No. 15-215

In The

Supreme Court of the United States

JIMMY YAMADA, ET AL.,

Petitioners,

v.

WILLIAM SNIPES, ET AL.,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2005 by former Federal Election Commission Chairman Bradley A. Smith, the Center for Competitive Politics ("CCP") is a nonpartisan, nonprofit organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education. CCP was co-counsel in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*), and has filed *amicus curiae* briefs in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC*, 558 U.S. 310 (2010) and *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434 (2014).

All parties to this appeal have agreed that CCP may participate as *amicus curiae,* and all parties have consented to the filing of this brief. Rule 37.2(a).

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[1] Pursuant to Rule 37.6, *Amicus* states that no contributions of money were made to fund the preparation or submission of this brief, which was authored entirely by counsel for *Amicus*.

SUMMARY OF THE ARGUMENT

This Court has long held that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). While recognizing that public knowledge and the need to combat corruption may sometimes require limited regulation and disclosure, this Court has consistently acted to constrain such restrictions.

This case involves a for-profit corporation that, because it published three newspaper advertisements, was forced by Hawaii law under the guise of disclosure requirements to shoulder the regulatory burdens of a PAC, such as appointing PAC officers, registering with the State, and abiding by a full panoply of regulatory and disclosure requirements. This Court has limited such PAC-like regulation to candidates and groups with the major purpose of influencing elections, recognizing that to do otherwise would inevitably chill political expression. *See Buckley*, 424 U.S. at 63-64. Consequently, in dealing with independent speech, this Court has approved only limited disclosures that are directly related to that speech. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (requiring disclosure of the person making an expenditure and the names of certain contributors); *Buckley*, 424 U.S. at 75 (noting that the law required only disclosure of what a group spent, and not the identities of its contributors).

In upholding the constitutionality of Hawaii's law, the Ninth Circuit has ignored this Court's

decisions permitting only minimal reporting burdens on independent speech. In addition, by forcing a group to give up its right to engage in even the most incidental public electoral speech or else become a PAC, the Ninth Circuit has contributed to a circuit split concerning the burdens the First Amendment allows the government to impose on independent speakers.

Furthermore, no "sufficiently important governmental interest" justifies imposing PAC status on Petitioner. The Ninth Circuit ignored this Court's precedent holding that independent speech does not implicate the anti-corruption interest, *see, e.g.*, *Citizens United*, 558 U.S. at 360, and that there can be no anti-circumvention interest because there are no valid contribution limits that Petitioner's newspaper advertisement expenditures could possibly implicate. That the Ninth Circuit included such inapplicable interests in its burdens calculus demonstrates the depth of its error.

Finally, while the public's informational interest may sometimes justify some disclosure, it cannot justify the PAC regulations imposed here. Disclosure burdens applied against independent speakers may permissibly reveal information about the financial constituencies of candidates for office, i.e., information about who is doing the speaking and who may have funded the speech. Additional recordkeeping, registration, and reporting provisions shed no additional light on candidates' financial constituencies. Such regulation serves only to impose unnecessary, additional costs upon individuals and groups like Petitioner, and thus to stifle speech that candidates and PACs cannot control.

This Court should grant *certiorari* to vindicate its precedents prohibiting PAC-like regulation of independent speech, and to reiterate that government efforts to regulate such speech must bear a substantial relation to valid and important government interests.

ARGUMENT

I. Hawaii Has, Despite This Court's Precedents, Applied PAC Status To Groups Engaged In Minimal Independent Political Speech.

The State of Hawaii has applied political committee ("PAC") status to organizations that engage in limited independent speech concerning officeholders running for reelection, even when that speech does not directly advocate for or against any candidate. App. 168; Haw. Rev. Stat. 11-302. Applying that law, Hawaii has required a for-profit corporation wishing to publish three newspaper advertisements to become a PAC, and to appoint PAC officers, register with the State within ten days of speaking out, and abide by a number of regulatory and disclosure requirements.[2]

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[2] Hawaii imposes "noncandidate committee" status on any "association . . . or individual that has the purpose of making . . . expenditures . . . to influence . . . the election, of any candidate to office." (Haw. Rev. Stat. 11-302, App. 167-68.) Hawaii law automatically imposes *de facto* PAC status—continuing regulatory and disclosure burdens—on any noncandidate committee once it first incurs expenditures over $1,000 during any two-year election period. (Haw. Rev. Stat. 11-321(g), App. 171.) The regulatory and disclosure requirements thus triggered

That result does nothing to advance any legitimate state interest, but it was nevertheless blessed by the Ninth Circuit. In doing so, the Court of Appeals took this Court's decisions in the very different cases of *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding PAC status for groups predominantly engaged in express advocacy) and *Citizens United v. FEC*, 558 U.S. 310 (2010) (upholding limited, discrete reporting for speech addressing a candidate for office close in time to an election) and blended them together. This chimerical opinion applies *Buckley*'s holding on PACs to the incidental independent speech

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include the appointment of a chairperson and treasurer (Haw. Rev. Stat. 11-321, App. 170-71); the establishment of a campaign account, or at least the segregation of committee funds (*see* Haw. Rev. Stat. 11-323(a)(10), App. 173; Haw. Rev. Stat. 11-326(1)(C), App. 176; *Yamada v. Snipes*, 786 F.3d 1182, 1195 (9th Cir. 2015) (App. 26)); providing the name and address of the depository institution of the campaign account and the account number (Haw. Rev. Stat. 11-323(a)(10), App. 173); and providing identifying information of anyone who contributed more than $100 to the association since the last election, whether or not those contributions funded any involvement in electoral politics (Haw. Rev. Stat. 11-323(a)(12), App. 173).

Thereafter, the association must file at least a final election report each election period, and a preliminary and final report before and after any primary, special, or nonpartisan election and before and after any general election, as well as supplemental reports each January and each July after an election year, if the association's expenditures will exceed $1,000 during an election period. (Haw. Rev. Stat. 11-336, App. 185; Haw. Rev. Stat. 11-339, App. 187.) These regulations continue until the association ceases its activity, files a request for termination, files a report disclosing any contributions and expenditures not already reported, demonstrates that it has closed out its campaign account, and the request for termination is approved by the State. (Haw. Rev. Stat. 11-326, App. 176.)

reviewed in *Citizens United*. This was error, as other Courts of Appeals have recognized when faced with similar cases. This Court ought to grant the writ, both to restore the integrity of its own precedents and to resolve the circuit split created by the Ninth Circuit.

A. The *Buckley* Court clearly distinguished between PAC regulations and the disclosures permissibly imposed upon independent speech.

Buckley memorably declared that substantial segments of civil society should be unregulated or minimally regulated. There, the Court confronted a law—the Federal Election Campaign Act of 1971 ("FECA"), 86 Stat. 3—that imposed a $1,000-per-year expenditure threshold, rather than Hawaii's $1,000 threshold for each two-year electoral cycle. *See* FECA § 431(d); *Buckley*, 424 U.S. at 79 n. 105 (quoting same). Despite its higher monetary trigger, FECA would thus have turned many civil society groups into organizations that could speak only upon the condition of registering with the government and publicly disclosing sensitive data concerning their financial supporters.

To prevent the meritless regulation of wide swaths of First Amendment activity, this Court substantially narrowed FECA's reach. It limited the relevant definition of "expenditure" to reach only communications containing "express words of advocacy," such as "Smith for Congress" or "vote for" Smith. *Buckley*, 424 U.S. at 80 n. 108. It further ruled that "[t]o fulfill the purposes of the Act, [PACs] need only encompass organizations that are under the

control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. This holding ensured that invasive and burdensome government regulation reached only those groups that were, "by definition, campaign related." *Id.*

It is undisputed that A-1 is neither under the control of a candidate, nor does it have the major purpose of nominating or electing any candidate. Yet the Ninth Circuit required A-1 to shoulder exactly the types of burdens the *Buckley* held could not be imposed upon such an entity.

Subsequent decisions of this Court have expanded the type of speech that must be disclosed by organizations that are not PACs to include speech close in time to an election, *Citizens United*, 558 U.S. at 366-367 (upholding disclosure and disclaimer requirements for corporations making "electioneering communications"), but this Court has not permitted PAC status to be imposed beyond the bounds announced in *Buckley*. Accordingly, *Buckley* and its progeny have protected a large segment of civil society from federal regulation, even though the Court undoubtedly knew that groups engaging in limited amounts of express advocacy would not have to register with the government beyond reporting specific expenditures, nor would they be required to disclose their donor lists.

This commitment to a vibrant political sphere, one in which the citizens monitor their representatives, is also seen in the differences between the required disclosures and regulatory burdens the *Buckley* and *Citizens United* Courts allowed, respectively, for PACs and for independent speech. *See Minn. Citizens Concerned for Life, Inc. v.*

Swanson ("*MCCL*"), 692 F.3d 864, 872 (8th Cir. 2012) (noting "past judicial efforts [by the Supreme Court and other courts] to ensure laws imposing PAC status and accompanying burdens are limited in their reach").

The Court in *Buckley* and since has allowed required disclosures from groups making independent expenditures, but these regulations must reflect "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-367 (quotations omitted).

Compared to Hawaii's noncandidate committee law with its PAC-like burdens, the statute that the *Buckley* Court upheld regarding independent expenditure reports—Section 434(e)—required higher spending on expenditures to trigger disclosure requirements and imposed far fewer regulatory burdens. *See Buckley*, 424 U.S. at 74-82. In addressing groups making incidental independent expenditures, the Court expressly worried that these groups could be lumped together with PACs and saddled with the more onerous PAC regulations. For groups "engaged purely in issue discussion," as well as groups—such as A-1—still further removed from electoral politics, the Court concluded that "the purposes" of political regulation "may be too remote." *Id.* at 79-80. Accordingly, the Court defined "expenditure" narrowly, only as "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 80.[3] That is, the

[3] Such spending included "communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80.

expansion of regulation beyond candidates and PACs was "not fatal," because it was "narrowly limited." *Id.* at 81. The law did "not seek the contribution list of any association. Instead, it require[d only] direct disclosure of what [the] group . . . spen[t]." *Id.* at 75.

Similarly, in *Citizens United*, this Court held that limited reporting and registration, well short of PAC status, could apply to speech that was not express advocacy, but was instead "pejorative" toward the Presidential candidacy of then-Senator Hillary Clinton. 558 U.S. at 320, 325. Nevertheless, the Court did not allow the government to impose PAC-style regulatory burdens, and in fact contrasted the disclosure at issue with PAC status. *Id.* at 369. Consequently, the government may require that a person file a disclosure statement "identify[ing] the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors." *Id.* at 366. But the Court did not bless anything beyond the filing of a single report: neither continuing reporting nor regulations requiring the organization of a committee, committee termination, appointment of officers, repeat filings, or disclosures of funds or contributors unrelated to the expenditures at issue.

Although Hawaii's noncandidate committee laws deal with independent speech, it departs from the limited form of disclosure this Court has permitted under the First Amendment. Instead, Hawaii's law imposes the much greater regulation that the *Buckley* Court permitted only for candidates and PACs, and does so based upon a significantly lower disclosure threshold as measured in real

dollars.[4] These burdens—detailed record-keeping of both contributions and expenditures, including the names and addresses of those making contributions and the date and amount of contribution (and occupation and principal place of business for those making larger contributions); and continued filing requirements, including name, address, and occupation information for all contributors and the amount and date of their contributions—may only be imposed upon speakers with the major purpose of express advocacy. *Buckley*, 424 U.S. at 63-64, 79.

Buckley narrowed the government's ability to impose PAC-style burdens even though the disclosure of donors to other groups might arguably serve some state information interest. Forgetting this point, Hawaii proceeds to impose these same burdens upon A-1 through its noncandidate committee law, thus applying PAC status in all but name to groups speaking incidentally and independently. Moreover, it does so where no informational interest can conceivably be served. A-1 has no "donors." The sole effect of Hawaii's regulation is to burden speech and ensure that there will be less of it.

In upholding the constitutionality of this law, the Ninth Circuit ignored this Court's decisions permitting only minimal reporting burdens related to independent speech. In essence, the Ninth Circuit's interpretation of the independent disclosure law forces any individual or group to choose between

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[4] The $1,000 monetary trigger for PAC status in 1976 is the equivalent of well north of $4,000 in 2015. The $10,000 reporting trigger for electioneering communications reviewed by this Court in 2010 is, of course, substantially greater than Hawaii's $1,000 trigger for noncandidate committee status here.

becoming a PAC (or shouldering PAC-like burdens under another name) and not engaging in even the most incidental electoral speech. As a result, the Ninth Circuit has contributed to a circuit split concerning the level of burden upon independent speakers that the First Amendment permits. *See, e.g.*, *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 836-837 (7th Cir. 2014) (holding that "it's a mistake to read *Citizens United* as giving the government a green light to impose political-committee status on every person or group that makes a communication about a political issue that also refers to a candidate"); *MCCL*, 692 F.3d at 872, 876-77 (invalidating a law that "substantially extended the reach of PAC-like regulation to *all* associations").

Our Republic was founded on the belief that the public should monitor the government, that ideas should be expressed and tested, and that this is the preferred and only means of advancing the general welfare and avoiding the danger of seething silence. In regulating independent expenditures, this Court has balanced our commitment to a vibrant civil sphere and a free republic against the public's need to understand better a candidate's constituency before going to the polls. This case would permit the Court to affirm the continued viability of its precedents regarding independent speakers, and to announce that mere independent speech may not alone trigger PAC-like regulatory burdens.

II. Hawaii's Imposition Of PAC Status Against Petitioner Is Improperly Tailored To Any Cognizable Governmental Interest.

While this Court has, as discussed *supra*, held that governments may regulate speech about candidates, public officials, and the issues of the day, it has demanded that such regulations be narrowly tailored to vindicate especially crucial governmental interests. *NAACP v. Button*, 371 U.S 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). Laws that impose PAC status, with its attendant registration, reporting, and disclosure requirements are subject to—at minimum—exacting scrutiny, and "cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64. "In the First Amendment context, fit matters." *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1444, 1456 (2014).

The Ninth Circuit found that Hawaii's PAC-style burdens could be applied to Petitioner. Yet, Petitioner is a for-profit corporation, seeking to spend approximately 0.000225% of its annual revenues on issue communications. *See* Pet. for Cert. at 2, 5. Petitioner's speech, which is signed by the corporate speaker itself, consists of three newspaper advertisements. *Id.* at 5. These ads excoriate, *inter alia*, the alleged misuse of parliamentary procedure by Hawaii's legislators. *Id.* at 7-8.

Permitting this result represents an abdication of the Ninth Circuit's responsibility to guard against imprecise regulation of political speech. App. 30 ("[T]here is no question that Hawaii's noncandidate

committee requirements serve important government interests"). Indeed, the Court of Appeals believed that Hawaii's law served a surfeit of governmental interests. App. 31 ("Hawaii's noncandidate committee regulations serve all three interests that the Supreme Court has recognized as important in the context of reporting and disclosure requirements: providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions" (quotations omitted)). But the Court of Appeals did not demonstrate that these interests were, in fact, served by the State's law, particularly in A-1's specific context. This was error, and merits the grant of *certiorari*.

A. Hawaii's PAC status law does not serve the anti-corruption or anti-circumvention interests.

First, this Court has clearly stated that independent speech does not implicate the anti-corruption interest. *Citizens United*, 558 U.S. at 360; *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) ("In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption . . . "). A-1 A-Lectrician's speech about the "aloha spirit," the machinations of the legislative process, and concern for the traditional family structure were not coordinated with any candidate for office, and consequently—as a matter of law—may not serve the government's interest in combatting corruption.

Contra App. 32 (finding Hawaii's PAC status laws serve to deter corruption).

Nor is the anti-circumvention interest at issue, as it applies to A-1's expenditures of money for newspaper advertisements. There are no "valid contribution limitations" for independent speakers such as A-1, which does not, in any event, receive any contributions from any sources, nor is there any "campaign spending limitation[]" against independent speech from a corporation's general treasury. App. 32; *Citizens United*, 558 U.S. at 365 ("*Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures").

Indeed, the mere fact that the Ninth Circuit believed that Hawaii's PAC status law served either the anti-corruption or the anti-circumvention interests is, in and of itself, reason to grant the petition and reassert the validity of this Court's precedents regarding independent speech.

B. Hawaii's PAC status law is not properly tailored to serve the informational interest.

This Court has determined that the government's interest in "help[ing] voters to define more of the candidates' constituencies" may justify certain reporting and disclosure. *Buckley*, 424 U.S. at 81. This interest, often shorthanded as the "informational interest," is not a grant of unlimited discretion to the State. Hawaii must demonstrate a "substantial relation" between imposing PAC status against A-1 and "providing the electorate with information about the sources of election-related

spending." *Citizens United*, 558 U.S. at 366-367 (citing *Buckley*, 424 U.S. at 64, 66) (punctuation altered) (quotations omitted). Disclosure burdens applied against independent speakers must reveal information about the financial constituencies of candidates for office, or they fail constitutional review.

In *Citizens United*, this Court found the Bipartisan Campaign Reform Act's ("BCRA") electioneering communications requirements constitutional as applied to speech about Hillary Clinton in the context of her candidacy for President in 2008. 558 U.S. at 325, 366-367. The speech at issue there bears a fair resemblance to the speech at issue here. *Compare Citizens United v. FEC*, 530 F. Supp. 2d 274, 276 n.4 (D.D.C. 2008) (three-judge court) ("Hillary is the closest thing we have in America to a European socialist") *with* Pet. for Cert. at 6 ("Representatives such as Blake Oshiro and other representatives do not show the aloha spirit in the way they disrespect the legislative process and the people.") (capitalization altered). This Court determined that the informational interest was properly served by federal requirements that Citizens United attach an on-communication disclaimer to its speech and file a single report listing the expenditure, its cost, the relevant election at issue, and the name of contributors who gave specifically to fund the specific communication at issue. *Citizens United*, 558 U.S. at 366; 11 C.F.R. 104.20(c)(9). Such a regime, in that instance, provided the electorate with enough information to fairly evaluate Citizens United's advertisements for the *Hillary* film, "a feature-length negative advertisement that urges viewers to vote

against Senator Clinton for President." *Citizens United*, 558 U.S. at 325.

But, as discussed above, the *Citizens United* Court did not bless the imposition of PAC status upon groups that occasionally speak about candidates for office. Adding such additional recordkeeping, registration, and reporting provisions would have simply piled further burdens upon Citizens United, while shedding no additional light on the candidates' financial constituencies. Indeed, this Court favorably contrasted BCRA's more limited disclosure regime with PAC status by noting that electioneering communications reports are "a less restrictive alternative to more comprehensive regulations of speech" and citing to *FEC v. Massachusetts Citizens for Life*'s discussion of federal PAC status as an example of "more comprehensive regulations." *Citizens United*, 558 U.S. at 369 (citing *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986)). This, again, is reason enough to grant the writ.

Still more troubling is that, as-applied to A-1, Hawaii's PAC status provisions would wring no useful information from Petitioner that would not be captured by a less administratively burdensome regime, such as BCRA's.[5] Hawaii's additional PAC status requirements, as to registration, recordkeeping, and extensive reporting, would provide no further information to the electorate about A-1's non-existent contributors—but *would* impose

[5] This is not, of course, to suggest that Hawaii's disclaimer and reporting requirements meet the BCRA-*Citizens United* constitutional standard.

unnecessary, additional costs upon A-1.[6] App. 26 ("In addition to registering, the organization must file an organizational report, designate officers, disclose its bank account information, and designate a treasurer responsible for recording contributions and expenditures and maintaining records for five years . . . The committee's contributions must be segregated from its other funds . . . ").

Because these additional restrictions, regulations, and mandates do not provide the voters of Hawaii with any information beyond those that a BCRA electioneering communications report would provide, they do nothing to further the public's understanding of the candidates' financial supporters. *Buckley*, 424 U.S. at 77 ("Where First Amendment rights are involved, an even greater degree of specificity is required"). This Court ought to grant *certiorari* and clarify that government efforts to regulate political speech and association must be precisely tailored, and must not condition speaking out on the issues of the day upon complying with what amounts to little more than extra administrative busywork. Hawaii's imposition of PAC burdens upon A-1 is in service to *no* applicable governmental interest. Such a record demands that this Court step in and reverse, as Hawaii's PAC status laws will only serve to harass Petitioner with excessive, unnecessary costs as a condition of speaking.

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[6] The fact that A-1 has, in the past, decided to shoulder these additional burdens does not, of course, render them constitutional, and the Ninth Circuit's suggestion to the contrary further demonstrates the Court of Appeals's abdication of its responsibility to demand narrow tailoring from the State. App. 30.

Left to stand, the Ninth Circuit's opinion will risk chilling speech about candidates for office and the issues of the day throughout a large segment of the Nation, and signal an abandonment of this Court's precedents regarding the need to provide breathing space for First Amendment freedoms to survive. *Mass. Citizens for Life*, 479 U.S. at 254 n. 7 ("[T]he administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak"); *Button*, 371 U.S. at 433.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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