



STATE OF HAWAII
CAMPAIGN SPENDING COMMISSION

235 SOUTH BERETANIA STREET, ROOM 300
HONOLULU, HAWAII 96813

February 9, 2016

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 *kei*
Campaign Spending Commission

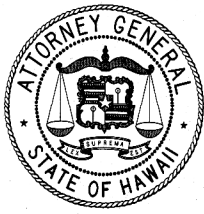
SUBJECT: **Testimony on H.B. No. 1954, Relating to Campaign Finance.**

Thursday, February 11, 2016
2:00 p.m., Conference Room 325

Thank you for the opportunity to testify on this bill. The Campaign Spending Commission (“Commission”) supports this bill.

This measure amends Hawaii Revised Statutes §11-353 by deleting subsection (d), the \$100¹ “calabash bowl” exception to the section’s general prohibition on anonymous contributions. The “calabash bowl” exception to the prohibition on anonymous contributions used to be \$500. In 2015, the Legislature reduced the exception amount to \$100 (Act 78). The Commission believes it is appropriate to remove the exception altogether since anonymous contributions do not lend support for transparency and openness in campaign finance.

¹ Must be received from ten or more persons at the same function.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

ON THE FOLLOWING MEASURE:

H.B. NO. 1954, RELATING TO CAMPAIGN FINANCE.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, February 11, 2016 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Deirdre Marie-Iha, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General provides comments regarding this bill. This bill amends section 11-353, Hawaii Revised Statutes (HRS), to eliminate the provision that currently allows small anonymous contributions to candidate committees or noncandidate committees to receive "amounts that aggregate to less than \$100 that are received from ten or more persons at the same political function." Under current law, a candidate may receive a small amount of money from ten or more persons anonymously at a political event. This is the only provision in current law that allows for anonymous contributions, which are otherwise prohibited. Section 11-353, HRS. This bill would eliminate this option.

This bill raises the potential for a constitutional challenge. To help the bill survive such a challenge, the rationale behind the bill should be articulated in the legislative history used to support it. Because this bill does not prohibit the flow of money but instead requires that the source be identified, it is a disclosure law. Disclosure laws, if properly crafted and not unduly burdensome, are generally constitutional under the First Amendment. To survive a constitutional challenge, however, the law must meet an intermediate form of scrutiny called "exacting scrutiny." Under this test, the government's interest behind the law must be "sufficiently important" and the law must be "substantially" related to that interest. See Yamada v. Snipes, 786 F.3d 1182, 1194 (9th Cir.), *cert. denied sub nom. Yamada v. Shoda*, 136 S. Ct. 569 (2015) ("Because the challenged laws provide for the disclosure and reporting of political spending but do not limit or ban contributions or expenditures, we apply exacting scrutiny. To survive this scrutiny, a law must bear a substantial relationship to a sufficiently important governmental

interest. Put differently, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.") (citations and internal quotation marks omitted). For campaign finance disclosure bills, the government's interest lies in informing the electorate and restoring public confidence in elected government. *Id.* at 1196-97. In the event of a challenge, it is the *government* that bears the burden of showing that the law meets the exacting scrutiny test.

It may be difficult for this bill to meet this rigorous standard because the amount of money that can be contributed anonymously is so low under existing law (no more than \$100 in the aggregate, from at least ten people, at one event). In other words, while eliminating the anonymity of this form of contribution would increase the information available as to these contributors, it may only marginally serve the government's interest in informing the electorate, because the amount of funding received in this manner is not large. Furthermore, the burden imposed by this bill would be substantial (eliminating any method for a candidate to accept \$20 from a supporter without having to keep track of it as all other contributions must be). To lessen these concerns as a constitutional matter, the benefit gained by this law should be increased and the burden should be decreased.

In addition, for purposes of protecting our *other* campaign finance laws, it is desirable to have a mechanism by which a small amount of anonymous contributions can be received. The federal case law places great value on disclosure thresholds; that is, a level of contributions below which one may contribute without having one's name published publicly. See, e.g., Canyon Ferry Rd. Baptist Church v. Unsworth, 556 F.3d 1021, 1033-34 (9th Cir. 2009) (striking down zero-threshold disclosure requirement). See also Yamada, 786 F.3d at 1199 (relying on \$1000 threshold to uphold definition of noncandidate committee). In other words, though it may seem counterintuitive, the existence of this method of making modest contributions anonymously can operate to protect other, more critical laws in part XIII of chapter 11. For these reasons the Department advises against passing the bill in its current form.

The Department offers one suggestion for the Committee's consideration. This bill may be prompted by concerns that this method of receiving funds is being used to circumvent the disclosure requirements required elsewhere in Hawai'i law (e.g., if an anonymous contributor made multiple contributions to the same recipient at many of the political events covered by

section 11-353, HRS). If that is the case, then there may be a method to address that concern while minimizing the constitutional concern noted above. Section 11-353(d), HRS, could instead be amended to limit the number of political events where these anonymous contributions can be received. Ideally this number would be set after examining the records from the Campaign Spending Commission to see how often contributions of this nature are being accepted. (Under existing law, even these anonymous contributions must be reported. Section 11-353(d), HRS.) Then a limit could be placed on how many times a candidate committee or noncandidate committee may accept contributions anonymously within an election period. If the Committee chooses to amend the bill in this fashion, we recommend that the legislative history document the facts showing the need to prevent circumvention of other disclosure laws. Legislative history of this nature would place this alternative suggestion in a strong position in the event of a constitutional challenge.

The Department recommends that the Committee adopt the alternative approach suggested here in lieu of the amendments presently in the bill. Thank you for the opportunity to testify.