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STATE OF HAWAII
CAMPAIGN SPENDING COMMISSION

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February 4, 2015

TO: The Honorable Karl Rhoads, Chair
House Committee on Judiciary

The Honorable Joy A. San Buenaventura, Vice Chair
House Committee on Judiciary

Members of the House Committee on Judiciary

FROM: Kristin Izumi-Nitao, Executive Director *KI*
Campaign Spending Commission

SUBJECT: **Testimony on H.B. No. 16, Relating to Elections**

Thursday, February 5, 2015
2:00 p.m., Conference Room 325

Thank you for the opportunity to testify on this bill. The Campaign Spending Commission ("Commission") opposes this bill.

Section 1 of the bill changes the title of Hawaii Revised Statutes ("HRS") §11-363 from "Other contributions and expenditures" to "Coordinated contributions and expenditures." Section 1 of the bill also removes a portion of subsection (a) of HRS §11-363 and moves that portion to subsection (b) of that section, where the definitions or examples of "coordinated activity" are contained.

In 2014, the Commission enforced subsection (a) against an independent expenditure committee ("IE Committee") that pulled campaign material from a candidate's website, without the candidate's consent, to use in the IE Committee's own "independent" advertisements in support of that candidate. Since under subsection (a), the cost of the advertisement containing the candidate's campaign material was deemed to be an in-kind contribution to the candidate, the Commission found that the IE Committee made an excess contribution to that candidate.

The Commission believes that the proposed amendments to HRS §11-363 would require the Commission to show that an IE Committee's use of campaign material from a candidate's website in independent advertisement in support of that same candidate, was done in cooperation or concert with the candidate, in order to find that the IE Committee's payment for the republication of the candidate's campaign material was an in-kind contribution to the candidate. That is, if in 2014, HRS §11-363 existed in the form that is proposed by this measure, the Commission would not have been able to take the enforcement action against the IE Committee.

Because of Citizens United,¹ IE Committees can raise and spend unlimited sums of money. They use this money to run independent advertisements in support of candidates they favor and in opposition to candidates they do not favor. Many people in this state, including our legislators, have voiced grave concerns about the huge influence that special interest groups, through the use of IE Committees, have on Hawaii elections. IE Committees should not have unfettered use of candidates' own campaign material to produce so-called independent advertisements on behalf of the candidates they support. By using a candidate's campaign material, the IE Committee is advancing the image and message that the candidate herself has produced and favors. If an IE Committee produces "independent" advertisements for a candidate it supports, the cost of republishing or disseminating the candidate's own material should be an in-kind contribution to the candidate.

HRS §11-363, as presently worded, is one tool to alleviate concerns over Citizens United. That provision encourages IE Committees to make truly independent expenditures by developing their own material for their advertisement, not simply using campaign material produced by the candidates themselves. As noted by the Brennan Center for Justice, the crucial assumption underlying Citizens United, that the "unlimited spending would happen independent of candidates," turned out to be gravely wrong. For states to effectively regulate coordinated spending, one of the recommendations made by the Brennan Center is to "treat as coordinated any spending to promote the election of a candidate that reproduces material produced by the candidate's campaign."² As noted above, this is what HRS §11-363, as enforced by the Commission, already does. H.B. No. 16 would be Hawaii taking a giant step back.

The Commission respectfully request that the House Committee on Judiciary defer H.B. No. 16.

¹ Citizens United v. FEC, 58 U.S. 370 (2010).

² Brennan Center for Justice (Lee, Ferguson, Earley), "After Citizens United: The Story in the States, 1-4, 29 (2014). The Brennan Center recommends a comprehensive approach in dealing with the aftermath of Citizens United. We have discussed just one of the recommendations.