IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JIMMY YAMADA, ET AL.,	)	CIVIL NO. 10-00497 JMS/LEK
	)	
Plaintiffs,	)	ORDER DENYING
	)	DEFENDANTS' MOTION TO
vs.	)	STAY ORDER GRANTING IN
	)	PART AND DENYING IN PART
PAUL KURAMOTO, IN HIS	)	PLAINTIFFS' AMENDED
OFFICIAL CAPACITY AS CHAIR	)	MOTION FOR PRELIMINARY
AND MEMBER OF THE HAWAII	)	INJUNCTION (ONLY AS TO ACT
CAMPAIGN SPENDING	)	211 § 11-KK) PENDING APPEAL
COMMISSION, ET AL.,	)	
	)	
Defendants.	)	
_____	)	

ORDER DENYING DEFENDANTS' MOTION TO STAY ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY INJUNCTION (ONLY AS TO ACT 211 § 11-KK) PENDING APPEAL

Defendants have moved pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure and Rules 62(a) & (c) of the Federal Rules of Civil Procedure to stay this court's October 7, 2010 Order Granting in Part and Denying in Part Plaintiffs' Amended Motion for Preliminary Injunction (Only as to Act 211 § 11-KK) (hereinafter "the October 7, 2010 § 11-KK Order") pending resolution of their preliminary injunction appeal now pending in the Ninth Circuit Court of Appeals.

The court applies the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2)

whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Golden Gate Rest. Ass'n v. S.F.*, 512 F.3d 1112, 1115 (9th Cir. 2009) (internal quotation marks omitted).

As explained in detail in the October 7, 2010 § 11-KK Order, Defendants are not likely to succeed on the merits -- the court remains of the opinion that *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010) is directly on point. The court disagrees with Defendants' argument that *City of Long Beach* improperly relied on *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), and that therefore this court should not have relied on *City of Long Beach*. Even if this court disagreed with *City of Long Beach*, it is bound by a Ninth Circuit opinion on point, absent other intervening binding authority. In short, this court cannot choose to ignore a Ninth Circuit opinion directly on point.

As for Defendants' new arguments now attempting to distinguish *City of Long Beach* on its facts, the court disagrees that they are a basis for distinguishing the clear direction from the Ninth Circuit. Moreover, these are arguments that should more appropriately have been made in opposition to the Amended Motion for Preliminary Injunction -- not in a motion to stay the effect of

the October 7, 2010 § 11-KK Order. Considering such new substantive arguments in detail at this stage would convert a motion to stay into a motion for reconsideration.

The court also disagrees that Plaintiffs would not be irreparably injured if a stay is entered. As explained in detail in the October 7, 2010 § 11-KK Order, where First Amendment rights are at stake, irreparable injury is presumed. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Although the court agrees with Defendants that Plaintiffs could have probably brought this action earlier, the court does not find this supposition sufficient to delay entry of a preliminary injunction. Act 211 was not enacted (or did not become effective) until July 6, 2010, which was *after* the Ninth Circuit issued *City of Long Beach* on April 30, 2010. This suit was filed within a reasonable period thereafter, on August 27, 2010. In any event, even if the suit could have been brought earlier, it does not change the irreparable injury to Plaintiffs that is presumed in this First Amendment context.

As for factors three and four (potential injury to other parties interested in the litigation, and the public interest), the court remains of the opinion that the application of a binding Ninth Circuit decision and the significant public interest in upholding free speech principles warrants entry of the injunction now.

Although some confusion might result, the record does not demonstrate that the integrity of the electoral process will be irreparably harmed.

In asserting that a stay is in the public interest, Defendants rely in part on *Page v. Bartels*, 248 F.3d 175 (3d Cir. 2001), for the proposition that a court should withhold "changing the rules governing the election" (Defs.' Mot. at 3) even if a court has already found the rule unconstitutional on the merits. *See Page*, 248 F.3d at 196 ("[W]here an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.") (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)).

Page, however, was addressing a situation where a temporary restraining order had previously been issued regarding the printing of ballots, and the injunctive relief sought regarding an apportionment plan would surely have meant postponing elections altogether. *Id.* at 194-95. No such preliminary injunction was entered here -- ballots are not affected, methods of counting votes are not declared improper, apportionment schemes have not been found invalid. *Compare, e.g.*, *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc) (recognizing that "election cases are different from

ordinary injunction cases" and upholding denial of preliminary injunction regarding use of punch-card ballots, despite possibility of success on merits of claim of violation of the Voting Rights Act) (citing *Reynolds*, 377 U.S. at 585). Rather, the court has allowed contributions that exceed § 11-KK's statutory limit, based on a reading of a binding Ninth Circuit opinion that such a limit to a committee doing only independent expenditures violates the First Amendment. Although confusion is possible as to how the court's decision might affect others, ultimately on the current record any such confusion remains speculative.

Weighing the necessary factors, the court declines to enter a stay pending appeal. Defendants' Motion to Stay Order Granting in Part and Denying in Part Plaintiffs' Amended Motion for Preliminary Injunction (Only as to Act 211 § 11-KK) Pending Appeal is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 14, 2010.

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge