PAC,* 470 U.S. 480, 497 (1985) ("*NCPAC*") ("The hallmark of corruption is the financial *quid pro quo:* dollars for political favors")).

> The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:
>
> > "Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is

> well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness." *McConnell,* 540 U.S., at 297 (opinion of Kennedy, J.).

Reliance on a "generic favoritism or influence theory ... is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Id.,* at 296.

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. *See Buckley,* [424 U.S.] at 46. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have

> the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse "'to take part in democratic governance'" because of additional political speech made by a corporation or any other speaker. *McConnell,* [540 U.S.] at 144 (quoting *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 390 (2000)).

Citizens United, 130 S.Ct. at 910. "Ingratiation and access … are not corruption." *Id.*

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

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

> (1) Registration (including treasurer-designation and bank-account) and termination requirements. HRS.11-321 (registration); HRS.11-324 (treasurer); HRS.11-326 (termination); HRS.11-351.a (bank account).
>
> (2) Recordkeeping requirements. HRS.11-324; HRS.11-351.b, and

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

are the very burdens that are "onerous" under *Citizens United v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 898 (2010), and *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 477 n.9 (2007) ("*WRTL-II*") (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 (nonresidents); 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).

Although *Human Life of Washington, Inc. v. Brumsickle* holds *post-Citizens United* that (1), (2), and (3) are "not unconstitutionally

burdensome[,]" 624 F.3d 990, 1013 (9th Cir. 2010) ("*HLW*") (citing *Citizens United,* 130 S.Ct. at 915-16 (addressing *non*-political-committee disclosure requirements)), *cert. denied,* 562 U.S. ____, 131 S.Ct. 1477 (2011), neither (4) nor (5) was at issue. *See id.* at 997-98. But they are at issue here.

1. Exacting Scrutiny or Strict Scrutiny

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 v. Valeo,* 424 U.S. 1, 74-82 (1976).

Under *HLW* – which supersedes previous Ninth Circuit case law, *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 New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 677 (10th Cir. 2010) ("*NMYO*").[38]

[38] 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 committee, or whatever label a jurisdiction uses – to speak. *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 658 (1990) (holding that 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. *Colorado Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1146 (10th Cir. 2007) ("*CRLC*") (applying strict scrutiny to a state requirement that organizations themselves be political committees); *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 290 (4th Cir. 2008) ("*NCRL-III*") (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.

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.[39,40,41,42]

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[39] Contrary to the suggestion that "the *record* does not indicate that the burdens on A-1 are onerous[,]" Doc.91.41 (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.

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

National Organization for Marriage, Inc. v. McKee misses this point. *See* 649 F.3d 34, 56 (1st Cir. 2011), *pet. for cert. filed* (U.S. Nov. 2, 2011), *available at* http://www.jamesmadisoncenter.org/cases/files/2011/11/Cert-Petition-final.pdf.

[41] Any A-1 political committee would be "a separate legal entity[,]" *California Med. Ass'n v. FEC,* 453 U.S. 182, 196 (1981), and "a separate association from" A-1, *Citizens United,* 130 S.Ct. at 897, so the activities of any A-1 political committee would be immaterial here. Allowing a political committee to speak does not allow the organization to speak. *Id.* Even if an organization spoke through its political committee – "and it does not" – there would still be "First Amendment problems" with a ban or the "burdensome" requirements of forming or being a political committee. *Id.*

HLW considers a political-committee definition, states incorrectly that the plaintiff also challenged the political-committee disclosure

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One 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. *National Org. for Marriage, Inc. v. McKee,* 765 F.Supp.2d 38, 48 (D. Me. 2011), *notice of appeal filed,* (1st Cir. Feb. 22, 2011).

This understates *Citizens United* and is an extension of another error by the Maine district court, which does not recognize that the "First Amendment problems" extend beyond bans.

[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 v. FEC,* 540 U.S. 93, 201 (2003)), *quoted in* Doc.91.2, full-fledged political-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 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)).

Both *McKee* decisions miss this point. *See* 649 F.3d at 56; 765 F.Supp.2d at 45-49.

requirements,[43] and analyzes the definition as a disclosure requirement. 624 F.3d at 997-98, 1008-09, 1011-12.

HLW establishes a priority-incidentally test for states' imposing political-committee status on organizations: *HLW* holds government may impose political-committee status[44] on organizations that have "'a'

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[43] *See HLW,* No. 1:08-cv-00590-JCC, VERIFIED COMPL. FOR DECLARATORY & INJUNCTIVE RELIEF at 10-12 (Count 1) (W.D. Wash. April 16, 2008).

[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 that *McConnell* did not change the test (citations omitted)); *NCRL-III,* 525 F.3d at 287-90.

Further, the major-purpose test is not a narrowing gloss. *CRLC,* 498 F.3d at 1153.

The apparent *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. Given that these requirements are burdensome and onerous as matter of law under *Citizens United* and *WRTL-II,* the apparent *McKee* holding makes no sense. Political speech needs protection from both federal and state governments. *See Bellotti,* 435 U.S. at 778-79.

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 organizations "that only incidentally engage in such advocacy." *Id.* at 1011. Contrary to the preliminary-injunction denial, this *contemplates* that an organization can "avoid" being a Hawaii noncandidate committee "because its political activity is small proportionally to its overall activities[.]" Doc.91.40. That is what naturally happens under a priority-incidentally test.

In any event, one fundamental difference between HLW and A-1 is that political advocacy is one of HLW's reasons for existing. *See* 624 F.3d at 995-96. This is not true of A-1. Political advocacy is not an A-1 priority.[45] The fact that "A-1 has substantial and varied recent election-related activity[,]" Doc.91.38, and "actively engages in political activity[,]" Doc. 91.39, does not mean "political advocacy" is a "priority" for A-1 under *HLW,* 624 F.3d at 1011. Thus, *HLW,* which makes

[45] *Supra* Part I.

"priority" and "incidental[]" opposites, does not allow Hawaii to impose full-fledged political-committee disclosure requirements on A-1. *Id.*

However the three *Buckley* interests in regulating political speech may apply to Hawaii's defining A-1 as a noncandidate committee, *see, e.g.,* Doc.91.29-91.33; Doc.91.39,[46] 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 the *HLW* priority-incidentally test.

In the alternative, *HLW* does not reach the issue of whether "the word 'primary' or its equivalent is constitutionally necessary" before

[46] *Infra* Part II.G.3.

"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 is "a primary" purpose rather than "the primary" purpose – Hawaii law imposes full-fledged political-committee 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.

And to be clear: It has never been A-1's position that government may not regulate "issue advocacy" in any form or by any means. Doc.91.24 (citations omitted).[47]

2. Applying Exacting or Strict Scrutiny

Thus, under the *HLW* priority-incidentally test, Hawaii's noncandidate-committee definition, HRS.11-302, fails exacting scrutiny and is unconstitutional as applied to A-1's speech.[48,49]

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[47] Saying this is HLW's position, 624 F.3d at 1015-16, is straw man.

[48] 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 or in its public statements, and (2) it does not devote the majority of its spending to contributions to, or independent expenditures for, such candidates.

Contrary to *McKee,* there is nothing "perverse" or "pernicious" here. 649 F.3d at 59; *National Org. for Marriage v. McKee,* 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 and (2) an organization may have only one major purpose. *Supra* Parts II.C, II.F.2.

[49] 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. *Cf. Buckley,* 424 U.S. at 74. Rather, it is a challenge when law imposes a *package* of political-committee-like requirements, which are "burdensome" and "onerous" as a matter of law under *Citizens United* and *WRTL-II,* and which government may impose only when organizations pass either test. *Supra* Part II.F.1. Hawaii imposes the *package* of requirements *via* the noncandidate-committee definition. In this situation, the proper challenge is to the package that the requirements come in, not to the requirements themselves.

G. The electioneering-communication definition, electioneering-communication reporting requirements, and the disclaimer requirements 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*

McKee's fundamental disagreement with this analysis, though, is not with the point that the proper challenge is to the definition. Rather, *McKee* disagrees with the *Citizens United* and *WRTL-II* point that these requirements are onerous, *supra* Part II.F.1, and then appears to reject the major-purpose test for state law. 649 F.3d at 56, 58, 59.

It is true that *SpeechNow.org v. FEC* – which is confusing, *see infra* Part II.G.1 – applies exacting scrutiny to political-committee disclosure requirements. 599 F.3d 686, 696-98 (D.C. Cir.) (*en banc*), *cert. denied,* 562 U.S. ____, 131 S.Ct. 553 (2010), *cited in* Doc.71.28. However, under current Supreme Court case law, *see 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. *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.

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

v. FEC, 554 U.S. 724, 744 (2008) (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).[50]

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[50] Moreover, government may impose greater disclosure burdens on organizations it *may* define as political committees than it may impose on other organizations. *Supra* Part II.F.1.

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 electioneering communications as defined in FECA 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 reporting requirements for express advocacy as defined in *Buckley* 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 express advocacy as defined in *Buckley* by persons government may *not* define as political committees).

Not distinguishing (1) from (2) is among a *pre-Citizens United* Ninth Circuit panel's mistakes in *Alaska Right to Life Committee v. Miles,* 441 F.3d 773, 786-94 (9th Cir.) ("*ARLC*"), *cert. denied,* 549 U.S. 886 (2006), which *WRTL-II* and *Citizens United* supersede.

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

SpeechNow, 599 F.3d at 697-98, also contradicts *MCFL, WRTL-II,* and *Citizens United.*

2. Spending for Political Speech

When it comes to persons Hawaii may *not* define as political committees, *HLW* does not rule on the appeal-to-vote test. *See* 624 F.3d at 1015 (stating only that the panel "could arguably" apply the appeal-to-vote test).

Instead, *HLW* allows regulation of ballot-measure speech "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

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SpeechNow in effect upholds a political-committee definition as applied to SpeechNow's speech by saying that defining an organization as a political committee is not that much more burdensome than just requiring reporting of independent expenditures properly understood. *Id.* 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). It is also incorrect as a matter of constitutional law. *Supra* Part II.F.1.

"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.

Therefore, for speech beyond ballot-measure speech one looks beyond *HLW*. And since *HLW* supersedes previous Ninth Circuit law, *see id.* at 1012-14,[51] 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:

- Express advocacy, *Buckley,* 424 U.S. at 39-51, 74-81, as defined in *Buckley, id.* at 44 & n.52, 80, *vis-à-vis* state or local office in Hawaii, and

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

●Regulable speech "about a candidate shortly before an election." *Citizens United,* 130 S.Ct. at 915: Electioneering communications as defined in FECA, *id.* at 914-16, having a clearly identified candidate for state or local office in Hawaii.

Cf. North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274, 281-82 (4th Cir. 2008) (*"NCRL-III"*) (addressing these two categories before *Citizens United* removed the appeal-to-vote test as a constitutional limit on government power[52]). This 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.[53] None of A-1's speech is such express advocacy or such an electioneering communication.

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. *Buckley,* 424 U.S. at 67

[52] *Supra* Part II.D.

[53] *Supra* Parts II.C.

(*Buckley* Interest 2), *quoted in* Doc.91.30-32. But this interest does not even apply when speech is independent.[54] All of the spending for political speech at issue here is independent. Therefore, Interest 2 does not even apply. *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));[55] *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. *Buckley,* 424 U.S. at 68 (*Buckley* Interest 3), *quoted in* Doc.91 at 31-32, 39. This interest also does not apply. *See*

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[54] *Supra* Part II.E.

[55] The *Buckley* discussion of Interest 2 does refer to what "affect[s] elections[,]" 424 U.S. at 67, yet that is not the standard for what is regulable. *See supra* Part II.D (citing *FEC v. Central Long Island Tax Reform Immediately Comm.,* 616 F.2d 45, 53 (2d Cir. 1980) (*en banc*) (quoting, in turn, *Buckley,* 424 U.S. at 42 n.50); *NCRL-I,* 168 F.3d at 713).

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 defining A-1 as a full-fledged noncandidate committee,[56] which is unconstitutional.[57]

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

[56] *See supra* Part II.F.

[57] *Supra* Part II.F.2.

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

Buckley applies Interest 1 to organizations that government *may* define as political committees. *See id.* at 66-67; *see also HLW,* 624 F.3d at 1005-08.

When it comes to spending for political speech by organizations government may *not* define as political committees, *Buckley* applies Interest 1 to independent expenditures as defined in *Buckley,* 424 U.S. at 80-81, and *Citizens United* applies it to electioneering communications as defined in FECA. 130 S.Ct. at 914-15.

However, Hawaii may not define A-1 as a political committee under the *HLW* priority-incidentally test,[58] and A-1 engages in neither *Buckley* independent expenditures nor FECA electioneering communications.

[58] *Supra* Part II.F.2.

Government's enthusiasm for information does not justify gathering information by any possible means. It does not trump the *HLW* priority-incidentally test.[59] *See MCFL,* 479 U.S. at 262 (holding that *non*-political-committee disclosure requirements for independent expenditures, properly understood, "provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions"); *id.* at 266 (O'Connor., J., concurring) (holding that 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.

[59] *Supra* Part II.F.1.

In short, *Buckley Interest 1 is not a wild card for government to play when Supreme Court case law does not establish that government may 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,[60] 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* Doc.91.2, 24, addresses disclosure requirements, it addresses only *non*-political-committee disclosure requirements, *id.,* not the greater burdens that accompany full-fledged political-committee status, *see id.* at 897-98; *MCFL,* 479 U.S. at 251-56, and upholds *non*-political-committee disclosure requirements only for FECA electioneering communications. 130 S.Ct. at 914-16.

[60] *Supra* Part II.C.

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,[61] its law fails exacting scrutiny and is unconstitutional as applied to A-1's speech.

But there is more.

●First, the *24 hour reporting requirement,* which applies only to electioneering communications, HRS.11-341.a, fails exacting scrutiny, because the 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). The 24 hour reporting is "patently unreasonable" and "severely burdens First Amendment rights[.]" *Citizens for Responsible Gov't State PAC v. Davidson,* 236 F.3d 1174,

[61] Contrary even to *McConnell,* Hawaii law reaches even "genuine[-]issue" speech. 540 U.S. at 206 n.88.

1197 (10th Cir. 2000) (applying strict scrutiny);[62] *see also National Org. 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), *pet. for cert. filed,* (U.S. Nov. 2, 2011).[63]

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[62] *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. ____, 129 S.Ct. 490 (2008). However, the *McConnell* plaintiffs did not challenge 24 hour reporting. While they challenged a law with 24 hour reporting, they challenged it for other reasons. *Tennant,* which was bound by *NCRL-FIPE,* rejects a challenge to 24 and 48 hour reporting requirements. *Tennant,* manuscript order at 76-83.

Moreover, unlike Hawaii's 24 hour reporting requirement, the requirements in *Tennant:*

> ●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 id.

[63] *Available at* http://www.jamesmadisoncenter.org/cases/files/2011/11/Cert-Petition-final.pdf.

●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* express advocacy as defined in *Buckley* or electioneering communications as defined in FECA, *see, e.g., Citizens United,* 130 S.Ct. at 915 (holding that attribution requirements, and by extension disclaimers, for electioneering communications as defined in FECA avoid confusion by making clear that neither candidates nor parties are paying for them) – they 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 ACLU of Nevada v. Heller,* 378 F.3d 979, 992 (9th Cir. 2004), *and cited in Vermont Right to Life Comm., Inc. v. Sorrell,* 221 F.3d 376, 386, 387 (2d Cir. 2000) ("*VRLC-I*"). Nothing in *McConnell* undermines, much less changes, this holding of *McIntyre. Heller,* 378 F.3d at 987.

●Third, the *disclaimer requirements,* HRS.11-391.a.2, are 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). Complying with this law will take up precious space, yet even more

significantly it will distract readers from A-1's message and mislead 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 or 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 the jurisdiction may not define as political committees. *See Citizens United,* 130 S.Ct. at 915-16 (electioneering communications as defined in FECA); *Majors v. Abell,* 361 F.3d 349, 355 (7th Cir. 2004) ("*Majors-II*") (express advocacy as defined in *Buckley*); *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),[64] and

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

[64]*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.

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

With the possible exception of contributions made to and received by political committees engaging in only independent spending for political speech,[65] intermediate scrutiny applies not only to *limits* on contributions made and received, *see Randall v. Sorrell,* 548 U.S. 230, 247 (2006) (considering contributions received by candidates (quoting *Buckley,* 424 U.S. at 25 (same))); *McConnell,* 540 U.S. at 136-37 (considering contributions received by political parties); *FEC v. Colorado Republican Fed. Campaign Comm.,* 533 U.S. 431, 446 (2001) ("*Colorado Republican-II*") (considering spending for political speech coordinated by political parties with candidates (quoting *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 387-88 (2000)) (considering contributions received by candidates))), but also to *bans* on contributions made, *see Beaumont v. FEC,* 539 U.S. 146, 162 (2003) (considering contributions by *MCFL* corporations to candidates (quoting *Shrink Mo.,* 528 U.S. at 387-88)), and by implication, contributions received. *Cf. Citizens Against Rent Control v. City of Berkeley,* 454 U.S.

[65] *Infra* Part II.I.

290, 298 (1981) (considering donations received for *ballot measures* and applying "exacting scrutiny" *before* the Supreme Court broke its three levels of exacting scrutiny in *Buckley,* 424 U.S. at 44, 64, 25, into strict, exacting, and intermediate scrutiny). In the alternative, 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).

A-1 will abide by constitutional *limits* on contributions candidates receive. *Compare* HRS.11-357 *with Randall,* 548 U.S. at 246-62. Yet a *ban,* HRS.11-355, is a limit of zero. While A-1 does not question *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), government has no compelling or sufficiently important interest in *banning* such contributions when the candidates or officeholders do *not* decide whether the contractors receive contracts and do *not* oversee the contracts. In the alternative, such a ban, *id.* at 628, 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." *Id.* at 627. Hawaii's ban applies beyond those "with oversight responsibility." *Id.* It applies to "all levels of government." *Id.* at 628.

The only interest that suffices to limit campaign finances is the prevention of corruption of candidates or officeholders, or its appearance.[66] When there is no connection to candidates or officeholders who decide whether government contractors receive contracts or who oversee contracts, no danger of corruption arises from the contributor's status as a government contractor. *See id.* at 627-28. Because A-1 will contribute only to candidates who do *not* decide whether A-1 receives contracts and who do *not* oversee A-1's contracts, Hawaii's ban, HRS.11-355, is unconstitutional *as applied* to A-1's speech, regardless of the level of scrutiny.

This is consistent with *Citizens United,* 130 S.Ct. at 908-10, whose rationale the Ninth Circuit and other circuits have applied to

[66] *Supra* Part II.E.

contribution limits, albeit as applied to contributions to organizations engaging in only independent spending for political speech. But that is a distinction without a difference here, because those opinions hold contribution limits – and by extension, bans – unconstitutional as applied when they do not prevent corruption or its appearance.[67] So it is here.

I. Hawaii's limit on contributions political committees receive is unconstitutional as applied to Yamada and Stewart's speech.

Independent spending for political speech does not "give rise to corruption or the appearance of corruption." *Citizens United,* 130 S.Ct. at 909, *quoted in Arizona Free Enterprise Club's Freedom PAC v. Bennett,* 564 U.S. ____, ____, 131 S.Ct. 2806, 2826 (2011) ("*AFEC*"). This principle applies when organizations engage in only independent spending for political speech. *See, e.g., Long Beach,* 603 F.3d at 695 ("Supreme Court precedent forecloses the … argument that independent expenditures by independent[-]expenditure committees … raise the specter of corruption or the appearance thereof").

[67] *Infra* Part II.I.

Except for candidate committees accepting government money, *Buckley,* 424 U.S. at 57 n.65, organizations have a First Amendment right to engage in unlimited spending for political speech. *See Randall,* 548 U.S. at 240-46; *Colorado Republican-II,* 518 U.S. at 613-20; *FEC v. National Conservative PAC,* 470 U.S. 480, 496-501 (1985) ("*NCPAC*"); *Buckley,* 424 U.S. at 54-58.

The next question is: What does this mean for contributions that organizations engaging in only independent spending for political speech receive? Doc. 71.15. May government ever limit them? If so, when? In particular, may Hawaii limit contributions Yamada and Stewart make to AFA-PAC? What is *not* at issue here is the constitutionality of limits on contributions received by organizations engaging in speech *other than* independent spending for political speech.[68] This challenge presents easier questions that multiple courts have addressed. Under the approach of any of these courts, Yamada and Stewart prevail.

[68] Such a challenge would present harder questions. *See, e.g., Randall,* 548 U.S. at 246-62.

The District of Columbia Circuit has held that government may never limit contributions to organizations engaging in only independent spending for political speech. *See SpeechNow.org v. FEC,* 599 F.3d 686, 694-95 (D.C. Cir.) (*en banc*), *cert. denied,* 562 U.S. ____, 131 S.Ct. 553 (2010); *see also EMILY's List v. FEC,* 581 F.3d 1, 9-11, 14 & n.13, 15 n.14 (D.C. Cir. 2009); *Carey v. FEC,* ____ F.Supp.2d ____, ____, No. 11-259, PRELIM. INJ. ORDER (D.D.C. June 14, 2011).[69]

A Supreme Court concurrence agrees. *See California Med. Ass'n v. FEC,* 453 U.S. 182, 203 (1981) (Blackmun, J., concurring) (holding that "contributions to a committee that makes only independent expenditures pose no … threat" "of actual or potential corruption"). This is the controlling opinion in *California Medical Association. EMILY's List,* 581 F.3d at 9 n.8 (citing *Marks v. United States,* 430 U.S. 188, 193 (1977)).

The Fourth Circuit agrees. *NCRL-III* holds that "contribution limits are … unacceptable when applied to … independent[-]expenditure committees … ." 525 F.3d at 292. The organizations

[69] *Available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2011cv0259-19.

"furthest removed from the candidate" are those that engage in only independent spending for political speech. It "is 'implausible' that contributions to independent[-]expenditure political committees are corrupting." *Id.* at 293 (quoting *North Carolina Right to Life, Inc. v. Leake,* 344 F.3d 418, 434 (4th Cir. 2003) ("*NCRL-II*"), *cert. granted and judgment vacated on other grounds,* 541 U.S. 1007 (2004)).

The Seventh Circuit agrees. *Wisconsin Right to Life State Political Action Comm. v. [Barland],* No. 11-2623, INJUNCTION PENDING APPEAL (7th Cir. Aug. 1, 2011) ("*WRTL-SPAC*").[70]

Under each of these approaches, limits on contributions to organizations engaging in only independent spending for political speech are unconstitutional. Each slams the door shut on any contrary approach.

The Ninth Circuit's approach closes the door for present purposes – and for many purposes – without slamming it shut forevermore. *See Long Beach,* 603 F.3d at 696-99. Like the *Long Beach* plaintiffs, AFA-PAC – a political committee engaging in only independent spending for

[70] PSJM.Exh.18.

political speech – is "several significant steps removed from 'the case in which a donor gives money directly to a candidate.'" It does "not enjoy a 'close connection and alignment,' 'close affiliation,' and 'nexus' with candidates." It is not like "middlemen through which funds merely pass from donors to candidates." It does not "coordinate or prearrange … independent expenditures with candidates," and it does "not take direction from candidates on how" to spend money.[71] Its "relationship with candidates is, at best, attenuated." *Id.* at 697 (citations omitted). Organizations such as AFA-PAC thus

> provide a distinct medium through which citizens may collectively enjoy and effectuate those expressive freedoms that they are entitled to exercise individually. Many "individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own

[71] A political committee's spending is not (entirely) independent if it makes direct contributions to, *see Buckley,* 424 U.S. at 24 n.23, or coordinates spending for political speech with, any candidate in the jurisdiction, the candidate's agents, or the candidate's committee, *see id.* at 78, *quoted in Survival Educ. Fund,* 65 F.3d at 294, or a party, *see McConnell,* 540 U.S. at 219-23, in the jurisdiction.

> personal direction." Just as the soloist's song becomes more powerful when joined by a chorus of people singing along, … citizen[s'] message[s] may become more widely and effectively disseminated when [t]he[y] join[] an [organization] of like-minded citizens.

Id. at 698-99 (internal citations omitted); *see also Thalheimer v. City of San Diego,* 645 F.3d 1109, 1118-21 (9th Cir. 2011); Doc.71 at 3, 10-19, 25; *Farris v. Seabrook,* manuscript order at 17-18 (W.D. Wash. July 15, 2011).[72]

Nothing suggests that the Court should consider contributions to AFA-PAC differently than the contributions in *Long Beach.* *See* 603 F.3d at 699. The contributors to AFA-PAC – Yamada and Stewart – are not foreign nationals. If they were, they would not have a First Amendment right to engage in the same speech as AFA-PAC. *Cf. Citizens United,* 130 S.Ct. at 911 (citing 2 U.S.C. 441e). Key to the inquiry under *Long Beach* is that the contributors to AFA-PAC are "entitled to exercise individually[,]" 603 F.3d at 698, the First

[72] PSJM.Exh.19.

Amendment right to spending for political speech, *see Buckley,* 424 U.S. at 44-51, that they "enjoy and effectuate" by contributing to AFA-PAC. *Long Beach,* 603 F.3d at 698.

How can (1) corruption of candidates or officeholders, or its appearance, ever arise when (2) organizations engaging in only independent spending for political speech (3) receive contributions from persons who themselves have a First Amendment right to engage in the same speech as the organizations? Since there is no corrupting link between (1) candidates or officeholders and (2) spending for political speech by organizations engaging in only independent spending for political speech, *see id.* at 695, the presence of (3) contributions from persons who themselves have a First Amendment right to engage in the same speech as the organizations cannot not somehow create that missing corrupting link. *See id.* at 698; *cf. AFEC,* 131 S.Ct. at 2826-27. Such organizations are not conduits for speech the contributors may not themselves engage in. *Cf. California Med.,* 453 U.S. at 203 (Blackmun, J., concurring). Again, it is not that the corrupting link is broken. It is just not there.

Given all of this, it is not surprising that the Supreme "Court has *never* held that it is constitutional to apply contribution limits to [organizations engaging in only independent spending for political speech, including] independent expenditures." *NCRL-III,* 525 F.3d at 292 (emphasis in original). Under strict or intermediate scrutiny respectively, government simply has no compelling or sufficiently important interest in limiting contributions to AFA-PAC. In the alternative, such a limit is not narrowly tailored or closely drawn to meet a compelling or sufficiently important government interest. Therefore, Hawaii's limit on contributions political committees receive, HRS.11-358, is unconstitutional as applied to Yamada's and Stewart's speech, regardless of the level of scrutiny. *Long Beach,* 603 F.3d at 696-99; *SpeechNow,* 599 F.3d at 692-96; *WRTL-SPAC,* INJUNCTION PENDING APPEAL; *compare EMILY's List,* 581 F.3d at 9-11, 14 & n.13, 15 n.14 (suggesting analyzing such law as a "spending restriction[,]" which means strict scrutiny[73]), *with NCRL-III,* 525 F.3d at 291-93 (applying intermediate scrutiny to a contribution limit).

[73] *E.g., Citizens United,* 130 S.Ct. at 898 (quoting *WRTL-II,* 551 U.S. at 464).

J. 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 unconstitutional in all its applications. *See United States v. Salerno,* 481 U.S. 739, 745 (1987). However, when a 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))); *Kolender v. Lawson,* 461 U.S. 352, 358 & n.8 (1983) (rejecting the dissent's contention that a *Salerno*-like burden applied), *followed in City of Chicago v. Morales,* 527 U.S. 41, 60 (1999); *see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 499 (1982) (holding that when a law burdens free speech, "a more stringent vagueness test should apply"); Doc.91.25 (citation omitted); *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).

A state 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] 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)).

The burden of proof is on the party asserting a 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 Plaintiffs' speech – *except the government-contractor ban and the political-committee contribution limit*[74] – is also facially unconstitutional. *See North Carolina Right to Life v. Leake,* 525 F.3d 274, 285-86 (4th Cir. 2008) ("*NCRL-III*") ("support or oppose"); *id.* at 289-90 (political-committee definition); *National Right to Work Legal Def. & Educ.*

[74] *Supra* Parts II.H-I; FAVC.¶¶114-15.

Found., Inc. v. Herbert, 581 F. Supp.2d 1132, 1151-54 (D. Utah 2008) (political-issues committee); *cf. Vote Choice v. DiStefano,* 4 F.3d 26, 36 (1st Cir. 1993) (political-committee disclosure requirements in a challenge by political committees).

The Supreme Court has never upheld such sweeping regulation of political speech. Thus, Hawaii may not simply point to FECA, cite *McConnell*, and claim its law is facially constitutional. *See NCRL-III,* 525 F.3d at 286. As in *NCRL-III,* 525 F.3d at 285, Hawaii law is full of constitutional flaws.

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 v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 894 (2010). "It is not judicial restraint to accept a[] narrow argument just so the Court can avoid another argument with broader implications." *Id.* at 892.

III. Conclusion

For the foregoing reasons, Plaintiffs request that the Court grant their summary-judgment motion.

Respectfully submitted,

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December 5, 2011

Certificate of Compliance

Plaintiffs prepared this brief using 14 point Century Schoolbook font. Pursuant to Local Rules 7.5.d and 7.5.e, Plaintiffs certify that this brief has 13,999 words.

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December 5, 2011

Certificate of Service

I certify that on December 5, 2011, I electronically filed the foregoing **Plaintiffs' Summary Judgment Brief** with the clerk of court using the CM/ECF system, which will notify:

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