

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Jimmy Yamada, Russell Stewart, and A-
1 A-Lectrician, Inc.,

Plaintiffs,

vs.

Michael Weaver, in his official capacity
as chair and member of the Hawaii
Campaign Spending Commission;
et al.,

Defendants.

CIVIL NO. CV10-00497 JMS/LEK

MEMORANDUM IN SUPPORT OF
CAMPAIGN SPENDING
COMMISSION'S MOTION FOR
SUMMARY JUDGMENT

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**MEMORANDUM IN SUPPORT OF CAMPAIGN SPENDING
COMMISSION'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

“The purpose of this part is to provide transparency
in the campaign finance process.”

HRS § 11-301

Plaintiffs seek to dismantle the means by which the Hawaii electorate may fulfill the assurance of transparency made by our Legislature when it re-enacted Hawaii's campaign finance laws in 2010. Human Life of Washington v. Brumsickle, 624 F.3d 990, 1017 (9th Cir. 2010) (“The ability of voters to determine who is behind the advertisements seeking to shape their views is integral to the full realization of the American ideal of government.”) (internal quotation marks and citation omitted). As recognized by the United States Supreme Court in Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010), transparency, disclosure, and the electorate's interest in information are extremely important governmental interests, all of which justify the regulation of campaign-related speech. This Court should uphold the disclosure provisions challenged here.

Plaintiffs' challenge has four parts: (1) the definitions of “noncandidate committee” and “expenditure,” (2) the electioneering communications provision, (3) the definition of “advertisement” and disclaimer requirement, and (4) the

government contractors provision. Doc. 24 at 38-52 (counts 1-7 and 9).¹ The first three are disclosure laws, aimed at ensuring transparency in campaign financing. The last is specific to government contractors, and is aimed at preventing corruption and the appearance of corruption. Each of these laws is constitutional for the reasons detailed below. There are no genuine issues of material fact, and the Commission is entitled to judgment as a matter of law. The Commission's motion for partial summary judgment should be granted.

¹ Counts 1, 2 and 3 concern the "noncandidate committee" and "expenditure" definitions. Doc. 24 at 38-46. Counts 4 and 5 concern the electioneering communications provision. *Id.* at 46-50. Count 6 concerns the advertising definition and disclaimer requirement. *Id.* Count 7 is an as-applied challenge to the government contractors provision. *Id.* at 50-51. Count 8 is an as-applied challenge to the noncandidate committee contribution limit. (As discussed below, the Commission agrees that a permanent injunction should be entered regarding this provision.) Count 9 reasserts the facial challenge. For ease of reference:

Provision Challenged	Current Citation*	Section Number in Act 211	Predecessor Statute Citation
Definitions section	HRS § 11-302	§ 11-B	§ 11-191
Electioneering communications	HRS § 11-341	§ 11-Z	§ 11-207.6
Disclaimer requirement	HRS § 11-391	§ 11-YY	§ 11-215
Government contractors	HRS § 11-355	§ 11-HH	§ 11-205.5

* See Ex. 8 for HRS §§ 11-301 to 11-412.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs Yamada, Stewart and A-1 filed their initial complaint in August 2010. Doc. 1. The operative first amended verified complaint was filed on September 3, 2010. Doc. 24. This complaint includes the nine counts listed above.

Plaintiffs moved for a preliminary injunction. Doc. 25. Plaintiffs later withdrew their request for preliminary injunctive relief on count 7, the government contractors provision. Doc. 60. This Court heard Plaintiffs' motion for a preliminary injunction in October 2010. Tr. Oct. 1, 2010. On Oct. 7, 2010, the Court preliminarily enjoined the noncandidate committee contribution limit, HRS § 11-358, as it applies to Yamada's and Stewart's contributions to Aloha Family Alliance PAC, a noncandidate committee that makes only independent expenditures.² Doc. 71. On Oct. 29, 2010, this Court denied the remainder of Plaintiffs' motion for preliminary injunction. Doc. 91.

From the operative complaint, stipulated facts, and testimony from the preliminary injunction hearing, the following facts emerge regarding A-1.³ A-1 is a for-profit corporation. Doc. 51 at 3 (stip.); Doc. 24 at 8. It is an electrical contractor. Id. It is not directly connected with any political candidate or political party. Id. It is currently registered as a noncandidate committee. Id. A-1 did not

² The Commission appealed this ruling, but the appeal was dismissed after Thalheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011).

³ Because Plaintiffs Yamada's and Stewart's claims concern only count 8, they are not discussed further.

form a distinct entity to serve as the noncandidate committee. Id. Instead, it registered itself. Id.; Doc. 51 at 4; Tr. Oct. 1, 2010 at 30, 34, 35. See also Tr. Oct. 1, 2010 at 42 (uses A-1's bank account to pay for election-related advertisements). A-1 no longer wishes to register as a noncandidate committee. Doc. 24 at 19; Tr. Oct. 1, 2010 at 37, 58, 59. A-1 contends that it does not have "the major purpose of nominating or electing a candidate or candidates for state or local office in Hawaii." Doc. 24 at 18.

A-1's speech is not coordinated with any candidate. A-1 ran three newspaper ads just before the 2010 primary election. Doc. 91, App. 1; Tr. Oct. 1, 2010 at 48. A-1 sees these ads as "issue ads," Tr. Oct. 1, 2010 at 60, but this Court previously found them to be the "functional equivalent of express advocacy." Doc. 91 at 48. Jimmy Yamada is the CEO of A-1. He testified that he makes the decisions about how to spend A-1's money on political speech. Tr. Oct. 1, 2010 at 43, 69.

"A-1 is often a government contractor, and such contracts often last several weeks or months." Doc. 24 at 9. A-1 contributed \$18,000 to candidates during the height of the 2010 election. Id. at 11; Exs. 4, 5. A-1 alleges that the government contractors' ban is unconstitutional because the candidates they contributed to "do not decide whether A-1 receives government contracts. Nor do they oversee the contracts." Doc. 24 at 29.

In December 2010, this case was stayed pending resolution of a petition for certiorari filed in Human Life. Doc. 97. In June 2011, the stay was lifted and the deadlines for dispositive motions were set. The hearing on the parties' competing motions for summary judgment has been set for February 6, 2012. Doc. 115.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(a). "An issue is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is 'material' only if it could affect the outcome of the suit under the governing law." Hughes v. Mayoral, 721 F. Supp. 2d 947, 956 (D. Haw. 2010).

ARGUMENT

A. *Citizens United* and *Human Life of Washington* Support Full Disclosure and Transparency in Campaign Financing

Citizens United upheld the federal campaign finance disclosure rules, relying on the need for transparency and information in the campaign process:

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Citizens United, 130 S. Ct. at 916. Following Citizens United, the Ninth Circuit upheld the State of Washington's disclosure rules. Human Life, 624 F.3d at 994.

The plaintiffs had challenged Washington's definitions of "political committee," "independent expenditures," and "political advertising." *Id.* at 997-98. Each of these were upheld as constitutional. Here, A-1 challenges the definition of "noncandidate committee," "expenditure," and "advertisement," the Hawaii counterparts to the laws challenged in Human Life.⁴ Because the Ninth Circuit has already upheld Washington's similar laws, so too should the definitions challenged here be upheld.

Human Life fully embraces the disclosure interest:

An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another. The increased transparency engendered by disclosure laws enables the electorate to make informed decisions and give proper weight to different speakers and messages. As the Supreme Court has stated: The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.

624 F.3d at 1008 (citations, brackets and internal quotation marks omitted).

The Supreme Court's recognition of this interest in information and transparency can be traced back to Buckley v. Valeo, 424 U.S. 1 (1976). *Id.* at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential[.]"). This interest has been reiterated many times in the years since. *See, e.g.,* McConnell v. Fed.

⁴ The Supreme Court turned down certiorari. Human Life of Washington v. Brumsickle, 131 S. Ct. 1477 (2011).

Election Comm’n, 540 U.S. 93, 197 (2003) (upholding disclosure requirements); Citizens Against Rent Control v. City of Berkeley, California, 454 U.S. 290, 298 (1981) (“[W]hen individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source.”).

Despite the vagaries of other campaign finance principles in the intervening decades, the transparency principle has remained essentially unchanged. Human Life, 624 F.3d at 1017 (Citizens United “up[held] the line of cases that recognize the importance of the government’s informational interest[.]”). In Citizens United, “the Supreme Court unreservedly affirmed the public’s interest in knowing who is speaking about a candidate shortly before an election[.]” Id. The importance of this interest—and its sufficiency under the exacting scrutiny test—cannot now be questioned. Doe v. Reed, 130 S. Ct. 2811, 2820 (2010) (“Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot.”)

This governmental interest is called by several names: disclosure, transparency, or an informational interest. The distinction between the terms is of little importance. What is important is that this governmental interest in transparency and disclosure is well established. After Citizens United, this interest is *indisputably* “sufficiently important” to justify campaign finance laws that

require disclosure and transparency.⁵ The government does not need to make any showing of *quid pro quo* corruption; the disclosure and transparency interest is sufficient to support the constitutionality of disclosure laws *by itself*. Citizens United, 130 S. Ct. at 916; Human Life, 624 F.3d at 1017.

Citizens United explicitly *rejected* the “contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.”⁶ 130 S. Ct. at 915. A-1’s contention otherwise is contrary to controlling Supreme Court precedent. Doc. 24 at 46, 47, 49, 55. In fact, since A-1 claims that only *express* advocacy can constitutionally trigger disclosure requirements, id., their assertion is doubly wrong. Not only has the Supreme Court rejected this contention, the Court has also rejected the *broader* contention that

⁵ Because Citizens United and Human Life hold that exacting scrutiny applies to disclosure provisions, the terminology from that standard is used here. Even if strict scrutiny did apply, however, the government’s interest in the transparency of campaign financing and in providing information to the electorate is compelling. “This vital provision of information repeatedly has been recognized as a sufficiently important, if not compelling, governmental interest.” Human Life, 624 F.3d at 1005-06. This is a democracy: the people are sovereign. Buckley, 424 U.S. at 14-15. Providing information to the electorate about who is seeking to influence their vote is absolutely critical for the meaningful exercise of the franchise.

⁶ The “functional equivalent of express advocacy” test comes from Federal Election Comm’n v. Wisconsin Right To Life, Inc., 551 U.S. 449, 469-70 (2007) (WRTL) (plurality op.) (“a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”). “Express advocacy” refers to the “magic words” requirement from Buckley, (i.e., “vote for” “elect” or “support”). Alaska Right To Life Committee v. Miles, 441 F.3d 773, 784 (9th Cir. 2006).

disclosure requirements can extend only to the *functional equivalent* of express advocacy. Citizens United, 130 S. Ct. at 915.

Citizens United's disclosure ruling is far broader than Plaintiffs acknowledge: the Court upheld disclosure rules based on the interest in "providing the electorate with information about the sources of election-related spending." Id. at 914 (internal quotation marks and citations omitted). This interest was stated in broad terms: "Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." Id. at 915. The only requirements stated in Citizens United are that the communication concern a candidate and that it take place shortly before an election or be related to a candidate. This is the *opposite* of the cramped reading suggested by Plaintiffs. Doc. 24 at 46-47, 49, 55.

B. Disclosure Requirements Are Judged Under Exacting Scrutiny, Not Strict Scrutiny

Campaign finance disclosure rules are reviewed under exacting scrutiny, not strict scrutiny. Citizens United conclusively resolved this question:

The Court has clarified that a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important governmental interest. In Doe v. Reed, 130 S.Ct. 2811 (2010), the Supreme Court examined a statute authorizing public disclosure of the signatories to a ballot initiative. In explaining why disclosure requirements were subject to the less demanding standard of review of exacting scrutiny, the Reed Court emphasized that the statute at issue was "not a prohibition on speech, but instead a disclosure requirement." Id. at 2818. As the Court held in Citizens United, "disclosure

requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking.”

Human Life, 624 F.3d at 1005 (emphasis added; internal quotation marks omitted).

Exacting scrutiny requires the Court to determine whether the challenged law is “substantially related to a sufficiently important governmental interest.” Id.

Any assertion that strict scrutiny applies to disclosure rules is contrary to both Supreme Court and Ninth Circuit precedent. The exacting scrutiny standard governs the challenges made to the disclosure provisions here.

C. Most of A-1’s Challenges are to Disclosure Rules Furthering The State’s Interest in Providing Transparency and Information to the Electorate

A-1’s challenge has four parts: (1) the definitions of “noncandidate committee” and “expenditure,” (2) the definition of “electioneering” and the reporting requirements that follow electioneering communications, (3) the definition of “advertisement” and the disclaimers required in advertisements, and (4) the government contractors provision. The first three are disclosure requirements. The fourth part is discussed below.

The first three challenges concern disclosure rules that serve the government’s interest in transparency and in providing information to the electorate. The definitions of “noncandidate committee” and “expenditure” both serve to trigger registration and reporting requirements. HRS § 11-302. That is their purpose: disclosure. It is an organization’s status as a noncandidate

committee (and the \$1000 threshold) that triggers the registration and disclosure requirements. HRS §§ 11-301, 11-321(g). The definition of noncandidate committee does not restrict any campaign spending. Likewise, “expenditure” describes what transactions are subject to reporting, as there are no financial limits placed on expenditures themselves. HRS § 11-301 (definition); HRS §§ 11-381 to 11-384 (campaign funds cannot be used for personal expenses; disposition of funds after the election). Read within the statutory framework, the definitions of both “noncandidate committee” and “expenditure” are disclosure laws. The Ninth Circuit has confirmed this. Human Life.

The electioneering communications provision, and the “advertisement” definition and disclaimer requirement are even more obviously disclosure rules. These provisions require organizations to *disclose* (1) the source of the funding for campaign ads, (2) the identity of the speaker, and (3) whether their activities are coordinated with any candidate. HRS § 11-302 (advertisement definition); HRS § 11-341 (electioneering communications); HRS § 11-391 (advertisement provision). These are disclosure rules, designed to provide information to the public and guarantee transparency. Hawaii’s recent re-codification of our campaign finance laws confirms that transparency is the primary aim of these laws. HRS § 11-301 (“purpose of this part is to provide transparency in the campaign finance process.”).

The provisions challenged reflect a disclosure interest that Hawaii has long sought and protected in its campaign finance laws. Hawaii's interest in disclosure can be traced back decades. Hawaii first began comprehensively regulating campaign spending in the 1970s. Over the course of five major enactments, the structure and basic principles of our present campaign finance law began to take shape. See 1970 Haw. Sess. L. Act 26 (rudimentary provisions regarding candidate expenses enacted as part of comprehensive amendments governing elections); 1973 Haw. Sess. L. Act 185 (registration and reporting requirements for committees); 1975 Haw. Sess. L. Act 146 (adding definition of advertisement); 1976 Haw. Sess. L. Act 127 (amendments following Buckley); 1979 Haw. Sess. L. Act 224 (comprehensive recodification) (Ex. 10). The 1979 codification is the foundation of the present statutory framework.

The need for transparency is evident from the statutes enacted and the legislative history. See, e.g., 1970 Haw. Sess. L. Act 26, then-new §§ 11-193 (requiring disclosure of contributors over \$500), 11-195 (prohibiting anonymous contributions); Hse. Stand. Comm. Rep. No. 188, in 1973 Hse. Journal at 840 (Ex. 9) ("The purpose of this bill is to . . . expand the scope of public scrutiny relative to the financial aspects of the campaign process[;]") and at 841 ("Your Committee feels that this systematic method of requiring reports of campaign expenditures permits an orderly way for the voters to keep scrutiny on the financial aspects of

the campaign process.”); Sen. Stand. Comm. Rep. No. 875, in 1975 Sen. Journal at 1172, 1173 (“[Y]our Committee wishes to emphasize its concern that the public be made fully aware of the disclosures reported by persons subject to this Act.”); Conf. Comm. Rep. No. 78, in 1979 Hse. Journal at 1137, 1140 (Ex. 11) (“comprehensive disclosure and reporting” scheme; quoting Buckley to state that “there are governmental interests sufficiently important to outweigh” First Amendment interests “because the free functioning of our national institutions is involved.”).

The 1979 enactment was comprehensive. Id. It addressed registration, organizational reports, campaign treasurers, anonymous contributions, false names, preliminary, final and supplemental reports, and advertising. 1979 Haw. Sess. L. Act 224. Current law requires the disclosure of more information. But the 1979 enactment remains relevant, because many provisions are governed by the same terminology now. Compare 1979 Haw. Sess. L. Act 224, enacting old §§ 11-191 (definitions), 11-194 (registration), 11-196 (organizational report) with HRS §§ 11-302 (definitions), 11-321 (registration), 11-323 (organizational report).

In 1995, the Legislature reiterated the State’s interest in disclosure when it enacted 1995 Haw. Sp. Sess. L. Act 10 (Ex. 12),⁷ a “breakthrough piece of legislation[.]” 1995 Sen. Journal at 681 (Sen. Baker) (Ex. 16). Act 10 “require[d]

⁷ Act 10 was the result of combining provisions from two other bills into one bill. Hse. Stand. Comm. Rep. No. 6-S, in 1995 Hse. Journal at 33, 34 (Ex. 13).

noncandidate committees to prepare extensive organization reports,” *id.*, and represented “a comprehensive overhaul of [the] campaign spending law[.]” 1995 Hse. Journal at 853 (Rep. Tom) (Ex. 17). Then, as now, transparency was one of the major goals of the legislation: “The bill . . . seeks to ensure fair election practices by closing the loopholes in the current law and by mandating full disclosure, both by the candidates themselves as well as by those who make large contributions to candidates.” *Id.* See also Hse. Stand. Comm. Rep. No. 522, in 1995 Hse. Journal at 1219 (Ex. 14); Sen. Stand. Comm. Rep. No. 1344, in 1995 Sen. Journal at 1345 (Ex. 15).

D. The Definitions of ‘Noncandidate Committee,’ and ‘Expenditure,’ Are Constitutional Disclosure Rules and Are Not Vague or Overbroad

1. The ‘Noncandidate Committee’ Definition is Substantially Related to a Sufficiently Important Governmental Interest

The noncandidate committee definition is a disclosure provision. The government’s interest in ensuring transparency in campaign financing is unquestionably “sufficiently important” under the exacting scrutiny test. All that remains is a tailoring analysis, that is, determining whether this provision is “substantially related” to this important governmental interest.

Human Life answers this question. The Ninth Circuit concluded that Washington’s definition of “political committee” was constitutional when it imposed disclosure requirements on “organizations with a primary purpose of

political advocacy.” Human Life, 624 F.3d at 1011. The court rejected the assertion that Buckley effectively limits disclosure requirements to only those groups with the “major purpose” of engaging in political advocacy:

Contrary to Human Life’s interpretation, Buckley’s statement—that defining groups with “the major purpose” of political advocacy as political committees is sufficient “[t]o fulfill the purposes of the Act,” Buckley, 424 U.S. at 79, does *not* indicate that an entity *must* have that major purpose to be deemed constitutionally a political committee.

Id. at 1009-10 (emphases added). Buckley did not determine the *only* manner in which regulation of committees may be constitutionally pursued. Instead, what is permissible depends on the application of the exacting scrutiny test. Id. at 1010. Any assertion that Buckley’s “major purpose” test is the only method to constitutionally regulate political committees is contrary to Ninth Circuit precedent.

Human Life also rejected the argument that an organization with multiple primary purposes cannot constitutionally be subject to disclosure rules. There is a “substantial relationship” to the government’s transparency interest even when a group has more than one primary purpose. Id. at 1011. Without this rule, these requirements could be easily circumvented. Id. “Washington’s Disclosure Law minimizes this risk of circumvention by tailoring its definition of “political committee” to cover groups with a primary purpose of political advocacy, even if the committee has other primary purposes as well. Id. at 1012.

The same analysis applies to Hawaii's definition of noncandidate committee. Buckley's "major purpose" rule is not constitutionally required, and the Ninth Circuit explicitly rejected the idea that the word "primary" is constitutionally required either. Id. at 1011. Instead, the exacting scrutiny test applies. Id. at 1010.

The noncandidate committee definition meets that test here. There is a "substantial relationship" between this provision and the government's interests in transparency and in providing information to the electorate. The noncandidate committee definition applies to organizations that have "the purpose of making or receiving contributions, making expenditures, or incurring financial obligations to influence the nomination for election, or the election, of any candidate[.]" HRS § 11-302.⁸ The definition excludes any "organization that raises or expends funds for the sole purpose of producing and disseminating informational or educational communications that are not made to influence the outcome of an election, question, or issue on a ballot." Id.

When organizations act with "the *purpose* of making or receiving contributions, making expenditures, or incurring financial obligations to influence the nomination for election, or the election, of any candidate[.]" this means that their political activity is not incidental. Id. (emphasis added). These activities are among the *goals* the organization seeks to achieve. See Websters New Collegiate

⁸ See Ex. 8 for the text of this provision.

Dictionary (9th ed. 1990) at 957 (“purpose” defined as “something set up as an object or end to be attained: intention.”). Any *incidental* involvement with political speech does not trigger registration and reporting requirements. Reporting requirements are *not* triggered until an organization makes contributions or expenditures “of more than \$1000, in the aggregate, in a two-year election period[.]” HRS § 11-321(g). Compare HRS § 11-321(g) with North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 712 (4th Cir. 1999) (challenge to statute that defined political committee as one with “the primary *or incidental* purpose” “to support or oppose any candidate[.]”) (emphasis added).

This definition covers organizations that have *more than one* “purpose.” HRS § 11-302. Many organizations have multiple purposes. Regulating *only* those that identify *one* single purpose (i.e., political speech aimed at influencing the election) would invite circumvention of these lawful disclosure requirements. The Ninth Circuit has already rejected the notion that only organizations with *one* purpose can be constitutionally subject to political committee registration requirements. Human Life, 624 F.3d at 1011-12.

The law considered in Human Life contained the word “primary,” but Hawaii’s law does not. Id. at 1011; HRS § 11-302. This does not change the result here, however, because the word “purpose” and the statute’s exclusion of incidental political activity are sufficiently related to the governmental interest to

justify the statutory definition.⁹ Like Washington’s law, Hawaii’s noncandidate committee definition regulates no further than it should. By statute the definition excludes groups who communicate only by issue advocacy or have only incidental participation. HRS §§ 11-302, 11-321(g).

The way in which political committees operate further demonstrates the proper tailoring of this law. Seeking disclosure only works if it is *effective* in providing information to the public. All organizations who meet the definition (and exceed the \$1000 threshold) must register, even if they have more than one “purpose.” Organizations often have innocuous-sounding names that disguise their true purpose, where their funds originate from, and what interests or political goals they serve. See, e.g., McConnell, 540 U.S. at 197 (giving examples like “Citizens for Better Medicare” and “The Coalition-Americans Working for Real Change” and noting that “Plaintiffs never satisfactorily answer the question of how ‘uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the scrutiny of the voting public.”); Human Life, 624 F.3d at 1017-18 (“organizations with disingenuously innocuous names like American Crossroads and the American Action Network [can] serve as a funnel for anonymous campaign donations[.]”) (internal citation marks omitted). It is only by

⁹ Because of this, no narrowing gloss (such as interpreting “purpose” to mean only “primary purpose”) is necessary. The statute is constitutional as written.

mandating disclosure of the *source* of such an organization's funding that true transparency can be achieved.

Noncandidate committees registered in Hawaii have used similar tactics. Among the noncandidate committees that are currently registered or were previously registered with the Commission, there appear such wonderfully nondescript names as: Change Hawaii, Citizens for Responsive Government, Coalition for Hawaii's Future, Hope for Hawaii, Hawaii Alliance, Hawaii Citizens' Rights Political Action Committee, and Committee for Good Government. Decl. of A. Baldomero. In Hawaii, as elsewhere in the country, disclosure becomes of critical importance when those seeking to influence the election deliberately choose organizational names to hide their identities. The prevalence of this practice further demonstrates that the noncandidate committee definition *is* sufficiently tailored to the transparency interest. Without reaching organizations like these, efforts to provide transparency and information to the electorate would be for naught.

This aspect of the noncandidate committee definition becomes even more important in light of recent developments regarding independent spending. See Thalheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011). If a noncandidate committee makes *only* independent spending, it is governed by this Court's preliminary injunction order. Doc. 71 at 25. And, as detailed below, the

Commission agrees that a permanent injunction mirroring the preliminary injunction should be entered regarding the noncandidate committee contribution limit, as applied to noncandidate committees making only independent expenditures.

The facility by which a speaker may hide his or her identity increases by orders of magnitude when a noncandidate committee making only independent expenditures operates without the benefit of a contribution limit. What is to stop a single donor from setting up a noncandidate committee, giving it an innocuous name, funding it with \$4 million, and letting the committee make all the election-related speech without the donor's name attached? See McConnell, 540 U.S. at 224 (“Money, like water, will always find an outlet.”) This is a nationwide phenomenon. See, e.g., Super PACs Barge Into the 2012 Presidential Race, available at <http://abcnews.go.com/blogs/politics/2011/11/super-pacs-barge-into-the-2012-presidential-race/> (last visited Dec. 1, 2011); Jeremy R. Petermann, *PACs Post-Citizens United: Improving Accountability and Equality in Campaign Finance*, 86 N.Y.U. L. Rev. 1160, 1195 (“PACs that make only independent expenditures” are “commonly referred to as Super PACs.”). Knowing the true identity of a speaker is ever more important in the modern age:

In an age characterized by the rapid multiplication of media outlets and the rise of internet reporting, the “marketplace of ideas” has become flooded with a profusion of information and political messages. *Citizens rely ever more on a message’s source as a proxy for reliability and a barometer of*

political spin. Disclosing the identity and constituency of a speaker engaged in political speech thus enables the electorate to make informed decisions and give proper weight to different speakers and messages.

National Organization for Marriage v. McKee, 649 F.3d 34, 57 (1st Cir. 2011)

petition for cert. filed (U.S. Nov. 2, 2011) (No. 11-599) (emphasis added, internal quotation marks and citation omitted). The noncandidate committee definition meets the exacting scrutiny test, and A-1's challenge should be rejected.

2. *The 'Noncandidate Committee' Definition is Not Vague or Overbroad*

A-1 alleges that the definition of noncandidate committee is "vague, and therefore overbroad." Doc. 24 at 41. A-1 claims that the phrase "to influence" renders the definition unconstitutionally vague.¹⁰ *Id.* at 40.

A law implicating free speech is unconstitutionally vague only "if it fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." Human Life, 624

¹⁰ The operative complaint does not articulate a freestanding overbreadth claim about this provision. Instead, the allegations turn on vagueness, with a claim that the provision is "vague, and therefore overbroad." Doc. 24 at 41. Other allegations regarding overbreadth, *id.* at 42-46, are not typical overbreadth challenges. These allegations actually concern whether the statute is sufficiently tailored. *Id.* Typically, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). Here, the same reasoning that establishes why the statute meets the exacting scrutiny test also shows why it is not overbroad. Human Life, 624 F.3d at 1020 n.9 ("We already have addressed Human Life's "overbreadth" arguments above insofar as we have held that the definitions of "independent expenditure" and "political advertising" do not burden more speech than is constitutionally permissible under exacting scrutiny.").

F.3d at 1019 (internal quotation marks omitted). But “perfect clarity is not required even when a law regulates protected speech, and we can never expect mathematical certainty from our language[.]” Id. (internal quotation marks omitted). “The touchstone of a facial vagueness challenge in the First Amendment context, however, is not whether some amount of legitimate speech will be chilled; it is whether a **substantial** amount of legitimate speech will be chilled.” California Teachers Ass’n v. State Bd. of Educ., 271 F.3d 1141, 1152 (9th Cir. 2001) (emphasis added, citing Young v. American Mini Theatres, Inc., 427 U.S. 50, 60 (1976)). See also Hill v. Colorado, 530 U.S. 703, 733 (2000) (“speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications.”) (citation and internal quotation marks omitted).

Under these standards, it is not enough for A-1 to complain that they are uncertain what “to influence” means. Words in statutes have common meaning and that meaning informs how the statute should be read. See California Teachers, 271 F.3d at 1152 (discussing “terms of common understanding.”) The meaning of the word “influence”—especially in the context of campaign finance—is perfectly clear. A party who seeks to “influence” an election is trying to effect or alter its outcome, in favor of the candidate they support. Even more importantly, Buckley interpreted this same phrase in 1976 and added its narrowing gloss, limiting “to

influence” to express advocacy. Buckley, 424 U.S. at 43. Communications that are the “functional equivalent” of express advocacy were given the same status later. WRTL, 551 U.S. at 469-70.

Hawaii’s campaign finance laws take their inspiration from the federal laws considered in Buckley. During the first comprehensive codification of these laws, the Legislature’s intention to bring our statutes into alignment with Buckley was explicitly stated. Conf. Comm. Rep. No. 78, in 1979 Hse. Journal at 1137, 1140 (Ex. 11). The Hawaii Legislature is entitled to rely on United States Supreme Court rulings on what is and is not constitutional, and cannot be faulted for using what is essentially a campaign finance term of art. Hawaii’s regulations also rely upon the concept of express advocacy and its functional equivalent. Hawaii Administrative Rules (HAR) § 3-160-6. For that reason, reading the Buckley and WRTL narrowing gloss into the phrase “to influence” in the noncandidate committee definition is entirely consistent with Hawaii’s campaign finance laws. The First Circuit adopted this narrowing construction for the word “influence” in Maine’s statutes and subsequently upheld the statutes against a vagueness challenge. McKee, 649 F.3d at 64-67. This Court should do the same here.

Adding this narrowing gloss does not *make* the statutes unconstitutional. In McKee, the plaintiffs argued that “Citizens United eliminated ‘the appeal-to-vote test as a constitutional limit on government power,’ and reads into this an implicit

holding that the test was unconstitutionally vague.” McKee, 649 F.3d at 69. The

First Circuit soundly rejected this argument:

NOM’s reading finds no support in the text of Citizens United, though we agree with NOM that, in striking down the federal electioneering expenditure statute, Citizens United eliminated the context in which the appeal-to-vote test has had any significance.⁴⁸ ***It is a large and unsubstantiated jump, however, to read Citizens United as casting doubt on the constitutionality of any statute or regulation using language similar to the appeal-to-vote test to define the scope of its coverage.*** The basis for Citizens United’s holding on the constitutionality of the electioneering expenditure statute had nothing to do with the appeal-to-vote test or the divide between express and issue advocacy. Instead, the decision turned on a reconsideration of prior case law holding that a corporation’s political speech may be subjected to greater regulation than an individual’s.

⁴⁸ We do not agree, however, with NOM’s characterization of the appeal-to-vote test, or any of the other tests proposed by the Court for distinguishing between express and issue advocacy, as a “constitutional limit on government power.” Citizens United made clear that at least some forms of regulation may reach issue advocacy[.]

McKee, 649 F.3d at 69 and n.48 (emphasis added). This result is the correct one.

Citizens United unmistakably held that disclosure requirements are not limited to express advocacy and its functional equivalent. Citizens United, 130 S. Ct. at 915. Given the strength of Citizens United’s disclosure ruling, it is possible that future interpretations of the phrase “to influence” for vagueness purposes might include *more* than express advocacy and its functional equivalent. Whether that might eventually come to pass is not presently relevant. Evaluating Hawaii’s current law, the phrase “to influence” (as construed) is ***narrower*** than the disclosure ruling of

Citizens United. As this Court observed, express advocacy and its functional equivalent offers a “safe harbor” from the regulator’s perspective. Doc. 91 at 46 n.16. Hawaii’s laws take advantage of that safe harbor.

The fact that speech “to influence” (as construed) the election is voluminous does *not* make the statute vague. The statute governs a lot of speech *because the election generates a lot of speech*. Our country is a democracy. Every election decides the path of our government, shapes our policy priorities, and determines how the finite resources of the State will be spent. Much is at stake, and that is why the “marketplace of ideas” flourishes in the weeks before every election. Speech made “to influence” (as construed) the outcome of an election is not unconstitutionally vague. Buckley; McKee.

Political speech that does not seek “to influence” (as construed) the outcome of an election is excluded by statute (i.e., “issue ads”). HRS § 11-302. It follows, therefore, that the noncandidate committee definition does not “chill” “legitimate speech.” The speech that is beyond constitutional boundaries is *already excluded* by the definition itself. Id. It is illogical to suggest that a “substantial amount of legitimate speech” will be chilled, when issue ads are already outside the reach of the statute. California Teachers, 271 F.3d at 1152. Because the phrase “to influence” has a readily understandable meaning in the campaign finance context, A-1 can make no showing that the statute is so imprecise as to chill a *substantial*

amount of protected speech. The noncandidate committee definition is not vague nor overbroad.

3. *A-1 is Properly Subject to the 'Noncandidate Committee' Definition*

A-1's as-applied challenge to the noncandidate committee definition fails as well. A-1 claims that it should fall within this definition because it does not have the "major purpose" of engaging in political advocacy and its political speech is incidental compared to its overall activities. Doc. 24 at 18. This argument may be easily discarded. An organization need not have political advocacy as its sole major purpose in order to be constitutionally subject to political committee registration requirements. Human Life, 624 F.3d at 1009-1011.

A-1's claim that its political advocacy is incidental is easily rejected. During the 2010 election season, A-1 contributed *substantial* sums to numerous candidates and the Hawaii Republican Party. Commission records show that A-1 gave more than \$12,000 to the Hawaii Republican Party before the 2010 primary. Ex. 2. During October and November 2010, A-1 gave \$18,000 to individual candidates. Exs. 4, 5. And during September 2010, A-1 gave \$6,000 to political organizations. Ex. 3. These funds exceed **\$35,000.00**. Such a sum cannot seriously be called "incidental." Compare Canyon Ferry Road Baptist Church v. Unsworth, 556 F.3d 1021 (9th Cir. 2009) (striking down application of disclosure provisions to

“incidental” political activities by a church; the activities were space on a table for flyers, and a few minutes of the pastor’s time).

A-1 does not challenge the noncandidate committee reporting requirements themselves. Doc. 24 at 53. Even if it did, the reporting requirements are not very onerous. Filing is done electronically and at relatively infrequent intervals. HRS § 11-336. The forms are straightforward. Ex. 1. Organizations need not form a separate legal entity. Nor do they have to set up a segregated fund, as long as records are kept tracking the noncandidate committee’s financial activity. HAR § 3-160-21(c) (permitting either “separate bank account” or a “ledger account in the noncandidate committee’s main account.”). Hawaii’s reporting requirements are not unduly burdensome given that only organizations with the “purpose” of political advocacy that exceed the \$1000 threshold must comply. HRS §§ 11-302, 11-321(g). See SpeechNow.org v. Fed. Election Comm’n, 599 F.3d 686 (D.C. Cir. 2010) (reporting requirements not overly burdensome).

The noncandidate committee definition withstands all of A-1’s attacks. It is a constitutional disclosure provision that passes the exacting scrutiny test, and it is neither vague nor overbroad.

4. *The ‘Expenditure’ Definition is Constitutional for the Same Reasons as the Noncandidate Committee Definition*

A-1 makes the same challenges to the expenditure definition as it does to the noncandidate committee definition. Doc. 24 at 42-46; HRS § 11-302; Ex. 8. A-1

alleges that the “major purpose” test should apply, id. at 43, that “to influence” to vague, id. at 40, and that the definition is vague and therefore overbroad. Id. at 41. The arguments made above dispose of this challenge as well. Human Life.

Hawaii’s campaign finance laws regulate *but do not prohibit* expenditures. HRS §§ 11-381, 11-382 (proper use of campaign funds). The purpose of the provisions concerning “expenditures” is transparency. How the word is used elsewhere in this chapter reinforces that conclusion. See, e.g., HRS § 11-335(b)(2) (requiring disclosure of expenditures). As a disclosure rule, the expenditure definition is judged under the exacting scrutiny test. Human Life.

The expenditure definition includes a list of what is included. HRS § 11-302. The statutory definition also excludes some items. Id. (volunteer, voter registration, and uncompensated internet activities excluded). Achieving *effective* disclosure of the financial sources of campaign advertisements depends in large part on an effective definition of “expenditure.” Without such a definition, the law will have loopholes. Campaign finance laws are constructed of “interlocking multilayered provisions designed to prevent circumvention[.]”. Federal Election Comm’n v. Colorado Republican Federal Campaign Committee, 533 U.S. 431, 457 n.19 (2001). The Commission’s interest in preventing circumvention of other disclosure rules further supports the definition of expenditure. Human Life, 624 F.3d at 1011-1012. The definition meets the exacting scrutiny test.

This definition is not unconstitutionally vague or overbroad either. A-1 objects to the word phrase “influencing.” Doc. 24 at 17, 40; HRS § 11-302 (see (1)(A) and (1)(B) of expenditure definition). This word operates in this provision in the same manner as it does in the definition of noncandidate committee. Compare HRS § 11-302 “expenditure” definition (“ . . . for the purpose of influencing the nomination for election, or the election, of any person seeking nomination for election or election to office . . .”) with “noncandidate committee” definition (“ . . . to influence the nomination for election, or the election of any candidate to office. . . .”). In both definitions the word “influence” (and its variant “influencing”) is tied to the *nomination or election of a candidate to office*. Id. The words are used in the same way. The narrowing gloss applied above to the phrase “to influence” therefore applies with equal force here. With that narrowing construction, there is no vagueness problem. Buckley; McKee. Since A-1’s overbreadth claim about this provision is dependent on its vagueness claim, the overbreadth claim fails as well. Doc. 24 at 41.

A-1’s as-applied challenge to the expenditure definition is easily discarded. A-1’s political activities are plainly within the scope of the statute: giving money to candidates, parties, and noncandidate committees, and purchasing political advertisements. See Exs. 2-5; Doc. 24, Ex. 14. It is constitutional to impose disclosure requirements on such activities. Human Life.

E. The Electioneering Communications Provision Is A Constitutional Disclosure Rule

A-1's challenge to the "electioneering communications" definition and reporting requirements fails for much the same reasons. Doc. 24 at 46-50, 51-52 (counts 4, 5 and 9). HRS § 11-341 is a disclosure rule: its purpose is the provision of information. This provision is a constitutional disclosure law and is neither vague nor overbroad.

1. A-1's Challenge to the Electioneering Communications Definition and Reporting Requirements Are Moot

Registered noncandidate committees need not file separate statements of information regarding electioneering communications. Instead its electioneering communications are disclosed through its noncandidate committee reports. HAR § 3-160-48 ("A noncandidate committee registered with the commission is not required to file a statement of information for disbursements for electioneering communications."). A-1's challenge to the "electioneering communications" definition and reporting requirements is therefore moot. The noncandidate committee definition is constitutional, properly applies to A-1, and they are subject to the reporting requirements. This Court need not address A-1's challenge to HRS § 11-341 any further.

2. *The Electioneering Communications Provision Is a Constitutional Disclosure Provision and is Neither Vague Nor Overbroad*

Even if A-1's challenge to the electioneering communications provision was not moot, that challenge would fail. Like the other provisions discussed above, HRS § 11-341 is a disclosure rule, aimed at transparency in campaign financing. Disclosure provisions are constitutional if they are "substantially related to a sufficiently important governmental interest." Human Life, 624 F.3d at 1005. The governmental interest in providing information to the electorate and guaranteeing transparency in campaign funding is well established. Id. at 1008. All that remains, therefore, is a tailoring analysis, that is, to determine whether the statute is "substantially related" to those interests.¹¹ Id. at 1005.

HRS § 11-341 easily meets this test. "Electioneering communication" means an advertisement that refers to (1) "a clearly identifiable candidate," (2) is made within 30 days prior to a primary election or 60 days prior to a general election and (3) is "not susceptible to any reasonable interpretation other than as an appeal to vote for or against a specific candidate." HRS § 11-341(c). The statute

¹¹ A-1 makes no freestanding allegation that the electioneering communication definition is *itself* vague or overbroad. Doc. 24 at 46-50. Instead, the vagueness and overbreadth challenge to this provision is limited to the use of the phrase "advertisement" in HRS § 11-341. Id. at 40-41. (This is addressed below). The Commission nevertheless addresses these arguments for the sake of completeness. The arguments overlap with those that demonstrate why the law is properly tailored under the exacting scrutiny test in any event.

excludes news stories, expenditures, in-house bulletins, and candidate debates from the definition of “electioneering communication.” Id.

This requirement is very similar to statutes upheld elsewhere. McConnell v. Fed. Election Comm’n, 540 U.S. 93 (2003) upheld the federal electioneering communications definition against a facial challenge.¹² The statute considered in McConnell defined “electioneering communication” as one that referred to a “clearly identified candidate,” made within 60 days of a general election or 30 days of a primary election, and is “targeted to the relevant electorate.” Id. at 189. McConnell upheld this statute and rejected the plaintiffs’ argument that only “express advocacy” could be regulated in this fashion. Id. at 190-92. The statute was not unconstitutionally vague because “[t]hese components are both easily understood and objectively determinable.” Id. at 194.

Hawaii’s definition of electioneering communication is two-thirds *identical* to the one upheld in McConnell. HRS § 11-341 also requires that the communication concern a “clearly identified candidate,” and be made within 30 days of a primary election or 60 days of a general election. HRS § 11-341(c). These are exactly the same requirements as in McConnell, “components [that] are

¹² Citizens United overruled McConnell only to the extent it relied on Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). Citizens United, 130 S. Ct. at 913. McConnell’s disclosure holdings remain good law. Id. at 915 (“we now adhere to that decision [McConnell] as it pertains to the disclosure provisions.”).

both easily understood and objectively determinable.” McConnell, 540 U.S. at 194. Like McConnell, there is no vagueness concern.

The “clearly identifiable candidate” aspect of this provision is made even more precise by the statutory definitions and the applicable regulation. “‘Clearly identified’ means the inclusion of name, photograph or other similar image, or other unambiguous identification of a candidate.” HRS § 11-301. The regulation gives examples. HAR § 3-160-3(b) (“Examples of ‘clearly identified’ include but are not limited to: ‘the Governor’, ‘your Senator’, ‘the incumbent’, ‘the Republican gubernatorial nominee’, or ‘the Democratic candidate for the 60th House seat’.”).

In lieu of the federal provision about targeting the relevant electorate, HRS § 11-341 requires that an electioneering communication be “not susceptible to any reasonable interpretation other than as an appeal to vote for or against a specific candidate.” HRS § 11-341(c)(3). In other words, the communication must be the “functional equivalent” of express advocacy. Id. This phrase is lifted out of the WRTL decision. WRTL, 551 U.S. at 469-70.¹³ Because the “targeting” provision of the federal statute has no similar requirement limiting it to the “functional

¹³ WRTL was not a disclosure case. The provision challenged in WRTL was a ban on electioneering communications by corporations and unions funded by general treasury funds. WRTL, 551 U.S. at 457-58. This was the provision struck down in Citizens United. Citizens United, 130 S. Ct. at 898. But Citizens United also makes clear that disclosure provisions need not be limited to express advocacy or its functional equivalent. Id. at 915. Importing the “functional equivalent” principle into a disclosure rule is, therefore, not required. HRS § 11-341 is *narrower* than what is constitutionally permissible under Citizens United.

equivalent” of express advocacy, Hawaii’s electioneering communications provision is *narrower* than the one upheld in McConnell. No narrowing gloss is necessary; the statute is constitutional as written.

The federal definition of electioneering communications is not the *only* constitutional method to regulate this kind of electoral advertisement. As long as the relevant test is met, a State may use other factors. In Alaska Right To Life Committee v. Miles, 441 F.3d 773 (9th Cir. 2006) (AKRTL), the Ninth Circuit upheld Alaska’s definition of electioneering communication, which included a requirement that the “communication address an issue of national, state or local political importance,” in lieu of the federal electorate-targeting requirement. Id. at 782-84. The court noted that Alaska’s provision was narrower than the federal equivalent because “it covers only certain kinds of communication[,]” instead of the federal targeted-to-the-electorate requirement. Id. at 783. The court concluded that “if anything, those words make the provision less rather than more vague.” Id. at 784. Together, McConnell and AKRTL demonstrate how misplaced A-1’s challenge is. HRS § 11-341 is neither vague nor overbroad.

The statute is also properly tailored to the important governmental interest at stake. The reporting requirements are triggered only by exceeding a \$2000 threshold amount. HRS § 11-341(a). An advertisement that would otherwise qualify as an electioneering communication but is nominal in cost is therefore

excluded. Id. The documentation required for a statement of information is readily determinable. HRS § 11-341(b). The person who makes the electioneering communication must provide the name of the person making the disbursement, their address, the amount of disbursement and to whom it was given, the elections that the electioneering communication addresses, names and addresses of contributors who gave funds for the purpose of broadcasting the electioneering communication, and whether the electioneering communication was made in coordination with any candidate. Id. All of this information should be readily at hand for anyone who purchases an electioneering communication. These requirements are therefore not unduly burdensome. The filing is electronic and the form is relatively simple. Ex. 7.

By statute the information must be provided to the Commission within 24 hours of the disbursement. HRS § 11-341(a). This short time period is justified by the fact that electioneering communications are limited to those made within the last few weeks before an election. HRS § 11-341(c)(2) (sixty days before a general election; thirty days before a primary election). The election is imminent before this provision even applies. It is this juxtaposition that justifies the 24-hour reporting period: disclosure is only effective *when the public has access to the information*. The interests of disclosure and transparency have been repeatedly acknowledged as of the highest importance. Human Life, 624 F.3d at 1008. These

interests are served *only* if the disclosure is given in a timely fashion *before* the election. “Given the relatively short timeframes in which electioneering communications are made, the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant.” McConnell, 540 U.S. at 200. The 24-hour reporting period serves the interests the government is protecting with this statute, and is properly tailored under the exacting scrutiny standard.

F. The Definition of ‘Advertisement’ is Not Vague or Overbroad and The Disclaimer Required for Advertisements Is a Constitutional Disclosure Rule

A-1 claims that the definition of “advertisement” is unconstitutionally vague because it uses words like “advocates,” “supports” and “opposition.” Doc. 24 at 40-41. Similar statutory language was upheld against a vagueness challenge in McConnell:

We likewise reject the argument that § 301(20)(A)(iii) is unconstitutionally vague. The words “promote,” “oppose,” “attack,” and “support” clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision. These words provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.

McConnell, 540 U.S. 93 at 243 n.64 (internal quotation marks omitted). Even more telling, the First Circuit recently rejected a vagueness challenge to these exact words (“support” and “opposition”) and very similar terms (“promoting” instead of “advocating.”). National Organization for Marriage v. McKee, 649 F.3d 34, 62-64

(1st Cir. 2011) *petition for cert. filed* (U.S. Nov. 2, 2011) (No. 11-599).¹⁴ Though the exact terms used were not identical to those considered in McConnell, the First Circuit still found McConnell persuasive:

[T]he statutory context here is close enough to McConnell to make the Court's conclusion that the terms are not vague particularly persuasive. In each of the provisions, the terms "promote"/ "promoting," "support," and "oppose"/"opposition" have an election-related object: "candidate" in the federal law, 2 U.S.C. § 431(20)(A)(iii), and "candidate," "nomination or election of any candidate" and "campaign, referendum or initiative" in the Maine provisions, Me. Rev. Stat. tit. 21-A, §§ 1019-B(3)(B), 1052(4)(A)(1), (5)(A)(5). If anything, the terms of Maine's statutes provide slightly more clarity: for example, § 1052(5)(A)(5)'s reference to "promoting ... the nomination or election of any candidate" is more precise than the federal law's reference to "promot[ing] ... a candidate," 2 U.S.C.A. § 431(20)(A)(iii). ***We thus find the use of "promoting," "support," and "opposition" in §§ 1019-B and 1052 clear enough to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.***

Id. at 63-64 (emphasis added, some internal quotation marks omitted). Like the Maine statute upheld in McKee, Hawaii's statutes have "an election-related object: "the nomination, opposition or election of the candidate[.]" HRS § 11-302 (definition of advertisement). And like Maine's statute, this language is *more precise* than the language upheld in McConnell. Compare 2 U.S.C.A. § 431(20)(A)(iii) (as quoted in McKee) ("promot[ing] . . . a candidate[.]" with no mention of nomination or the election itself) with HRS § 11-302 (definition of

¹⁴ In McKee, these words ("support," "opposition," and "promoting") appear in other provisions of Maine's campaign finance laws, not their advertisement definition. McKee, 649 F.3d at 62-63. Because A-1's challenge to this provision turns on these exact terms, the logic of this case still applies. Doc. 24 at 40-41.

advertisement) (including, as Maine’s provision does, reference to the “nomination . . . or election of the candidate . . .”). No narrowing construction is necessary; the statute is constitutional as written. A-1’s vagueness challenge to this provision ends here.¹⁵

The disclaimer requirement applies to advertisements. HRS § 11-391(a)(2). It requires a “notice in a prominent location” stating either that the advertisement is published or broadcast with the approval and authority of the candidate, or that “[t]he advertisement is published, broadcast, televised, or circulated without the approval and authority of the candidate.” Id.

A-1 claims that the disclaimer detracts from its message and that the State is regulating the content of its speech. Doc. 24 at 27. It also claims that the requirement reaches beyond what is constitutionally permissible. Id. at 49. A-1 reiterates its claim that only express advocacy can be constitutionally subject to disclosure requirements. As the Ninth Circuit has acknowledged, however, Citizens United explicitly discarded that argument. Human Life, 624 F.3d at 1016.

¹⁵ The specificity of the advertisement definition is further assisted by the regulation, which gives examples of the kind of “sundry” items that are excluded from the definition. HAR § 3-160-2 (“sundry items” include “clothing, bumper stickers, pins, buttons and similar small items[.]”) A-1 raises no freestanding overbreadth challenge here: it is subsumed within the vagueness challenge. Doc. 24 at 41. The disclosure obligation imposed by this provision is limited to speech that identifies a candidate and “advocates,” “supports,” or “opposes” that candidate’s nomination or election for office. HRS § 11-302. Any overbreadth challenge to this provision is therefore meritless.

The disclaimer requirement is a constitutional disclosure rule for the same reasons discussed above. The government's interest in disclosure is unquestionably sufficient under the exacting scrutiny test. And the disclaimer requirement bears a "substantial relationship" to that interest because it regulates no farther than it needs to. The disclaimer provision bans no speech; it requires a disclaimer to prevent confusion about *who* is seeking to influence your vote, and *whether* they are coordinating their efforts with candidates. HRS § 11-391(a)(2). This information is valuable to voters as they evaluate their choices. It is one sentence in any advertisement, so the effort of compliance is minimal. HRS § 11-391(a)(2)(A) and (B).

The use of similar disclaimers is so prevalent that there is little realistic chance that a disclaimer will substantially detract from any election-related message. See 2 U.S.C.A. § 441d(a) (federal disclaimer requirement; predecessor provision was added in 1976). Political advertisements typically monopolize the airwaves and television stations in the last days before a general election, despite the finely-printed disclosures. The disclaimers have not undercut the frequency of this particular form of political speech, nor its actual or perceived effectiveness.

Citizens United upheld the federal disclaimer provision, and that provision is more onerous to comply with than HRS § 11-391(a)(2). Citizens United, 130 S. Ct. at 913-14 (requirement specifies length of time that a disclaimer must be

displayed on the screen and that it must be displayed in a “clearly readable manner.”). After Citizens United, A-1’s attack on Hawaii’s disclaimer requirement is baseless.¹⁶

G. The Government Contractors’ Provision Is a Constitutional Means of Preventing *Quid Pro Quo* Corruption and the Appearance of Corruption in the Form of ‘Pay to Play’

1. The Operative Complaint Challenges This Provision Only As to Contributions Made Directly to Candidates

A-1’s challenge to this provision is limited. The complaint challenges this provision *only* as it prevents A-1 from donating *to candidates* while it is a government contractor. Doc. 24 at 9, 11, 29, 50. This count is an as-applied challenge *only*. Id. at 54.

A-1 contributed \$18,000 to candidates during the height of the 2010 election season. Exs. 4 & 5.¹⁷ It is “often” a government contractor. Doc. 24 at 9. A-1 makes no factual allegations regarding the *other* provisions of HRS § 11-355. The question before this Court, therefore, is limited to that part of HRS § 11-355 that bans A-1 from making contributions to candidates.

¹⁶ A-1’s as-applied challenge to this provision fails as well. The three ads A-1 ran are the functional equivalents of express advocacy. Doc. 91, App. 1. The ads ran just before the primary election and mention candidates by name. Id. at 48. Even if A-1’s advertisements were not functional equivalents of express advocacy, under Citizens United disclosure and disclaimer provisions may be constitutionally applied to “issue ads.” Human Life, 624 F.3d at 1016. A-1’s as-applied constitutional challenge to HRS § 11-391 therefore fails by necessity, as the provision is narrower than that permitted by Citizens United.

¹⁷ A-1 gave *another* \$20,100 to candidates earlier in 2010. Ex. 2.

2. *The Government Contractors Provision is Subject to Closely Drawn Scrutiny, Not Strict Scrutiny*

This provision is a *contribution* provision, not a ban on independent spending. It is therefore subject to closely drawn scrutiny, not strict scrutiny. Contribution limits have long been subject to a lesser level of scrutiny than bans on *independent* spending. Buckley, 424 U.S. at 20-21. Contributions are considered “speech by proxy” and are not entitled to the same deference as independent expenditures. California Medical Ass’n v. Fed. Election Comm’n, 453 U.S. 182, 195-96 (1981) (plurality op.). This logic applies here as well: HRS § 11-355(a) bans *contributions* to candidates. It does not ban the contractor’s own speech. It is the ***type of speech*** that determines the level of scrutiny, not whether the law can be characterized as a *ban* or a *limit*.

Citizens United does not change this. First, Citizens United concerned a ban on independent *spending*. HRS § 11-355 does not govern independent spending at all. Government contractors remain free to make their own speech. HRS § 11-355. Second, the choice to apply strict scrutiny in Citizens United, 130 S. Ct. at 898, does not support jettisoning the closely drawn scrutiny test for a provision governing *contributions*. Citizens United did not address contribution provisions at all. Id. at 909. Third, the plaintiffs in Citizens United did not have any financial relationship with the State. Id. at 886. This distinction is critical: it changes the entire premise of how corruption can develop, and how the State can combat it.

A recent decision from the Fourth Circuit fully supports the application of the closely drawn standard here. Preston v. Leake, 2011 WL 5320750 (4th Cir., Nov. 7, 2011). Preston concerned a North Carolina provision that *banned* lobbyists from making any contributions to candidates. Id. at *2. The court applied the “closely drawn” standard, relying on Buckley’s distinction between contributions and expenditures:

While a symbolic contribution to a candidate’s campaign is undoubtedly political expression protected by the First Amendment, the prohibition of this particular expressive activity is less onerous, because of the numerous other ways in which would-be contributors can associate with particular candidates and express their political viewpoints. ***The imposition of a restriction, whether a limit or a ban, on contributions by a specific group of individuals serves only as a channeling device, cutting off the avenue of association and expression that is most likely to lead to corruption but allowing numerous other avenues of association and expression.***

Id. at *6 (emphasis added, internal quotation marks and citations omitted). Case law since Citizens United also confirms the continuing vitality of the “dual levels of scrutiny.” Id. at *7. Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2816-17 (2011). The Ninth Circuit agrees, holding that contribution bans are subject to closely drawn, not strict, scrutiny:

Plaintiffs acknowledge that the closely drawn standard of review is appropriate for contribution limits, but suggest that contribution bans should be treated differently. However, the Supreme Court has held that while it is not that the difference between a ban and a limit is to be ignored . . . the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself.

Thalheimer v. City of San Diego, 645 F.3d 1109, 1124 n.4 (9th Cir. 2011) (internal quotation marks and citation omitted). See also Green Party of Connecticut v. Garfield, 616 F.3d 189, 199 (2nd Cir. 2010) (“we reject plaintiffs’ argument that we must apply strict scrutiny because the provisions at issue here are bans, as opposed to mere limits.”). The strict scrutiny standard does not apply here.¹⁸

3. *The Government Contractors Provision is a Constitutional Means to Prevent Corruption and the Appearance of Corruption*

HRS § 11-355 was enacted in 2005. 2005 Haw. Sess. L. Act 203, § 8 (Ex. 18). The biggest change between the 2005 law and the current provision is subsection (b). This subsection originally concerned segregated funds for corporations and labor organizations, which were made superfluous by Citizens United. Id. It now specifies that only *the contractor itself* is subject to the ban. HRS § 11-355(b). See also Conf. Comm. Rep. No. 185, in 2005 Hse. Journal at 1827, 1828 (“the prohibition on contributions by state and county contractors applies to the specific contracting entity and not to individuals associated with the contractor, such as the individual owners of the contracting entity[.]”) (Ex. 19). The provision is narrower now than when it was adopted.

¹⁸ Preventing corruption and the appearance of corruption is absolutely critical if this country is to maintain a functioning democracy. Even if the strict scrutiny standard applied, the need to prevent corruption and the appearance of corruption would meet that standard.

The legislative history shows that a “pay to play” system was part of what motivated the Legislature in 2005. See 2005 Hse. Journal at 477 (“It’s such a disappointment to me . . . not to see us go after the heart of the problem, which is the “pay to play” game. We should simply outlaw, ban contributions from people who do work with government.”) (statement by Rep. Fox) (Ex. 20). At the time Representative Fox made his speech, no such provision was in the bill. See H.B. No. 1747, H.D. 1 (2005) (Ex. 21). It was only after he made this plea that the government contractors’ ban was added into the next version of the bill, H.B. 1747, H.D. 1, S.D. 1. Compare Exs. 21 & 22.¹⁹

HRS § 11-355 also operates in tandem with the procurement code. The legislative history of HRS chapter 103D demonstrates the State’s continued commitment to maintaining the integrity of the procurement process. See, e.g., 1993 Haw. Sp. Sess. L. Act 8; Sen. Stand. Comm. Rep. No. S8-93, 1993 Sen. Journal at 39 (intent of the bill to “[i]ncrease public confidence in the integrity of the system[,]” and “[p]rovide fair and equitable treatment of all persons dealing with the government procurement system.”). The Legislature’s commitment to ethical practices in procurement was reinforced with the enactment of 2010 Haw. Sess. L. Act 207 (Ex. 23). This law details ethical requirements for both public employees and prospective contractors, including the requirement that employees

¹⁹ All versions of H.B. 1747 are *available at* <http://www.capitol.hawaii.gov/archives/2005.aspx> (last visited Dec. 1, 2011).

“[r]emain independent from any actual or prospective bidder . . .” and the requirement that prospective contractors avoid the “appearance of impropriety.”

Id. Because HRS § 11-355 applies only during a contract’s term, the broader context for this provision includes the procurement code itself.

HRS § 11-355 seeks to combat corruption and the appearance of corruption. It can take two forms: the straightforward money-for-favors, or a “pay to play” system. “Pay to play” is a tacit system, where government contractors routinely contribute to *both* sides of a electoral race, in an effort to secure favor regardless of who wins. A contractor’s decision to contribute to both competitors in a race undercuts the notion that these contributions are symbolic speech, that is, supportive of the *candidates* themselves. It is instead a way to “grease the skids” in government contracting, a perceived necessary evil. This is a fundamental threat to the integrity of the procurement system and our elected officials. This is the corruption and the appearance of corruption that HRS § 11-355 addresses.

Under Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 391 (2000), the amount of evidence the government needs to produce varies “up or down with the novelty and plausibility of the justification raised.” Here, very little (if any) empirical evidence is needed, because the proposition made is utterly unremarkable. The fact that political money can skew decisions on government contracts is not a novel proposition at all: federal campaign finance law has had a

contractors' ban in place since 1976. 2 U.S.C.A. § 441c. The existence of a *financial relationship* with the State makes the potential for corruption a logical given. Ethical rules abound based on this same principle. See, e.g., Haw. R. Prof. Conduct 1.8 (attorney financial transactions); Code of Conduct for U.S. Judges, Canon 2(B) (financial interests); HRS § 84-14 (conflicts of interest under state ethics code); 5 U.S.C.A. App. 4 § 102 (financial reporting requirements). The fact that a financial relationship draws into doubt each party's ability to deal objectively with the other is not a novel proposition at all. The Legislature is composed entirely of public officials who must regularly run for office: their decision to enact HRS § 11-355 is proof enough that this problem exists.

Even if empirical evidence is required, the evidence supports the Legislature's conclusion that § 11-355 was necessary to combat a "pay to play" system. The predecessor provision was enacted in 2005. 2005 Haw. Sess. L. Act 203. The data from the election just prior, in 2004, shows that a "pay to play" system did exist. Decl. of A. Baldomero. The Commission's data shows that more than *forty* contractors (and their principals) contributed substantial funds to *both sides* of the 2004 Honolulu Mayor's race. Id. This race is indicative of a wider problem because it was a large, high profile race. As detailed in the attached declaration, the information from 2004 shows a pattern of contributions from government contractors that readily leads to the appearance of corruption. Id.

HRS § 11-355 is sufficiently tailored to combat corruption and the appearance of corruption. The provision governs only contributions from *the contracting entity itself*. HRS § 11-355 is not the incredibly broad law rejected by the Colorado Supreme Court in Dallman v. Ritter, 225 P.3d 610 (Colo. 2010) (*en banc*).²⁰ Hawaii’s law is narrow in comparison:

Aspect of the Provision	Law in <u>Dallman</u>	HRS § 11-355
Whom is barred from making contributions	Contract holders (includes officers, persons with 10% shares) and immediate family, broadly defined	Contracting entity only
Length of time ban applies	Contract term plus two years afterwards	Contract term only
Penalties for violation	Bans contracts, bans all future office, requires violator to assume costs involved	Administrative fines; misdemeanor prosecution possible. Banned from future office for four years only if convicted. HRS §§ 11-410, 11-412.

²⁰ Plaintiffs’ reliance on Dallman is misplaced. They attempt to use this case to argue that the Hawaii Legislature has no oversight responsibility over State contracts. Doc. 24 at 50. But Dallman’s analysis contains no discussion of what role the legislature might have; it focuses solely on the agency *awarding* the contract. Dallman, 225 P.3d at 627. More importantly, Dallman acknowledges the federal provision, describing it as limited to “individuals with oversight responsibility.” Id. at 628. Even if Dallman did discuss the Colorado legislature, those observations would offer little insight into legislative practices in Hawaii.

Since HRS § 11-355 is much narrower than the law considered in Dallman, it is better analogized to the government contractors' contribution ban upheld in Green Party of Connecticut v. Garfield, 616 F.3d 189 (2nd Cir. 2010), and the lobbyist contribution ban upheld in Preston v. Leake, 2011 WL 5320750 (4th Cir. Nov. 7, 2011). In Preston, the Fourth Circuit upheld North Carolina's ban on contributions to candidates by lobbyists, which, like HRS § 11-355, still allowed for significant independent political activity by those subject to the ban. Id. at *6. The fact that the statute *completely banned* contributions did not make it unconstitutional:

The legislature thus made the rational judgment that a complete ban was necessary as a prophylactic to prevent not only actual corruption but also the appearance of corruption in future state political campaigns. This is both an important and a legitimate legislative judgment that “[c]ourts simply are not in the position to second-guess,” especially “where corruption is the evil feared.”

Id. at *8 (emphasis added). The Second Circuit's Garfield decision is especially relevant. In that case, the court upheld Connecticut's government contractors' ban, to combat the appearance of corruption and corruption itself:

Even if small contractor contributions would have been unlikely to influence state officials, ***those contributions could have still given rise to the appearance that contractors are able to exert improper influence on state officials.***

The [Connecticut Campaign Finance Reform Act] ban on contractor contributions, by contrast, unequivocally addresses *the perception of corruption* . . . By totally shutting off the flow of money from contractors to

state officials, it eliminates any notion that contractors can influence state officials by donating to their campaigns.

Garfield, 616 F.3d at 205 (emphases added). Notably, the Second Circuit upheld Connecticut's contractors' ban even though it was significantly broader than HRS § 11-355. Connecticut's law banned contributions from not just the contracting entity itself, but also from principals of the contractor, and the contractor's spouse and immediate family. Id. at 202-03. HRS § 11-355 is limited to the contracting entity itself. Connecticut's law applies to "prospective" contractors; Hawaii's law applies only during the contract term. Id. at 202; HRS § 11-355. If Connecticut's law is "sufficiently tailored"—and the Second Circuit has found that it is—then Hawaii's considerably narrower law logically meets this standard as well.²¹

A-1 asserts that it is too burdensome to keep track of its government contracts. Doc. 24 at 11. This is specious: every business must keep track of its customers. This should not be an additional burden for any organized business, and thus is not overly burdensome as a matter of law either.

²¹ Both of these cases detail scandals that prompted each State to enact the challenged provisions. Garfield, 616 F.3d at 193; Preston, 2011 WL 5320750 at *1. The Commission does not rely on any recent local scandals here. But it defies logic to assert that our Legislature must wait until corruption worsens to the point that public officials are drawn into scandal or convicted of crimes, or the like, before it may act. The democratic system need not break down completely before the State can act to protect it. See, e.g., Canyon Ferry 556 F.3d at 1032 ("We also reject the suggestion that, because Montana's election system appears to be open and highly functional, the need for disclosure is somehow decreased. We are not willing to count Montanans' current confidence in their state ballot process *against* the State's informational interest.")

As in Garfield and Preston, the fact that HRS § 11-355 operates as a **ban** on government contractors' making contributions to candidates does not make the statute insufficiently tailored under the closely drawn scrutiny test. Government contractors have a **financial relationship** with the State. That financial relationship makes the appearance of corruption particularly difficult to eliminate. As with the lobbyists' ban considered in Preston, only a complete ban will effectuate the State's goals:

The role of a lobbyist is both legitimate and important to legislation and government decisionmaking, but by its very nature, it is prone to corruption and therefore especially susceptible to public suspicion of corruption. ***Any payment made by a lobbyist to a public official, whether a campaign contribution or simply a gift, calls into question the propriety of the relationship, and therefore North Carolina could rationally adjudge that it should ban all payments.***

Preston, 2011 WL 5320750 at *9 (emphasis added). This same logic applies here: *any amount of money* exchanged between state officeholders and government contractors will readily cause an appearance of corruption. Hawaii cannot be faulted for taking the same cautious approach as was upheld in Preston and Garfield. HRS § 11-355 is constitutional.

4. *A-1's Argument About Legislative Oversight is Seriously Misplaced and Inherently Illogical*

A-1 claims that HRS § 11-355 is unconstitutional because "the candidates or officeholders do not decide whether the contractors receive contracts and do not oversee the contracts." Doc. 24 at 50. This argument is fundamentally flawed for

several reasons. First, A-1 seriously underestimates the degree of oversight the Legislature has over State contracts. Second, A-1 supposes—wrongly—that it can determine, in advance, the composition of the committees that have the largest role in the oversight of State contracts. Third, A-1 ignores the connection between the *statutes* that govern procurement and the Legislature itself. And fourth, as described below, this argument is inconsistent with A-1’s own actions during the 2011 legislative session.

The Hawaii Legislature retains significant oversight authority over State contracts. This is seen repeatedly during the legislative sessions: hearings, informational briefings, and bills that concern procurement. See, e.g., Exs. 25-28, 31. *All* legislators have the opportunity to weigh in on this debate: bills must pass both houses of the Hawaii Legislature, with the entire body of each house having the opportunity to vote. Haw. Const. Art. III § 15.

One bill, considered in the 2011 session, offers a case study showing the flaws in A-1’s argument. This is particularly pertinent given A-1’s emphasis on its contracts with the University of Hawaii, rather than with the State of Hawaii itself. Doc. 24, Exs. 3-13. This bill concerned the degree of independence UH has from the general rules of state procurement. As demonstrated below, the Legislature maintains supervision over UH’s procurement, A-1 is aware of this fact, and several of the candidates A-1 made contributions to in 2010 were *legislators who*

voted on this bill, or the opponents of those who ultimately voted on the bill. The space that A-1 imagines between the legislators and the procurement process is simply not there. But the potential for corruption is.

Senate Bill 1332, “Relating to the University of Hawaii,” was seriously considered by both houses but did not pass, after being referred to conference committee.²² Ex. 31. This bill concerned, in large part, whether the 2012 sunset date in 2010 Haw. Sess. L. Act 82 should be extended. Under Act 82, UH has more independence on procurement matters than most State agencies. The bill considered during the 2011 session, S.B. 1332, turned on this topic as well. Ex. 32. The particulars are not pertinent here. What is pertinent is that in considering this bill, the Legislature reconfirmed its oversight over UH’s procurement:

[T]he Legislature needs more specific information on the nature and extent of ongoing construction projects at the University of Hawaii, including a list of contracts, a description of the status of procured projects, and the costs of the projects. Your Committee believes that *it is a function of the Legislature to hold agencies accountable for expenditures of public funds*, and therefore the Legislature needs to be provided with certain information regarding those construction projects.

Sen. Stand. Comm. Rep. No. 610, 2011 Session (emphasis added) (Ex. 33). A-1 is aware of the degree of oversight the Legislature claims over UH’s procurement.

A-1 was named as one of the supporters of S.B. 1332 in Sen. Stand. Comm. Rep. No. 404, 2011 Session (Ex. 34). And A-1 submitted written testimony in favor of

²² The bill is not dead: measures that do not pass in an odd-numbered session year are automatically carried over to the next session. Haw. Const. Art. III § 15.

this bill when it was before the Senate Committee on Education. Ex. 35. Given its actions during the 2011 legislative session, A-1's claim here that the Legislature does not maintain control over UH procurements does not ring true.²³

A close examination of the progress of S.B. 1332 in 2011 shows the fallacy of A-1's supposition that there is an insufficient nexus between donation to candidates and the Legislature's oversight over UH's procurement. A-1's own behavior shows differently. During the last few weeks before the 2010 general election (Oct. 19, 2010 to Nov. 2, 2010), A-1 reported contributions to thirty different candidates. Ex. 5. *Eighteen of these contributions can be directly connected to the committees that considered this bill during the 2011 legislative session.*²⁴ A-1 generally supports Republican candidates and A-1 made contributions to many of them. Id. Of those Republican candidates A-1 supported who prevailed, three served on committees that considered this bill.²⁵ The other

²³ A-1 is of course free to make its views known to our elected officials. Here, however, the fact that it did so counters the factual allegations it makes in its complaint, namely, that the Legislature does not have oversight responsibility over contracts, particularly those with UH.

²⁴ Four committees considered the bill: (1) Senate Education, (2) Senate Public Safety, Governmental Operations, and Military Affairs, (3) House Finance and (4) House Higher Education. Ex. 31.

²⁵ A-1 made contributions to Corinne W.L. Ching, Aaron L. Johanson, and Gil Riviere. Ex. 5. These three candidates won their elections. Decl. of S. Nago. Reps. Ching and Johanson now serve on the House Higher Education Committee, which considered this bill on March 22, 2011. Exs. 28, 31. Reps. Ching and Johanson voted in favor of the bill. Ex. 31. Rep. Riviere serves on the House

fifteen contributions were made to the *opponents* of the legislators who now serve on one of the committees that considered this bill.²⁶ Using S.B. 1332 and A-1's own contributions as a case study, it is clear that A-1's conclusion that HRS § 11-355 is unconstitutional as applied to them because "the candidates do not . . . oversee the contracts[,]" Doc. 24 at 50, is factually unsupportable.

Even without this information, A-1's claim that it gives only to those candidates who do not have oversight responsibility over State contracts is

Finance Committee, which considered this bill on March 30, 2011. *Id.* Rep. Riviere also voted in favor of the bill. *Id.*

²⁶ A-1's contributions are listed in Ex. 5. The relevant committee assignments are in Exs. 28-30. Scott Nago's declaration lists the candidates for each district. Ex. 31 shows when each committee considered the bill. To summarize:

A-1 contributed to these unsuccessful candidates:	This candidate was the opponent of:	This legislator now serves on this committee:
Judy Franklin	Sen. Chun-Oakland	Sen. Education
Tracy Bean	Sen. Tokuda	Sen. Education
Marlene Hapai	Rep. Hanohano	Hse. Higher Ed.
Rebecca Leau	Rep. Coffman	Hse. Finance
Garner Shimizu	Rep. Ichiyama	Hse. Finance
Shaun Kawakami	Rep. M. Lee	Hse. Finance
Richard Fale	Rep. Wooley	Hse. Higher Ed.
Anel Montel	Sen. Espero	Sen. Public Safety, Governmental Operations and Military Affairs
Samuel Curtis	Rep. M. Oshiro	Hse. Finance
Reed Shiraki	Rep. Takuni	Hse. Higher Ed.
Carl Wong	Rep. Cullen	Hse. Finance
Makahaa Wolfgramm	Rep. C. Lee	Hse. Finance
Christopher Baron	Rep. Hashem	Hse. Finance
Carole Kaapu	Rep. Mizuno	Hse. Higher Ed.
Isaiah Sabey	Rep. Belatti	Hse. Higher Ed.

completely illogical. The composition of House and Senate committees *changes*. Rules of the House of Representatives 11.2(1) (membership provided by resolution); Ex. 28 (2011 resolution); Rules of the Senate 3(7) (Senate President appoints committee members).²⁷ It is impossible to determine, in advance, which candidates will be on the committees that are most likely to have oversight responsibility. And, as explained above, to prevent a “pay to play” system, the appearance of impropriety must be removed for *all* State legislators. A-1 completely ignores that bills—such as S.B. 1332—are considered by *all* legislators when they pass through both houses of the Legislature, not just by certain committees. When a bill considers amendments to the procurement code and reasserts the Legislature’s supervisory role over State contracts, it is considered by *every* legislator. The budget bill—which of course impacts procurement significantly—is considered by *all* Representatives and *all* Senators. A-1’s claim that some lawmakers do not share in the Legislature’s oversight responsibility is fundamentally inconsistent with the Legislature established by Hawaii’s constitution. Haw. Const. Art. III § 1.

A-1’s claims about HRS § 11-355 are logically flawed, factually unsupported, and legally unsound. The statute is constitutional.

²⁷ The current House and Senate Rules are *available at* <http://www.capitol.hawaii.gov/session2011/docs/2011SenateRules.pdf> and [2011HouseRules.pdf](http://www.capitol.hawaii.gov/session2011/docs/2011HouseRules.pdf) at the same address (both last visited Dec. 1, 2011).

H. The Commission Agrees that a Permanent Injunction Should be Entered Regarding the As-Applied Challenge to Noncandidate Committee Contribution Limit

Count 8 of the first amended verified complaint is an as-applied challenge to the noncandidate committee contribution limit, HRS § 11-358, as applied to noncandidate committees that make *only* independent expenditures. Doc. 24 at 51. Plaintiffs raise no facial challenge to this provision. Id. After careful analysis and in light of current Ninth Circuit law, the Commission now agrees that a permanent injunction, mirroring the language of the preliminary injunction, should be entered regarding this provision.²⁸

Because Plaintiffs' challenge to the noncandidate committee contribution limit is as-applied *only* and the case is not a class action, no relief broader than this is warranted. Making the preliminary injunction permanent would effect all of the relief sought in the operative complaint for this provision.²⁹ Id. at 51, 54.

²⁸ "The court GRANTS Plaintiffs' Amended Motion for Preliminary Injunction in part (the as applied challenge to § 11-KK) and DENIES the Motion in part (the facial challenge to § 11-KK). The contribution limit in § 11-KK is unconstitutional as applied to Yamada and Stewart's proposed contributions to AFA-PAC (an entity that engages in solely independent expenditures) in excess of the statutory limit. Defendants are enjoined from enforcing § 11-KK's monetary contribution limit as to Yamada's and Stewart's proposed campaign donations to AFA-PAC." Doc. 71 at 25.

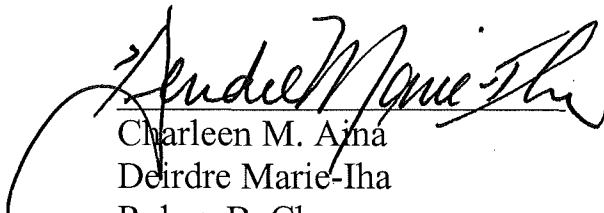
²⁹ The Commission tried without success to stipulate to a permanent injunction to this provision well in advance of the dispositive motions deadline. Plaintiffs' counsel eventually reported that our proposal to stipulate to a permanent injunction on this provision was not of interest to his clients. Decl. of D. Marie-Iha.

CONCLUSION

A-1's challenge to Hawaii's campaign finance laws falls into four parts. Three of the four are disclosure rules that clearly fall within the ambit of the transparency and informational interests embraced by Citizens United and Human Life. The fourth is a provision specific to government contractors, which acts to prevent *quid pro quo* corruption and the appearance of corruption. "Pay to play" is especially virulent in government contracting. The provision is properly targeted to address the scope of the problem. These laws are all constitutional under the First Amendment, as an exercise of the State of Hawaii's authority to protect the integrity and transparency of the democratic process. The Commission's motion for partial summary judgment should be granted.

Dated: Honolulu, Hawaii, December 5, 2011.

Respectfully submitted,



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