



House Judiciary Committee  
Chair Karl Rhoads, Vice Chair Joy San Buenaventura

Tuesday 2/10/2015 at 2:00 PM in Room 325  
HB630 Relating to Campaign Finance

TESTIMONY OF SUPPORT  
Carmille Lim, Executive Director, Common Cause Hawaii

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Dear Chair Rhoads, Vice Chair San Buenaventura, and members of the House Judiciary Committee:

**Common Cause Hawaii supports the intent of HB630.**

HB630 would prevent a corporation from making an election-related contribution or expense, or making an independent expenditure, unless it has received a majority support from its shareholders.

The 2014 election cycle brought about an unprecedented amount of money in our elections – particularly independent money. Voters were inundated with political ads attempting to influence their votes, and many citizens wanted to know more about the organizations behind these ads, and the funders and decision makers behind these organizations.

Common Cause Hawaii believes that requiring a corporation to receive majority shareholder approval before making election-related and/or independent expenditures would help bring about much-needed transparency and accountability to those special interest groups attempting to impact voters and our elections.

Thank you for the opportunity to offer testimony **supporting the intent of HB630.**



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-EIGHTH LEGISLATURE, 2015**

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**LATE**

**ON THE FOLLOWING MEASURE:**

H.B. NO. 630, RELATING TO CAMPAIGN FINANCE.

**BEFORE THE:**

HOUSE COMMITTEE ON JUDICIARY

**DATE:** Tuesday, February 10, 2015 **TIME:** 2:00 p.m.

**LOCATION:** State Capitol, Room

**TESTIFIER(S):** Russell A. Suzuki, Attorney General, or  
Deirdre Marie-Iha or  
Valri Lei Kunimoto, Deputy Attorneys General

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Chair Rhoads and Members of the Committee:

The Department of the Attorney General has significant reservations about this bill. A significant portion of the bill is largely unnecessary as a broader prohibition is already in place under current Hawaii law. In addition, there is a substantial possibility that the other parts of the bill cannot be reconciled with controlling case law from the United States Supreme Court. Unless these concerns can be addressed, the bill should be held.

The purpose of this measure is to prevent corporations from making any contribution to a candidate, candidate committee, or noncandidate committee, or making any independent expenditure, unless the expense is approved by a majority of the corporation's shareholders. "Corporation" is defined to include corporations "where the State or any county holds an investment" or those that enter into contracts with State or the counties. (Page 2, lines 6-19). The first category is discussed below. The second category is largely unnecessary. Businesses that receive government contracts (regardless of whether they are incorporated or organized in some other way) are already banned from making contributions to candidates or noncandidate committees for the duration of their contracts with the State or the counties. Section 11-355, Hawaii Revised Statutes. (We note that the constitutionality of this statute was upheld in a federal district court decision and is currently the subject of a pending Ninth Circuit appeal. *Yamada v. Weaver*, 872 F. Supp. 2d 1023 (D. Haw. 2012), *appeal docketed*, No. 12-15913 (9th Cir., April 20, 2012)). For those contractors, therefore, there is no need to require them to receive authorization from their shareholders to make political contributions, because they

cannot make those contributions *at all* for the duration of the government contract. Section 11-355 does not, however, address independent expenditures.

There are two portions of the bill that are not covered by the existing government contractors' ban: (1) the portion that would require prior shareholder approval for corporations acting as government contractors to make *independent expenditures*, and (2) the requirement for shareholder approval before a corporation "in which the State or any county holds any investment" may make a contribution *or* expenditure. In our view, both pose potentially serious constitutional concerns.

The Department understands this bill to be motivated, at least in part, by the influx of large sums of money into American elections since Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). In general, the Department shares these concerns and agrees there is great reason to be concerned about this trend. Given the current state of the case law, however, there are limited options for the states to address these concerns in a manner consistent with the federal constitution. By our reading, this bill seeks to prevent certain corporations from making political contributions without the prior approval of their shareholders. Though this concern is a genuine one, in the First Amendment context the Supreme Court has generally rejected the protection of shareholders as a sufficient justification to prevent corporate speech. Id. at 361 (rejecting "protecting dissenting shareholders" as a sufficient interest to justify restrictions on corporate speech). In fact, the Supreme Court has held that the usual procedures of "corporate democracy[.]" id. at 362, are sufficient to protect shareholders. See also First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 794-95 (1978) ("Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests."). Political speech is the highest, most protected form of speech under the First Amendment. When corporations make political contributions or independent expenditures, this activity is protected as a form of political speech. "[T]he First Amendment does not allow political speech restrictions based on a speaker's corporate identity." Citizens United, 558 U.S. at 347. This bill's focus on corporations and corporations alone is irreconcilable with this controlling case law.

The other problem with the bill stems from the fact that the corporation may not speak until it satisfies a precondition. The bill intends to prohibit corporate speech unless majority

shareholder approval is first secured. This would require a meeting of all shareholders (potentially a very numerous group). All contributions are banned until that approval is secured.<sup>1</sup> As such, the bill would operate as a pre-condition on the corporation's speech, and a fair amount of effort would be required to comply. Citizens United specifically rejected burdensome requirements applied as a predicate to corporate speech, particularly given the necessity of responding quickly to changing political campaigns. Id. at 339 ("Given the onerous restrictions, a corporation may not be able to establish a [political action committee] in time to make its views known regarding candidates and issues in a current campaign."). Placing prerequisites on speech, such as this bill does, may also be unconstitutional due to a separate First Amendment doctrine called "prior restraint." "A prior restraint need not actually result in suppression of speech in order to be constitutionally invalid. The relevant question in determining whether something is a prior restraint is whether the challenged regulation authorizes suppression of speech in advance of its expression[.]" Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011, 1023 (9th Cir. 2009) (brackets and internal quotation marks omitted; quoting Ward v. Rock Against Racism, 491 U.S. 781, 795 n.5 (1989)). See also Citizens United, 558 U.S. at 335 (analogizing onerous regulatory burdens on political speech with prior restraint); Arizona Right to Life Political Action Comm. v. Bayless, 320 F.3d 1002, 1008 (9th Cir. 2003) (finding that advance-notice requirement in campaign finance law was unconstitutional prior restraint). Given the time and planning necessarily involved with holding a shareholder meeting, it is unlikely that a corporation could secure majority shareholder approval in a manner sufficiently timely to respond to changing news about an election. Id. at 1008 ("To suggest that the waiting period is minimal ignores the reality of breakneck political campaigning and the importance of getting the message out in a timely, or, in some cases, even instantaneous fashion.").

It is possible that an argument may be made that this bill is merely acting to prevent a corporation from engaging in political speech against the views of the majority of its

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<sup>1</sup> Though it is not clear, the bill could be read to require shareholder approval for *each* individual contribution or expenditure. See Page 1, line 15 ("regarding *any* proposal by the corporation to make a contribution, expenditure, or independent expenditure.") (emphasis added). If true, then the bill is significantly more burdensome than described above.

shareholders. It could be argued that a corporation should not have an unrestricted right to speak in derogation of the views of the majority of its shareholders.

The Department reiterates that we understand the oft-repeated concern that corporate money is overrunning American politics. Our testimony is not meant to dismiss those concerns but only to ensure that the State's actions, when taken, are consistent with the federal constitution. We note that *all* corporations that contribute or spend more than \$1000 to influence any of Hawaii's elections are subject to the State's comprehensive disclosure rules under existing law. Under current case law, the State has much more flexibility with disclosure rules than it does with laws banning, conditioning, or restricting campaign speech. If further regulation is needed regarding corporations, additional disclosure measures may offer a productive avenue for further discussion. Our office is available to consult on this topic if desired.

For the reasons articulated above, we believe the bill's apparent intent cannot be achieved without raising significant constitutional concerns and that, given the case law, the risk of an adverse result is significant. The Department respectfully urges the Committee to hold this bill.

KRISTIN E. IZUMI-NITAO  
EXECUTIVE DIRECTOR



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**LATE**

STATE OF HAWAII  
CAMPAIGN SPENDING COMMISSION

235 SOUTH BERETANIA STREET, ROOM 300  
HONOLULU, HAWAII 96813

February 9, 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. 630, Relating to Elections**

Tuesday, February 10, 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 and offers the following comments.

This bill amends Chapter 11, Hawaii Revised Statutes ("HRS"), by adding a new section that prohibits a corporation from making a campaign contribution or expenditure unless a majority of its shareholders approve of the contribution or expenditure. The bill also requires corporations to place procedures in their bylaws for assessing the will of their shareholders with regard to contributions and expenditures. Finally, the bill defines "corporation" to include any corporation (1) in which the state or any county holds an interest, or (2) that has a contract with the state or any county.

This bill will be extremely difficult for the Commission to enforce. The Commission does not have ready access to a database of corporations in which the state and counties hold an interest. Further, the Commission will not know if a reported contribution from a corporation had been approved by the corporation's shareholders, unless the bill also requires the corporation to disclose this fact to the Commission. Finally, to the extent that the corporation making the contribution or expenditure is a government contractor under HRS §11-355, that corporation would already be barred from making a contribution to a candidate or noncandidate committee.<sup>1</sup>

The Commission respectfully requests that the House Committee on Judiciary defer H.B. No. 630.

<sup>1</sup> Since this bill places a burden (beyond disclosure) on contributions and expenditures of corporations, there may be constitutional implications. However, the Commission will defer to the Department of the Attorney General on this issue.

**LATE**

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Arianna Feinberg	Individual	Support	No

Comments: I strongly support this bill as it will ensure that the shareholders of a corporation consent to their company making political contributions. I believe this step will potentially hinder some large corporations from making political contributions if the majority of their shareholders do not agree with the expenditure. Ultimately we need to get money out of politics and this is a great early step. I hope to one day live in a state and country where politicians spend all their time in true public service and not raising money for expensive campaigns. Fundraising and financial support from corporations seems like a necessary evil at this point but steps like passing HB630 is a positive step towards returning democracy to real people instead of corporations. Thank you for your continued service to the people of Hawaii.