



STATE OF HAWAII
CAMPAIGN SPENDING COMMISSION

235 SOUTH BERETANIA STREET, ROOM 300
HONOLULU, HAWAII 96813

March 12, 2019

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

The Honorable Glenn Wakai, Vice Chair
Senate Committee on Judiciary

Members of the Senate Committee on Judiciary

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

SUBJECT: **Testimony on H.B. No. 627, H.D. 1, Relating to Campaign Finance**

Friday, March 15, 2019
9:00 a.m., Conference Room 016

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

Section 1 of the bill adds a new section to Chapter 11, Hawaii Revised Statutes (“HRS”) by requiring that a candidate who is supported by an independent expenditure report the expenditure as a contribution, and if an independent expenditure opposes a candidate, the candidates opposing that candidate must report the expenditure as a contribution. It also requires the Commission to notify applicable candidates when an independent expenditure is made as well as publish the reports required pursuant to this section on its website. Section 2 adds the definition of “opposing candidate” to HRS §11-302 and includes those terms in the definition of “contribution.”

Section 3 and Section 4 amends HRS §11-341 and HRS §11-393, respectively, to require Super PACs to disclose the three top contributors¹, to their advertisements in their Statement of Information for Electioneering Communications and advertisement disclaimers. Notably, Section 4 amends HRS §11-393(c) by deleting the definition of “top contributor” which the Commission believes should be reinstated to provide guidance. Section 4 also eliminates the

¹ “Top contributor” is defined as a contributor who has contributed \$10,000 or more to a noncandidate committee within a twelve-month period prior to the purchase of an advertisement. See, HRS §11-393(c).

hardship exception from short duration advertisements broadcast by radio or television thereby requiring the disclosure of the three top contributors.

Requiring candidates to report independent expenditures as contributions could have dire consequences. In most cases, independent expenditures are costly. All candidates operate under campaign contribution limits. See, HRS §11-357. If a candidate had to report the cost of an independent advertisement as a contribution, that contribution would more than likely be an excess contribution and thus subject to a fine. Also, if the cost of an independent advertisement is reported as a contribution, being in-kind in nature, the candidate must also report the cost as an expenditure. If the candidate is a publicly funded candidate who has agreed to abide by the expenditure limit for the candidate's office, that candidate will need to, *inter alia*, return all public funds. See, Hawaii Administrative Rules §3-160-64(d)(2). As proposed, this new section treats independent expenditures as if they were coordinated with the candidate or candidate committee. This application is not currently presumed and must be proven by the Commission. It is thus an application that may be subject to judicial scrutiny. Further, the bill requires that the Commission notify affected candidates when a Super PAC makes an independent expenditure as well as publish the reports on its website. The Commission notes that it only becomes aware of independent expenditures when a Super PAC files its report on a reporting deadline or files a Statement of Electioneering Communication, both of which are posted on the Commission's website.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019**

LATE

ON THE FOLLOWING MEASURE:

H.B. NO. 627, H.D. 1, RELATING TO CAMPAIGN FINANCE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Friday, March 15, 2019

TIME: 9:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Clare E. Connors, Attorney General, or
Valri Lei Kunimoto, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General supports the intent of the bill and makes the following comments.

H.B. No. 627, H.D. 1, requires that a candidate who is supported by a noncandidate independent expenditure to report the expenditure as a contribution of an unspecified value and, if a noncandidate independent expenditure opposes a candidate, the candidates opposing that candidate must report that expenditure as a contribution. The bill also requires the Campaign Spending Commission (Commission) to notify the applicable candidates when any independent expenditure is made and to publish on its website the reports required by this bill. In section 4, the bill deletes the definition of "top contributor" for the statutory provisions that require identification of the three top contributors to noncandidate committees in an advertisement.

Noncandidate committees that make independent expenditures are referred to as "SuperPacs". In Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), the U.S. Supreme Court held that the government cannot prohibit corporations or other associations from making independent expenditures that are not coordinated with a specific political campaign because political speech is protected under the free speech clause of the First Amendment to the U.S. Constitution. Laws that burden political speech are subject to strict scrutiny for a violation of the First Amendment and requires the government to prove that the restriction furthers a compelling government interest

and is narrowly tailored to achieve that interest. Because of Citizens United, SuperPacs may receive an unlimited amount of contributions from corporations and spend unlimited amounts on independent expenditures to advocate for and against candidates or ballot questions. SpeechNow.org v. Federal Election Commission, 599 F.3d 686 (2010) (Limiting contributions by individuals to political committees that made only independent expenditures that expressly advocated the election or defeat of a candidate, violated First Amendment free speech rights.)

SuperPacs make independent expenditures to advocate for a candidate or ballot measure; they do not make contributions to candidate committees. If the SuperPacs coordinated the expenditures with candidate committees, the expenditures would not be independent and the SuperPacs may be subject to contribution limits. The Department believes that treating an independent expenditure from a SuperPac as a contribution to a candidate committee blurs and confuses the independent nature of the expenditure for SuperPacs and may have a chilling effect on the amounts that they may otherwise spend and thereby impact the free speech rights of the individuals and corporations supporting the SuperPacs. The Department respectfully recommends that this provision be deleted from the bill because the provision is vulnerable to constitutional challenge.

The Department also has concerns that the bill deletes the definition of "top contributor" from section 11-393, Hawaii Revised Statutes, in section 4 of the bill. That section requires advertisements paid by SuperPacs to include the names of the top three contributors to the committee that paid for the advertisement. "Top contributor" is defined as a contributor who has contributed an aggregate amount of \$10,000 or more to a noncandidate committee within a twelve-month period prior to the purchase of an advertisement. In 2013, when the top contributor provisions were being considered by the Legislature, the Department recommended the threshold be raised from \$5,000 to \$10,000 and the number of top contributors be decreased from five to three to strengthen the provision to withstand a potential constitutional challenge. The Campaign Spending Commission's data from the 2012 election supported the 2013 recommendations; the data demonstrated disclosure would not be reduced due to the

changes as there were contributions far larger than \$10,000 to the SuperPacs and typically from a very small number of big money contributors. The legislative history from 2013 supported the inclusion of the \$10,000 contribution threshold and the Department recommends that the definition be retained. The provision was narrowly tailored to identify the substantial contributors to the noncandidate committee to inform the public.

If the "top contributor" definition is deleted, the Department respectfully recommends that a detailed purpose section be added to the bill to support the bill's amendments against a constitutional challenge and discuss why the additional disclosure of smaller contributors is necessary in Hawaii. The legislative history should also include supporting details from the recent 2018 election that supports the need for additional disclosure.

Thank you for the opportunity to testify on this bill.



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COMMITTEE ON JUDICIARY

FRIDAY, 3/15/19, 9 AM, Room 016
HB627 HD1, RELATING TO CAMPAIGN FINANCE

TESTIMONY

Beppie Shapiro, Legislative Committee, League of Women Voters of Hawaii

Chair Rhoads, Vice-Chair Wakai and Committee Members:

The League of Women Voters of Hawaii **opposes HB627 HD1** that categorizes expenditures by independent committees which advocate for or against the election of a clearly identifiable candidate, as contributions to the candidate committee or the committees of all opposing candidates.

We acknowledge that often, the “independence” of supposedly independent committees is highly questionable, but we do not advise the Legislature to assume that all independent committees are coordinating with the candidate or his/her committee.

If HB627 HD1 becomes law, candidates who in good faith did not communicate with independent committees supporting their election would find themselves responsible for election expenses over which those candidates and their committees had no control. Likewise for candidates opposing such a candidate. These candidates/committees might well find themselves responsible for expenditures which exceed legal limits.

We urge you to hold HB627 HD1.

Thank you for the opportunity to present this testimony.



Testimony of Chris Leonard
President – Hawaii Association of Broadcasters, Inc.
President – New West Broadcasting Corp.
Regarding HB 627 HD1, Relating to Campaign Finance

Before the Senate Committee on Judiciary
March 15, 2019

RELATING TO CAMPAIGN FINANCE

Good morning Chairman Rhoads, Vice Chair Wakai and members of the committee. For the record, my name is Chris Leonard and I am the President of New West Broadcasting Corp. We are a locally-owned broadcast company that owns and operates five radio stations in Hilo and Kona. I am also the President of the Hawaii Association of Broadcasters. The Association represents over 100 Television & Radio stations that serve local communities across the State of Hawaii. I provide these comments regarding HB 627 HD 1 on behalf of my organization and on behalf of the Hawaii Association of Broadcasters.

I agree that democracy is best served when voters are informed about the sources of advertising seeking to influence the outcome of each election, however I have concerns about the language in this bill that may have unintended consequences. HB627 HD1 appears to remove the exemption provided in 11-393 Sec 4, subsection C that stated,

“this section shall not apply to advertisements broadcast by radio or television of such short duration that including a list of top contributors would constitute a hardship...”

While transparency is essential, the hardship exemption exists in 11-393 to prevent an intractable problem. It will be a practical impossibility to fit a list of the top 3 contributors in addition to the already required disclaimer which includes the non-candidate committee name, complete address and notice that it is with/without the approval and authority of the candidate in a 15 or 30 second commercial especially on radio. The disclaimer could be as long or longer than the time allotted for the commercial. Furthermore, the intended transparency of this bill is addressed by broadcasters. Broadcasters are required by Federal law to keep detailed

records of all political advertising including non-candidate issue advertising. These records include detailed information on what is purchased, by what organization, their address and the individual or individuals that are directly responsible for the advertising. These files are required to be posted on each broadcast station's public file which is available online 24/7 at FCC.gov for public review.

Chairman Rhoads, Vice Chair Wakai and committee members, we appreciate your time and consideration of this bill. We ask that you ensure that the current law that that protects these "short-duration" advertisements as contained in 11-393 Sec 4, subsection C is protected and/or added to this bill.

Sincerely,

Chris Leonard
President
Hawaii Association of Broadcasters

President / General Manager
New West Broadcasting Corp.

To: The Senate Committee on the Judiciary
From: Brodie Lockard for the Common Cause Hawaii Board
Date: Friday, March 15, 2019, 9:00 am

In strong support of HB 627 HD1, with comments

Dear JDC Chair Rhoads, Vice Chair Wakai and Committee Members—

Common Cause Hawaii strongly supports HB 627 HD1. It should cost the State nothing.

Independent expenditures advocating for candidates benefit them at least as much as direct contributions, which can be used for anything from office supplies to pizza.

Independent expenditures advocating the defeat of a candidate clearly benefit all other candidates in a given race. A candidate may not approve of, or have control over, a negative ad about an opponent, but in the big picture, this provision should contribute strongly to a decrease in negative ads, making ads more civil and issue-focused, which can only improve the tone of elections and encourage broader public participation in them.

Disclosing all contributors to an advertisement is a necessary piece of the public's understanding of ads' true intent. Political ads can be very duplicitous, leading an audience to conclude the opposite of what facts support. Disclosing donors is a powerful antidote to this deceit.

Please pass HB 627 HD1, to justly classify independent expenditures, to help civilize campaign ads, and to keep campaign ads more honest.

Thank you for the opportunity to testify.

Brodie Lockard
Board Member, Common Cause Hawaii