

August 10, 1998

Mr. A. Duane Black
Chairperson
Campaign Spending Commission
State of Hawaii
Leiopapa A Kamehameha Building
235 South Beretania Street, Room 300
Honolulu, Hawaii 96813

Dear Chairperson Black:

Re: Noncandidate Committees

This is in response to the letter dated April 28, 1998, from Executive Director Robert Y. Watada, seeking advice regarding the constitutionality of section 11-204(b), Hawaii Revised Statutes, which prohibits persons or entities from making contributions to noncandidate ballot measure committees. We understand the question to be whether the general application of section 11-204(b) is unconstitutional in light of the United States Supreme Court's decision in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981).

We answer the question in the affirmative.

Section 11-204(b), Hawaii Revised Statutes, provides in relevant part that "[n]o person or any other entity shall make contributions to a noncandidate committee, in an aggregate amount greater than \$1,000 in an election." Section 11-191, Hawaii Revised Statutes, defines a "noncandidate committee" to mean "a committee as defined in this section and does not include a candidate's committee." That section further defines a "committee" to mean: ([top](#))

- (1) Any organization, association, or individual that accepts or makes a contribution or makes an expenditure for or against any:
 - (A) Candidate;
 - (B) Individual who files for nomination at a later date and becomes a candidate; or
 - (C) Party;with or without the authorization of the candidate, individual, or party. In addition, the term "committee" means any organization, association, or individual who accepts or makes a contribution or makes an expenditure for or against any question or issue appearing on the ballot at the next applicable election;
- (2) Any organization, association, or individual that raises or holds money or anything of value for a political purpose, with or without the consent or knowledge of any:
 - (A) Candidate;
 - (B) Individual who files for nomination at a later date and becomes a candidate; or
 - (C) Party; andsubsequently contributes money or anything of value to, or makes expenditures on behalf of, the candidate, individual, or party;
- (3) Notwithstanding any of the foregoing, the term "committee" shall not include any individual making a contribution or expenditure of the individual's own funds or anything of value that the individual originally

acquired for the individual's own use and not for the purpose of evading any provision of this subpart; or

(4) Any committee as defined in paragraph (1) that accepts or makes contributions or makes expenditures in aggregate of more than \$1,000 in an election to influence the nomination and election of individuals to public office or the outcome of ballot questions or issues, shall register with the commission and file reports as required by this chapter. [Emphases added.]
([top](#))

In *Citizens*, the United States Supreme Court determined that an ordinance that places a limitation of \$250 on contributions to committees formed to support or oppose ballot measures submitted to a popular vote violates the right of association and the speech guarantees of the First Amendment to the United States Constitution. The ordinance in question in *Citizens* provided that "[n]o person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars (\$250)." ([top](#))

The Court, in *Citizens*, noted that limits on political activity were contrary to the First Amendment. The Court recognized the narrow exception to the rule that was established in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 657 (1976), that is, that limits on contributions to candidates and candidate committees are constitutional in order to prevent the perception of undue influence of large contributors to a candidate. However, the Court further determined that such limitations cannot be applied to ballot measures, because "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." ([top](#))

In an opinion rendered previous to *Citizens*, the Supreme Court held that the constitutional protection includes contributions by corporations and is not limited to contributions by individuals. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978), the Supreme Court had determined that a state could not prohibit corporations from making contributions or expenditures advocating views on ballot measures. ([top](#))

Reading *Citizens* and *First National* together, we conclude that section 11-204(b) violates the First Amendment because it restricts persons or other entities from making contributions to noncandidate ballot measure committees. ([top](#))

In addition, we have also reviewed section 11-204(j), Hawaii Revised Statutes, and we believe that subsection (j) also conflicts with the Supreme Court's rulings in *Citizens* and *First National*. Subsection (j) provides that no "corporation or other organization" may contribute to noncandidate committees "unless the noncandidate committee has been in existence continuously . . . for at least twelve months prior to the next primary election." This statutory provision prohibits contributions based upon the length of time that the noncandidate committee has been registered. This durational requirement, we believe, is unconstitutional because it imposes limitations on the right of association and the right of expression when contributions are made to noncandidate committees. We do not believe that there is any significant state or public interest that could justify imposing a durational requirement on noncandidate committees. Ballot measures are not often determined twelve months in advance. ([top](#))

In conclusion, we advise that subsections (b) and (j) of section 11-204, Hawaii Revised Statutes, are unconstitutional and that the Campaign Spending Commission should consider issuing an advisory opinion on this matter and seek repeal of section 11-204(b) and (j).

Should you have questions, please do not hesitate to contact us.

Very truly yours,

Jon S. Itomura
Deputy Attorney General

APPROVED:

Margery S. Bronster
Attorney General

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