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

In the United States District Court
for the District of Hawaii

Jimmy Yamada, Russell Stewart, and A-1 A-Lectrician, Inc., ***Plaintiffs*** ***v.*** **Paul Kuramoto,** in his official capacity as chair and member of the Hawaii Campaign Spending Commission; Steven Olbrich, in his official capacity as vice chair and member of the Hawaii Campaign Spending Commission; Gino Gabrio, Dean Robb, and Michael Weaver, in their official capacities as members of the Hawaii Campaign Spending Commission, ***Defendants***	Civil Action No. 10-00497-JMS-LEK

Plaintiffs' Response to
Defendants' Motion to Stay Pending Appeal

This action is before the Court on Defendants' motion[1] to stay pending appeal the preliminary-injunction order of October 7, 2010.[2]

[1] Doc. 74.

[2] Doc. 71.

The order addresses the part of Plaintiffs Jimmy Yamada, Russell Stewart, and A-1 A-Lectrician, Inc.'s ("A-1's") preliminary-injunction motion[3] regarding Yamada and Stewart's *as-applied* challenge to Hawaii's limits on contributions noncandidate committees receive. ACT 211, SLH 2010, H.B. 2003 HD3 SD2, 25th Leg. § 11-KK (Hawaii 2010) ("ACT 211").[4] Yamada and Stewart do not contend this provision is *facially* unconstitutional.[5]

Applying the four-factor standard that Defendants themselves articulate,[6] their motion is due to be denied.

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[3] Doc. 25.

[4] *Available at* http://hawaii.gov/campaign/law/hawaii-revised-statutes (visited October 4, 2010).

[5] *Compare* Doc. 71 at 3, 19-21, 25 *with* Doc. 25 (citing, *inter alia,* Doc. 24 ¶¶ 48, 115 ("Plaintiffs Yamada and Stewart seek a declaratory judgment that the limit on contributions noncandidate committees receive, ACT 211 §[] 11-KK, is unconstitutional *as applied* to Yamada's and Stewart's speech. Yamada and Stewart further ask that the Court preliminarily and then later permanently enjoin its enforcement." (emphasis in original))).

[6] Doc. 74-1 at 4 (quoting *Golden Gate Restaurant Ass'n v. City and County of San Francisco,* 512 F.3d 1112, 1115 (9th Cir. 2008)).

Likelihood of Success on the Merits

As the Court is aware,[7] Aloha Family Alliance – Political Action Committee ("AFA-PAC") is a noncandidate committee under Hawaii law, *see* ACT 211 § 11-B (2010) (defining "noncandidate committee"), and Plaintiffs Yamada and Stewart want to contribute to AFA-PAC beyond Hawaii's contribution limit. *See id.* § 11-KK.

The Court noted at the October 1 preliminary-injunction hearing that this action presents hard questions. Plaintiffs submit, however, that the as-applied challenge to Section 11-KK is not one of them: The contribution limit is unconstitutional as applied to Yamada's and Stewart's speech, because AFA-PAC does only independent spending for political speech, and neither directly contributes to, nor coordinates spending for political speech with, any candidate for state or local office in Hawaii, the candidate's agents, the candidate's committee, or any state or local political party in Hawaii. *See Long Beach Area Chamber of Commerce v. City of Long Beach,* 603 F.3d 684, 691-99 (9th Cir. 2010), *cert. denied,* 562 U.S. ____, 131 S.Ct. ____, No. 10-155 (U.S. Oct.

[7] Doc. 71 at 4-6.

4, 2010);[8] *SpeechNow.org v. FEC,* 599 F.3d 686, 692-96 (D.C. Cir. 2010) (*en banc*), *pet. for cert. filed,* (U.S. undated);[9] *EMILY's List v. FEC,* 581 F.3d 1, 14 n.13 (D.C. Cir. 2009) (citing *California Med. Ass'n v. FEC,* 453 U.S. 182, 202 (1981) (Blackmun, J., concurring)); *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 291-93 (4th Cir. 2008) ("*NCRL III*"); *cf. EMILY's List,* 581 F.3d at 15 n.14.

Even if Defendants contrary assertions[10] were right as a matter of principle – which they are not[11] – binding, on-point Ninth Circuit precedent forecloses their position. Holding for Yamada and Stewart is thus consistent with – not "contrary to"[12] – *Long Beach,* 603 F.3d at

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[8] *Available at* http://www.supremecourt.gov/orders/courtorders/100410ZOR.pdf.

[9] *Available at* http://www.scotusblog.com/wp-content/uploads/2010/07/SpeechNow-petition-7-23-10.pdf.

[10] Doc. 74-1 at 7-10.

[11] *See* Doc. 26 at 37-38 & n.31 (citations omitted), 76-77 (citations omitted).

[12] Doc. 74-1 at 10.

691-99.[13] *The fact that the plaintiffs here are not the political committee itself but contributors to the political committee*[14] *does not change the fact that limits on contributions to political committees are unconstitutional as applied to contributions to political committees doing only independent spending for political speech. See id.* The right to receive unlimited contributions would be useless if potential contributors, such as Yamada and Stewart, lacked the right to make them.

"In short, the Ninth Circuit has spoken"[15] – *Long Beach* controls Defendants' motion in any Ninth Circuit district court. Defendants' further assertions regarding Yamada and Stewart's speech are mistaken:

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[13] As an aside, this is not an occasion when the Ninth Circuit has created a circuit split that can linger for years. *Cf. FEC v. Furgatch,* 807 F.2d 857, 863 (9th Cir.), *cert. denied,* 484 U.S. 850 (1987), *clarified in California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) ("*CPLC I*").

[14] Doc. 74-1 at 10-12.

[15] Doc. 71 at 17.

● The fact that Yamada and Stewart can do other speech,[16] like another contention this Court has rejected, "misses the point."[17] They want to do *this* speech. Limiting *this* speech is unconstitutional, regardless of the level of scrutiny that applies. *See id.* As previously noted,[18] when "persons have a constitutional right to do what they want to do, it is no answer for government to tell them do other speech or do less.[19]"

● Defendants fear groups with "no known prior identities" will engage in political speech.[20] The unspoken premise here is that *government* must know who is speaking. It is true that disclosure is sometimes constitutional; government may *regulate* speech by political committees such as AFA-PAC. *See Buckley v. Valeo,* 424 U.S. 1, 79

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[16] Doc. 74-1 at 11.

[17] Doc. 71 at 18; *see also* Doc. 42 at 26-27.

[18] Doc. 42 at 10.

[19] *See* Doc. 26 at 27 (noting that in determining whether government may regulate speech, one does not consider what the speaker does not say or says elsewhere (citing *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 471, 472 (2007) ("*WRTL II*")).

[20] Doc. 74-1 at 2.

(1976). What is at issue here, however, is not a *regulation* of speech in the sense of a disclosure requirement, but a *limit* on speech. That is a different thing.

● While Defendants say contribution limits are constitutional if they survive intermediate scrutiny,[21] no sufficiently important government interest supports Defendants' contribution limit as-applied to Yamada and Stewart's speech.[22]

● Defendants fear that groups such as AFA-PAC will "exist only to amplify the political voices of known individuals and groups[.]"[23] But what is wrong with that? Group association enhances effective advocacy, particularly but not only when ideas or subjects are controversial. *See Buckley,* 424 U.S. at 15 (quoting *NAACP v. Alabama,* 357 U.S. 449, 460 (1958)). Political committees always amplify the voices of their contributors. Defendants' contention in effect is one

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[21] *See* Doc. 74-1 at 12 (quoting *Randall v. Sorrell,* 548 U.S. 230, 247 (2006)).

[22] Doc. 71 at 13-17.

[23] Doc. 74-1 at 2.

against the very existence of political committees. That cannot be right. *See, e.g., id.*

Irreparable Harm, Balance of Equities, and the Public Interest

Declining to stay the preliminary injunction at issue here will not irreparably harm Defendants, yet staying it will irreparably harm Yamada and Stewart, because "the 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' *Elrod v. Burns,* 427 U.S. 347, 373 (1976). So unless Plaintiffs [may act on] the relief they [received], they will suffer irreparable harm. There is no adequate remedy at law. *See id.*"[24]

Nothing Defendants assert trumps this:

● Defendants say "changing the rules … so close to Election Day" "undercuts the very expression the First Amendment is supposed to protect," but do not explain what this means.[25]

● They cite law about legislative reapportionment,[26] yet this action does not concern legislative reapportionment.

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[24] Doc. 26 at 20.

[25] Doc. 74-1 at 2 (citing *Citizens United,* 130 S.Ct. at 916).

● They urge "restraint" when a court has not heard "the full adjudication on the merits[,]"[27] yet this is an argument against *all* non-consolidated preliminary-injunction motions, which by definition occur before such full adjudication. This argument runs counter to the Federal Rules of Civil Procedure and cannot be right. *See* FED. R. CIV. P. 65.a (2009).

● Defendants complain about the timing of this action.[28] However, as previously noted:[29]

> The fact that Plaintiffs brought their challenge shortly before an election[30] does not diminish the merits of their claims. *See, e.g., FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 460 (2007) ("*WRTL II*") (holding for plaintiffs who filed suit on July 28 before the September primary). Indeed, that is when persons can most effectively communicate with the public about, and advocate positions on, issues. *See Citizens United,* 130 S.Ct. at 895.[31]

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[26] Doc. 74-1 at 3.

[27] Doc. 74-1 at 3.

[28] Doc. 74-1 at 4-5.

[29] Doc. 42 at 9-10.

[30] Doc. 74-1 at 4, 6-7. This assertion is familiar. *See* Doc. 35 at 2-3.

[31] *Cited in* Doc. 24 ¶ 34.

● Defendants say Plaintiffs have not explained why they filed their suit when they did.[32] Given *WRTL II* and *Citizens United,* Plaintiffs do not owe the government an explanation.

● Defendants fault Yamada and Stewart, saying they waited too long to "choose the noncandidate committee … in order to sue."[33] So here is Defendants' position: In 2010, Hawaii enacts a law that under *Long Beach,* 603 F.3d at 691-99, is already unconstitutional as applied to particular speech. Two persons assert their constitutional rights. When they prevail, Defendants blame these two persons. Would they have also blamed prevailing families who waited for "eight months"[34] – or however much time – after *Brown v. Board of Education,* 347 U.S. 483 (1954), to assert their constitutional rights?

● Defendants say they have no basis to enforce Section 11-KK against persons like Yamada and Stewart or noncandidate committees

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[32] Doc. 74-1 at 5.

[33] Doc. 74-1 at 4.

[34] Doc. 74-1 at 4 (emphasis omitted).

like AFA-PAC,[35] yet that is how as-applied holdings work, even when they have sweeping effect. *See, e.g., WRTL II,* 551 U.S. at 457, 470, 474 n.7 (establishing the appeal-to-vote test for electioneering communications as defined in the Federal Election Campaign Act); *see generally Citizens United,* 130 S.Ct. at 889-90, 915 (removing the test as a constitutional limit on government power).

● Defendants fear that some will "abuse[]" the Court's holding,[36] yet cite no authority for the strange proposition that this means the Court should stay an injunction. This is just not the law. As

> *WRTL II* repeatedly emphasizes[,] where "the First Amendment is implicated, the tie [(if there is one)] goes to the speaker, not the censor." 551 U.S. at 474. The law "must give the benefit of any doubt to protecting rather than stifling speech." *Id.* at 469 (citing *New York Times* [*Co. v. Sullivan,* 376 U.S. 254], 269-70 [(1964)]), *quoted in Citizens United,* 130 S.Ct. at 891. In other words, "we give the benefit of the doubt to speech, not censorship." *Id.* at 482.[37]

[35] Doc. 74-1 at 5-6.

[36] Doc. 74-1 at 6.

[37] Doc. 26 at 24 (second alteration in original).

● Defendants say the Court's holding may affect elections.[38] That, however, is not the standard for whether speech is regulable.[39]

● They even say this holding "will change and … could adversely affect the results of the 2010 general election itself."[40] With this statement, Defendants have tipped their hand. They are concerned about election *results,* and some results are, in their view, *adverse.* But it is not government's business to say what results are or are not adverse. *See, e.g.,* U.S. CONST. art. IV § 4 (1787) ("The United States shall guarantee to every State in this Union a Republican Form of Government"). State governments must "remain accountable to the local electorate" – not state bureaucracy. *New York v. United States,* 505 U.S. 144, 186 (1992) (holding there was no Guarantee Clause

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[38] Doc. 74-1 at 6-7.

[39] *See* Doc. 26 at 27 ("impact on an election" (citing *WRTL II,* 551 U.S. at 470-71)); *see also id.* at 52 (citing *FEC v. Central Long Island Tax Reform Immediately Comm.,* 616 F.2d 45, 53 (2d Cir. 1980) *(en banc); North Carolina Right to Life, Inc. v. Bartlett,* 168 F.3d 705, 713 (4th Cir. 1999) ("*NCRL I*"), *cert. denied,* 528 U.S. 1153 (2000))).

[40] Doc. 74-1 at 5.

violation when, *inter alia,* "state government officials remain accountable to the local electorate").

Conclusion

Plaintiffs submit Defendants' motion is meritless. Some questions really are close calls. This is not one of them.

Respectfully submitted,

/s/ Randy Elf

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