



Beverly Hills City Council Liaison / Sunshine Task Force Committee will conduct a Regular Meeting, at the following time and place, and will address the agenda listed below:

CITY OF BEVERLY HILLS  
455 N. Rexford Drive  
Municipal Gallery  
Beverly Hills, CA 90210

**IN-PERSON / TELEPHONIC / VIDEO CONFERENCE MEETING**

Beverly Hills Liaison Meeting  
<https://beverlyhills-org.zoom.us/my/bhliaison>  
Meeting ID: 312 522 4461  
**Passcode: 90210**

You can also dial in by phone:  
+1 669 900 9128 US  
+1 888 788 0099 Toll-Free

One tap mobile  
+16699009128,,3125224461#,,,,\*90210# US  
+18887880099,,3125224461#,,,,\*90210# Toll-Free

Monday, August 22, 2022  
5:00 PM

*In the interest of maintaining appropriate social distancing, members of the public can view this meeting through live webcast at [www.beverlyhills.org/live](http://www.beverlyhills.org/live) and on BH Channel 10 or Channel 35 on Spectrum Cable, and can participate in the teleconference/video conference by using the link above. Written comments may be emailed to [mayorandcitycouncil@beverlyhills.org](mailto:mayorandcitycouncil@beverlyhills.org) and will also be taken during the meeting when the topic is being reviewed by the Beverly Hills City Council Liaison / Sunshine Task Force Committee. Beverly Hills Liaison meetings will be in-person at City Hall.*

**AGENDA**

- 1) Public Comment
  - a) Members of the public will be given the opportunity to directly address the Committee on any item not listed on the agenda.
- 2) Resolution of the Sunshine Task Force Committee of the City of Beverly Hills Continuing to Authorize Public Meetings to be Held via Teleconferencing Pursuant to Government Code Section 54953(e) and Making Findings and Determinations Regarding the Same  

Recent legislation was adopted allowing the Sunshine Task Force Committee to continue virtual meetings during the COVID-19 declared emergency subject to certain conditions and the proposed resolution implements the necessary requirements – Attachment 1
- 3) Discussion of the Next Meeting Date of the Sunshine Taskforce, Scheduled for Monday, September 26, 2022, which falls on the Second Night of Rosh Hashanah.
- 4) Approval of June 27, 2021 Highlights – Attachment 2

- 5) Discussion by Councilmember Mirisch Regarding the Disclosure of Fees Paid to Legislative Advocates and the Notice of Termination Filed by Legislative Advocates – Attachment 3
- 6) Establishment of Revocation Procedures for Developments – Attachment 4
- 7) Request by Councilmember Mirisch to Discuss a Local Ordinance Prohibiting Campaign Donations from Contractors, Developers, and Legislative Advocates Doing Business with the City –Attachment 5
- 8) Discussion by Councilmember Mirisch Regarding Campaign Advertisement Disclosure Requirements for Contractors, Developers, and Legislative Advocates – Attachment 6
- 9) Discussion by Vice-Mayor Gold regarding what constitutes the membership of the Sunshine Task Force – Attachment 7
- 10) As Time Allows:
  - a) Restricting “Continuances” – Attachment 8
  - b) Interested Party – Email Sign Up – Attachment 9
  - c) Making Property owner information available online
  - d) Limit on Contacts by Legislative Advocates
  - e) Allow Public to Observe On-Site Visits with Developers

11) Future Agenda Items

12) Adjournment

**Links to Attachments Not Associated With Any Item:**

- Building Permit Report - July
- Current Development Activity Projects List

Next Meeting: September 26, 2022



**Huma Ahmed**  
**City Clerk**

**Posted: August 19, 2022**

**A DETAILED LIAISON AGENDA PACKET IS AVAILABLE FOR REVIEW AT**  
**[WWW.BEVERLYHILLS.ORG](http://WWW.BEVERLYHILLS.ORG)**



Pursuant to the Americans with Disabilities Act, the City of Beverly Hills will make reasonable efforts to accommodate persons with disabilities. If you require special assistance, please call (310) 285-1014 (voice) or (310) 285-6881 (TTY). Providing at least twenty-four (24) hours advance notice will help to ensure availability of services. City Hall, including the Municipal Gallery, is wheelchair accessible.

RESOLUTION NO. CCL-STFC - 09

RESOLUTION OF THE CITY COUNCIL LIAISON/SUNSHINE TASK FORCE COMMITTEE OF THE CITY OF BEVERLY HILLS CONTINUING TO AUTHORIZE PUBLIC MEETINGS TO BE HELD VIA TELECONFERENCING PURSUANT TO GOVERNMENT CODE SECTION 54953(e) AND MAKING FINDINGS AND DETERMINATIONS REGARDING THE SAME

WHEREAS, the City Council Liaison/Sunshine Task Force Committee is committed to public access and participation in its meetings while balancing the need to conduct public meetings in a manner that reduces the likelihood of exposure to COVID-19 and to support physical distancing during the COVID-19 pandemic; and

WHEREAS, all meetings of the City Council Liaison/Sunshine Task Force Committee are open and public, as required by the Ralph M. Brown Act (Cal. Gov. Code Sections 54950 – 54963), so that any member of the public may attend, participate, and watch the City Council Liaison/Sunshine Task Force Committee conduct its business; and

WHEREAS, pursuant to Assembly Bill 361, signed by Governor Newsom and effective on September 16, 2021, legislative bodies of local agencies may hold public meetings via teleconferencing pursuant to Government Code Section 54953(e), without complying with the requirements of Government Code Section 54953(b)(3), if the legislative body complies with certain enumerated requirements in any of the following circumstances:

1. The legislative body holds a meeting during a proclaimed state of emergency, and state or local officials have imposed or recommended measures to promote social distancing.
2. The legislative body holds a meeting during a proclaimed state of emergency for the purpose of determining, by majority vote, whether as a result of the

emergency, meeting in person would present imminent risks to the health or safety of attendees.

3. The legislative body holds a meeting during a proclaimed state of emergency and has determined, by majority vote, that, as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees.

WHEREAS, on March 4, 2020, Governor Newsom declared a State of Emergency in response to the COVID-19 pandemic (the “Emergency”); and

WHEREAS, the Centers for Disease Control and Prevention continue to advise that COVID-19 spreads more easily indoors than outdoors and that people are more likely to be exposed to COVID-19 when they are closer than 6 feet apart from others for longer periods of time; and

WHEREAS, the Los Angeles County “Responding together at Work and in the Community Order (8.23.21)” provides that all individuals and businesses are strongly encouraged to follow the Los Angeles County Public Health Department Best Practices. The Los Angeles County Public Health Department “Best Practices to Prevent COVID-19 Guidance for Businesses and Employers”, updated on September 13, 2021, recommend that employers take steps to reduce crowding indoors and to support physical distancing between employees and customers; and

WHEREAS, the unique characteristics of public governmental buildings is another reason for continuing teleconferenced meetings, including the increased mixing associated with bringing people together from across several communities, the need to enable those who are immunocompromised or unvaccinated to be able to safely continue to fully participate in public

meetings and the challenge of achieving compliance with safety requirements and recommendations in such settings; and

WHEREAS, the Beverly Hills City Council has adopted a resolution that continues to recommend steps to reduce crowding indoors and to support physical distancing at City meetings to protect the health and safety of meeting attendees; and

WHEREAS, due to the ongoing COVID-19 pandemic and the need to promote social distancing to reduce the likelihood of exposure to COVID-19, the City Council Liaison/Sunshine Task Force Committee intends to continue holding public meetings via teleconferencing pursuant to Government Code Section 54953(e).

NOW, THEREFORE, the City Council Liaison/Sunshine Task Force Committee of the City of Beverly Hills resolves as follows:

Section 1. The Recitals provided above are true and correct and are hereby incorporated by reference.

Section 2. The City Council Liaison/Sunshine Task Force Committee hereby determines that, as a result of the Emergency, meeting in person presents imminent risks to the health or safety of attendees.

Section 3. The City Council Liaison/Sunshine Task Force Committee shall continue to conduct its meetings pursuant to Government Code Section 54953(e).

Section 4. Staff is hereby authorized and directed to continue to take all actions necessary to carry out the intent and purpose of this Resolution including, conducting open and public meetings in accordance with Government Code Section 54953(e) and other applicable provisions of the Brown Act.

Section 5. The City Council Liaison/Sunshine Task Force Committee has reconsidered the circumstances of the state of emergency and finds that: (i) the state of emergency continues to directly impact the ability of the members to meet safely in person, and (ii) state or local officials continue to impose or recommend measures to promote social distancing.

Section 6. The Secretary of the City Council Liaison/Sunshine Task Force Committee shall certify to the adoption of this Resolution and shall cause this Resolution and her certification to be entered in the Book of Resolution of the City Council Liaison/Sunshine Task Force Committee of this City.

Adopted:

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JULIAN A. GOLD, M.D.  
Presiding Councilmember of the City  
Council Liaison/Sunshine Task Force  
Committee of the City of Beverly Hills,  
California



**CITY OF BEVERLY HILLS**  
455 N. Rexford Drive  
Beverly Hills, CA 90210  
Telephonic/Video Conference

**Sunshine Task Force Committee**

**MEETING HIGHLIGHTS**

**June 27, 2022**

Pursuant to Government Code Section 54953(e)(3), members of the Beverly Hills City Council Liaison/Sunshine Task Force Committee and staff may participate in this meeting via a teleconference. In the interest of maintaining appropriate social distancing, members of the public can view this meeting through live webcast at [www.beverlyhills.org/live](http://www.beverlyhills.org/live) and on BH Channel 10 or Channel 35 on Spectrum Cable, and can participate in the teleconference/video conference by using the link above. Written comments may be emailed to [mayorandcitycouncil@beverlyhills.org](mailto:mayorandcitycouncil@beverlyhills.org).

Councilmember Mirisch called the meeting to order at 5:03 p.m.

In Attendance: Councilmember John A. Mirisch, Councilmember Robert Wunderlich, Steve Mayer, Alan Block, Thomas White, Debbie Weiss, Debbie Quick, and Fred Fenster

City Staff: City Attorney Larry Wiener, Associate Attorney with RWG, Chelsea Straus, Assistant City Manager Nancy Hunt-Coffey, Director of Community Development Ryan Gohlich, Chief Information Officer David Schirmer, Principal Performance Auditor Abbey Tenn, and Records Manager Michael Dunn

- 1) Public Comment
  - a) Members of the public will be given the opportunity to directly address the Committee on any item not listed on the agenda.
    - *Thomas White offered congratulations to Nancy Hunt-Coffey on her appointment to City Manager to succeed City Manager George Chavez upon his retirement at the end of the year. Committee members and staff concurred.*
- 2) Resolution of the Sunshine Task Force Committee of the City of Beverly Hills Continuing to Authorize Public Meetings to be Held via Teleconferencing Pursuant to Government Code Section 54953(e) and Making Findings and Determinations Regarding the Same
  - *At the recommendation of City Attorney Larry Wiener, Councilmembers Mirisch and Wunderlich agreed to adopt the resolution.*
- 3) Establishment of Revocation Procedures for Developments
  - *City Attorney Larry Wiener presented.*
  - *Committee members expressed their concerns and provided their comments.*
  - *All members were in agreement with the proposed revocation procedures for developments.*
- 4) Discussion by Councilmember Mirisch Regarding the Disclosure of Fees Paid to Legislative Advocates and the Notice of Termination Filed by Legislative Advocates
  - *Associate Attorney with RWG, Chelsea Straus presented.*

- *Committee members expressed their concerns and provided their comments.*
  - *All members agreed to broader amounts of disclosure, as requested by Councilmember Wunderlich, and that the amounts disclosed at time of termination should be the total and exact earnings received from completed projects.*
- 5) Discussion by Councilmember Mirisch Regarding Campaign Advertisement Disclosure Requirements for Contractors, Developers, and Legislative Advocates
- *City Attorney Larry Weiner presented.*
  - *Committee members expressed their concerns and provided their comments.*
  - *City Attorney Larry Weiner indicated that staff would revise the ordinance to better reflect Councilmember Mirisch's intent and return to present at a future meeting for further discussion.*
- 6) Request by Councilmember Mirisch to Discuss a Local Ordinance Prohibiting Campaign Donations from Contractors, Developers, and Legislative Advocates Doing Business with the City
- *City Attorney Larry Weiner presented.*
  - *Final Ordinance will come back for review at a future meeting.*
- 7) Future Agenda Items:
- Restricting "Continuances"
  - Interested Party – Email Sign Up
  - Limit on Contacts by Legislative Advocates
  - Allow Public to Observe On-Site Visits with Developers
- 8) Adjournment – 6:01 p.m.



ORDINANCE NO. 22-O-\_\_\_\_\_

AN ORDINANCE OF THE CITY OF BEVERLY HILLS  
AMENDING THE BEVERLY HILLS MUNICIPAL CODE  
REGARDING THE DISCLOSURE OF FEES PAID TO  
LEGISLATIVE ADVOCATES AND THE NOTICE OF  
TERMINATION FILED BY LEGISLATIVE ADVOCATES

THE CITY COUNCIL OF THE CITY OF BEVERLY HILLS DOES ORDAIN AS  
FOLLOWS:

Section 1. Subsection 5 of Section 1-9-105(A) of Article 1 of Chapter 9 of Title 1 of the Beverly Hills Municipal Code regarding the disclosure of fees paid to Legislative Advocates is hereby amended to read as follows:

“ 5. An estimate of fees to be generated, or if the Legislative Advocate is a financier, the estimate of fees to be paid by such financier. The estimate of fees shall be a check-box on the form that will provide a range of fees as follows:

Up to \$50,000.00

\$50,000.01 to \$100,000.00

\$100,000.01 to \$200,000.00

\$200,000.01 to \$500,000.00

\$500,000.01 to \$1,000,000.00

\$1,000,000.01 to \$2,000,000.00, and

\$2,000,000.01 and above,”

Section 2. Section 1-9-106 of Article 1 of Chapter 9 of Title 1 of the Beverly Hills Municipal Code regarding disclosure at public meetings is hereby amended to read as follows:

**“1-9-106: Disclosure at Public Meetings and Annual Disclosures**

A. At any time that a Legislative Advocate engages in Legislative Advocacy at a City Council or City commission meeting, the Legislative Advocate shall announce the specific matter being addressed and shall identify the client who is being represented by the Legislative Advocate.

B. Within thirty (30) days after the annual anniversary of the date that a Legislative Advocate has registered as a Legislative Advocate concerning a matter, the Legislative Advocate shall file, on a form provided by the City, the annual amount that the Legislative Advocate has been paid for engaging in Legislative Advocacy. Alternatively, by January 31, a Legislative Advocacy Firm may file, on a form provided by the City, the amount that the Legislative Advocacy Firm has been paid for engaging in Legislative Advocacy during the prior calendar

year, on each matter where a Legislative Advocate employed by the Legislative Advocacy Firm has registered.”

**Section 3.** Section 1-9-107 of Article 1 of Chapter 9 of Title 1 of the Beverly Hills Municipal Code regarding filing a notice of termination is hereby amended to read as follows:

**“1-9-107: Notice of Termination**

Upon termination of a Legislative Advocate's role concerning a project, the Legislative Advocate shall file a notice of termination with the City. The notice shall be filed on the form provided by the City, and the Legislative Advocate shall disclose the total amount of payments the Legislative Advocate received to engage in direct communication with a City official or with City officials for the purpose of advocating in support of or in opposition to the project.”

**Section 4.** Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance or the application thereof to any person or place, is for any reason held to be invalid or unconstitutional by the final decision of any court of competent jurisdiction, the remainder of this Ordinance shall be and remain in full force and effect.

**Section 5.** Publication. The City Clerk shall cause this Ordinance to be published at least once in a newspaper of general circulation published and circulated in the City within fifteen (15) days after its passage in accordance with Section 36933 of the Government Code, shall certify to the adoption of this Ordinance, and shall cause this Ordinance and her certification, together with proof of publication, to be entered in the Book of Ordinances of the Council of this City.

**Section 6.** Effective Date. This Ordinance shall go into effect and be in full force and effect at 12:01 a.m. on the thirty-first (31st) day after its passage.

Adopted:  
Effective:

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Mayor of the City of  
Beverly Hills, California

ATTEST:

\_\_\_\_\_(SEAL)  
HUMA AHMED  
City Clerk

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

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LAURENCE S. WIENER  
City Attorney

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GEORGE CHAVEZ  
City Manager

ORDINANCE NO. 20-O-\_\_\_\_\_

AN ORDINANCE OF THE CITY OF BEVERLY HILLS  
ESTABLISHING REVOCATION PROCEDURES FOR  
DEVELOPMENTS AND AMENDING THE BEVERLY HILLS  
MUNICIPAL CODE

THE CITY COUNCIL OF THE CITY OF BEVERLY HILLS HEREBY ORDAINS AS  
FOLLOWS:

**Section 1.** Article 49 (“Revocation of Permits”) is hereby added to Chapter 3  
 (“ZONING”) of Title 10 (“PLANNING AND ZONING”) to read as follows:

“Article 49. Revocation of Permits for Developments

Section 10-3-4900. Definitions.

For the purposes of this Article, unless it is plainly evident from the context that a different  
 meaning was intended, the following definition shall apply:

“Ultimate Reviewing Authority” means the decision-making body who made the final  
 decision, including appeals, on the underlying project application.

Section 10-3-4901. Grounds for Revocation.

The inclusion of inaccurate, substantially incomplete or erroneous information in an application,  
 or in a presentation at a hearing, including supporting material, for development of a new  
 building or for a remodel of an existing building by more than fifty percent (50%), that was made  
 intentionally or with gross negligence or reckless disregard, shall be grounds for revocation  
 pursuant to this Article, where the Ultimate Reviewing Authority finds that accurate and

Deleted: the

complete information would have caused the Ultimate Reviewing Authority to require additional or different conditions on a permit or to deny the application of the permit.

Section 10-3-4902. Initiation of Proceedings.

The application for revocation of the permit shall be made to the Director of Community Development on a form supplied by the City and attested to under penalty of perjury. The application shall be accompanied by a fee specified by resolution of the City Council. The application must be submitted prior to issuing a Certificate of Occupancy for the project for which the permit was issued.

The Director of Community Development shall initiate revocation proceedings unless the request is patently frivolous and without merit. The Director of Community Development may initiate proceedings on his or her own motion, pursuant to the provisions of this Article, when the Director believes that grounds for revocation have been established.

If the applicant for revocation disagrees with the Director's determination not to process the application for revocation because the request for revocation is patently frivolous and without merit, then the applicant for revocation may submit the applicant's application to the Planning Commission Liaison Committee, using a form supplied by the City. The Planning Commission Liaison Committee shall determine, de novo, whether application is patently frivolous and without merit or whether the application should be forwarded to the Ultimate Reviewing Authority for a hearing on the revocation. If the Planning Commission Liaison Committee determination results in a tie vote, then matter shall be forwarded to the Ultimate Reviewing Authority for a hearing on the revocation. The Planning Commission Liaison Committee's

decision shall be final and there shall be no appeal from that Committee's decision. However, the City Council may order review of whether application is patently frivolous and without merit. If the application is forwarded to the Ultimate Reviewing Authority for a hearing on the revocation, then that hearing shall be held pursuant to Title 1, Chapter 4 of this Code.

Section 10-3-4903. Notice.

Notice of the hearing by the Ultimate Reviewing Authority shall be required pursuant to section 10-3-258.

Section 10-3-4904. Notice to Permittee; Suspension of Permit.

The Director of Community Development shall notify the permittee in writing of the request for revocation and shall enclose a copy of the application for revocation, if any, and the procedures set forth in this Article.

If physical construction has not yet begun, the operation of the permit shall be suspended until the Ultimate Reviewing Authority votes on the request for revocation. If physical construction has commenced, including grading, then the operation of the permit shall not be suspended unless and until the Ultimate Reviewing Authority votes on the request for revocation.

If the permit has been suspended, the Director shall also notify the applicant that any development undertaken while the permit is suspended is a violation of the Beverly Hills Municipal Code.

Section 10-3-4905. Hearing on Revocation.

At the earliest feasible meeting after notice has been given pursuant to 10-3-4904, the Director shall schedule a hearing before the Ultimate Reviewing Authority. The Ultimate Reviewing Authority shall render its decision within sixty (60) days after the first meeting at which a hearing was commenced.

The burden of proof shall be placed upon the party seeking revocation.

Section 10-3-4906. Additional Grounds for Denying a Request for Revocation.

In addition to finding that the person requesting a revocation did not carry his burden to show that the grounds set forth in Section 10-3-4901 justified revocation of the permit, the Ultimate Reviewing Authority may determine that the request for revocation was not filed with due diligence following the approval of the permit and may deny the request for revocation on that basis.

Section 10-3-4907. Appeal.

Any decision by the Ultimate Reviewing Authority may be appealed in the same manner as the original underlying project decision. However, the appeal shall not stay the decision of the Ultimate Reviewing Authority.”

**Section 2. Severability.** If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance or the application thereof to any person or place, is for any jurisdiction, the remainder of this Ordinance shall be and remain in full force and effect.

**Deleted: Section 10-3-4908.** Projects that were not heard by an Ultimate Reviewing Authority ¶  
Any project which was not heard by an Ultimate Reviewing Authority shall be subject to the requirements of this Section.¶  
(a) If (i) a building permit holder violates a building permit by constructing, or failing to construct, in accordance with the approved plans, and (ii) the building permit holder receives written notice from the City to correct the violation or disregards a stop work order issued as a result of the alleged violation, and (iii) the violation of the building permit was first brought to the attention of the City by a resident of the City, then that resident shall be entitled to reimbursement for his or her reasonable attorney’s fees and reasonable investigative costs associated with identifying the violation. The reimbursement shall be made by the owner of the property for which the building permit was issued.¶  
(b) The Director of Community Development shall provide written notice to the complaining resident if a written correction notice has been issued or a stop work order has been placed on the property in question.¶  
(c) The resident may submit, in writing, the resident’s reasonable attorney’s fees and reasonable investigative costs to the Director of Community Development within thirty (30) days after receiving notice that the City has issued a written correction notice or that a stop work notice was violated. ¶  
(d) The Director of Community Development, upon receiving the resident’s demand for attorney’s fees and costs will provide, in writing, within one (1) week of receipt, the demand for attorney’s fees and costs to the property owner.¶  
(e) The property owner shall have thirty (30) days after the receipt of notice of the demand, to either pay the attorney’s fees and costs to the resident or request an arbitration pursuant to subparagraph (f) below. If the property owner neither pays the fees and costs nor requests the arbitration, the City may issue a stop work order concerning the construction on that property.¶  
(f) If the property owner disputes the reasonableness of the attorney’s fees and/or reasonableness of the investigative costs associated with identifying the violation, the property owner may request that the matter be heard by an arbitrator to determine the reasonableness of the fees and costs. The property owner’s request shall be made to the City within 30 days after the property owner’s receipt of notice of demand. The City shall select the arbitrator from the American Arbitration Association and the arbitrator shall apply the fast track rules for construction-related arbitration. The Applicant shall pay the initial fee for the arbitrator, however the arbitrator shall have the ability to award arbitration costs as the arbitrator deems appropriate. The arbitrator’s decision shall be final.¶  
(g) The property owner shall pay the arbitrator’s award within thirty (30) days of receiving written notice of the award. Failure to pay the arbitrator’s award may result in a stop work order being issued for construction on the property.¶  
**Section 10-3-4909.** Violation of Article. ¶  
Any person who knowingly and willfully, or with gross negligence or reckless disregard violates any provision of this Article may be punished as provided in Title 1, Chapter 3 of this Code.

**Section 3.** Publication. The City Clerk shall cause this Ordinance to be published at least once in a newspaper of general circulation published and circulated in the City within fifteen (15) days after its passage in accordance with Section 36933 of the Government Code, shall certify reason held to be invalid or unconstitutional by the final decision of any court of competent to the adoption of this Ordinance, and shall cause this Ordinance and this certification, together with proof of publication, to be entered in the Book of Ordinances of the Council of this City.

**Section 4.** Effective Date. This Ordinance shall go into effect and be in full force and effect at 12:01 a.m. on the thirty-first (31st) day after its passage.

**Section 5.** Certification. The City Clerk shall certify to the adoption of this Ordinance.

Adopted:  
Effective:

\_\_\_\_\_  
LILI BOSSE  
Mayor of the City of  
Beverly Hills, California

Deleted: ROBERT WUNDERLICH

ATTEST:

\_\_\_\_\_(SEAL)  
HUMA AHMED  
City Clerk

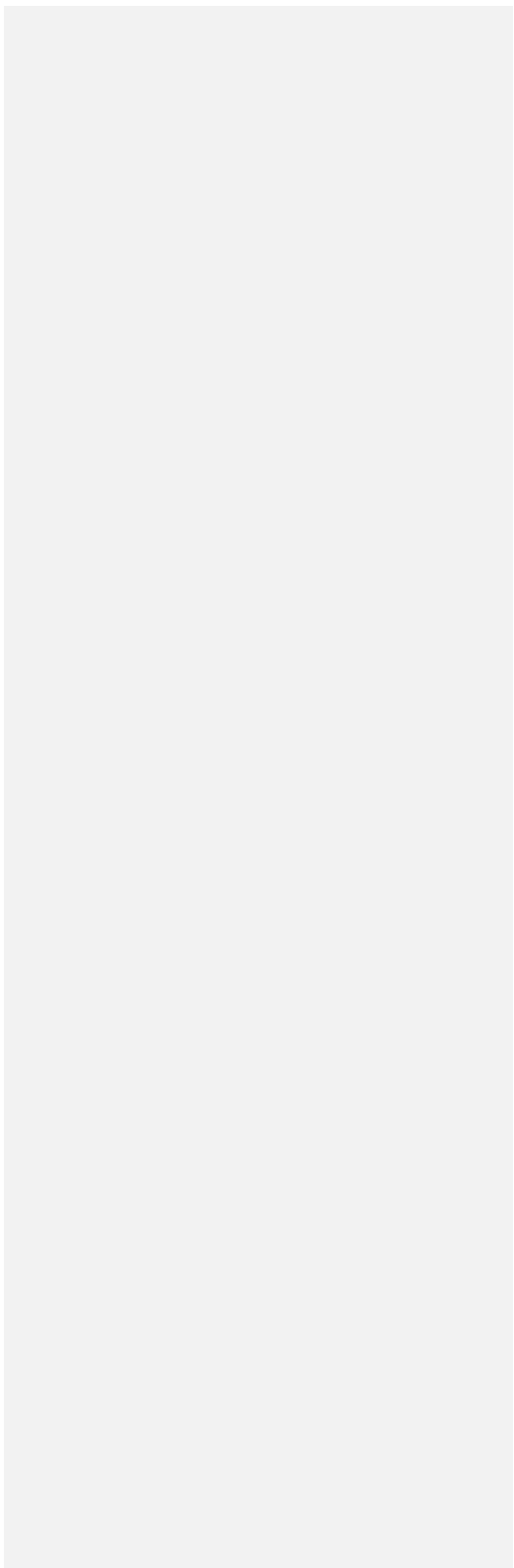
APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

\_\_\_\_\_  
LAURENCE S. WIENER  
City Attorney

\_\_\_\_\_  
GEORGE CHAVEZ  
City Manager





ORDINANCE NO. 22-O-\_\_\_\_\_

AN ORDINANCE OF THE CITY OF BEVERLY HILLS  
PROHIBITING CAMPAIGN DONATIONS FROM  
CONTRACTORS, DEVELOPERS, AND LEGISLATIVE  
ADVOCATES, AND AMENDING THE BEVERLY HILLS  
MUNICIPAL CODE

THE CITY COUNCIL OF THE CITY OF BEVERLY HILLS DOES ORDAIN AS  
FOLLOWS:

Section 1. Section 1-8-2 of Chapter 8 of Title 1 of the Beverly Hills Municipal Code regarding definitions is hereby revised to insert the following definitions in alphabetical order:

“Contract: An agreement, franchise, lease, grant, land use license or easement, or concession, including any agreement for professional or technical personal services, for the performance of any work or service or construction, for the provision of any materials, goods, equipment, or supplies, for the sale or purchase of property, or for the rendering of any service to the City, and approved by the City Council or by council members when the entire Council is sitting as the board of a related agency.

Contractor: A person who has entered into, performs under, or seeks a Contract. Contractor shall also include: (1) the Contractor’s paid board chair, president, chief executive officer, chief operating officer, or the individuals who serve in the functional equivalent of one or more of those positions, and (2) a person who holds an ownership interest in the Contactor of twenty (20) percent or more. Provided however, a Contractor shall not include the following:

- i. A person who is an elected official who has entered into a Contract in connection with their work as an elected official; or
- ii. A person who has entered into or performs under an employment agreement or Memorandum of Understanding, with the City; or
- iii. A person who receives or pays for services normally rendered by the City to residents and businesses, such as sewer service, water service, or trash removal service; or
- iv. A person who is awarded a Contract that is required by State law to be awarded to the lowest responsible bidder; or
- v. A person who is representing a government agency.

Developer: A person who is currently seeking from the City a specific plan, zone change, development agreement, density bonus, subdivision tract map, conditional use permit, variance, or a development plan review permit, or an amendment to any of these approvals or permits. The term shall include any Legislative Advocate of the Developer, and where the Developer is a business entity shall include all owners, shareholders, principals, partners, members, officers, directors, and managers.

Legislative Advocacy: Shall have the same definition as set forth in Section 1-9-102 of this Title.

Legislative Advocacy Firm : Shall have the same definition as set forth in Section 1-9-102 of this Title.

Legislative Advocate: Any individual, other than a Contractor, who is compensated or who is hired, directed, retained or otherwise becomes entitled to be compensated for engaging in Legislative Advocacy and makes a direct or indirect communication with a City official or who is an expenditure lobbyist or financier. Legislative Advocate shall also include: (1) the paid board chair, president, chief executive officer, chief operating officer, or the individuals who serve in the functional equivalent of one or more of those positions of the Legislative Advocacy Firm that is engaging in Legislative Advocacy in the City, and (2) a person who holds an ownership interest of twenty (20) percent or more in the Legislative Advocacy Firm that is engaging in Legislative Advocacy in the City. Provided, however, the term shall only apply to Legislative Advocates who are advocating for a project that (1) requires a City Council decision, or (2) can be appealed to the City Council.”

Section 2. Subsection F is hereby added to Section 1-8-3 of Chapter 8 of Title 1 of the Beverly Hills Municipal Code regarding contribution limitations to read as follows:

“F. Prohibition on Contributions by Contractors, Developers, and Legislative Advocates:

1. A Contractor shall not make a Contribution to any Candidate or Candidate’s controlled committee during the following periods:

i. From the submission by the Contractor of a bid, a proposal, qualifications, or a similar document until the awarding of a Contract or an amendment to the Contract, or the withdrawal or cancellation of the solicitation, if the Contractor is not awarded the Contract; or

ii. From the submission by the Contractor of a bid, a proposal, qualifications, or a similar document until 12 months after the Contract or an amendment to the Contract is executed, if the Contractor is awarded the Contract.

2. A Developer shall not make a Contribution to any Candidate or Candidate's controlled committee from the time that a development application is submitted until 12 months after the date the decision on the application is final. If the application is withdrawn or terminated, the Contribution restriction applies until the day after the termination or the filing of the withdrawal.

3. A Legislative Advocate shall not make a Contribution to any Candidate or Candidate's controlled committee..

4. Every solicitation for bids or proposals issued by the City shall include a notice that substantially states the following: "All Contractors, as defined in Section 1-8-2 of the Beverly Hills Municipal Code, are prohibited from making a contribution to any candidate or candidate's controlled committee during the applicable time period for Contractors set forth in subsection F of Beverly Hills Municipal Code Section 1-8-3."

5. Every application that the City provides to a Developer, or registration form that the City provides to a Legislative Advocate, shall include a notice that substantially states the following: "All Developers and Legislative Advocates, as defined in Section 1-8-2 of the Beverly Hills Municipal Code, are prohibited from making a contribution to any candidate or candidate's controlled committee as set forth in subsection F of Beverly Hills Municipal Code Section 1-8-3."

6. Notwithstanding section 1-8-7 of this Chapter, a Candidate shall not be liable for any violation of this Subsection F."

Section 3. Subsection E is hereby added to Section 1-8-7 of Chapter 8 of Title 1 of the Beverly Hills Municipal Code regarding remedies for violations of contribution prohibitions to read as follows:

"E. Remedies For Violation of Prohibition on Contributions:

In addition to any remedies for violation of the Municipal Code, the following remedies shall be applicable to a violation of Section 1-8-3 of this Chapter:

1. A Contractor convicted of a violation of, or found by an administrative hearing officer to have violated, Section 1-8-3 of this Chapter shall not be eligible to bid on or be considered for a new Contract, extension, or amendment for 12 months after the determination of the violation, unless the City Council determines at a public meeting that mitigating

circumstances exist. If the City has an existing Contract with a Contractor who has violated Section 1-8-3 of this Chapter, the City Council may determine at a public meeting whether it is in the best interest of the City to terminate the Contract.

2. A Developer convicted of a violation of, or found by an administrative hearing officer to have violated, Section 1-8-3 of this Chapter may not be a Developer on a new application for 12 months after the determination of the violation, unless the City Council determines at a public meeting that mitigating circumstances exist or processing of the development application is otherwise required by State law.
3. A Legislative Advocate convicted of a violation of, or found by an administrative hearing officer to have violated, Section 1-8-3 of this Chapter may not engage in Legislative Advocacy for 12 months after the determination of the violation, unless an administrative hearing officer determines that mitigating circumstances exist.”

Section 4. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance or the application thereof to any person or place, is for any reason held to be invalid or unconstitutional by the final decision of any court of competent jurisdiction, the remainder of this Ordinance shall be and remain in full force and effect.

Section 5. Publication. The City Clerk shall cause this Ordinance to be published at least once in a newspaper of general circulation published and circulated in the City within fifteen (15) days after its passage in accordance with Section 36933 of the Government Code, shall certify to the adoption of this Ordinance, and shall cause this Ordinance and her certification, together with proof of publication, to be entered in the Book of Ordinances of the Council of this City.

Section 6. Effective Date. This Ordinance shall go into effect and be in full force and effect at 12:01 a.m. on the thirty-first (31st) day after its passage.

Adopted:  
Effective:

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Mayor of the City of  
Beverly Hills, California

ATTEST:

\_\_\_\_\_(SEAL)  
HUMA AHMED  
City Clerk

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

\_\_\_\_\_  
LAURENCE S. WIENER  
City Attorney

\_\_\_\_\_  
GEORGE CHAVEZ  
City Manager

DRAFT



## CITY OF BEVERLY HILLS

OFFICE OF THE CITY ATTORNEY

455 North Rexford Drive, 2<sup>nd</sup> Floor, Beverly Hills, California 90210  
Telephone 310.285.1055 Facsimile 310.285.1056

# MEMORANDUM

TO: The Sunshine Task Force

FROM: Laurence S. Wiener, City Attorney

DATE: August 19, 2022

SUBJECT: Case Law on Constitutionality of Campaign Contributions Bans

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At the last Sunshine Task Force Committee Meeting, there was a request for the cases that informed our decision to limit the proposed campaign contributions ban for contractors and developers to 12 months. Therefore, I am providing the following instructive cases on campaign contributions bans that informed our decision to limit the duration of the City's proposed campaign contributions ban:

- (1) *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2nd Cir. 2010); and
- (2) *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015).

Attachment(s)

**GREEN PARTY OF CONNECTICUT, S. Michael Derosa, Libertarian Party of Connecticut, Elizabeth Gallo, Joanne P. Philips, Ann C. Robinson, Roger C. Vann, Association of CT Lobbyists, and Barry Williams, Plaintiffs–Appellants,**

v.

**Jeffrey GARFIELD, Richard Blumenthal, Patricia Hendel, Robert N. Woraghtik, Jaclyn Bernstein, Rebecca M. Doty, Enid Johns Oresman, Dennis Riley, Michael Rion, Scott A. Storms, Sister Saly J. Tolles, and Benjamin Bycel, Defendants–Appellees,**

**Audrey Blondin, Tom Seigny, Common Cause of CT, and Connecticut Citizen Action Group, Intervenor–Defendants–Appellees.**

Nos. 09–0599–cv(L), 09–0609–cv(CON).

United States Court of Appeals,  
Second Circuit.

Argued Jan. 13, 2010.

Decided July 13, 2010.

**Background:** Political parties, prospective candidates, and lobbyist groups brought action against Connecticut Elections Enforcement Commission and other state officials, challenging lobbyist and state contractor contribution and solicitation ban provisions of the Connecticut Campaign Finance Reform Act (CFRA). The United States District Court for the District of Connecticut, Stefan R. Underhill, J., 590 F.Supp.2d 288, granted summary judgment in favor of state defendants. Plaintiffs appealed.

**Holdings:** The Court of Appeals, José A. Cabranes, Circuit Judge, held that:

(1) contribution bans imposed by CFRA on state contractors, prospective con-

tractors, and related individuals, did not violate First Amendment; but

- (2) bans imposed on contributions made by lobbyists and their families violated First Amendment; and
- (3) CFRA provisions banning solicitation of contributions by contractors or lobbyists violated the First Amendment.

Affirmed in part and reversed in part.

See also 616 F.3d 189, 2010 WL 2737134.

### 1. Constitutional Law ⇌1698

Political speech challenge to contribution bans imposed by Connecticut’s Campaign Finance Reform Act (CFRA), which prohibited state contractors, lobbyists, and associated individuals from making campaign contributions to candidates for state office, was subject to closely drawn standard of review, rather than strict scrutiny, even though provisions were bans as opposed to limits. U.S.C.A. Const.Amend. 1; C.G.S.A. §§ 9–610(g), 9–612(g)(2)(A, B).

### 2. Constitutional Law ⇌1698

#### Elections ⇌311

Contribution bans imposed by Connecticut’s Campaign Finance Reform Act (CFRA), which prohibited state contractors and associated individuals from making campaign contributions to candidates for state office, furthered a sufficiently important interest in combatting both actual corruption and the appearance of corruption caused by contractor contributions, as required to survive political speech challenge; ban on contractor contributions was passed in response to a series of scandals in which contractors illegally offered bribes, “kick-backs,” and campaign contributions to state officials in exchange for contracts with the state, which showed that contributions could lead to corruption and created a strong appearance of impropriety in the transfer of any money be-



tween contractors and state officials. U.S.C.A. Const.Amend. 1; C.G.S.A. § 9-612(g)(2).

### 3. Constitutional Law ⇌1479

#### Elections ⇌311

Contribution bans imposed by Connecticut's Campaign Finance Reform Act (CFRA), which prohibited state contractors and prospective contractors from making campaign contributions to candidates for state office, was closely drawn to meet state's interest in combating corruption and appearance of corruption, and thus did not violate the First Amendment; nearly all of the corruption scandals that gave rise to the CFRA involved both current and prospective state contractors offering bribes in exchange for assistance in winning new state contracts. U.S.C.A. Const.Amend. 1; C.G.S.A. § 9-612(g)(2)(A, B).

### 4. Constitutional Law ⇌1479

#### Elections ⇌311

Contribution bans imposed by Connecticut's Campaign Finance Reform Act (CFRA), which prohibited "principals" of state contractors, defined to include, inter alia, any member of the entity's board of directors or an officer or employee thereof, from making campaign contributions to candidates for state office, was closely drawn to meet state's interest in combatting corruption and appearance of corruption, and thus did not violate the First Amendment, in light of troubling episodes involving bribes and "kick-backs" offered by contractors. U.S.C.A. Const.Amend. 1; C.G.S.A. § 9-612(g)(1)(F), (g)(2)(A, B).

### 5. Constitutional Law ⇌1479

#### Elections ⇌311

Contribution bans imposed by Connecticut's Campaign Finance Reform Act (CFRA), which prohibited spouses and children of state contractors from making

campaign contributions to candidates for state office, was closely drawn to meet state's interest in combating corruption and appearance of corruption, and thus did not violate the First Amendment; although there was little direct evidence suggesting that contractors would use their spouses or children to circumvent the CFRA's contribution bands, corruption scandals in Connecticut demonstrated that contractors were willing to resort to varied forms of misconduct to secure contracts with the state. U.S.C.A. Const.Amend. 1; C.G.S.A. § 9-612(g)(1)(F)(v), (g)(1)(G), (g)(2)(A, B).

### 6. Constitutional Law ⇌1479

#### Elections ⇌311

Connecticut's Campaign Finance Reform Act's (CFRA) outright ban on contributions by contractors, prospective contractors, and their principals was closely drawn to state's interest in combatting appearance of corruption, and thus did not violate First Amendment; although a limit, as opposed to a ban, would likely be sufficient to address interest in addressing actual corruption, CFRA was also meant to address appearance of corruption and a limit on contractor contributions would only have partially addressed the perception of such corruption. U.S.C.A. Const. Amend. 1; C.G.S.A. § 9-612(g).

### 7. Constitutional Law ⇌1469, 1698, 1699

A limit on campaign contributions causes some constitutional damage, as it restricts one aspect of the contributor's freedom of political association, but a ban on contributions causes considerably more constitutional damage, as it wholly extinguishes that aspect of the contributor's freedom of political association; a limit, moreover, leaves intact the contributor's right to make the symbolic expression of support evidenced by a contribution, but a ban infringes that constitutional right, as it precludes the "symbolic expression" that

comes with a small contribution. U.S.C.A. Const.Amend. 1.

#### 8. Constitutional Law ⇌1469

##### Elections ⇌311

Outright contribution bans imposed by Connecticut's Campaign Finance Reform Act (CFRA) prohibiting lobbyists and their families from making campaign contributions to candidates for state offices were not closely drawn to any state interest in combatting actual corruption and appearance of corruption, and thus bans violated the First Amendment, since a limit on lobbyist contributions would adequately address the state's interest in combating corruption; although lobbyist contributions could give rise to an appearance of "influence," corruption scandals in Connecticut that may have justified contribution bans relating to state contractors had nothing to do with lobbyists. U.S.C.A. Const.Amend. 1; C.G.S.A. § 9-610(g).

#### 9. Constitutional Law ⇌1698

Unlike laws limiting contributions, which present marginal speech restrictions that lie closer to the edges than to the core of political expression, a limit on the solicitation of otherwise permissible contributions prohibits exactly the kind of expressive activity that lies at the First Amendment's core. U.S.C.A. Const. Amend. 1.

#### 10. Constitutional Law ⇌1681

Speech uttered during a campaign for political office requires the fullest and most urgent application of the protections set forth in the First Amendment. U.S.C.A. Const.Amend. 1.

#### 11. Constitutional Law ⇌1698

Connecticut's Campaign Finance Reform Act (CFRA) provisions banning the solicitation of contributions by contractors, lobbyists, and associated individuals, were

laws that burdened political speech and were, as a result, subject to strict scrutiny, which required government to prove that the restriction furthered a compelling interest and was narrowly tailored to achieve that interest. U.S.C.A. Const.Amend. 1.

#### 12. Constitutional Law ⇌1469

Strict scrutiny does not apply to laws prohibiting the solicitation of illegal campaign contributions, just as strict scrutiny does not apply to laws prohibiting the solicitation of other prohibited activity.

#### 13. Constitutional Law ⇌1505

In order to narrowly tailor a law to address a problem, the government must curtail speech only to the degree necessary to meet the particular problem at hand, and the government must avoid infringing on speech that does not pose the danger that has prompted regulation. U.S.C.A. Const.Amend. 1.

#### 14. Constitutional Law ⇌1050

In order to narrowly tailor a law to address a problem, government must prove that there is no less restrictive alternative to the law in question, for if a less restrictive alternative would serve the government's purpose, the legislature must use that alternative.

#### 15. Constitutional Law ⇌1698

##### Elections ⇌311

Even assuming that the threat that state contractors and lobbyists would bundle campaign contributions made by their clients or employees made state's anti-corruption interest compelling, Connecticut's Campaign Finance Reform Act (CFRA) provisions banning the solicitation of contributions by contractors, lobbyists, and associated individuals, was not narrowly tailored to address the problem, and thus ban violated the First Amendment right to free speech, since ban prohibited a wide range of activity unrelated to bundling,

and there were several less restrictive alternatives that would more directly address the perceived bundling threat; less restrictive alternative to address problem of bundling was to ban only large-scale efforts to solicit contributions or to ban lobbyists from soliciting from their clients and contractors from soliciting contributions from their employees and subcontractors, and state otherwise simply could have banned bundling itself. U.S.C.A. Const.Amend. 1; C.G.S.A. §§ 9-610(h), 9-612(g)(2).

West Codenotes

**Held Unconstitutional**

C.G.S.A. § 9-610(g, h).

**Limited on Constitutional Grounds**

C.G.S.A. § 9-612(g)(2).

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R. Bartley Halloran, Farmington, CT, for plaintiffs-appellants Association of CT Lobbyists and Barry Williams.

Mark J. Lopez, Lewis, Clifton & Nikolaidis, P.C., New York, NY, (Benjamin Sahl, American Civil Liberties Union Foundation, New York, NY, and David J. McGuire, American Civil Liberties Union Foundation, Hartford, CT, on the brief), for the remaining plaintiffs-appellants.

Perry Zinn-Rowthorn (Richard Blumenthal, Attorney General, and Maura Murphy Osborne, Assistant Attorney General, on the brief), Office of the Attorney General of the State of Connecticut, Hartford, CT, for defendants-appellees.

Ira M. Feinberg, Hogan & Hartson LLP, New York, NY, (Monica Y. Youn and Angela Migally, Brennan Center for Justice, NYU School of Law, New York, NY; and David Dunn, Hogan & Hartson LLP,

New York, NY, on the brief), for intervenor-defendants-appellees.

Justin R. Clark and Peter J. Martin, Pepe & Hazard LLP, Hartford, CT, for amicus curiae the Republican Party of Connecticut in support of plaintiffs-appellants.

Before KEARSE, CABRANES, and HALL, Circuit Judges.

JOSE A. CABRANES, Circuit Judge:

This is the second of two opinions in which we consider a constitutional challenge to certain provisions of Connecticut's Campaign Finance Reform Act (CFRA).

As we describe in our first opinion, the CFRA was enacted in 2005 as a comprehensive effort to bring about campaign finance reform in Connecticut. In our first opinion, which we file separately, we consider a challenge to the Citizens Election Program (CEP), a part of the CFRA that provides public funds to candidates running for state office. *See Green Party of Conn. v. Garfield*, 616 F.3d 213, 2010 WL 2737153 (2d Cir.2010). We consider here a challenge to provisions of the CFRA that ban campaign contributions and the solicitation of campaign contributions by state contractors, lobbyists, and their families.

Following cross-motions for summary judgment, the United States District Court for the District of Connecticut (Stefan R. Underhill, *Judge*) determined that each of the challenged provisions was consistent with the First Amendment. *See Green Party of Conn. v. Garfield*, 590 F.Supp.2d 288 (D.Conn.2008) ("*Green Party I*"). We affirm part of that decision, as we hold that the CFRA comports with the First Amendment insofar as it bans contributions by state contractors, "prospective" state contractors, the "principals" of con-

tractors and prospective state contractors,<sup>1</sup> and the spouses and dependent children of those individuals.

We also reverse part of the District Court's decision, as we hold that the CFRA violates the First Amendment insofar as it bans contributions by lobbyists and their families and insofar as it prohibits contractors, lobbyists, and their families from soliciting contributions on behalf of candidates.

### BACKGROUND

We first describe the history of the CFRA. We then outline the challenged provisions and briefly recount the procedural history of this action.

#### I. The History of the CFRA

In our first opinion addressing the CFRA, we summarized the history of the statute:

The CFRA . . . was passed in response to several corruption scandals in Connecticut. [*See Green Party of Conn. v. Garfield*, 648 F.Supp.2d 298, 306–07 (D.Conn.2009) (“*Green Party II*”).] The most widely publicized of the scandals involved Connecticut's former governor, John Rowland. In 2004, Rowland was accused of accepting over \$100,000 worth of gifts and services from state contractors, including vacations, flights on a private jet, and renovations to his lake cottage. Rowland accepted the gifts, it was alleged, in exchange for assisting the contractors in securing lucrative state contracts. Rowland resigned amidst the allegations, and in

2005 pleaded guilty—along with two aides and several contractors—to federal charges in connection with the scandal. Rowland was fined and sentenced to a year and a day in federal prison. *See id.* at 307.

Sadly, the ignominy of public corruption was not limited to Rowland. As the District Court discussed in detail, the “Rowland scandal was but one of the many corruption scandals involving elected officials in state and local government that helped earn the state the nickname ‘Corrupticut.’” *See id.* at 307–08 (cataloging the scandals); *see also id.* at 307 n. 9 (discussing the decline of the reputation of Connecticut's state government).

It was in the wake of those scandals that Connecticut lawmakers resolved to enact “expansive campaign finance reforms.” *Id.* at 309. In the summer of 2005, Governor M. Jodi Rell established the Campaign Finance Reform Working Group (the “Working Group”), a collection of six state representatives and six state senators who were charged with drafting a new campaign finance reform law. After holding televised hearings for three months, the Working Group proposed an expansive bill, much of which would be incorporated into the final version of the CFRA. *See id.* at 309–10.

In the fall of 2005, Governor Rell called a special session of the General Assembly for the sole purpose of considering the Working Group's proposed bill. After a month of debate, the General Assembly passed the CFRA, and Gover-

1. We use the term “principal” in this opinion to mean those individuals and entities defined in Conn. Gen.Stat. § 9–612(g)(1)(F)(i)–(iv), (vi). Although it is included in the statutory definition, we do not use the term “principal” to mean the “spouse” or “dependent child” of a contractor. *See id.* § 9–612(g)(1)(F)(v). We

analyze the CFRA's effect on a contractors' spouses and dependent children separately from the statute's effect on “principals.” The opinion will refer to the “spouses” or the “dependent children” of contractors by using those terms or by using the term “families.”

nor Rell signed it into law. *See id.* at 310–11. As the District Court set forth in detail, several contemporaneous statements from General Assembly members, as well as Governor Rell, explain that the CFRA was passed “to combat actual and perceived corruption in state government.” *Id.* at 311.

*Green Party*, at 218–19, 2010 WL 2737153.

## II. The Challenged Provisions

The CFRA is a broad-ranging and complex statute, and plaintiffs challenge only parts of the law. Put succinctly, the challenged provisions of the CFRA prohibit state contractors and certain lobbyists from (1) making campaign contributions to candidates for state office and (2) soliciting campaign contributions on behalf of candidates for state office. Violations of those prohibitions are punishable by civil penalties and criminal sanctions. *See Conn. Gen.Stat.* §§ 9–610(j), 9–622(8), 9–622(10), 9–623(a).

### A. Contribution Bans

First, the CFRA prohibits state contractors and lobbyists from making campaign contributions to candidates for state office.

2. The prohibition on contributions by dependent children applies only to “a dependent child who is eighteen years of age or older.” *Conn. Gen.Stat.* § 9–612(g)(1)(F)(v).

3. The ban on contractor contributions reads in full:

(A) No state contractor, prospective state contractor, principal of a state contractor or principal of a prospective state contractor, with regard to a state contract or a state contract solicitation with or from a state agency in the executive branch or a quasi-public agency or a holder, or principal of a holder of a valid prequalification certificate, shall make a contribution to, or solicit contributions on behalf of (i) an exploratory committee or candidate committee established by a candidate for nomina-

*See Conn. Gen.Stat.* §§ 9–610(g), 9–612(g)(2)(A)–(B).

The CFRA’s ban on *contractor* contributions applies to any “person, business entity or nonprofit organization that enters into a state contract.” *Id.* § 9–612(g)(1)(D). It also applies to any “prospective” contractor; to any “principal” of a contractor or prospective contractor; and to the “spouse” or “dependent child”<sup>2</sup> of a contractor, a prospective contractor, or a principal of a contractor or prospective contractor. *Id.* § 9–612(g)(2). (We discuss these terms in detail below.)

In addition, the ban on contractor contributions is what might be called “branch specific.” If the contract in question is “with or from a state agency in the executive branch,” the contractor may contribute to a candidate for the General Assembly but not to a candidate for an executive office (*i.e.*, a candidate for “Governor, Lieutenant Governor, Attorney General, State Comptroller, Secretary of the State or State Treasurer”). *Id.* § 9–612(g)(2)(A). If the contract in question is “with or from the General Assembly,” the contractor may contribute to a candidate for an executive office but not to a candidate for the General Assembly. *Id.* § 9–612(g)(2)(B).<sup>3</sup> Nonetheless, any “holder,

tion or election to the office of Governor, Lieutenant Governor, Attorney General, State Comptroller, Secretary of the State or State Treasurer, (ii) a political committee authorized to make contributions or expenditures to or for the benefit of such candidates, or (iii) a party committee[.]

(B) No state contractor, prospective state contractor, principal of a state contractor or principal of a prospective state contractor, with regard to a state contract or a state contract solicitation with or from the General Assembly or a holder, or principal of a holder, of a valid prequalification certificate, shall make a contribution to, or solicit contributions on behalf of (i) an exploratory committee or candidate committee established by a candidate for nomination or election to the office of state senator

or principal of a holder of a valid prequalification certificate,” such a certification being required in order to bid or perform work on certain high-cost, state-funded projects, is precluded from contributing to candidates for either branch of government. *Id.* § 9-612(g)(2)(A)–(B). Further, all individuals and entities covered by the contractor ban are prohibited from contributing to any state or town “[p]arty committee.” *Id.* § 9-601(1)–(2).

The CFRA’s ban on *lobbyist* contributions applies to any “communicator lobbyist,” defined (a) as “someone compensated for lobbying over the threshold amount of \$2,000 in any calendar year,” *Green Party I*, 590 F.Supp.2d at 295 n. 3 (quoting State Elections Enforcement Commission (SEEC) Declaratory Ruling 2006–1, at 2), and (b) as “a lobbyist who communicates directly or solicits others to communicate with an official or his staff in the legislative or executive branch of government or in a quasi-public agency for the purpose of influencing legislative or administrative action,” Conn. Gen.Stat. § 1-91(v). The ban on lobbyist contributions also applies to the “spouse” or “dependent child” of a

communicator lobbyist. *See id.* § 9-610(g) (applying the ban to the “immediate family” of a communicator lobbyist); *id.* § 9-601(24) (defining “[i]mmediate family” as “the spouse or a dependent child of an individual”).<sup>4</sup>

### B. Solicitation Bans

The CFRA also prohibits contractors and lobbyists from “solicit[ing]” campaign contributions “on behalf of” candidates for state office. *See* Conn. Gen.Stat. §§ 9-610(h), 9-612(g)(2)(A)–(B).

Like the CFRA’s ban on contributions, the ban on the solicitation of contributions applies not only to current state contractors, but also to any “prospective” contractor; to any “principal” of a contractor or prospective contractor; and to the “spouse” or “dependent child” of a contractor, a prospective contractor, or a principal of a contractor or prospective contractor. *Id.* § 9-612(g)(2).<sup>5</sup> The solicitation ban also applies to any “communicator lobbyists” and to the “spouse” or “dependent child” of such a lobbyist. *Id.* §§ 9-601(24), 9-610(h).<sup>6</sup>

or state representative, (ii) a political committee authorized to make contributions or expenditures to or for the benefit of such candidates, or (iii) a party committee[.]

Conn. Gen.Stat. § 9-612(g)(2).

4. The ban on lobbyist contributions reads in full:

No communicator lobbyist, member of the immediate family of a communicator lobbyist, or political committee established or controlled by a communicator lobbyist or a member of the immediate family of a communicator lobbyist shall make a contribution or contributions to, or for the benefit of (1) an exploratory committee or a candidate committee established by a candidate for nomination or election to the office of Governor, Lieutenant Governor, Attorney General, State Comptroller, State Treasurer, Secretary of the State, state senator or state representative, (2) a political committee established or controlled by any such candi-

date, (3) a legislative caucus committee or a legislative leadership committee, or (4) a party committee.

Conn. Gen.Stat. § 9-610(g).

5. For the full version of the ban on the solicitation of contributions by contractors, see note 3, *ante*.

6. The ban on the solicitation of contributions by lobbyists reads in full:

No communicator lobbyist, immediate family member of a communicator lobbyist, agent of a communicator lobbyist, or political committee established or controlled by a communicator lobbyist or any such immediate family member or agent shall solicit (1) a contribution on behalf of a candidate committee or an exploratory committee established by a candidate for the office of Governor, Lieutenant Governor, Attorney General, State Comptroller, State Treasur-

The term “solicit” is defined by statute to include, among other things, “requesting that a contribution be made,” “participating in any fund-raising activities for a candidate,” and “bundling contributions” for a candidate. *Id.* § 9-601(26). Excluded from the statutory definition of “solicit” is, among other things, “making a contribution that is otherwise permitted under this chapter” and “informing any person of a position taken by a candidate.” *Id.*<sup>7</sup>

The CFRA is administered and interpreted by a state agency known as the State Elections Enforcement Commission (SEEC). The SEEC has issued a “declaratory ruling” that clarifies the scope of the CFRA’s solicitation ban. According to the SEEC, a contractor or lobbyist may, consistent with the CFRA’s solicitation ban, engage in a number of political activities; for example, a contractor or lobbyist may “[v]olunteer for a . . . candidate’s political campaign,” “[e]xpress support for a candidate,” “[r]un for office,” or “[b]e the spouse or dependent child of someone running for office.” *Green Party I*, 590 F.Supp.2d at 298 (quoting SEEC Declaratory Ruling 2006-1, at 5-6).

er, Secretary of the State, state senator or state representative, a political committee established or controlled by any such candidate, a legislative caucus committee, a legislative leadership committee or a party committee, or (2) the purchase of advertising space in a program for a fund-raising affair sponsored by a town committee, as described in subparagraph (B) of subdivision (10) of section 9-601a.

Conn. Gen.Stat. § 9-610(h).

7. The full statutory definition of “solicit” reads as follows:

“Solicit” means (A) requesting that a contribution be made, (B) participating in any fund-raising activities for a candidate committee, exploratory committee, political committee or party committee, including, but not limited to, forwarding tickets to potential contributors, receiving contributions for transmission to any such commit-

### III. This Action

Plaintiffs-appellants (“plaintiffs”) brought this action in 2006 claiming that certain provisions of the CFRA violated the First and Fourteenth Amendments to the United States Constitution. Plaintiffs also claimed that the challenged provisions violated the Connecticut Constitution.

#### A. The Parties

We described the parties to this action in our first opinion:

Plaintiffs include two minor parties operating in Connecticut: the Green Party of Connecticut and the Libertarian Party of Connecticut. Plaintiffs also include several Connecticut-based lobbyists and state contractors. . . . *See Green Party II*, 648 F.Supp.2d at 302-06; J.A. [No. 09-3760-cv(L)] 49-52 (Compl. ¶¶ 10-17).<sup>8</sup>

Defendants-[appellees] (“defendants”) include Jeffrey Garfield, who is named in his official capacity as the Executive Director and General Counsel of the State Elections Enforcement Commis-

tee or bundling contributions, (C) serving as chairperson, treasurer or deputy treasurer of any such committee, or (D) establishing a political committee for the sole purpose of soliciting or receiving contributions for any committee. “Solicit” does not include (i) making a contribution that is otherwise permitted under this chapter, (ii) informing any person of a position taken by a candidate for public office or a public official, (iii) notifying the person of any activities of, or contact information for, any candidate for public office, or (iv) serving as a member in any party committee or as an officer of such committee that is not otherwise prohibited in this subdivision.

Conn. Gen.Stat. § 9-601(26).

8. Citations to the “Complaint” are to the amended complaint filed by the Green Party of Connecticut and others on September 29, 2006.

sion, and Richard Blumenthal, who is named in his official capacity as the Attorney General of the State of Connecticut. See *Green Party II*, 648 F.Supp.2d at 306; J.A. [No. 09-3760-cv(L)] 52 (Compl.¶¶ 18-19).

The parties in this action also include several individuals and entities who successfully moved to intervene as defendants. The intervenor-defendants-[appellees] include three former major-party candidates for state office and two advocacy groups: Connecticut Common Cause and Connecticut Citizens Action Group. See *Green Party II*, 648 F.Supp.2d at 306. The intervenor-defendants defend the constitutionality of the [challenged provisions of the CFRA].

*Green Party*, at 222-23, 2010 WL 2737153.

### B. The Claims

We also described plaintiffs' claims in our first opinion:

Plaintiffs have organized their claims into five counts.<sup>9</sup> In Count One, plaintiffs claim that the CEP's qualification criteria and distribution formulae, Conn. Gen.Stat. §§ 9-702(b), 704-05, violate the First Amendment and the Equal Protection Clause of the Fourteenth Amendment by invidiously "discriminat[ing]" against minor parties and their candidates. See J.A. 66 [No. 09-3760-cv(L)] (Compl.¶ 53). In Counts Two and Three, plaintiffs assert First Amendment challenges to the CEP's excess expenditure provision, Conn. Gen.Stat. § 9-713 (Count Two), and the CEP's

independent expenditure provision, *id.* § 9-714 (Count Three). See J.A. [No. 09-3760-cv(L)] 66-67 (Compl.¶¶ 54-55).

In Counts Four and Five, plaintiffs assert First Amendment challenges to aspects of the CFRA that do *not* involve the CEP. In Count Four, plaintiffs challenge the CFRA's bans on contributions (and the solicitation of contributions) by registered lobbyists, state contractors, and their families. Conn. Gen.Stat. §§ 9-610(g)-(h), 9-612(g). In Count Five, plaintiffs challenge disclosure requirements imposed by the CFRA on state contractors. *Id.* § 9-612(h)(2); see J.A. [No. 09-3760-cv(L)] 67 (Compl.¶¶ 56-57).

*Green Party*, at 223, 2010 WL 2737153.

Our first opinion addresses Counts One, Two, and Three. This opinion addresses Count Four. Plaintiffs have not pursued Count Five in these appeals; thus we do not address it.

### C. Proceedings in the District Court

The District Court disposed of plaintiffs' claims by means of two separate judgments. First, following cross-motions for summary judgment, the Court granted summary judgment to defendants on Count Four, holding that the CFRA's contribution and solicitation bans did not violate the First Amendment. See *Green Party I*, 590 F.Supp.2d 288. The Court evaluated each of the challenged provisions under the so-called "closely drawn" standard, see *Fed. Election Comm'n v. Beau-*

9. As we noted in our first opinion, there are two operative complaints in this action: (1) an "amended complaint" filed by the Green Party of Connecticut and others on September 29, 2006, and (2) a "second amended complaint" filed by the Association of Connecticut Lobbyists and Barry Williams on January 16, 2007. In discussing the various

"counts" asserted by plaintiffs, we refer to the counts contained in the complaint filed by the Green Party on September 29, 2006. See note 8, *ante*. Count Four of the Green Party's complaint is, for all relevant purposes, identical to the claims raised in the complaint filed by the Association of Connecticut Lobbyists.



mont, 539 U.S. 146, 162, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003), and held that in light of Connecticut's recent corruption scandals, each aspect of the contribution and solicitation bans was "closely drawn to the state's sufficiently important state interest of preventing actual and perceived corruption," *Green Party I*, 590 F.Supp.2d at 294.

On February 11, 2009, the District Court entered a partial final judgment for defendants with respect to Count Four. See Fed.R.Civ.P. 54(b). Plaintiffs filed a timely appeal of that partial final judgment, which we address in this opinion.

The Court then held a bench trial and, on September 2, 2009, entered a judgment in plaintiffs' favor with respect to Counts One, Two, and Three. See *Green Party of Conn. v. Garfield* ("*Green Party II*"), 648 F.Supp.2d 298 (D.Conn.2009). Defendants filed a timely appeal of the District Court's September 2, 2009 judgment (2d Cir. Docket No. 09-3760-cv(L)), which we address in our first, separately filed opinion.

## DISCUSSION

We conduct a *de novo* review of a District Court's decision to grant summary judgment. See, e.g., *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir.2005). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R.Civ.P. 56(c)(2).

### I. The CFRA's Contribution Bans

We first consider whether the provisions of the CFRA that prohibit state contractors, lobbyists, and associated individuals from making campaign contributions to candidates for state office violate the First Amendment.

#### A. The Standard for Evaluating the CFRA's Contribution Bans

In a long line of cases beginning with *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court has distinguished laws restricting campaign expenditures and campaign-related speech from laws restricting campaign contributions. The Court has determined that laws limiting campaign expenditures and campaign-related speech "impose significantly more severe restrictions on protected freedoms of political expression and association than do" laws limiting campaign contributions. *Id.* at 23, 96 S.Ct. 612. As a result, the Court has evaluated laws limiting campaign expenditures and campaign-related speech under the "strict scrutiny" standard, which "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. Fed. Election Comm'n*, — U.S. —, —, 130 S.Ct. 876, 898, — L.Ed.2d —, — (2010) (quotation marks omitted).

For laws limiting campaign contributions, by contrast, the Court has conducted a "relatively complaisant review under the First Amendment." *Beaumont*, 539 U.S. at 161, 123 S.Ct. 2200. Such laws, the Court has concluded, are "merely 'marginal' speech restrictions," since contributions "lie closer to the edges than to the core of political expression." *Id.* Thus, "instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest," a law limiting contributions "passes muster if it satisfies the lesser demand of being 'closely drawn' to match a 'sufficiently important interest.'" *Id.* at 162, 123 S.Ct. 2200 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000)) (some quotation marks omitted);

see also *Buckley*, 424 U.S. at 25, 96 S.Ct. 612.

The Court has always applied that lower standard—often referred to as the “closely drawn” standard—to evaluate First Amendment challenges to laws restricting campaign contributions. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 253, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (plurality opinion); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 138 n. 40, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), *overruled in part on other grounds by Citizens United*, 130 S.Ct. at 913; *Beaumont*, 539 U.S. at 161, 123 S.Ct. 2200. The Court has applied the closely drawn standard even when the law in question imposed an outright *ban* on contributions. In *Beaumont*, for instance, the Court applied the closely drawn standard in upholding a federal law that banned all campaign contributions made by corporations. See *id.* at 149, 161–62, 123 S.Ct. 2200.

Although the Court’s campaign-finance jurisprudence may be in a state of flux (especially with regard to campaign-finance laws regulating corporations), *Beaumont* and other cases applying the closely drawn standard to contribution limits remain good law. Indeed, in the recent *Citizens United* case, the Court overruled two of its precedents and struck down a federal law banning independent campaign *expenditures* by corporations, but it explicitly declined to reconsider its precedents involving campaign *contributions* by corporations to candidates for elected office. See 130 S.Ct. at 909 (“*Citizens United* has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.”).

[1] We will, therefore, evaluate the contribution bans imposed by the CFRA under the closely drawn standard. We

will uphold the statutory bans against plaintiffs’ First Amendment challenge only if they are closely drawn to achieve a “sufficiently important” government interest. *Beaumont*, 539 U.S. at 162, 123 S.Ct. 2200 (quotation marks omitted).

In so doing, we reject plaintiffs’ argument that we must apply strict scrutiny because the provisions at issue here are *bans*, as opposed to mere *limits*. Such an argument was explicitly rejected in *Beaumont* (which, as discussed above, remains binding precedent). See *id.* As *Beaumont* concisely explained: “It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself.” *Id.* Accordingly, the closely drawn standard applies to the bans on contributions imposed by the CFRA. As we discuss in greater detail below, however, the fact that the provisions impose outright bans—and not limits—on contributions is a factor we will consider when we “apply [ ] scrutiny at the level selected” and determine whether the provisions are, in fact, closely drawn to achieve the state’s interests. *Id.*

## B. The Ban on Contributions by Contractors and Associated Individuals

In assessing the CFRA’s ban on contributions by *contractors* and associated individuals, we first determine whether the ban furthers a “sufficiently important” interest; we then determine whether the ban is closely drawn to achieve that interest. See *Beaumont*, 539 U.S. at 162, 123 S.Ct. 2200

### 1. Do the Bans on Contractor Contributions Further a “Sufficiently Important” Interest?

[2] As set forth above, the Connecticut General Assembly enacted the CFRA’s

ban on contractor contributions in response to a series of scandals in which contractors illegally offered bribes, “kick-backs,” and campaign contributions to state officials in exchange for contracts with the state. The ban was designed to combat both actual corruption and the appearance of corruption caused by contractor contributions. See *Green Party I*, 590 F.Supp.2d at 303.

Such an “anticorruption” interest, see *Citizens United*, 130 S.Ct. at 903, 130 S.Ct. 876, has been recognized as a legitimate reason to restrict campaign contributions. Beginning with *Buckley*, the Supreme Court has repeatedly held that laws limiting campaign contributions can be justified by the government’s interest in addressing both the “actuality” and the “appearance” of corruption. 424 U.S. at 26, 96 S.Ct. 612; accord *McConnell*, 540 U.S. at 143, 124 S.Ct. 619 (“Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits.”).

The record before us, moreover, shows that the General Assembly had good reason to be concerned about both the “actuality” and the “appearance” of corruption involving contractors. Connecticut’s recent corruption scandals showed that contributions by contractors could lead to corruption. And it took no great leap of reasoning to infer that those scandals created a strong *appearance* of impropriety in the transfer of any money between contractors and state officials—whether or not the transfer involved an illegal *quid pro quo*. The scandals reached the highest state offices, leading to the resignation and eventual criminal conviction and imprisonment of the state’s governor. They were, as a result, covered extensively by local media and garnered the attention of national media outlets as well. See *Green*

*Party II*, 648 F.Supp.2d at 307 n. 9 (providing examples of newspaper articles covering Connecticut’s corruption scandals). Thus, corruption spurred by state contractors became a salient political issue in Connecticut, and there arose an appearance of impropriety with respect to all contractor contributions. See *Meadow Decl.* ¶ 30 (May 24, 2007) (describing a public opinion poll in which 76% of Connecticut voters believed that “campaign contributions Governor Rowland received influenced him in awarding government contracts”).

Accordingly, we conclude that the CFRA’s ban on contractor contributions furthers “sufficiently important” government interests. See *Beaumont*, 539 U.S. at 162, 123 S.Ct. 2200. There is sufficient evidence in the record of actual corruption stemming from contractor contributions, and in light of the widespread media coverage of Connecticut’s recent corruption scandals, the General Assembly also faced a manifest need to curtail the appearance of corruption created by contractor contributions.

## 2. Are the Bans on Contractor Contributions “Closely Drawn” to Achieve the State’s Interest?

The more difficult question, however, is whether each aspect of the CFRA’s ban on contractor contributions is closely drawn to achieve the state’s anticorruption interest. See *Beaumont*, 539 U.S. at 162, 123 S.Ct. 2200. We first describe the standard for determining whether a statute is closely drawn to achieve the state’s interest, and we then apply that standard to the provisions of the CFRA banning contributions of state contractors, prospective state contractors, principals of state contractors, and the spouses and dependent children of state contractors.

**a. The Standard for Determining Whether a Statute is “Closely Drawn”**

On only one occasion has the Supreme Court held that a contribution limit was not closely drawn to the government’s interests. In *Randall v. Sorrell*, the Supreme Court applied a multifactor test and struck down a Vermont law that limited the amount of money that any single individual could contribute to a campaign for state office. See 548 U.S. at 253–62, 126 S.Ct. 2479. A plurality of the Court found the law “too restrictive” because, among other things, its limits were so low that they “prevent[ed] candidates from ‘amassing the resources necessary for effective [campaign] advocacy.’” *Id.* at 248, 253, 126 S.Ct. 2479 (quoting *Buckley*, 424 U.S. at 21, 96 S.Ct. 612) (second alteration in *Randall*).

The District Court relied extensively on *Randall*’s multifactor test in determining whether the CFRA’s contribution bans were “closely drawn” to the asserted government interests. See *Green Party I*, 590 F.Supp.2d at 309–16. We disagree with that approach. *Randall* addressed general contribution limits that applied to all citizens. The law in *Randall*, for instance, prohibited any Vermont resident from contributing more than \$400 to a candidate for governor. See 548 U.S. at 238, 126 S.Ct. 2479. Thus *Randall*’s multifactor test was concerned primarily with the effect the contribution limits would have on the electoral system as a whole. See, e.g., *id.* at 248–49, 126 S.Ct. 2479 (“[C]ontribution limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.” (emphasis added)).

Here, however, plaintiffs are not challenging the provisions of the CFRA that impose general contribution limits on all

Connecticut citizens. See generally Conn. Gen.Stat. § 9–611 (imposing, for instance, a limit of \$3500 on any individual’s contributions to a gubernatorial campaign). Rather, plaintiffs are challenging the provisions of the CFRA that impose contribution bans on discrete groups of Connecticut citizens. And unlike the situation in *Randall*, there is no serious argument here that the challenged contribution bans will harm the electoral process by stifling candidates’ ability to raise sufficient campaign funds. See 548 U.S. at 248–49, 126 S.Ct. 2479. Indeed, contributions by contractors and lobbyists have, in the past, made up only a small fraction of the total amount of money given as campaign contributions in Connecticut. See *Green Party I*, 590 F.Supp.2d at 316.

Accordingly, the First Amendment inquiry in this case does not focus on the electoral process, for the issue is not—as it was in *Randall*—whether the law in question “prevent[s] candidates from ‘amassing the resources necessary for effective [campaign] advocacy.’” *Randall*, 548 U.S. at 248, 126 S.Ct. 2479 (quoting *Buckley*, 424 U.S. at 21, 96 S.Ct. 612) (second alteration in *Randall*). We will not, therefore, look to *Randall*’s multifactor test as a means of evaluating whether the CFRA’s ban on contributions is closely drawn to the state’s interests.

The issue, instead, is whether the CFRA’s contribution bans impermissibly infringe the First Amendment rights of the discrete groups of citizens it regulates—contractors, lobbyists, and associated individuals. To address that issue, we are required to examine how the CFRA applies to the different groups of individuals it regulates and determine, in each case, whether the law is closely drawn to the state’s interest in combating corruption and the appearance of corruption.

The CFRA’s ban on contractor contributions, in particular, applies not only to

individuals who currently have contracts with the state, but also to “prospective” state contractors who seek (but do not currently have) state contracts. *See* Conn. Gen.Stat. § 9-612(g)(1)(E), (2)(A)-(B). It also applies to any “principal” of an entity that has (or is seeking) contracts with the state, *see id.* § 9-612(g)(1)(F), (2)(A)-(B), and it applies to any “spouse” or “dependent child” of a covered individual, *see id.* § 9-612(g)(1)(F)(v), (1)(G), (2)(A)-(B). To survive First Amendment scrutiny, the CFRA’s contractor contribution bans must be “closely drawn” to the state’s anticorruption interest with respect to each of those groups of individuals.

#### b. Current and “Prospective” Contractors

[3] The CFRA applies to contributions made by any current state contractor, as well as any “prospective state contractor,” *id.* § 9-612(g)(2)(A)-(B), which is defined to include, in essence, any individual or entity that “submits a response” to a call for bids on state contracts, *see id.* § 9-612(g)(1)(E). That aspect of the CFRA is, without question, “closely drawn” to meet the state’s interest in combating corruption and the appearance of corruption. It is undisputed that nearly all of the corruption scandals that gave rise to the CFRA—including the scandal involving

Governor Rowland—involved both current and prospective state contractors offering bribes in exchange for assistance in winning new state contracts. *See Green Party I*, 590 F.Supp.2d at 304-06. Contributions by current and prospective state contractors, therefore, lie at the heart of the corruption problem in Connecticut.

Thus, insofar as it applies to campaign contributions made by both current and prospective state contractors, *see* Conn. Gen.Stat. § 9-612(g)(1)(D)-(E), (2)(A)-(B), the CFRA is closely drawn and survives First Amendment scrutiny.

#### c. “Principals” of Contractors

[4] If an artificial entity, rather than an individual, is awarded (or seeks) a state contract, the CFRA bans contributions made by any “principal” of that entity.<sup>10</sup> *See id.* § 9-612(g)(1)(F), (2)(A)-(B). A “principal” is defined to include, among other things, (1) any member of the entity’s board of directors,<sup>11</sup> (2) any “individual” who “has an ownership interest of five per cent or more” in the entity, (3) the “president, treasurer or executive vice president” of the entity,<sup>12</sup> and (4) any “officer” or “employee” of either a business entity or a nonprofit organization who “has managerial or discretionary responsibilities with respect to a state contract.”<sup>13</sup>

The definition of “principal” sweeps broadly and prevents a wide range of indi-

10. We note that many state contractors are likely artificial entities, so the provisions governing the behavior of “principals” of contractors are particularly important.

11. Although in most cases, the CFRA applies equally to for-profit and nonprofit organizations, the definition of “principal” does not include “an individual who is a member of the board of directors of a nonprofit organization.” Conn. Gen.Stat. § 9-612(g)(1)(F)(i).

12. If the entity is “not a business entity,” the CFRA applies to the “chief executive officer” of the entity or “the officer who duly possess-

es comparable powers and duties.” Conn. Gen.Stat. § 9-612(g)(1)(F)(iii).

13. “Principal” is also defined to include the “spouse” or “dependent child” of a contractor. *See* Conn. Gen.Stat. § 9-612(g)(1)(F)(v). We discuss that aspect of the definition separately. *See* note 1, *ante*.

“Principal” is also defined to include “a political committee established or controlled by an individual described in [subparagraph (F)] or the business entity or nonprofit organization that is the state contractor or prospective state contractor.” *See* Conn. Gen.Stat. § 9-612(g)(1)(F)(vi).

viduals from contributing to campaigns for state office. We have some doubts, therefore, as to whether the provision is indeed closely drawn to achieve the state's anti-corruption interest.

Nonetheless, we are mindful of the teachings of the Supreme Court that we, as judges, cannot consider each possible permutation of a law limiting contributions, and thus we "cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives." *Randall*, 548 U.S. at 248, 126 S.Ct. 2479. Moreover, in light of the troubling episodes involving state contractors in Connecticut's recent history, we are reluctant to second-guess the judgment of the General Assembly when it defines which individuals associated with an artificial entity are likely to attempt to exert improper influence over a state official.

We will, therefore, follow the "ordinar[y]" approach in evaluating the ban on principal contributions and "defer[] to the legislature's determination of such matters." *Id.* The ban on principals' contributions strikes us as bordering on overboard, but the record shows that the dangers of corruption associated with contractor contributions are so significant in Connecticut that the General Assembly should be afforded leeway in its efforts to curb contractors' influence on state lawmakers.

We thus conclude that, insofar as it applies to campaign contributions made by "principals" of state contractors or prospective state contractors, *see* Conn. Gen. Stat. § 9-612(g)(1)(F), (2)(A)-(B), the CFRA is closely drawn and withstands First Amendment scrutiny.

**d. Spouses and Children of Contractors**

[5] The CFRA not only bans contributions by contractors, prospective contrac-

tors, and the principal of any contractor or prospective contractor; it also bans contributions by the "spouse" or "dependent child" of any of those covered individuals. *See* Conn. Gen.Stat. § 9-612(g)(1)(F)(v), (1)(G), (2)(A)-(B). Defendants do not attempt to justify the ban on family-member contributions by arguing that a contractor's family members will themselves attempt to exert improper influence over a state official. *See* Appellees' Br. 80-83, 98. That is for good reason, as there is no record evidence to suggest that the spouses or dependent children of state contractors have been in any way involved in Connecticut's recent corruption scandals (or, for that matter, any other corruption scandals of which the parties have made us aware). Rather, defendants attempt to justify the ban on family-member contributions by arguing that it is a "reasonable measure to avoid circumvention of the prohibition of contributions by [contractors]." *Id.* at 80. That is, defendants argue that contractors and other covered individuals will avoid the CFRA's ban on contractor contributions by siphoning their improper contributions through their spouses and children.

The Supreme Court has recognized that, in regulating campaign contributions, the legislature must be given "room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137, 124 S.Ct. 619; *see also* *Beaumont*, 539 U.S. at 155, 123 S.Ct. 2200. Nonetheless, the Court has struck down so-called anti-circumvention provisions where the government has put forward only "scant evidence" of a particular "form of evasion." *McConnell*, 540 U.S. at 232, 124 S.Ct. 619.

Here, the record in support of the ban on contributions by contractors' spouses

and dependent children is by no means overwhelming. There is little direct evidence suggesting that contractors will use their spouses or children to circumvent the CFRA's contribution bans. Nevertheless, the recent corruption scandals in Connecticut have shown that contractors are willing to resort to varied forms of misconduct to secure contracts with the state. That, we think, is far more than the "scant evidence" required by *McConnell*. See *id.*

In light of the recent corruption scandals, therefore, the General Assembly must be given "room to anticipate and respond to concerns about" the "circumvention" of the bans on contractor contributions. *Id.* at 137, 124 S.Ct. 619. Indeed, were we to affirm the ban on contributions by contractors but strike down the ban on contributions by their family members, we would invite the very circumvention that the General Assembly was trying to prevent.

Thus, we conclude that the CFRA's ban on contributions by contractors' spouses and dependent children, see Conn. Gen. Stat. § 9-612(g)(1)(F)(v), (1)(G), (2)(A)-(B), is "closely drawn" to avoid the circumvention of the ban on contractor contributions.

**e. A "Ban" as Opposed to a "Limit"**

[6] Finally, we consider the fact that the CFRA imposes an outright ban—not a mere limit—on contributions made by contractors, prospective contractors, and their principals. That fact, as discussed above, does not require us to review the law under the strict scrutiny standard. But we must nevertheless determine whether an outright ban on contractor contributions is closely drawn to the state's anti-corruption interest. See *Beaumont*, 539 U.S. at 162, 123 S.Ct. 2200 ("It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the

level selected, not in selecting the standard of review itself.").

The majority of campaign laws reviewed by the Supreme Court—and other courts—have involved *limits* on contributions, not bans. See, e.g., *Randall*, 548 U.S. at 246, 126 S.Ct. 2479; *Nixon*, 528 U.S. at 381, 120 S.Ct. 897; *Cal. Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182, 184, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981); *Buckley*, 424 U.S. at 13, 96 S.Ct. 612. The Court has, however, upheld the longstanding federal "ban on direct corporate contributions." *Beaumont*, 539 U.S. at 154, 123 S.Ct. 2200. That is enough to demonstrate that laws banning contributions by a discrete group are not unconstitutional *per se*.

[7] Yet a ban is a drastic measure. A limit on contributions causes some constitutional damage, as it "restrict[s] 'one aspect of the contributor's freedom of political association.'" *Randall*, 548 U.S. at 246, 126 S.Ct. 2479 (quoting *Buckley*, 424 U.S. at 24-25, 96 S.Ct. 612) (emphasis added). But a ban on contributions causes considerably more constitutional damage, as it wholly *extinguishes* that "aspect of the contributor's freedom of political association." A limit, moreover, leaves intact the contributor's right to make "the symbolic expression of support evidenced by a contribution." *Id.* at 247, 126 S.Ct. 2479 (quoting *Buckley*, 424 U.S. at 21, 96 S.Ct. 612). But a ban infringes that constitutional right, as it precludes the "symbolic expression" that comes with a small contribution.

There are, therefore, undoubtedly many situations in which a strict contribution limit—as opposed to an outright contribution ban—will adequately achieve the government's objectives. In those situations it will be difficult for the government to establish that a contribution ban is "closely drawn" to its asserted interests. Instead,

such a ban risks being struck down as unconstitutionally overbroad.

Here, for example, a limit—as opposed to a ban—would likely be sufficient to address the General Assembly’s interest in addressing *actual* corruption. If, for example, the CFRA were to allow contractors to make small contributions (say, \$50 per election) to state officials, it is unlikely that a contractor could exert any influence over an official with the promise of such a modest sum. Yet such a limit would not wholly extinguish a contractor’s associational rights, and it would allow the contractor to make “the symbolic expression of support evidenced by a contribution.” *Id.* at 247, 126 S.Ct. 2479 (quoting *Buckley*, 424 U.S. at 21, 96 S.Ct. 612). Thus, if the state’s only interest in this case were combating *actual* corruption, the CFRA’s outright ban on contractor contributions would likely be held overbroad.

Combating *actual* corruption, however, is not the state’s only interest here; the CFRA is also meant to address the *appearance* of corruption caused by contractor contributions. *See Green Party I*, 590 F.Supp.2d at 303. As discussed above, Connecticut’s recent corruption scandals were widely publicized, and corruption involving state contractors became a major political issue in Connecticut in recent years. *See* subsection I.B.1, *ante*. A limit on contractor contributions would have partially addressed the perception of corruption created by those incidents, but such a limit still would have allowed some money to flow from contractors to state officials. Even if small contractor contributions would have been unlikely to influence state officials, those contributions could have still given rise to the appearance that contractors are able to exert improper influence on state officials.

The CFRA’s *ban* on contractor contributions, by contrast, unequivocally addresses

the perception of corruption brought about by Connecticut’s recent scandals. By totally shutting off the flow of money from contractors to state officials, it eliminates any notion that contractors can influence state officials by donating to their campaigns. Thus, although the CFRA’s ban on contractor contributions is a drastic measure, it is an appropriate response to a specific series of incidents that have created a strong appearance of corruption with respect to all contractor contributions.

We hold, as a result, that in light of Connecticut’s recent experience with corruption scandals involving state contractors, the CFRA’s imposition of an outright ban on contributions by contractors, prospective contractors, and their principals, *see* Conn. Gen.Stat. § 9–612(g), is closely drawn to the state’s interest in combating the appearance of corruption.

### C. The Ban on Contributions by Lobbyists and Their Families

The CFRA’s ban on contributions by lobbyists presents markedly different considerations than the CFRA’s ban on contributions by contractors. The distinction centers on the fact that the recent corruption scandals in Connecticut in no way involved lobbyists. *See, e.g., Green Party I*, 590 F.Supp.2d at 321 (“[L]obbyists ha[ve] not been directly linked to the pay-to-play scandals, which primarily involved *state contractors* offering bribes in exchange for preferential treatment . . . .” (emphasis added)).

As a restriction on campaign contributions, not campaign *expenditures*, we review the CFRA’s ban on lobbyists contributions under the closely drawn standard. *See Beaumont*, 539 U.S. at 162, 123 S.Ct. 2200; subsection I.A, *ante*. We will uphold the ban against plaintiffs’ First Amendment challenge only if it is closely drawn to achieve sufficiently important



government interests. *Beaumont*, 539 U.S. at 162, 123 S.Ct. 2200.

[8] Defendants seek to justify the ban on lobbyist contributions as necessary to combat both actual corruption and the appearance of corruption. We decline to decide whether those interests are sufficiently important in this context, *see id.*, for “[e]ven assuming, *arguendo*, the Government advances an important interest,” *McConnell*, 540 U.S. at 232, 124 S.Ct. 619, the CFRA’s ban on lobbyist contributions is not closely drawn to the asserted interests.

As set forth above, *see* subsection I.B.2.e, *ante*, an outright ban on contributions is a drastic measure that substantially infringes “one aspect of the contributor’s freedom of political association.” *Randall*, 548 U.S. at 246, 126 S.Ct. 2479 (quoting *Buckley*, 424 U.S. at 24–25, 96 S.Ct. 612). As opposed to a contribution *limit*, which merely restricts those First Amendment freedoms, *see id.*, a contribution ban utterly eliminates an individual’s right to express his or her support for a candidate by contributing money to the candidate’s cause. Indeed, a contribution ban cuts off even the “symbolic expression of support evidenced by” a small contribution. *Id.* at 247, 126 S.Ct. 2479 (quoting *Buckley*, 424 U.S. at 21, 96 S.Ct. 612). Thus, if the state’s interests in this case can be achieved by means of a *limit* on lobbyist contributions, rather than a ban, the ban should be struck down for failing “to avoid unnecessary abridgment of associational freedoms,” *Buckley*, 424 U.S. at 25, 96 S.Ct. 612.<sup>14</sup>

14. We reiterate that we are *not* applying strict scrutiny, and thus we acknowledge that the ban on lobbyist contributions need not be narrowly tailored to achieve the state’s anticorruption interest. Nonetheless, the ban must be closely drawn to the state’s interest, a

We have upheld the CFRA’s ban on *contractor* contributions because the recent corruption scandals in Connecticut have created an appearance of corruption with respect to *all* exchanges of money between state contractors and candidates for state office. We have held that an outright ban on contractor contributions was justified (*i.e.*, closely drawn to meet the state’s anticorruption interest) because even a severe limit on contractor contributions would allow a small flow of contributions between contractors and candidates and would, as a result, likely give rise to an appearance of corruption.

The situation is different with lobbyists. The recent corruption scandals had nothing to do with lobbyists, *see Green Party I*, 590 F.Supp.2d at 321, and thus there is insufficient evidence to infer that *all* contributions made by state lobbyists give rise to an appearance of corruption. Plaintiffs have submitted some evidence suggesting that many members of the public generally distrust lobbyists and the “special attention” they are believed to receive from elected officials. *See, e.g.*, Meadow Decl. ¶¶ 13–14, 26. But as the Supreme Court has recently clarified, the anticorruption interest recognized by *Buckley* and other cases is “limited to *quid pro quo* corruption” and does not encompass efforts to limit “[f]avoritism and influence” or the “appearance of influence or access.” *Citizens United*, 130 S.Ct. at 909–10 (quotation marks omitted). “The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt,” and favoritism and influence are “[un]avoidable in representative politics.” *Id.* at 910 (quotation marks

standard that requires some measure of tailoring. In this context, if a contribution limit would suffice where a ban has been enacted, the ban is not closely drawn to the state’s interests.

omitted). Influence and access, moreover, are not sinister in nature. Some influence, such as wise counsel from a trusted advisor—even if that advisor is a lobbyist—can enhance the effectiveness of our representative government.

Accordingly, there is insufficient evidence to demonstrate that all lobbyist contributions give rise to an appearance of corruption, and the evidence demonstrating that lobbyist contributions give rise to an appearance of “influence,” *see, e.g.*, Meadow Decl. ¶26, has no bearing on whether the CFRA’s ban on lobbyist contributions is closely drawn to the state’s anticorruption interest. We conclude, as a result, that on this record, a *limit* on lobbyist contributions would adequately address the state’s interest in combating corruption and the appearance of corruption on the part of lobbyists.<sup>15</sup> The CFRA’s *ban* on lobbyist contributions, therefore, is *not* closely drawn to achieve the state’s anticorruption interest. Thus, we hold that the CFRA’s ban on lobbyist contributions, Conn. Gen.Stat. § 9–610(g), violates the First Amendment.<sup>16</sup>

## II. The CFRA’s Solicitation Bans

As set forth above, the CFRA prohibits contractors and lobbyists from “solicit[ing]” contributions “on behalf of” candidates for state office. *See* Conn. Gen.Stat. §§ 9–610(h), 9–612(g)(2). That prohibition applies to current state contractors, prospective state contractors, and the principals of current and prospective state contractors, as well as to the spouses and dependent children of covered lobbyists

and contractors. *See id.* §§ 9–601(24), 9–610(h), 9–612(g)(1)(F), (2).

[9, 10] Unlike laws limiting contributions, which present “marginal speech restrictions” that “lie closer to the edges than to the core of political expression,” *Beaumont*, 539 U.S. at 161, 123 S.Ct. 2200 (quotation marks omitted), a limit on the solicitation of otherwise permissible contributions prohibits exactly the kind of expressive activity that lies at the First Amendment’s “core.” That is because the solicitation of contributions involves *speech*—to solicit contributions on behalf of a candidate is to make a statement: “You should support this candidate, not only at the polls but with a financial contribution.” Whatever may be said about whether money is speech, *see, e.g., Davis v. Fed. Election Comm’n*, — U.S. —, — — — n. 3, 128 S.Ct. 2759, 2778–79 n. 3, 171 L.Ed.2d 737 (2008) (Stevens, J., dissenting in part), *speech* is speech, even if it is speech about money, *see, e.g., Bates v. State Bar of Ariz.*, 433 U.S. 350, 363, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (“[O]ur cases long have protected speech even though it is . . . in the form of a solicitation to pay or contribute money. . . .”). Speech “‘uttered during a campaign for political office,’” moreover, requires the “‘fullest and most urgent application’” of the protections set forth in the First Amendment. *Citizens United*, 130 S.Ct. at 898, 130 S.Ct. 876 (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989)) (quotation marks omitted).

15. Again we emphasize that the recent corruption scandals in Connecticut in no way implicated lobbyists. *See Green Party I*, 590 F.Supp.2d at 321.

16. The CFRA’s ban on contributions by a lobbyist’s spouse or dependent children, a meas-

ure intended to prevent lobbyists from circumventing the contribution ban, is likewise *not* closely drawn to achieve the state’s anticorruption interest. On this record, therefore, it too violates the First Amendment.

[11, 12] Thus, the CFRA's provisions banning the solicitation of contributions are "[l]aws that burden political speech" and are, as a result, "'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* (quoting *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (Opinion of Roberts, C.J.)).<sup>17</sup>

The state attempts to justify the CFRA's solicitation bans, like the CFRA's contribution bans, as a means to combat corruption and the appearance of corruption. Although the anticorruption interest has been held sufficiently important to justify restrictions on contributions, *see, e.g., McConnell*, 540 U.S. at 143, 124 S.Ct. 619; *Buckley*, 424 U.S. at 25–26, 96 S.Ct. 612, in reviewing limits on campaign expenditures under the strict scrutiny standard, the Supreme Court has consistently held that the anticorruption interest is not a compelling government interest, *see, e.g., Citizens*

*United*, 130 S.Ct. at 908–09 (striking down a restriction on corporate independent expenditures); *Buckley*, 424 U.S. at 45, 96 S.Ct. 612 (striking down a different restriction on independent expenditures).

As we observed above, moreover, "[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." *Citizens United*, 130 S.Ct. at 909, 130 S.Ct. 876. It is easy to see how a "large contribution[]" can be "given to secure a political *quid pro quo* from current and potential office holders." *Buckley*, 424 U.S. at 26, 96 S.Ct. 612. That is the "hallmark" of corruption: "dollars for political favors." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). It is far more difficult to see how an individual might secure a political favor by *recommending* that *another person* make a campaign contribution, if for no other reason

17. We recognize that *McConnell* declined an invitation to apply strict scrutiny to certain provisions of federal law that banned the solicitation of contributions. *See* 540 U.S. at 138–40, 124 S.Ct. 619. As the District Court in this case concisely explained, however, the *McConnell* solicitation provisions largely "barred the solicitation of contributions that the potential donor would have been prohibited from making in the first place." *Green Party I*, 590 F.Supp.2d at 339 (citing *McConnell*, 540 U.S. at 138, 124 S.Ct. 619). Strict scrutiny certainly does not apply to laws prohibiting the solicitation of *illegal* contributions, just as strict scrutiny does not apply to laws prohibiting the solicitation of other prohibited activity. *See, e.g., United States v. Williams*, 553 U.S. 285, 297, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection.").

Here, however, the CFRA's solicitation bans prohibit contractors and lobbyists from soliciting contributions that are otherwise *legal* for the contributors to make. Such provi-

sions are categorically different from most of the provisions at issue in *McConnell*, a point the state "concede[d]" to the District Court. *See Green Party I*, 590 F.Supp.2d at 339. Many of the solicitation provisions in *McConnell* took the ordinary step of banning the solicitation of contributions that were already prohibited; thus strict scrutiny was plainly inapplicable. The CFRA, by contrast, takes the extraordinary step of banning the solicitation of contributions that are *not* otherwise prohibited; that is a burden on political speech requiring the application of strict scrutiny.

In any event, to the extent that a few of the provisions in *McConnell* banned the solicitation of otherwise legal contributions, *McConnell* is distinguishable: the extreme breadth of the CFRA's solicitation provisions—unlike the provisions in *McConnell*—justifies the application of strict scrutiny because the CFRA's provisions "burden[]" speech in a way that a direct restriction on the contribution itself would not." *McConnell*, 540 U.S. at 139, 124 S.Ct. 619.

than that the third person must exercise his own free will to make a contribution.

Nevertheless, the District Court upheld the CFRA's solicitation bans based primarily upon its finding that contractors and lobbyists could exert improper influence over state officials by "bundling campaign contributions" made by their clients or employees. *Green Party I*, 590 F.Supp.2d at 343 n. 33. The threat posed by "bundling" is that contractors and lobbyists will promise to deliver large numbers of coordinated contributions to a state official in exchange for political favors. A prospective state contractor, for instance, might promise to organize a large fundraising event in exchange for a candidate's assistance in securing a lucrative state contract.

There are good reasons to think that the threat of bundling does not provide a compelling justification for the solicitation bans, especially with regard to lobbyists. But even assuming, without deciding, that the threat of bundling makes the anti-corruption interest compelling in this context, the CFRA's ban on solicitations is by no means narrowly tailored to address that threat.

[13, 14] In order to narrowly tailor a law to address a problem, the "government must curtail speech only to the degree necessary to meet the particular problem at hand," and the government "must avoid infringing on speech that does not pose the danger that has prompted regulation." *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). The government must prove that there is no "less restrictive alternative" to the law in question, for "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Group,*

*Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

[15] Here, the state has not met its burden to show that the CFRA's solicitation ban is narrowly tailored to address the problem posed by "bundling," for the ban prohibits a wide range of activity unrelated to bundling, and there are several less restrictive alternatives that would more directly address the perceived bundling threat. For one thing, the CFRA prohibits small-scale solicitation efforts that could not possibly be deemed "bundling." A state contractor, for instance, is prohibited under the CFRA from advising his mother about whether she should contribute to a particular gubernatorial candidate. A less restrictive alternative to address the problem of bundling would be to ban only large-scale efforts to solicit contributions—for example, a ban on state contractors organizing fundraising events of a certain size.

In addition, the problem with bundling, according to the District Court, is that lobbyists will bundle contributions by their "deep-pocketed clients" and state contractors will bundle contributions from their "many employees and subcontractors." *Green Party I*, 590 F.Supp.2d at 343. If that is the case, then a less restrictive means to address the bundling problem would be simply to ban lobbyists from soliciting contributions from their clients and contractors from soliciting contributions from their employees and subcontractors. The CFRA, however, bans *all* solicitation efforts by lobbyists and contractors—even those not directed at clients, employees, or subcontractors.

Finally, insofar as the CFRA's solicitation ban was intended to combat corruption and the appearance of corruption caused by "bundling," the state has not adequately explained why it could not simply outlaw *bundling* itself. Indeed, the

CFRA currently defines the term “solicit” to include, among other things, “bundling contributions,” *see* Conn. Gen.Stat. § 9-601(26), and the SEEC has issued a decision that defines the term “bundling,” *see* Green Party I, 590 F.Supp.2d at 297 (citing SEEC Declaratory Ruling 2006-1, at 4). The problem is that, in addition to banning bundling, the CFRA also bans many other activities that often do not involve bundling. *See* Conn. Gen.Stat. § 9-601(26) (broadly defining “solicit” to include, among other things, “requesting that a contribution be made” and “serving as . . . deputy treasurer” of a “political committee”).

We are not, of course, called upon here to determine the constitutionality of other, hypothetical laws. Our conclusion is only that less restrictive alternatives exist, and thus the state has not met its burden of showing that the CFRA’s solicitation ban is narrowly tailored. We hold, therefore, that on this record, the CFRA’s bans on the solicitation of contributions, *see* Conn. Gen.Stat. §§ 9-610(h), 9-612(g)(2), violate the First Amendment.

### III. Remaining Claims

In addition to their First Amendment claims, plaintiffs have asserted claims under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, as well as under the Connecticut Constitution.

The equal protection and due process claims, asserted only by the Association of Connecticut Lobbyists and Barry Williams, challenge provisions of the CFRA that we have struck down under the First Amendment—namely, the CFRA’s ban on lobbyist contributions and the solicitation of contributions by lobbyists. Thus we need not address those claims.

With respect to the claims under the Connecticut Constitution, we agree with the District Court that “there is no indication” in Connecticut case law that the Connecticut Constitution “provide[s] broader protection [than] the [federal constitutional] rights at issue here.” *Green Party I*, 590 F.Supp.2d at 346. Thus, insofar as we have held that certain provisions of the CFRA are consistent with the First Amendment, the Connecticut Constitution provides no additional basis—beyond the First Amendment—for challenging the CFRA. Insofar as we have held that certain provisions of the CFRA violate the First Amendment, it is unnecessary for us to decide—and we expressly decline to decide—whether those provisions also violate the Connecticut Constitution.

### IV. The Severability of the Unconstitutional Provisions and the Appropriate Injunctive Relief

We have held that two aspects of the CFRA violate the First Amendment: the ban on lobbyist contributions and the ban on the solicitation of contributions. The question arises, therefore, whether those provisions are severable from the CFRA or whether the entire CFRA must be struck down along with the unconstitutional provisions. The District Court did not consider the severability issue because it held that each of the challenged provisions was constitutional.

In our first opinion, published today, which addressed plaintiffs’ challenge to the CFRA’s Citizen Election Program (CEP), we remanded the cause to the District Court to determine in the first instance whether certain unconstitutional provisions of the CEP were severable. We specifically instructed the District Court to examine the meaning of § 9-717 of the General Statutes of Connecticut in connection with

its ruling on the severability issue.<sup>18</sup>

18. That statute, which was recently amended, now reads in full:

(a) If, during a period beginning on or after the forty-fifth day prior to any special election scheduled relative to any vacancy in the General Assembly and ending the day after such special election, a court of competent jurisdiction prohibits or limits, or continues to prohibit or limit, the expenditure of funds from the Citizens' Election Fund established in section 9-701 for grants or moneys for candidate committees authorized under sections 9-700 to 9-716, inclusive, for a period of seven days or more, (1) sections 1-100b, 9-700 to 9-716, inclusive, 9-750, 9-751 and 9-760 and section 49 of public act 05-5 of the October 25 special session shall be inoperative and have no effect with respect to any race of such special election that is the subject of such court order until the day after such special election, and (2)(A) the amendments made to the provisions of the sections of the general statutes pursuant to public act 05-5 of the October 25 special session shall be inoperative until the day after such special election with respect to any such race, (B) the provisions of said sections of the general statutes, revision of 1958, revised to December 30, 2006, shall be effective until the day after such special election with respect to any such race, and (C) the provisions of subsections (g) to (j), inclusive, of section 9-612 shall not be implemented until the day after such special election with respect to any such race.

(b) Except as provided for in subsection (a) or (c) of this section, if, on or after April fifteenth of any year in which a state election is scheduled to occur, a court of competent jurisdiction prohibits or limits, or continues to prohibit or limit, the expenditure of funds from the Citizens' Election Fund established in section 9-701 for grants or moneys for candidate committees authorized under sections 9-700 to 9-716, inclusive, for a period of thirty days or more, (1) sections 1-100b, 9-700 to 9-716, inclusive, 9-750, 9-751 and 9-760 and section 49 of public act 05-5 of the October 25 special session shall be inoperative and have no effect with respect to any race that is the subject of such court order until December thirty-first of such year, and (2)(A) the amendments made to the provi-

We adopt that same approach here and

sions of the sections of the general statutes pursuant to public act 05-5 of the October 25 special session shall be inoperative until December thirty-first of such year, (B) the provisions of said sections of the general statutes, revision of 1958, revised to December 30, 2006, shall be effective until December thirty-first of such year, and (C) the provisions of subsections (g) to (j), inclusive, of section 9-612 shall not be implemented until December thirty-first of such year. If, on the April fifteenth of the second year succeeding such original prohibition or limitation, any such prohibition or limitation is in effect, the provisions of subdivisions (1) and (2) of this section shall be implemented and remain in effect without the time limitation described in said subdivisions (1) and (2).

(c) If, during a year in which a state election is held, on or after the second Tuesday in August set aside as the day for a primary under section 9-423, a court of competent jurisdiction prohibits or limits the expenditure of funds from the Citizens' Election Fund established in section 9-701 for grants or moneys for candidate committees authorized under sections 9-700 to 9-716, inclusive, for a period of fifteen days, or if said Tuesday occurs during a period of fifteen days or more in which period such a court continues to prohibit or limit such expenditures, then, after any such fifteen-day period, (1) sections 1-100b, 9-700 to 9-716, inclusive, 9-750, 9-751 and 9-760 and section 49 of public act 05-5 of the October 25 special session shall be inoperative and have no effect with respect to any race that is the subject of such court order until December thirty-first of such year, and (2)(A) the amendments made to the provisions of the sections of the general statutes pursuant to public act 05-5 of the October 25 special session shall be inoperative until December thirty-first of such year, (B) the provisions of said sections of the general statutes, revision of 1958, revised to December 30, 2006, shall be effective until December thirty-first of such year, and (C) the provisions of subsections (g) to (j), inclusive, of section 9-612 shall not be implemented until December thirty-first of such year. If, on the April fifteenth of the second year succeeding such original prohibition or limitation, any such prohibition or limi-

remand to the District Court to determine whether the unconstitutional provisions of the CFRA addressed in this opinion are severable from the remainder of the law. In so doing the District Court should examine the relevancy, if any, of § 9-717. After the District Court has ruled on the severability issue, it should then enter appropriate injunctive relief in light of our holdings in this opinion.

### CONCLUSION

In summary, we hold as follows:

(1) The CFRA's bans on contributions by state contractors, lobbyists, and associated individuals, *see* Conn. Gen.Stat. §§ 9-610(g), 9-612(g)(2)(A)–(B), are “marginal speech restrictions” that withstand scrutiny under the First Amendment if they are “closely drawn to match a sufficiently important [government] interest.” *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 161–62, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003) (quotation marks omitted).

(2) The CFRA's ban on *contractor* contributions, *see* Conn. Gen.Stat. § 9-612(g)(2)(A)–(B), is consistent with the First Amendment. The ban furthers “sufficiently important” government interests, *Beaumont*, 539 U.S. at 162, 123 S.Ct. 2200 (quotation marks omitted), in that it addresses both the “actuality” and the “appearance” of corruption involving state contractors, *see Buckley v. Valeo*, 424 U.S. 1, 26, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). It is also “closely drawn” to achieve those interests. *Beaumont*, 539 U.S. at 162, 123 S.Ct. 2200 (quotation marks omitted). With respect to the ban on contractor con-

tributions, therefore, we affirm the District Court's grant of summary judgment to defendants.

(3) The CFRA's ban on *lobbyist* contributions, Conn. Gen.Stat. § 9-610(g), violates the First Amendment. Although an outright ban on *contractor* contributions can be justified as a means to address the appearance of corruption caused by Connecticut's recent corruption scandals, those scandals did not involve lobbyists and thus do not provide sufficient justification for an outright ban on lobbyist contributions. Rather, even assuming, without deciding, that the state's anticorruption interest is “sufficiently important” in this context, an outright *ban* on lobbyist contributions—as opposed to a mere *limit* on lobbyist contributions—is not closely drawn to achieve the state's interest. *See Beaumont*, 539 U.S. at 162, 123 S.Ct. 2200. With respect to the ban on lobbyist contributions, therefore, we reverse the District Court's grant of summary judgment to defendants and instruct the Court to grant summary judgment to plaintiffs.

(4) The CFRA's ban on the solicitation of contributions, *see* Conn. Gen.Stat. §§ 9-610(h), 9-612(g)(2)(A)–(B), is a law that “burden[s] political speech” and is, as a result, subject to strict scrutiny, *Citizens United v. Fed. Election Comm'n*, — U.S. —, —, 130 S.Ct. 876, 898, — L.Ed.2d —, — (2010). The law will be upheld only if the “[state] . . . prove[s] that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Id.* (quotation marks omitted).

tation is in effect, the provisions of subdivisions (1) and (2) of this section shall be implemented and remain in effect without the time limitation described in said subdivisions (1) and (2).

(d) Any candidate who has received any funds pursuant to the provisions of sections 1-100b, 9-700 to 9-716, inclusive, 9-750,

9-751 and 9-760 and section 49 of public act 05-5 of the October 25 special session prior to any such prohibition or limitation taking effect may retain and expend such funds in accordance with said sections unless prohibited from doing so by the court. Conn. Gen.Stat. § 9-717 (as amended by Public Act 10-2 on April 14, 2010).

(5) Under the strict scrutiny standard, the CFRA’s solicitation ban, *see* Conn. Gen.Stat. §§ 9–610(h), 9–612(g)(2)(A)–(B), violates the First Amendment. Even assuming, without deciding, that the state has a “compelling” interest in preventing contractors and lobbyists from “bundling” contributions, the state has failed to establish that the CFRA’s solicitation ban is narrowly tailored to meet that interest because the law prohibits numerous activities unrelated to “bundling.” With respect to the solicitation ban, therefore, we reverse the District Court’s grant of summary judgment to defendants and instruct the Court to grant summary judgment to plaintiffs.

(6) We need not address plaintiffs’ equal protection and due process claims, for they challenge provisions of the CFRA that we have struck down under the First Amendment—namely, the CFRA’s ban on lobbyist contributions and the solicitation of contributions by lobbyists.

(7) Insofar as we have upheld certain provisions of the CFRA under the First Amendment, we likewise uphold those provisions under the Connecticut Constitution, which provides no additional basis—beyond the First Amendment—for challenging the provisions in question. Insofar as we have held that certain provisions of the CFRA violate the First Amendment, it is unnecessary for us to decide—and we expressly decline to decide—whether those provisions also violate the Connecticut Constitution.

(8) We remand the cause to the District Court (a) to determine, in the first instance, whether the unconstitutional provisions of the CFRA are severable from the remainder of the statute; (b) to grant appropriate injunctive relief in light of our holdings in this opinion and the District Court’s resolution of the severability issue on remand; and (c) to conduct any further

proceedings, consistent with this opinion, that may be required.

\* \* \*

The February 11, 2009 partial judgment of the District Court on Count Four of this action is **AFFIRMED** in part and **REVERSED** in part as set forth in sections (1) through (7) of this conclusion. The cause is **REMANDED** to the District Court for further proceedings in accordance with the instructions set forth in section (8) of this conclusion.

Recognizing that an election has been scheduled for November 2, 2010, and given the importance of this case to ongoing campaigns for state office, we request that the District Court act expeditiously in considering the issues presented for decision on remand.



**GREEN PARTY OF CONNECTICUT, S. Michael Derosa, Libertarian Party of Connecticut, Elizabeth Gallo, Joanne P. Philips, Roger C. Vann, Barry Williams, and Ann C. Robinson, Plaintiffs–Appellees,**

**American Civil Liberties Union of Connecticut and Association of Connecticut Lobbyists, Plaintiffs,**

v.

**Jeffrey GARFIELD, in his official capacity as Executive Director and General Counsel of the State Elections Enforcement Commission, and Richard Blumenthal, in his official capacity as Attorney General, Defendants–Appellants,**



the more general requirement that states attain national air quality standards by specific dates. We decline to extend the CAA's citizen-suit provision beyond what it says by providing for general attainment-forcing remedies when the CAA does not. *See* 42 U.S.C. § 7604(a) (authorizing citizen suits to obtain remedies for, among other things, violations of "emission standard[s] or limitation[s]"). If California does not fulfill a commitment to propose and adopt emission control measures or to achieve aggregate emission reductions, the public can seek a remedy for such specific violations. If, on the other hand, California does not attain required air quality standards, EPA may use means available under other parts of the CAA to ensure that the state attains the relevant national air quality standard. *See, e.g.*, 42 U.S.C. §§ 7413, 7509.

Because California's commitments to propose and adopt emission control measures and to achieve aggregate emission reductions are neither aspirational goals nor unenforceable as a matter of discretion or practicality, we conclude that these commitments are enforceable emission standards or limitations, and that EPA's approval of them into the Plans was not arbitrary or capricious and did not violate the CAA. We deny this portion of the petition for review.

#### V

We grant the petition for review in part and remand the matter to EPA for further proceedings consistent with our decision.

Petitioners may recover from EPA the costs and fees incurred in this litigation. 42 U.S.C. § 7607(f). Determination of an appropriate amount of fees and costs is referred to the Appellate Commissioner, who shall conduct whatever proceedings he deems appropriate, and who shall have authority to enter an order awarding the

same. *See Ober v. EPA*, 84 F.3d 304, 316 (9th Cir.1996).

**PETITION GRANTED in part, DENIED in part, and REMANDED.**



**Jimmy YAMADA; Russell  
Stewart, Plaintiffs,**

**and**

**A-1 A-Lectrician, Inc., Plaintiff-  
Appellant,**

**v.**

**William SNIPES, in his official capacity as chair and member of the Hawaii Campaign Spending Commission, Tina Pedro Gomes, in her official capacity as vice chair and member of the Hawaii Campaign Spending Commission; and Eldon Ching, Gregory Shoda and Adrienne Yoshihara, in their official capacities as members of the Hawaii Campaign Spending Commission, Defendants-Appellees.**

**Jimmy Yamada; Russell Stewart,  
Plaintiffs-Appellants,**

**and**

**A-1 A-Lectrician, Inc., Plaintiff,**

**v.**

**William Snipes, in his official capacity as chair and member of the Hawaii Campaign Spending Commission; Tina Pedro Gomes, in her official capacity as vice chair and member of the Hawaii Campaign Spending Commission; and Eldon Ching, Gregory Sho-**

**da and Adrienne Yoshihara, in their official capacities as members of the Hawaii Campaign Spending Commission, Defendants–Appellees.**

**Nos. 12–15913, 12–17845.**

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Oct. 9, 2013.

Filed May 20, 2015.

**Background:** Individual and corporate donors to non-candidate committees filed § 1983 action against Hawaii Campaign Spending Commission alleging that Hawaii campaign finance laws violated their First Amendment and due process rights. The United States District Court for the District of Hawaii, J. Michael Seabright, J., permanently enjoined \$1,000 contribution limit as applied to individual donors, but entered summary judgment in Commission’s favor on remaining claims, 872 F.Supp.2d 1023, and granted in part donors’ motion for attorney fees, 2012 WL 6019121. Donors appealed.

**Holdings:** The Court of Appeals, Fisher, Circuit Judge, held that:

- (1) statutes’ definitions of “expenditure” and “noncandidate committee” were not impermissibly vague;
- (2) definition of “advertisement” was not impermissibly vague;
- (3) noncandidate committee reporting and disclosure requirements did not unduly burden corporation’s free speech rights;
- (4) requirement that political advertising include disclaimer as to advertiser’s affiliation with candidate or candidate committee did not violate First Amendment;
- (5) corporation lacked standing to challenge Hawaii’s electioneering communications reporting requirements;

(6) ban on political contributions by government contractors did not violate First Amendment as applied; and

(7) district court was authorized to award attorney fees incurred in defending against state’s interlocutory appeal.

Affirmed in part and reversed in part.

For additional opinion, see 604 Fed.Appx. 579.

### 1. Constitutional Law ⇌3905

Law is unconstitutionally vague under Due Process Clause when it fails to provide person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. U.S.C.A. Const.Amend. 14.

### 2. Constitutional Law ⇌1022

In determining whether statute is void for vagueness under Due Process Clause, court must consider any limiting construction that state court or enforcement agency has proffered. U.S.C.A. Const.Amend. 14.

### 3. Constitutional Law ⇌1025, 1026

In determining whether statute is void for vagueness under Due Process Clause, court may impose limiting construction on statute only if it is readily susceptible to such construction, and will not insert missing terms into statute or adopt interpretation precluded by its plain language. U.S.C.A. Const.Amend. 14.

### 4. Constitutional Law ⇌4232, 4236

#### Election Law ⇌195, 202(1)

Definitions of “expenditure” and “non-candidate committee” in Hawaii campaign finance laws were not impermissibly vague, in violation of due process, even though definitions relied on whether expenditures were intended to “influence” election, where Hawaii Campaign Spend-

ing Commission reasonably limited term “influence” to “communications or activities that constitute express advocacy or its functional equivalent.” U.S.C.A. Const. Amend. 14; HRS § 11-302.

#### 5. Constitutional Law ⇌4236

##### Election Law ⇌195

Definition of “advertisement” in Hawaii campaign finance laws was not impermissibly vague, in violation of due process, where statute referred only to “nomination or election of the candidate.” U.S.C.A. Const. Amend. 14; HRS § 11-302.

#### 6. Constitutional Law ⇌1701, 1706

##### Election Law ⇌202(2)

Hawaii’s noncandidate committee reporting and disclosure requirements did not unduly burden corporation’s free speech rights, even if requirements were inconvenient, and did not require that political advocacy be organization’s primary purpose, where corporation was self-financed and did not receive contributions, corporation had been complying with noncandidate committee requirements for several years without difficulty, requirements served important government interests in providing electorate with information, in avoiding corruption or its appearance in electoral politics, and in gathering data necessary to detect violations of campaign finance laws, and statutes’ \$1,000 threshold ensured that organization would be more than incidentally engaged in political advocacy before it would be required to register and file reports as noncandidate committee. U.S.C.A. Const. Amend. 1; HRS §§ 11-302, 11-321, 11-323, 11-324, 11-326, 11-331, 11-336, 11-339, 11-351(a), 11-352, 11-353, 11-355, 11-356, 11-358.

#### 7. Constitutional Law ⇌1706

##### Election Law ⇌195

Hawaii’s requirement that political advertising include disclaimer as to advertis-

er’s affiliation with candidate or candidate committee did not violate First Amendment rights of noncandidate committee that placed political advertisements in newspapers; disclaimer requirement imposed only modest burden, and requiring disclaimer was closely related to state’s important governmental interest in dissemination of information regarding financing of political messages. U.S.C.A. Const. Amend. 1; HRS § 11-391(a)(2).

#### 8. Election Law ⇌195

Corporation lacked standing to challenge Hawaii’s electioneering communications reporting requirements, where corporation was not subject to electioneering communication reporting requirements as of date its complaint was filed. HRS § 11-341.

#### 9. Constitutional Law ⇌1469

##### Election Law ⇌179

Hawaii’s ban on political contributions by government contractors was closely drawn to meet state’s interest in combating corruption and appearance of corruption, and thus did not violate First Amendment as applied to contributions to legislators who neither awarded nor oversaw contracts; ban served sufficiently important governmental interests by combating both actual and appearance of quid pro quo corruption, it targeted direct contributions from contractors to officeholders and candidates, which were most closely linked to actual and perceived quid pro quo corruption, ban was in response to past “pay to play” scandals and widespread appearance of corruption that existed at time of legislature’s actions, and it was not possible to predict with certainty at time contributions were made which candidates would not become involved in contract award or oversight process. U.S.C.A. Const. Amend. 1; HRS § 11-355(a).

**10. Civil Rights** ⇌ 1492

District court was authorized to award attorney fees incurred by successful plaintiffs in § 1983 action in defending against defendants' interlocutory appeal of order granting their motion for preliminary injunction, even though defendants dismissed their interlocutory appeal, and Court of Appeals did not transfer fee request to district court; plaintiffs were not yet prevailing parties when defendants dismissed their interlocutory appeal and could not have requested fees at that time, and plaintiffs' challenge was not rendered moot until district court entered final judgment in their favor. 42 U.S.C.A. §§ 1983, 1988.

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Appeal from the United States District Court for the District of Hawaii, J. Michael Seabright, District Judge, Presiding. D.C. No. 1:10-cv-00497-JMS-RLP.

Before: ALEX KOZINSKI,  
RAYMOND C. FISHER and PAUL J.  
WATFORD, Circuit Judges.

**OPINION**

FISHER, Circuit Judge:

This appeal concerns the constitutionality of four provisions of Hawaii's campaign finance laws under *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), and related authority. A-1 A-Lectrician, Inc. (A-1), a for-profit corporation, appeals the district court's summary judgment in favor of members of Hawaii's Campaign Spending Commission ("the Commission"). Relying on *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir.2010), we hold that the challenged laws satisfy the First and Fourteenth Amendments.

**I. Background**

The plaintiffs are Jimmy Yamada, Russell Stewart and A-1. Before the 2010 general election, Yamada and Stewart each sought to contribute \$2,500 to the Aloha Family Alliance-Political Action Committee (AFA-PAC), a registered "noncandidate committee" that makes independent campaign expenditures in Hawaii elections. They were forbidden from doing so, however, by Hawaii Revised Statute (HRS) § 11-358, which prohibits any person from "mak[ing] contributions to a noncandidate committee in an aggregate amount greater than \$1,000 in an election."

Plaintiff A-1 is a Hawaii electrical-construction corporation that makes campaign contributions and engages in political speech. Yamada is its CEO. During the 2010 election, A-1 contributed over \$50,000 to candidates, candidate committees and party committees. It also purchased three newspaper advertisements at a cost of \$2,000 to \$3,000 each. Under the heading "Freedom Under Siege," these advertise-

ments declared that Hawaiians had “lost our freedom” because “we have representatives who do not listen to the people.” One advertisement asserted State House Majority Leader Blake Oshiro and other representatives were “intent on the destruction of the family.” Another accused Oshiro and his colleagues of “disrespect[ing] the legislative process and the people.” In accordance with Hawaii law, *see* HRS § 11-391(a)(2)(B), all three advertisements included a disclaimer that they were “[p]ublished without the approval and authority of the candidate.”

As a result of these expenditures and contributions, Hawaii law required A-1 to register as a “noncandidate committee” as defined by HRS § 11-302. Section 11-302 imposes reporting and disclosure requirements on any organization that has “the purpose of making or receiving contributions, making expenditures, or incurring financial obligations to influence [elections]” over \$1,000 in the aggregate for an election cycle. *Id.*; *see* HRS § 11-321(g). A-1, which plans to run similar advertisements and to make similar contributions to candidates in the future, objects to both the disclaimer requirement and the noncandidate committee registration and reporting requirements.

If A-1 is relieved of the obligation of registering as a noncandidate committee, it could be subject to reporting requirements associated with “electioneering communications” because it seeks to publish newspaper advertisements that mention candidates by name shortly before an election. *See* HRS § 11-341. Every entity that makes a disbursement for an electioneering communication, such as A-1’s newspaper advertisements, must report certain identifying information to the Commission

within 24 hours of certain disclosure dates. *See id.* Under the regulations in effect when A-1 filed this action, if A-1 were to remain a noncandidate committee, however, it would not have to file an electioneering communications report or comply with the provisions of HRS § 11-341. *See* Haw. Admin. Rule (HAR) § 3-160-48.<sup>1</sup>

Finally, A-1 is often a state government contractor, and when it has such contracts, Hawaii law prohibits it from making campaign contributions to candidates or candidate committees. *See* HRS § 11-355. A-1 challenges that prohibition as applied to its speech, although it declares it seeks to contribute only to lawmakers who neither award nor oversee its public contracts.

Shortly before the 2010 primary election, Yamada, Stewart and A-1 filed a nine-count complaint challenging the constitutionality of five provisions of Hawaii campaign finance law. Yamada and Stewart challenged the \$1,000 limit on contributions to noncandidate committees, HRS § 11-358, and A-1 challenged four other provisions: (1) the requirement that it register as a noncandidate committee and the associated expenditure definition, HRS § 11-302; (2) if it does not have to register as a noncandidate committee, the requirement that it report identifying information when it makes an electioneering communication, HRS § 11-341; (3) the requirement that its advertisements include certain disclaimers, HRS § 11-391; and (4) the ban on contributions from government contractors to state legislative candidates, HRS § 11-355.

In October 2010, the district court preliminarily enjoined enforcement of the \$1,000 contribution limit, HRS § 11-358, as applied to Yamada’s and Stewart’s pro-

1. On November 5, 2014, an amendment to HRS § 11-341 went into effect, requiring registered noncandidate committees to file elec-

tioning communications statements. *See* 2013 Haw. Sess. L. Act 112.

posed \$2,500 contributions to AFA-PAC, a noncandidate committee. *See Yamada v. Kuramoto*, 744 F.Supp.2d 1075, 1078, 1087 (D.Haw.2010) (*Yamada I*). The court denied A-1's motion for a preliminary injunction on its first, second and third claims. *See Yamada v. Kuramoto*, No. 10-cv-00497, 2010 WL 4603936, at \*20 (D.Haw. Oct. 29, 2010) (*Yamada II*). A-1 did not seek to enjoin the government contractor ban. The defendants appealed the preliminary injunction of § 11-358 but dismissed their appeal before argument.

On the parties' cross-motions for summary judgment, the district court permanently enjoined the \$1,000 contribution limit, HRS § 11-358, as applied to Yamada's and Stewart's contributions to AFA-PAC and rejected each of A-1's constitutional challenges. *See Yamada v. Weaver*, 872 F.Supp.2d 1023, 1027-28, 1063 (D.Haw.2012) (*Yamada III*). A-1 appeals the denial of summary judgment on its claims. The defendants have not cross-appealed the court's invalidation of § 11-358.

Yamada and Stewart sought their attorney's fees under 42 U.S.C. § 1988 based on their successful constitutional challenge to the \$1,000 contribution limit. The district court awarded them \$60,152.65 in fees and \$3,623.29 in costs. Yamada and Stewart appeal that award in several respects, including the district court's denial of the fees they incurred defending against the defendants' abandoned appeal of the preliminary injunction ruling.

We have jurisdiction under 28 U.S.C. § 1291 and review A-1's constitutional challenges de novo. *See Human Life*, 624 F.3d at 1000. A-1 raises three groups of issues on appeal: (1) whether the expenditure, noncandidate committee and advertisement definitions are unconstitutionally vague; (2) whether the noncandidate committee definition and advertising dis-

claimer and electioneering communications reporting requirements impose unconstitutional burdens on speech; and (3) whether the ban on contributions by government contractors is unconstitutional as applied to A-1's proposed contributions. Yamada and Stewart also appeal the partial denial of attorney's fees. We address these issues in turn.

## II. Due Process Vagueness Challenge

[1] We begin by addressing A-1's argument that § 11-302's definitions of "expenditure," "noncandidate committee" and "advertisement" are unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment. A law is unconstitutionally vague when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). This doctrine "addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc.*, — U.S. —, 132 S.Ct. 2307, 2317, 183 L.Ed.2d 234 (2012). Where, as here, First Amendment freedoms are involved, "rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* Even for regulations of expressive activity, however, "perfect clarity and precise guidance" are not required, *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), because "we can never expect mathematical certainty from our language," *Human Life*, 624 F.3d at 1019 (quoting *Grayned v. City of Rockford*, 408

U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)) (internal quotation marks omitted).

[2, 3] In evaluating A–1’s challenges, we must consider “any limiting construction that a state court or enforcement agency has proffered.” *Ward*, 491 U.S. at 796, 109 S.Ct. 2746 (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)) (internal quotation marks omitted). We may impose a limiting construction on a statute, however, “only if it is ‘readily susceptible’ to such a construction.” *Reno v. ACLU*, 521 U.S. 844, 884, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (quoting *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)). We will not “insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance.” *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir.1998).

**A. Hawaii’s Expenditure and Noncandidate Committee Definitions Are Not Vague Given the Commission’s Narrowing Construction**

A–1’s first vagueness challenge is to the expenditure and noncandidate committee definitions. Section 11–302 defines an “expenditure” to include:

(1) Any purchase or transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, or payment incurred or made, or the use or consumption of a nonmonetary contribution for the purpose of:

(A) *Influencing* the nomination for election, or the election, of any person seeking nomination for election or election to office, whether or not the person has filed the person’s nomination papers;

(B) Influencing the outcome of any question or issue that has been certified to appear on the ballot at the next applicable election. . . .

HRS § 11–302 (emphasis added). It defines a “noncandidate committee” as:

[A]n organization, association, party, or individual that has the purpose of making or receiving contributions, making expenditures, or incurring financial obligations *to influence* the nomination for election, or the election, of any candidate to office, or for or against any question or issue on the ballot. . . .

*Id.* (emphasis added). Noncandidate committees are Hawaii’s version of independent expenditure committees, similar to the Washington “political committee” definition we addressed in *Human Life*. See 624 F.3d at 997.

A–1 challenges these definitions under *Buckley v. Valeo*, 424 U.S. 1, 77, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), which held that the terms “influencing” and “for the purpose of influencing” were unconstitutionally vague when used to delineate types of speech subject to regulation. *Id.* at 77–82, 96 S.Ct. 612. If both definitions are unconstitutionally vague, Hawaii cannot constitutionally impose noncandidate committee status and the accompanying registration and reporting burdens on A–1.

[4] Like the district court, we assume without deciding that the term “influence” may be vague under some circumstances. “Conceivably falling within the meaning of ‘influence’ are objectives as varied as advocacy for or against a candidate’s election; championing an issue for inclusion in a candidate’s platform; and encouraging all candidates to embrace public funding.” *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 65 (1st Cir.2011). But the Commission has offered and the district court

applied a limiting construction on the term “influence” in § 11–302’s definitions of “expenditure” and “noncandidate committee,” eliminating this potential vagueness. Under the Commission’s interpretation, “influence” refers only to “communications or activities that constitute express advocacy or its functional equivalent.” This interpretation significantly narrows the statutory language, because “express advocacy” requires words “such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject,’” *Buckley*, 424 U.S. at 44 n. 52, 96 S.Ct. 612, and communications are the “functional equivalent of express advocacy” only when they are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,” *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469–70, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of Roberts, C.J.).

A–1 argues that the proffered limiting construction does not render § 11–302 constitutional because (1) it is inconsistent with the plain language of the statute, thus barring us from adopting it, and (2) even if we could adopt it, the challenged definitions remain unconstitutionally vague. We find neither argument persuasive.

### 1.

The Commission’s proffered construction is not inconsistent with the plain language of the statute. We have previously noted that the term “influencing” is susceptible to a narrowing construction, *see ACLU of Nev. v. Heller*, 378 F.3d 979, 986 n. 5 (9th Cir.2004), and the Commission’s interpretation of “influence” is consistent with *Buckley*, which construed the phrase “for the purpose of . . . influencing” to mean “communications that expressly advocate the election or defeat of a clearly identified candidate,” 424 U.S. at 79, 80, 96

S.Ct. 612 (footnote omitted). Given the substantial similarity between the statutory language in *Buckley* and the language at issue here, the Commission’s gloss is entirely reasonable. *Compare* 2 U.S.C. § 431(f) (1971), *with* HRS § 11–302.

Moreover, the Commission reasonably construes the statute as referring not only to express advocacy but also to its functional equivalent. After *Buckley*, case law and Federal Election Commission regulations have broadened the concept of express advocacy to include its “functional equivalent,” as defined in *Wisconsin Right to Life*, 551 U.S. at 469–70, 127 S.Ct. 2652. *See* 11 C.F.R. § 100.22; *Real Truth About Abortion, Inc. v. Fed. Election Comm’n*, 681 F.3d 544, 550–53 (4th Cir.2012) (discussing the evolution of the “functional equivalent of express advocacy” concept). Elsewhere, Hawaii’s Commission has adopted a regulation defining express advocacy with reference to its functional equivalent, or as communications that are “susceptible to no other reasonable interpretation but as an exhortation to vote for or against a candidate.” HAR § 3–160–6. The Commission’s proposed construction is consistent with *Buckley*, subsequent Supreme Court decisions, federal regulations and other Commission regulations. The proposed construction, therefore, is neither unreasonable nor foreclosed by the plain language of the statute. *See Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 832–34 (7th Cir.2014) (limiting “for the purpose of influencing the election or nomination for election of any individual to state or local office” to express advocacy and its functional equivalent); *McKee*, 649 F.3d at 66–67 (construing “influencing” and “influence” in Maine campaign finance statutes to include only communications that constitute express advocacy or its functional equivalent).

The legislative history of Hawaii’s non-candidate committee and expenditure def-



initions lends further validity to the Commission's interpretation. In 1979, the Hawaii legislature revised state campaign finance laws to harmonize them with *Buckley*. See 1979 Haw. Sess. L. Act 224; Conf. Comm. Rep. No. 78, in Haw. H.J. 1137, 1140 (1979). The legislature was "mindful" that *Buckley* "narrowly construed the operation of the federal spending and contribution disclosure requirements" to encompass only "communications that expressly advocate the election or defeat of a clearly identified candidate." Conf. Comm. Rep. No. 78, in Haw. H.J. 1137, 1140 (1979). Thus, as the district court concluded, "[i]t is reasonable to infer . . . that Hawaii's Legislature adopted terminology such as 'to influence' in reliance on the Supreme Court's interpretation of the same terminology in federal law." *Yamada III*, 872 F.Supp.2d at 1046. We agree.<sup>2</sup>

A-1 nonetheless contends we should not adopt the narrowing construction because it would not bind a state court and therefore provides insufficient protection for First Amendment values. We again disagree. By adopting a "'readily apparent' constitutional interpretation," we provide A-1 and other parties not before the court "sufficient protection from unconstitutional application of the statute, as it is quite likely nonparty prosecutors and state courts will apply the same interpretation." *Planned Parenthood of Idaho, Inc. v.*

2. A-1 draws a different inference from this legislative history, arguing that the legislature's retention of the word "influence" after *Buckley* suggests that the legislature did not intend to limit the law to express advocacy and its functional equivalent. See *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 271 (4th Cir.1998). We disagree, but even if the legislative history is debatable, the Commission's reasonable limiting interpretation merits our deference. See *Vill. of Hoffman Estates*, 455 U.S. at 504, 102 S.Ct. 1186; *McKee*, 649 F.3d at 66.

*Wasden*, 376 F.3d 908, 932 (9th Cir.2004); see also *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 n. 15 (9th Cir.2013).<sup>3</sup>

We hold that the Commission's proffered construction is neither unreasonable nor the product of "strained statutory construction." *Wasden*, 376 F.3d at 932. We therefore adopt it.

## 2.

We also reject A-1's argument that § 11-302's definitions of "expenditure" and "noncandidate committee" are unconstitutionally vague even with this limiting construction in place. With the narrowing gloss, these definitions are sufficiently precise to provide "a person of ordinary intelligence fair notice of what is prohibited." *Williams*, 553 U.S. at 304, 128 S.Ct. 1830. Only expenditures for communications that expressly advocate for a candidate or are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" can trigger noncandidate committee registration, reporting and disclosure requirements under § 11-302. There is no dispute that "express advocacy" is not a vague term, and the controlling opinion in *Wisconsin Right to Life* held the "functional equivalent" or "appeal to vote" component of this test also meets the "imperative for clarity" that due process requires. 551 U.S. at 474 n. 7, 127 S.Ct. 2652. That close cases may arise in applying this test does not make it

3. Like federal courts, Hawaii courts construe state statutes to avoid constitutional infirmities whenever possible. See, e.g., *Kapiolani Park Pres. Soc'y v. City & Cnty. of Honolulu*, 69 Haw. 569, 751 P.2d 1022, 1028 (1988) ("Legislative acts . . . are not to be held invalid, or unconstitutional, or unconscionable, if such a construction can reasonably be avoided."). We would therefore expect Hawaii courts to adopt the same limiting construction.

unconstitutional, given there will always be an inherent but permissible degree of uncertainty in applying any standards-based test. See *Williams*, 553 U.S. at 306, 128 S.Ct. 1830 (“Close cases can be imagined under virtually any statute.”); *Real Truth*, 681 F.3d at 554–55. We therefore join the First, Fourth and Tenth Circuits in holding that the “appeal to vote” language is not unconstitutionally vague. See *Free Speech v. Fed. Election Comm’n*, 720 F.3d 788, 795–96 (10th Cir.2013); *Real Truth*, 681 F.3d at 552, 554 (“[T]he test in *Wisconsin Right to Life* is not vague.”); *McKee*, 649 F.3d at 70.

A–1 resists this conclusion, advancing two arguments why the “appeal to vote” language is impermissibly vague. Neither is persuasive.

First, A–1 contends the test is unconstitutionally vague because Hawaii’s law applies to a broader range of communications than the provision upheld in *Wisconsin Right to Life*. *Wisconsin Right to Life* sustained the functional equivalent test against a vagueness challenge to the federal definition of electioneering communications, which covers only broadcast communications, see 551 U.S. at 474 n. 7, 127 S.Ct. 2652; 2 U.S.C. § 434(f)(3) (2000 ed., Supp. IV), whereas Hawaii’s noncandidate committee and expenditure definitions extend to speech in printed form, see HRS § 11–302. The statute at issue in *Wisconsin Right to Life* also regulated only communications run shortly before an election, whereas Hawaii’s statute applies to communications without strict temporal limitations. But these differences are immaterial. Regardless of when a communication is aired or printed and whether it appears in print or in a broadcast medium, the purveyor of the advertisement has fair notice that the regulations reach only those ads that clearly advocate for an identified candidate. Like the Fourth Circuit, we

hold that the functional equivalent language is not unconstitutionally vague merely because it applies more broadly than the federal provision upheld in *Wisconsin Right to Life*. See *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 280–81 (4th Cir.2013).

Second, the validity of the functional equivalent test has not been undermined by *Citizens United*, which struck down the federal electioneering communication definition, see 2 U.S.C. § 434(f)(3), for which the test was first developed. As the First Circuit explained in rejecting an identical argument:

The basis for *Citizens United*’s holding on the constitutionality of the electioneering expenditure statute had nothing to do with the appeal-to-vote test. . . . Instead, the decision turned on a reconsideration of prior case law holding that a corporation’s political speech may be subjected to greater regulation than an individual’s. The opinion offered no view on the clarity of the appeal-to-vote test. In fact, the Court itself relied on the appeal-to-vote test in disposing of a threshold argument that the appeal should be resolved on narrower, as-applied grounds.

*McKee*, 649 F.3d at 69 (citations omitted); see also *Nat’l Org. for Marriage v. Roberts*, 753 F.Supp.2d 1217, 1220 (N.D.Fla. 2010), *aff’d*, 477 Fed.Appx. 584, 585 (11th Cir.2012) (per curiam). We also have relied on the appeal to vote test, albeit in dicta, since *Citizens United*. See *Human Life*, 624 F.3d at 1015. We could not have done so if the test was unconstitutionally vague.

Accordingly, we sustain Hawaii’s noncandidate committee and expenditure definitions from A–1’s vagueness challenges. The term “influence” is readily and reasonably interpreted to encompass only “communications or activities that consti-

tute express advocacy or its functional equivalent.” As construed, the definitions are not unconstitutionally vague.

**B. Hawaii’s Advertising Definition is Not Unconstitutionally Vague**

A-1 argues that § 11-302’s advertising definition is unconstitutionally vague because it uses the terms “advocates,” “supports” and “opposition.” This provision spells out when an advertisement must include a disclaimer as to whether the ad was disseminated with or without the approval of a candidate. See HRS § 11-391. In relevant part, Hawaii law defines an “advertisement” as:

any communication, excluding sundry items such as bumper stickers, that:

- (1) Identifies a candidate directly or by implication, or identifies an issue or question that will appear on the ballot at the next applicable election; and
- (2) *Advocates or supports* the nomination, *opposition*, or election of the candidate, or *advocates* the passage or defeat of the issue or question on the ballot.

HRS § 11-302 (emphasis added).

Applying a narrowing construction to this definition, as before, the district court limited the reach of “advocates or supports the nomination, opposition, or election of the candidate” to express advocacy or its functional equivalent. See *Yamada III*, 872 F.Supp.2d at 1054. With this limiting construction, the district court concluded that Hawaii’s definition of an advertisement was not unconstitutionally vague. A-1 contends that the district court impermissibly adopted a limiting construction for the same reasons it argues a limiting construction was inappropriate for the noncandidate committee and expenditure definitions. It further argues that with or

without the limiting construction, the challenged definition is unconstitutionally vague under *Buckley* and *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 365-66, 130 S.Ct. 876. The Commission responds that the definition is not vague even without a limiting construction.

[5] We agree with the Commission that Hawaii’s advertising definition is sufficiently precise without a limiting construction and therefore decline to adopt one. The words “advocates or supports” and “opposition” as used here are substantially similar to the words “promote,” “oppose,” “attack” and “support” that survived a vagueness challenge in *McConnell*. There, the Court considered a statute defining “Federal election activity” as “a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).” 2 U.S.C. § 431(20)(A)(iii). The Court noted that “[t]he words ‘promote,’ ‘oppose,’ ‘attack,’ and ‘support’ clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision.” *McConnell*, 540 U.S. at 170 n. 64, 124 S.Ct. 619. Because “[t]hese words ‘provide explicit standards for those who apply them’ and ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,’” the Court held that the provision was not unconstitutionally vague. *Id.* (quoting *Grayned*, 408 U.S. at 108-09, 92 S.Ct. 2294).<sup>4</sup> *McConnell* sup-

4. Joining the First, Second and Fourth Cir-

cuits, we reject A-1’s argument that *McCon-*

ports the conclusion that Hawaii's advertisement definition is not unconstitutionally vague.

Decisions in other circuits also support that conclusion. In *McKee*, the First Circuit turned away a vagueness challenge to a Maine law using the terms "promoting," "support" and "opposition" in several campaign finance provisions. The terms were not impermissibly vague because they were tied to an "election-related object"—either "candidate," "nomination or election of any candidate" or "campaign." *McKee*, 649 F.3d at 64. Maine's expenditure statute, for example, "instructs that reports submitted pursuant to the provision 'must state whether the expenditure is in *support* of or in *opposition* to the candidate.'" *Id.* at 63 n. 41 (quoting Me.Rev.Stat. tit. 21-A, § 1019-B(3)(B)). The Second, Fourth and Seventh Circuits have reached similar conclusions. See *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 128–30 (2d Cir.2014) (holding that "promotes," "supports," "attacks" and "opposes" were not vague with reference to a "clearly identified candidate"); *Tennant*, 706 F.3d at 286–87 (holding that "promoting or opposing" was not vague); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 485–87, 495 (7th Cir.2012) (holding that "promote" and "oppose" were not vague).

As in *McKee*, Hawaii's statutes are tied to an election-related object—the terms "advocates," "supports" and "opposition" refer only to "the nomination . . . or election of the candidate." HRS § 11-302. So too does the federal law upheld in *McConnell*, which used the words "promote," "oppose," "attack" and "support" only in relation to a "clearly identified

candidate for Federal office." 2 U.S.C. § 431(20)(A)(iii). Although the terms "advocate," "support" and "opposition" may not, in isolation, offer sufficient clarity as to what advertisements must include a disclaimer, their proximity to "nomination" or "election of the candidate" make clear the sort of campaign-related advertising for which a disclaimer must be included. Read as a whole and in context, the advertisement definition is sufficiently clear to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned*, 408 U.S. at 108, 92 S.Ct. 2294.

Finally, we reject A-1's argument that "advocates," a term that *McConnell* did not consider, makes Hawaii's advertising definition unconstitutionally vague. A-1 relies on *Buckley*, which considered a provision that prohibited any person or group from making "any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures . . . advocating the election or defeat of such candidate, exceeds \$1,000." 424 U.S. at 42, 96 S.Ct. 612. *Buckley* held that this provision—which imposed a severe restriction on independent spending by all individuals and groups other than political parties and campaign organizations—was impermissibly vague because of its potential breadth, extending to the discussion of public issues untethered from particular candidates. See *id.* at 40, 42, 96 S.Ct. 612. The Court therefore construed the provision "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44, 96 S.Ct. 612.

*nell's* vagueness holding is limited to laws that regulate campaign finance for political parties. See *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 128 (2d Cir.

2014); *Tennant*, 706 F.3d at 287 ("[T]he Court . . . did not limit its holding to situations involving political parties."); *McKee*, 649 F.3d at 63.

A-1's contention that "advocates" is unconstitutionally vague in this context does not survive the Supreme Court's post-*Buckley* discussion of nearly identical language in *McConnell*, 540 U.S. at 170 n. 64, 124 S.Ct. 619. For candidate elections, Hawaii's definition uses the word "advocates" only in relation to a communication that (1) identifies a candidate and (2) "advocates or supports the nomination, opposition, or election of [that] candidate." HRS § 11-302. Although the word "advocates" was not at issue in *McConnell*, there is nothing unconstitutionally vague about "advocate" when used in Hawaii's advertising definition to refer to communications that identify a candidate for state office and "plead in favor of" that candidate's election. Webster's Third New International Dictionary 32 (2002). A-1's vagueness challenge to the Hawaii advertising definition therefore fails.

### III. First Amendment Claims

A-1 brings First Amendment challenges to (1) the registration, reporting and disclosure requirements that Hawaii places on "noncandidate committees" and (2) the requirement that political advertisements include a disclaimer stating whether they are broadcast or published with the approval of a candidate. 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. See *Family PAC v. McKenna*, 685 F.3d 800, 805-06 (9th Cir.2011); *Human Life*, 624 F.3d at 1005. To survive this scrutiny, a law must bear a substantial relationship to a sufficiently important governmental interest. See *Doe v. Reed*, 561 U.S. 186, 196, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010); *Hu-*

*man Life*, 624 F.3d at 1008. Put differently, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe*, 561 U.S. at 196, 130 S.Ct. 2811 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008)) (internal quotation marks omitted).

#### A. The Noncandidate Committee Reporting and Disclosure Requirements Survive Exacting Scrutiny As Applied to A-1

[6] We first consider whether the noncandidate committee reporting and disclosure requirements satisfy exacting scrutiny as applied to A-1. Looking to the burden side of the balance, the district court found that the "registration and disclosure requirements that come with noncandidate committee status do not present an undue burden on A-1." *Yamada III*, 872 F.Supp.2d at 1052. We agree.

The noncandidate committee is Hawaii's method for monitoring and regulating independent political spending in state elections. In relevant part, a noncandidate committee is broadly defined as an organization "that has the purpose of making or receiving contributions, making expenditures, or incurring financial obligations to influence" Hawaii elections. HRS § 11-302.<sup>5</sup> To paraphrase the statute, and incorporating the Commission's narrowing construction we adopted earlier (see page 20), the noncandidate committee definition is limited to an organization that:

Has "the purpose" of making or receiving contributions, or making expendi-

focus solely on noncandidate committee status for organizations, and we shall do the same.

5. Although noncandidate committee status also extends to an individual who makes contributions or expenditures not of his or her own funds, see HRS § 11-302, the parties

tures, for communications or activities that constitute express advocacy or its functional equivalent (i.e., that are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate to office, or for or against any question or issue on the ballot).

Expenditures are further defined as payments or nonmonetary contributions made for the purpose of communications or activities that constitute express advocacy or its functional equivalent. *See id.*; HRS § 11–302.

Noncandidate committee status is triggered only when an organization receives contributions or makes or incurs qualifying expenditures totaling more than \$1,000 during a two-year election cycle. *See* HRS § 11–321(g). Within 10 days of reaching this threshold, the organization must register as a noncandidate committee by filing an organizational report with the Commission. *Id.* 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. *See* HRS §§ 11–321, 11–323, 11–324, 11–351(a). The committee’s contributions must be segregated from its other funds. *See* HAR § 3–160–21(c).

Every committee must also comply with reporting requirements tied to election periods. These requirements include disclosing contributions made and received, expenditures by the committee and the assets on hand at the end of the reporting period. *See* HRS §§ 11–331 (filing of re-

ports), 11–335 (noncandidate committee reports), 11–336 (timing of reports for noncandidate committees), 11–340 (penalties for failure to file a required report).<sup>6</sup> The reports must be filed no later than 10 days before an election, 20 days after a primary election and 30 days after a general election; additional reports must be filed on January 31 of every year and July 31 after an election year. *See* HRS § 11–336(a)–(d). If a noncandidate committee has aggregate contributions and expenditures of \$1,000 or less in an election period, it need only file a single, final election-period report, or it may simply request to terminate its registration. *See* HRS §§ 11–326, 11–339(a).

A–1’s argument that these burdens are substantial is foreclosed by *Human Life*, which held that the burdens of compliance with Washington State’s materially indistinguishable registration and reporting requirements were “modest” and “not unduly onerous.” 624 F.3d at 1013–14. Indeed, the majority of circuits have concluded that such disclosure requirements are not unduly burdensome. *See Sorrell*, 758 F.3d at 137–38 (rejecting the argument that “registration, recordkeeping necessary for reporting, and reporting requirements” are onerous as a matter of law); *Worley v. Fla. Sec’y of State*, 717 F.3d 1238, 1250 (11th Cir.2013) (holding that Florida’s analogous “PAC regulations do not generally impose an undue burden”); *McKee*, 649 F.3d at 56 (holding that Maine’s analogous PAC regulations “do not prohibit, limit, or impose any onerous burdens on speech”); *Family PAC*, 685 F.3d at 808 n. 6 (noting the generally “modest” administrative burdens imposed

6. The Hawaii Legislature slightly revised the reporting requirements after the district court granted summary judgment to the Commission. *See* 2013 Haw. Sess. Laws 209–10 (S.B. 31) (amending HRS §§ 11–335, 11–336). We

consider the version of the reporting statutes in effect at the time this suit was filed. In any event, the minor amendments do not affect our constitutional analysis.

on ballot committees by Washington law); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 697–98 (D.C.Cir.2010) (holding that the organizational, administrative and continuous reporting requirements applicable to federal political committees were not unduly burdensome); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 789–92 (9th Cir.2006) (holding that registration, reporting and disclosure requirements applicable to Alaskan political committees were not “significantly burdensome” or “particularly onerous”).

A–1 would distinguish *Human Life*'s burden analysis on the ground that a non-candidate committee in Hawaii is subject to additional limits on the kinds of contributions it may receive. Specifically, A–1 points to Hawaii law limiting contributions to noncandidate committees (HRS § 11–358), and banning contributions from particular sources, including bans on contributions made in the name of another (HRS § 11–352), anonymous contributions (HRS § 11–353), or prohibitions on contributions from government contractors and foreign nationals (HRS §§ 11–355, 11–356). These differences do not distinguish *Human Life*. First, because A–1 is self-financed and does not receive contributions, any funding limits or bans have no bearing on our as-applied constitutional analysis.

7. The burdens of noncandidate committee status in Hawaii are also distinguishable from the burdens of federal “PAC status” that A–1 labels “onerous,” citing to the Supreme Court’s decisions in *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 248, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986), and *Citizens United*, 558 U.S. at 337–39, 130 S.Ct. 876. The federal PAC status in *MCFL* required corporations to set up a separate legal entity and create a segregated fund before engaging in any direct political speech, and further prohibited an organization from soliciting contributions beyond its “members.” See *McKee*, 649 F.3d at 56; see also *Madigan*, 697 F.3d at 488 (distinguishing *MCFL*'s PAC burdens); *Human Life*,

Second, none of these limits imposes a substantial burden. The Commission concedes that the only constitutionally suspect limit A–1 identifies—the \$1,000 limit on contributions to noncandidate committees—is unconstitutional as applied to committees making only independent expenditures. The other limits apply to A–1 regardless of its status as a noncandidate committee. Thus, there are no material differences between the burdens of non-candidate committee status in Hawaii and political committee status in Washington.<sup>7</sup>

A–1 has been complying with the non-candidate committee requirements for several years without difficulty. No separate organization need be created, as long as records are kept tracking financial activity by the noncandidate committee, see HAR § 3–160–21(c), and filing of the brief, required reports may be performed electronically at infrequent intervals, see HRS § 11–336. As the district court concluded, “[a]lthough the requirements might be inconvenient, the record does not indicate the burdens on A–1 are onerous as matters of fact or law.” *Yamada III*, 872 F.Supp.2d at 1053.

Turning to the governmental interests side of the equation, there is no question that Hawaii’s noncandidate committee requirements serve important government

624 F.3d at 1010 (same); *Alaska Right to Life*, 441 F.3d at 786–87, 791–92 (same). But see *Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 839–42 (7th Cir.2014) (describing the “heavy administrative burdens” of Wisconsin’s analogous, but more detailed, “PAC-like disclosure program,” which “in critical respects [was] unchanged from *Buckley*’s day”). Like Maine’s political committee provision, Hawaii law “imposes three simple obligations” on a qualifying entity that are not nearly as onerous as those considered in *MCFL*: “filing of a registration form disclosing basic information, . . . reporting of election-related contributions and expenditures, and simple recordkeeping.” *McKee*, 649 F.3d at 56.

interests. The Hawaii legislature created these requirements to “expand the scope of public scrutiny relative to the financial aspects of the campaign process” and to avoid corruption or its appearance in electoral politics. House Stand. Comm. Rep. No. 188, H.B. No. 22, in Haw. H.J. 840 (1973). Subsequent amendments to Hawaii’s disclosure scheme reaffirmed the important “informational value” served by reporting and disclosure requirements, as well as the state’s interest in “deter[ing] . . . corruption” and “gathering data necessary to detect violations” of campaign finance laws. Conf. Comm. Rep. No. 78, in Haw. H.J. 1137, 1140 (1979). When Hawaii revised its campaign finance laws in 1995, the legislature cited the importance of “reforming the campaign spending law . . . to restor[e] the public’s confidence in the political process.” S. Stand. Comm. Rep. No. 1344, H.B. No. 2094, Haw. S.J. 1346 (1995). The legislature found that “[m]aking candidates, contributors, and others more accountable by requiring the filing of reports . . . and specifying what information must appear in these reports go[es] a long way to accomplishing these goals.” *Id.*

Thus, 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.” *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031 (9th Cir. 2009) (quoting *McConnell*, 540 U.S. at 196, 124 S.Ct. 619).

First, the reporting and disclosure obligations provide information to the electorate about who is speaking—information

that “is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment.” *Human Life*, 624 F.3d at 1005; see also *McCutcheon v. Fed. Election Comm’n*, — U.S. —, 134 S.Ct. 1434, 1459–60, 188 L.Ed.2d 468 (2014); *Citizens United*, 558 U.S. at 368–69, 130 S.Ct. 876; *Family PAC*, 685 F.3d at 806, 808. “This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages,” *Citizens United*, 558 U.S. at 371, 130 S.Ct. 876, making disclosure of this information a “sufficiently important, if not compelling, governmental interest,” *Human Life*, 624 F.3d at 1005–06. Second, Hawaii’s reporting and disclosure obligations “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.” *Buckley*, 424 U.S. at 67, 96 S.Ct. 612; see also *McCutcheon*, 134 S.Ct. at 1459. Third, the registration, record keeping, reporting and disclosure requirements provide a means of detecting violations of valid contribution limitations, preventing circumvention of Hawaii’s campaign spending limitations, including rules that bar contributions by foreign corporations or individuals, see HRS § 11–356, or that prohibit contributions from government contractors, see HRS § 11–355. See *Buckley*, 424 U.S. at 67–68, 96 S.Ct. 612; *SpeechNow.org*, 599 F.3d at 698 (holding that “requiring disclosure . . . deters and helps expose violations of other campaign finance restrictions”). Thus, Hawaii’s noncandidate committee reporting and disclosure requirements indisputably serve important governmental interests.

A–1 nonetheless contends these reporting and disclosure requirements are not sufficiently tailored to survive exacting scrutiny because they apply to any organization that has “the purpose” of engaging



in political advocacy, HRS § 11-302, rather than applying more narrowly to organizations having a *primary* purpose of engaging in such activity. A-1 concedes that Hawaii may impose reporting and disclosure requirements on organizations that make political advocacy a priority but argues that it only incidentally engages in such advocacy.

A-1's argument rests on *Human Life*, which considered the Washington disclosure regime whereby an organization qualifies as a political committee if its "primary or one of [its] primary purposes is to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." 624 F.3d at 1008 (internal quotation marks and citation omitted). First, *Human Life* rejected the argument that this definition was facially overbroad because "it covers groups with 'a' primary purpose of political advocacy, instead of being limited to groups with 'the' primary purpose of political advocacy." 624 F.3d at 1008-11 (emphasis added). It explained that *Buckley* and *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986), did not hold that an entity must have the sole, major purpose of political advocacy "to be deemed constitutionally a political committee." *Human Life*, 624 F.3d at 1009-10 (citing *Buckley*, 424 U.S. at 79, 96 S.Ct. 612). Next, *Human Life* held that Washington's political committee definition withstood exacting scrutiny because there was "a substantial relationship between Washington State's informational interest and its decision to impose disclosure requirements on organizations with a primary purpose of political advocacy." *Id.* at 1011. We reasoned that the definition:

does not extend to all groups with "a purpose" of political advocacy, but instead is tailored to reach only those

groups with a "primary" purpose of political activity. This limitation ensures that the electorate has information about groups that make political advocacy a *priority*, without sweeping into its purview groups that only *incidentally* engage in such advocacy. Under *this* statutory scheme, the word "primary"—not the words "a" or "the"—is what is constitutionally significant.

*Id.* at 1011 (emphasis added).

A-1 correctly points out that the provision at issue in *Human Life* applied to organizations with a primary purpose of political advocacy, whereas Hawaii's law applies to an organization with "the purpose" of political advocacy. *Human Life*, however, did not "hold that the word 'primary' or its equivalent [was] constitutionally necessary." *Id.* It held only that this limitation was "sufficient" for Washington's political committee definition to withstand First Amendment scrutiny. *Id.* *Human Life* is therefore not controlling, and, reaching an issue we did not address there, we conclude that Hawaii's noncandidate committee reporting and disclosure requirements are sufficiently tailored as applied to A-1 even without a "primary" modifier.

First, because Hawaii's definition extends only to organizations having "the purpose" of political advocacy, it avoids reaching organizations engaged in only incidental advocacy. Under the Commission's narrowing construction, noncandidate committee status applies to organizations that have the purpose of making or receiving contributions, or making expenditures, for express advocacy or its functional equivalent. *Cf. Madigan*, 697 F.3d at 488 (holding that Illinois' political committee definition's "limit of 'on behalf of or in opposition to' confines the realm of regulated activity to expenditures and

contributions within the core area of genuinely campaign-related transactions”).<sup>8</sup>

Second, Hawaii’s registration and reporting requirements are not triggered until an organization makes more than \$1,000 in aggregate contributions and expenditures during a two-year election period. *See* HRS § 11–321(g); HAR § 3–160–21(a). This threshold also ensures that an organization must be more than incidentally engaged in political advocacy before it will be required to register and file reports as a noncandidate committee. Third, an organization that “raises or expends funds for the sole purpose of producing and disseminating informational or educational communications”—even if it also engages in limited political advocacy costing less than \$1,000 in the aggregate—need not register as a noncandidate committee. *See* HRS §§ 11–302; 11–321(g). Fourth, if an organization registers as a noncandidate committee, but subsequently reduces its advocacy activity below the \$1,000 threshold, it need only file a single report per

election period or can terminate its registration. HRS § 11–339.<sup>9</sup>

Given these limits and the extent of A–1’s past and planned political advocacy, we have little trouble concluding that the regulations are constitutional as applied to A–1. A–1, which made more than \$50,000 in contributions and spent more than \$6,000 on political ads in 2010, clearly engages in more than incidental political advocacy. Although A–1 now pledges to limit its individual contributions to \$250 and to contribute only to candidates, these proposed activities—combined with A–1’s expenditures on its political ads—plainly exceed incidental activity. Hawaii thus has a strong interest in regulating A–1.

Hawaii’s choice of a \$1,000 registration and reporting threshold is also a far cry from the zero dollar threshold invalidated in *Canyon Ferry*, 556 F.3d at 1033–34. *See also* *Worley*, 717 F.3d at 1251 (noting that “federal PAC requirements kick in

8. Hawaii’s definition is distinguishable from the Wisconsin regulation struck down in *Barland*, 751 F.3d at 822, 834–37, which treated an organization as a political committee if it, inter alia, spent more than \$300 to communicate “almost anything . . . about a candidate within 30 days of a primary and 60 days of a general election.” Hawaii’s more tailored disclosure regime only extends to organizations with the purpose of engaging in express advocacy or its functional equivalent. *See Sorrell*, 758 F.3d at 137–38 (distinguishing *Barland* and upholding Vermont’s political committee regime, which applied only to groups that accepted contributions and made expenditures over \$1,000 “for the purpose of supporting or opposing one or more candidates”).

9. The reporting requirements of Hawaii law are more narrowly tailored than the “onerous” and “potentially perpetual” reporting requirement preliminarily enjoined in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 873–74 (8th Cir.2012) (en banc). In Minnesota, an organization must

register as a political committee once it spends \$100 in the aggregate on political advocacy, and once registered, it must “file five reports during a general election year” even if the committee makes no further expenditures. *Id.* at 873, 876; *see also* *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 596–98 (8th Cir.2013) (striking down Iowa’s ongoing reporting requirements that were untethered to any future political spending). We do not agree that such reporting requirements are “onerous” as a general matter. *See Human Life*, 624 F.3d at 1013–14. Moreover, unlike in Minnesota, an organization need not register as a noncandidate committee in Hawaii until it crosses the \$1,000 threshold for a two-year election cycle, *see* HRS § 11–321(g), and a committee with aggregate contributions and expenditures of \$1,000 or less in any subsequent election cycle need only file a single, final election-period report, *see* HRS § 11–326. Hawaii’s reporting regime is thus contingent on an organization’s ongoing contributions and expenditures, reflecting its closer tailoring to Hawaii’s informational interest than Minnesota’s analogous regime.

once a group has raised \$1000 during a calendar year to influence elections and . . . these requirements have not been held unconstitutional” (citing 2 U.S.C. § 431(4)(a) (2012))). Although we carefully scrutinize the constitutionality of a legislature’s chosen threshold for imposing registration and reporting requirements, *see Randall v. Sorrell*, 548 U.S. 230, 248–49, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (plurality opinion), the precise “line is necessarily a judgmental decision, best left in the context of this complex legislation to [legislative] discretion,” *Family PAC*, 685 F.3d at 811 (quoting *Buckley*, 424 U.S. at 83, 96 S.Ct. 612); *see also Worley*, 717 F.3d at 1253 (“Challengers are free to petition the legislature to reset the reporting requirements for Florida’s PAC regulations, but we decline to do so here.”). At least as applied to A–1, Hawaii’s \$1,000 threshold adequately ensures that political committee burdens are not imposed on “groups that only incidentally engage” in political advocacy. *Human Life*, 624 F.3d at 1011.

A–1’s argument that regulations should reach only organizations with a primary purpose of political advocacy also ignores the “fundamental organizational reality that most organizations do not have just one major purpose.” *Human Life*, 624 F.3d at 1011 (internal quotation marks and citation omitted). Large organizations that spend only one percent of their funds on political advocacy likely have many other, more important purposes—but this small percentage could amount to tens or hundreds of thousands of dollars in political activity, depending on the size of the organization. *See id.*; *see also Madigan*, 697 F.3d at 489–90; *McKee*, 649 F.3d at 59. The \$1,000 threshold appropriately reaches these multipurpose organizations’ participation in the political process.

A–1’s political advocacy underscores this point. Although A–1’s political spending may be limited in proportion to its overall activities, the strength of Hawaii’s informational interest does not fluctuate based on the diversity of the speaker’s activities. Hawaii has an interest in ensuring the public can follow the money in an election cycle, regardless of whether it comes from a single-issue, political advocacy organization or a for-profit corporation such as A–1. The Commission makes the reported information freely available in searchable databases on its website, which provides Hawaiians with a vital window into the flow of campaign dollars.<sup>10</sup> This prompt, electronic disclosure of contributions and expenditures “can provide . . . citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters,” *Citizens United*, 558 U.S. at 370, 130 S.Ct. 876, and “given the Internet, disclosure offers much more robust protections against corruption,” *McCutcheon*, 134 S.Ct. at 1460. Thus, the distinction between A–1, a for-profit electrical contractor, and a group like Human Life of Washington, a “non-profit, pro-life advocacy corporation,” 624 F.3d at 994, is not constitutionally significant here. A–1 may not make political advocacy a priority, but it nonetheless has been a significant participant in Hawaii’s electoral process, justifying the state’s imposition of registration and reporting burdens.

Furthermore, Hawaii’s noncandidate committee definition, by extending beyond organizations making political advocacy a priority, avoids the circumvention of valid campaign finance laws and disclosure requirements. *See Human Life*, 624 F.3d at 1011–12. As the Seventh Circuit has explained:

10. *See* <http://ags.hawaii.gov/campaign/nc/>.

[L]imiting disclosure requirements to groups with the major purpose of influencing elections would allow even those very groups to circumvent the law with ease. Any organization dedicated primarily to electing candidates or promoting ballot measures could easily dilute that major purpose by just increasing its non-electioneering activities or better yet by merging with a sympathetic organization that engaged in activities unrelated to campaigning.

*Madigan*, 697 F.3d at 489. Hawaii’s definition addresses the “hard lesson of circumvention” in the campaign finance arena, by including within its reach any entity that has political advocacy as one of its goals. *McConnell*, 540 U.S. at 165, 124 S.Ct. 619. As the district court explained:

[A–1] has purposely not created a separate organizational structure for election-related activity, choosing instead to register itself (A–1 A–Lectrician, Inc.) as a noncandidate committee. If it were allowed to avoid registration merely because its political activity is small proportionally to its overall activities (as an electrical contractor and perhaps as a pure issue advocacy organization), it would encourage any affiliated noncandidate committee to avoid disclosure requirements by merging its activities into a larger affiliated organization.

*Yamada III*, 872 F.Supp.2d at 1052 (citation omitted).<sup>11</sup>

In sum, the noncandidate committee definition and accompanying reporting and disclosure requirements are substantially

related to Hawaii’s important interests in informing the electorate, preventing corruption or its appearance, and avoiding the circumvention of valid campaign finance laws. Because the burden of complying with this disclosure scheme is modest compared to the significance of the interests being served, we uphold Hawaii’s noncandidate committee reporting and disclosure requirements as applied to A–1.

In doing so on an as-applied basis, we have no occasion to consider whether Hawaii law would withstand exacting scrutiny as applied to another business or nonprofit group that seeks to engage in less substantial political advocacy than A–1. We decline to “speculate about ‘hypothetical’ or ‘imaginary’ cases.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). Based on the record before us, we hold only that noncandidate committee status may be extended to organizations, such as A–1, even though their primary purpose is not political advocacy. The burdens attending such a status are modest and substantially related to important government interests.

#### **B. The Disclaimer Requirement for Advertisements is Constitutional Under *Citizens United***

A–1 contends that Hawaii’s requirement that political advertising include a disclaimer as to the affiliation of the advertiser with a candidate or candidate committee cannot survive exacting scrutiny. “Advertisements” for purposes of Hawaii election

11. Although not directly relevant to A–1’s challenge—because A–1’s political activities are self-financed and it receives no contributions—we also note the heightened importance of noncandidate committee disclosure requirements now that the limit on contributions to noncandidate committees has been permanently enjoined. A single contributor may provide thousands of dollars to indepen-

dent committees, and yet avoid disclosing its identity if the committee makes all the expenditures itself. The noncandidate committee definition acts to ensure that the contributor’s identity will be disclosed to the voting public. Hawaii’s efforts to provide transparency would be incomplete if disclosure was not required in such circumstances.

law are print and broadcast communications that (1) identify a candidate or ballot issue directly or by implication and (2) “advocate[ ] or support[ ] the nomination, opposition, or election of the candidate, or advocate[ ] the passage or defeat of the issue or question on the ballot.” HRS § 11–302. The challenged disclaimer rule provides that an advertisement must include a “notice in a prominent location” that “[t]he advertisement has the approval and authority of the candidate” or “has not been approved by the candidate.” HRS § 11–391(a)(2).<sup>12,13</sup> The rule thus advises voters whether an advertisement is coordinated with or independent from a candidate for elected office. The fine for violating this section is \$25 per advertisement, not to exceed \$5,000 in the aggregate. *See* HRS § 11–391(b).

A–1 seeks to place advertisements that (1) mention a candidate by name; (2) run in close proximity to an election; and (3) include language stating that particular candidates “are representatives who do not listen to the people,” “do not understand the importance of the values that made our nation great” or “do not show the aloha spirit.” It argues the disclaimer requirement is unconstitutional because it regulates the content of speech itself and is therefore an even greater incursion on its First Amendment rights than reporting requirements. A–1 further contends a disclaimer can be mandated only for speech that is a federal electioneering communication, as defined by federal law, or that is express advocacy, not including its functional equivalent.

[7] We agree with the district court that the disclaimer requirement survives exacting scrutiny as applied to A–1’s news-

paper advertisements. Like the noncandidate committee requirements, the disclaimer serves an important governmental interest by informing the public about who is speaking in favor or against a candidate before the election and imposes only a modest burden on First Amendment rights. A–1’s arguments to the contrary are all but foreclosed by *Citizens United*, 558 U.S. at 366–69, 130 S.Ct. 876.

First, the disclaimer requirement imposes only a modest burden on A–1’s First Amendment rights. Like disclosure requirements, “[d]isclaimer . . . requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking.” *Id.* at 366, 130 S.Ct. 876 (citation and internal quotation marks omitted). Hawaii’s disclaimer requirement is no more burdensome than the one for televised electioneering communications upheld in *Citizens United*. *See id.* at 366–69, 130 S.Ct. 876. That rule required a statement as to who was responsible for the content of the advertisement “be made in a ‘clearly spoken manner,’ and displayed on the screen in a ‘clearly readable manner’ for at least four seconds,” along with a further statement that “the communication ‘is not authorized by any candidate or candidate’s committee.’” *Id.* at 366, 130 S.Ct. 876 (quoting 2 U.S.C. § 441d(d)(2), (a)(3)). Similarly, all that is required here is a short statement stating that the advertisement is published, broadcast, televised, or circulated with or without the approval and authority of the candidate. *See* HRS § 11–391(a).

Second, requiring a disclaimer is closely related to Hawaii’s important governmen-

12. A–1 does not challenge the related requirement that all political advertisements disclose the name and address of the person or entity paying for the ad. *See* HRS § 11–391(a)(1).

13. This provision was amended during the pendency of this appeal, but the minor changes are immaterial. *See* 2014 Hawaii Laws Act 128 (H.B. 452).

tal interest in “dissemination of information regarding the financing of political messages.” *McKee*, 649 F.3d at 61. A–1’s past advertisements ran shortly before an election and criticized candidates by name as persons who did not, for example, “listen to the people.” As the district court found, these advertisements—published on or shortly before election day—are not susceptible to any reasonable interpretation other than as an appeal to vote against a candidate. *Yamada III*, 872 F.Supp.2d at 1055. Such ads are the very kind for which “the public has an interest in knowing who is speaking,” *Citizens United*, 558 U.S. at 369, 130 S.Ct. 876, and where disclaimers can “avoid confusion by making clear that the ads are not funded by a candidate or political party,” *id.* at 368, 130 S.Ct. 876. *See also Worley*, 717 F.3d at 1253–55 (rejecting a challenge to an analogous disclaimer requirement); *McKee*, 649 F.3d at 61 (same); *Alaska Right to Life*, 441 F.3d at 792–93 (same). And contrary to A–1’s argument, nothing in *Citizens United* suggests that a state may not require disclaimers for political advertising that is not the functional equivalent of a federal electioneering communication. In applying the federal disclaimer requirement to an advertisement urging voters to see a short film about a presidential candidate, *Citizens United* explained that “[e]ven if the ads only pertain to a commercial transaction, the public has an

14. We reject A–1’s comparison to the disclaimer invalidated by the Supreme Court in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 340, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), which prohibited the distribution of pamphlets without the name and address of the person responsible for the materials, or to the disclosure provision invalidated by this court in *ACLU of Nev. v. Heller*, 378 F.3d 979, 981–82 (9th Cir.2004), which required persons paying for publication of any material “relating to an election” to include their names and addresses. *Citizens United*’s post-*McIntyre*, post-*Heller* discussion makes clear

interest in knowing who is speaking about a candidate shortly before an election.” 558 U.S. at 369, 130 S.Ct. 876.<sup>14</sup>

Accordingly, the disclaimer requirement does not violate the First Amendment as applied to A–1’s political advertisements.

### C. A–1 Lacks Standing to Challenge the Electioneering Communications Reporting Requirements

[8] A–1 acknowledges that, at the time it filed this action, it lacked standing to challenge the electioneering communications law if it must continue to register as a noncandidate committee. *See Washington Emtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir.2013) (“A plaintiff must demonstrate standing for each claim he or she seeks to press and for each form of relief sought.”) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006)). A–1 argues, however, that it now has standing because Hawaii law was amended as of November 5, 2014, to require registered noncandidate committees to comply with electioneering communications reporting requirements. *See* 2013 Haw. Sess. L. Act 112. But, “[s]tanding is determined as of the commencement of litigation.” *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171 (9th Cir.2002); *see also Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005) (“As with all questions of subject

that disclaimer laws such as Hawaii’s may be imposed on political advertisements that discuss a candidate shortly before an election. *See* 558 U.S. at 368–69, 130 S.Ct. 876; *see also Worley*, 717 F.3d at 1254 (rejecting the argument that *McIntyre* dictated the demise of Florida’s analogous disclaimer requirement). An individual pamphleteer may have an interest in maintaining anonymity, but “[l]eaving aside *McIntyre*-type communications . . . there is a compelling state interest in informing voters who or what entity is trying to persuade them to vote in a certain way.” *Alaska Right to Life*, 441 F.3d at 793.

matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint. . . . The party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint to establish its standing.” (alteration in original) (internal quotation marks omitted)), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 130 S.Ct. 2323, 176 L.Ed.2d 1131 (2010); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n. 4, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (“The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed. It cannot be that, by later participating in the suit, the State Department and AID retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset.” (citation and internal quotation marks omitted)). Accordingly, because we conclude the non-candidate committee requirements can be constitutionally applied to A–1, and A–1 was not subject to the “electioneering communication” reporting requirements as of the date the complaint was filed, we do not consider A–1’s constitutional challenge to those requirements. *See* HRS § 11–341.<sup>15</sup>

**D. The Contractor Contribution Ban is Constitutional Even As Applied to Contributions to Legislators Who Neither Award nor Oversee Contracts**

A–1’s final First Amendment challenge is to Hawaii’s ban on contributions by government contractors. The challenged provision makes it

unlawful for any person who enters into any contract with the State, any of the counties, or any department or agency thereof either for the rendition of personal services, the buying of property, or furnishing of any material, supplies, or equipment to the State, any of the counties, any department or agency thereof, or for selling any land or building to the State, any of the counties, or any department or agency thereof, if payment for the performance of the contract or payment for material, supplies, equipment, land, property, or building is to be made in whole or in part from funds appropriated by the legislative body, at any time between the execution of the contract through the completion of the contract, to:

. . . Directly or indirectly make any contribution, or promise expressly or impliedly to make any contribution to any candidate committee or noncandidate committee, or to any candidate or to any person for any political purpose or use; HRS § 11–355(a).

A–1 does not challenge the ban as applied to contributions it makes to lawmakers or legislative candidates who either decide whether it will receive a contract or oversee its performance of a contract. Instead, A–1 asserts it intends to make contributions only to lawmakers or candidates who will neither award nor oversee its contracts, and it argues the government contractor contribution ban is unconstitutional solely as applied to those intended contributions.<sup>16</sup>

15. Nothing we say today (other than as a matter of *stare decisis*) precludes A–1 from bringing a future challenge to the electioneering communication reporting requirements to which, it claims, it is now subject.

16. A–1 challenges only its right to make contributions to state legislative candidates while acting as a state government contractor. It

does not distinctly argue, for example, that § 11–355(a) impermissibly infringes its right to contribute to county or municipal officials while serving as a state contractor. We therefore have no occasion to decide whether the ban would survive First Amendment scrutiny as applied to those circumstances.

Contribution bans are subject to “closely drawn” scrutiny. *See Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 161–63, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003) (applying the closely drawn standard in upholding a federal law banning campaign contributions made by corporations); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124 & n. 4 (9th Cir.2011) (applying closely drawn scrutiny to a city ordinance making it unlawful for “non-individuals” to contribute directly to candidates). A regulation satisfies closely drawn scrutiny when “the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.” *McCutcheon*, 134 S.Ct. at 1444 (quoting *Buckley*, 424 U.S. at 25, 96 S.Ct. 612) (internal quotation marks omitted).<sup>17</sup>

A-1 does not argue that Hawaii’s government contractor contribution ban is unconstitutional as a general matter. The Second Circuit confronted a similar ban in *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir.2010). There, the court turned away a First Amendment challenge to Connecticut’s ban on campaign contributions by state contractors, holding that it furthered a “‘sufficiently important’ government interest[.]” by “combat[ing] both actual corruption and the appearance of corruption caused by contractor contributions.” *Id.* at 200. The court further held that the ban was “closely drawn” because it targeted contributions by current and prospective state contractors—the contributions associated

most strongly with actual and perceived corruption. *See id.* at 202. Recognizing a ban on contributions by government contractors, rather than a mere *limit* on the amount of those contributions, was “a drastic measure,” the court held that the ban was closely drawn because it addressed a perception of corruption brought about by recent government-contractor-related corruption scandals in Connecticut. *See id.* at 193–94, 204–05. The ban “unequivocally addresses the perception of corruption” because, “[b]y totally shutting off the flow of money from contractors to state officials, it eliminates any notion that contractors can influence state officials by donating to their campaigns.” *Id.* at 205; *see also Ognibene v. Parkes*, 671 F.3d 174, 185 (2d Cir.2011) (“When the appearance of corruption is particularly strong due to recent scandals . . . a ban may be appropriate.”).

[9] The same reasoning applies here. Hawaii’s government contractor contribution ban serves sufficiently important governmental interests by combating both actual and the appearance of quid pro quo corruption. *Green Party*, 616 F.3d at 200; *see also McCutcheon*, 134 S.Ct. at 1450 (reaffirming that a legislature may limit contributions to prevent actual quid pro quo corruption or its appearance); *cf. Preston v. Leake*, 660 F.3d 726, 736–37 (4th Cir.2011) (upholding a complete ban on contributions by lobbyists “as a prophylactic to prevent not only actual corruption but also the appearance of corruption in future state political campaigns”). It is

17. We previously noted that *Beaumont* and other cases applying the closely drawn standard to contribution limits remained good law after *Citizens United*. *See Thalheimer*, 645 F.3d at 1124–25. This remains true after *McCutcheon*. There, the Supreme Court considered the constitutionality of “aggregate limits” under federal law, which “restrict[ed] how much money a donor [could] contribute

in total to all candidates or committees” in a given election period. *See* 134 S.Ct. at 1442 (citing 2 U.S.C. § 441a(a)(3)). Because the Court held that the aggregate limit for federal elections failed even under less stringent, “closely drawn” scrutiny, the Court declined to revisit the proper standard of review for contribution limits. *See id.* at 1445–46.



closely drawn because it targets direct contributions from contractors to officeholders and candidates, the contributions most closely linked to actual and perceived quid pro quo corruption. See *Green Party*, 616 F.3d at 202; see also *McCutcheon*, 134 S.Ct. at 1452 (noting that the “risk of quid pro quo corruption or its appearance” is greatest when “a donor contributes to a candidate directly”).<sup>18</sup> And as in Connecticut, Hawaii’s decision to adopt an outright ban rather than mere restrictions on how much contractors could contribute was justified in light of past “pay to play” scandals and the widespread appearance of corruption that existed at the time of the legislature’s actions. See *Yamada III*, 872 F.Supp.2d at 1058–59 nn. 26–27 (summarizing the evidence of past scandals and the perception of corruption). Thus, as a general matter, Hawaii’s ban on contributions by government contractors satisfies closely drawn scrutiny.

A–1’s narrower argument that the contractor contribution ban is unconstitutional as applied to its contributions to lawmakers and candidates *who neither award nor oversee its contracts* is also without merit. Hawaii’s interest in preventing actual or the appearance of quid pro quo corruption is no less potent as applied to A–1’s proposed contributions because the Hawaii legislature *as a whole* considers all bills concerning procurement. Thus, although an individual legislator may not be closely involved in awarding or overseeing a particular contract, state money can be spent

only with an appropriation by the entire legislature. See Haw. Const. art. VII, §§ 5, 9. Hawaii reasonably concluded that contributions to any legislator could give rise to the appearance of corruption.

In essence, A–1 contends that Hawaii’s contractor ban should be tailored more narrowly, but narrower tailoring is not required here. There is no question the ban is closely drawn to the state’s anticorruption interest as a general matter, and we decline to revisit the legislature’s judgment not to craft a still narrower provision. Closely drawn scrutiny requires “a fit that is not necessarily perfect, but reasonable,” and Hawaii’s contractor contribution ban is a reasonable response to the strong appearance of corruption that existed at the time of the legislature’s actions. *McCutcheon*, 134 S.Ct. at 1456 (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)) (internal quotation marks omitted). We need not “determine with any degree of exactitude the precise restriction necessary to carry out the statute’s legitimate objectives” to uphold the contribution ban. *Randall*, 548 U.S. at 248, 126 S.Ct. 2479.

Even if narrower tailoring were required, A–1’s proposal for a narrower ban is unworkable. A–1 does not explain how it would determine, before the election, which candidates would neither award nor oversee any of its contracts. The membership of the various legislative committees

18. Hawaii’s contractor contribution ban is narrower than many others. The ban upheld in *Green Party*, for example, applied not only to contractors but also to principals of that contractor and to family members of a contractor or of a principal of a contractor. See *Green Party*, 616 F.3d at 202–03. The federal ban is also broader than the Hawaii ban; it applies not only to existing contractors but also to prospective contractors. See 2 U.S.C. § 441c. Hawaii’s law does not prohibit A–1

from making contributions as a prospective contractor, A–1’s principals (such as plaintiff Yamada) from making contributions or A–1 from making independent expenditures on behalf of the candidates it seeks to support. Cf. *Beaumont*, 539 U.S. at 161 n. 8, 123 S.Ct. 2200 (“A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.”).

can change with each election, and a different committee—whether the Education Committee or Public Safety, Government Operations, and Military Affairs Committee—may serve a greater or lesser oversight role on a particular project. There is, therefore, a “clear fallacy” in A–1’s logic:

[During the 2011 Legislative Session], A–1 testified . . . in favor of a construction and procurement-related bill regarding the University of Hawaii. At least three Legislators that served on committees that considered the bill (and voted in favor of it) also received campaign contributions from A–1 in the 2010 elections. And A–1 made contributions to opponents of fifteen other Legislators who considered the bill.

*Yamada III*, 872 F.Supp.2d at 1061 n. 30 (citation omitted). Simply put, A–1 cannot predict with certainty which candidates will not become involved in the contract award or oversight process when it makes its contributions. Moreover, A–1’s contributions to candidates who do not become directly involved in contract award and oversight could still create the appearance of “the financial quid pro quo: dollars for political favors.” *Citizens United*, 558 U.S. at 359, 130 S.Ct. 876 (quoting *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985)) (internal quotation marks omitted).

For these reasons, we hold that Hawaii’s government contractor contribution ban survives closely drawn scrutiny even as applied to A–1’s proposed contributions to candidates who neither decide whether A–1 receives contracts nor oversee A–1’s contracts.

#### IV. Attorney’s Fees

Finally, we consider the district court’s fee award to Yamada and Stewart (the

plaintiffs) for their successful constitutional challenge to the \$1,000 limit on contributions to noncandidate committees, HRS § 11–358. Under 42 U.S.C. § 1988(b), the district court had discretion to award “the prevailing party . . . a reasonable attorney’s fee.” We review the award for an abuse of discretion, but any element of legal analysis that figures into the district court’s decision is reviewed de novo. *See Watson v. Cnty. of Riverside*, 300 F.3d 1092, 1095 (9th Cir.2002). The plaintiffs’ primary contention, with which we agree, is that the district court erred by refusing to award the fees they incurred in successfully defending against the defendants’ interlocutory appeal. We address the plaintiffs’ other contentions in a concurrently filed memorandum disposition.

In October 2010, the district court granted a preliminary injunction in favor of the plaintiffs on their claim that HRS § 11–358, limiting to \$1,000 contributions to noncandidate committees, violates the First Amendment. The defendants then filed an interlocutory appeal. After the parties finished briefing in this court, however, the defendants dismissed the appeal, presumably in light of an intervening decision upholding a preliminary injunction of a similar contribution limit. *See Thalheimer*, 645 F.3d at 1117–21. In subsequent district court proceedings, the defendants offered to stipulate to a permanent injunction against § 11–358. The parties, however, were unable to reach agreement on the form of an injunction, and on the parties’ subsequent cross-motions for summary judgment, the district court permanently enjoined § 11–358 as applied to the plaintiffs’ proposed contributions.

Based on their successful constitutional challenge to § 11358, Yamada and Stewart sought attorney’s fees and costs, including those fees incurred in defending against

the defendants' interlocutory appeal, under § 1988. The district court granted in part and denied in part their fee request. As relevant here, it concluded it had "no authority" to award fees pertaining to the interlocutory appeal because (1) the plaintiffs became prevailing parties when the defendants abandoned their appeal of the preliminary injunction, *see Watson*, 300 F.3d at 1095 (stating that, under certain circumstances, "a plaintiff who obtains a preliminary injunction is a prevailing party for purposes of § 1988"), and (2) under Ninth Circuit Rule 39-1.6 and *Cummings v. Connell*, 402 F.3d 936, 940 (9th Cir.2005) (*Cummings II*), "[a] district court is not authorized to award attorney's fees for an appeal unless we transfer the fee request to the district court for consideration." Because it assumed the plaintiffs could have requested fees from the Ninth Circuit as prevailing parties when the defendants dismissed their appeal, the court concluded it had no authority to award fees for the appeal.

[10] The plaintiffs contend, and we agree, that the district court's analysis was flawed for two reasons. First, contrary to the district court's analysis, Yamada and Stewart were not yet prevailing parties when the defendants dismissed their interlocutory appeal and could not have requested fees at that time. A court may award attorney's fees under § 1988 only to a "prevailing party," and a plaintiff prevails for purposes of § 1988 only "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Higher Taste, Inc. v.*

*City of Tacoma*, 717 F.3d 712, 715 (9th Cir.2013) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)) (internal quotation marks omitted). This requires an "enduring" change in the parties' relationship, *Sole v. Wyner*, 551 U.S. 74, 86, 127 S.Ct. 2188, 167 L.Ed.2d 1069 (2007), that has "judicial imprimatur" . . . such as a judgment on the merits or a court-ordered consent decree," *Watson*, 300 F.3d at 1096 (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001)).

The district court concluded that the plaintiffs were prevailing parties under *Watson*, but *Watson* is distinguishable. As explained in *Higher Taste*, *Watson* stands for the proposition that, "when a plaintiff wins a preliminary injunction and the case is rendered moot before final judgment, either by the passage of time or other circumstances beyond the parties' control, the plaintiff is a prevailing party eligible for a fee award." *Higher Taste*, 717 F.3d at 717 (emphasis added). Here, the plaintiffs' challenge to HRS § 11-358 was not "rendered moot" until the district court entered final judgment against the Commission on that claim. A plaintiff does not become a prevailing party until it obtains relief that is "no longer subject to being reversed, dissolved, or otherwise undone by the final decision in the same case." *Id.* (quoting *Sole*, 551 U.S. at 83, 127 S.Ct. 2188). Here, that occurred when the district court entered a final judgment on the plaintiffs' § 11-358 claim, not when the Commission abandoned its appeal of the adverse preliminary injunction ruling.<sup>19</sup>

19. *Higher Taste* extended *Watson*'s prevailing party analysis to circumstances in which a plaintiff obtains a preliminary injunction and then the case is dismissed upon the parties' stipulation following settlement, when the set-

tlement agreement provides the plaintiff with "what it had hoped to obtain through a permanent injunction." 717 F.3d at 717-18. Here, however, the parties did not reach a settlement agreement at the time of the pre-

The defendants argue Yamada and Stewart were nonetheless prevailing parties at the time the defendants dismissed their interlocutory appeal because the preliminary injunction issued by the district court was not an “ephemeral” victory at all, but “a published opinion, resolving a constitutional question, enjoining a campaign finance law weeks before an election.” That the preliminary injunction would be converted into a permanent one appeared to be a “foregone conclusion” to the parties and the district court, particularly once we issued our decision in *Thalheimer*.

We disagree. Because the preliminary injunction order could be negated by a final decision on the merits, it was an interlocutory order that did not confer prevailing party status on the plaintiffs when the defendants dismissed their appeal.

Furthermore, because the plaintiffs were not yet prevailing parties when the defendants dismissed the interlocutory appeal, the district court erred by relying on *Cummings II* to deny them attorney’s fees for the appeal. *Cummings II* was the second appeal before this court in a case proceeding under § 1983. The district court granted summary judgment to the plaintiffs in the underlying case, and the defendant appealed that final order. In *Cummings v. Connell*, 316 F.3d 886, 898–99 (9th Cir.2003) (*Cummings I*), we upheld the grant of summary judgment as to the defendant’s liability, thus preserving the plaintiffs’ status as prevailing parties

on the merits, but remanded for reconsideration of damages. On remand, the district court awarded an additional \$30,000 in attorney’s fees the plaintiffs had incurred defending against the defendant’s prior appeal in *Cummings I*. *Cummings II*, 402 F.3d at 942, 947. The parties cross-appealed again. We held that the fees related to the first appeal were improperly awarded “because plaintiffs failed to file their request with the court of appeals as required by Ninth Circuit Rule 39–1.6.” *Id.* at 947. In short,

[p]laintiffs’ application for attorneys’ fees and expenses incurred on appeal in *Cummings I* should have been filed with the Clerk of the Ninth Circuit. Ninth Circuit Rule 39–1.8 authorizes us to transfer a timely-filed fees-on-appeal request to the district court for consideration, but the decision to permit the district court to handle the matter rests with the court of appeals. In the absence of such a transfer, the district court was not authorized to rule on the request for appellate attorney’s fees.

*Id.* at 947–48.<sup>20</sup> See *Natural Res. Def. Council, Inc. v. Winter*, 543 F.3d 1152, 1164 (9th Cir.2008) (“In *Cummings [II]*, we held that appellate fees requested pursuant to 42 U.S.C. § 1988 must be filed with the Clerk of the Ninth Circuit in the first instance, not with the district court.”). Accordingly, we reversed the attorney’s fees award for the first appeal, holding that the plaintiffs’ request for fees was

liminary injunction appeal or any time thereafter.

**20.** Ninth Circuit Rule 39–1.6(a) reads:

Absent a statutory provision to the contrary, a request for attorneys’ fees shall be filed no later than 14 days after the expiration of the period within which a petition for rehearing may be filed, unless a timely petition for rehearing is filed. If a timely petition for

rehearing is filed, the request for attorneys’ fees shall be filed no later than 14 days after the Court’s disposition of the petition.

This amended version of Ninth Circuit Rule 39–1.6 omits the “shall be filed with the Clerk” language of the prior version, but as the district court correctly concluded, the amendment did not alter the substance of the rule.

untimely. *See Cummings II*, 402 F.3d at 948.

*Cummings II*, however, did not consider a situation in which a party prevails on interlocutory review and only *subsequently* becomes entitled to attorney's fees under a fee-shifting statute such as § 1988. When a plaintiff is not entitled to attorney's fees after an interlocutory appeal, as was the case here, it cannot immediately request attorney's fees from this court. Should the plaintiff subsequently become a prevailing party, however, it should presumptively be eligible for attorney's fees incurred during the first appeal, because that appeal likely contributed to the success of the underlying litigation. *See Crumpacker v. Kansas, Dep't of Human Res.*, 474 F.3d 747, 756 (10th Cir.2007) (Title VII) (holding that "parties who prevail on interlocutory review in this court, and who subsequently become prevailing parties . . . are implicitly entitled to reasonable attorneys' fees related to the interlocutory appeal"); *cf. Cabrales v. Cnty. of L.A.*, 935 F.2d 1050, 1053 (9th Cir.1991) (holding that "a plaintiff who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage").

Here, because Yamada and Stewart prevailed in an interlocutory appeal, and subsequently became prevailing parties after the district court entered judgment in their favor, the district court erred by failing to consider whether to award them reasonable appellate attorney's fees. We hold that Yamada and Stewart are entitled

to attorney's fees arising from the prior appeal. The matter is referred to the Ninth Circuit Appellate Commissioner to determine the amount of fees to be awarded.<sup>21</sup>

## V. Conclusion

We affirm the judgment of the district court on the merits of A-1's constitutional claims. We vacate the district court's fee award to Yamada and Stewart in part and refer the matter to the Ninth Circuit Appellate Commissioner for a determination of the proper fee award arising out of the interlocutory appeal. Each party shall bear its own costs on appeal.

**AFFIRMED IN PART, REVERSED IN PART; REFERRED TO THE APPELLATE COMMISSIONER WITH INSTRUCTIONS.**



**Etumai Felix MTOCHED, Petitioner,**

v.

**Loretta E. LYNCH, Attorney  
General, Respondent.**

**No. 13-70295.**

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Oct. 9, 2014.

Filed May 22, 2015.

**Background:** Citizen of Palau and resident of Commonwealth of the Northern

**21.** The plaintiffs further argue Ninth Circuit Rule 39-1.6 cannot restrict the jurisdiction of the district court to award attorney's fees related to a prior appeal where a fee-shifting statute, such as § 1988, does not preclude the district court from awarding such fees. The Eighth Circuit agreed with this position in *Little Rock School District v. State of Arkan-*

*sas*, 127 F.3d 693, 696 (8th Cir.1997), where it held that, despite an analogous Eighth Circuit rule to our Rule 39-1.6, "the district courts retain jurisdiction to decide attorneys' fees issues that we have not ourselves undertaken to decide." Although the plaintiffs' argument has some appeal, we are bound by our contrary holding in *Cummings II*.

## ORDINANCE NO. 22-O-\_\_\_\_\_

AN ORDINANCE OF THE CITY OF BEVERLY HILLS  
 AMENDING THE BEVERLY HILLS MUNICIPAL CODE  
 REGARDING FILING AND OTHER DISCLOSURE  
 REQUIREMENTS FOR COMMITTEES AND  
 CONTRACTORS, DEVELOPERS, LEGISLATIVE  
 ADVOCATES, AND LEGISLATIVE ADVOCACY FIRMS

THE CITY COUNCIL OF THE CITY OF BEVERLY HILLS DOES ORDAIN AS  
 FOLLOWS:

Section 1. Section 1-8-2 of Chapter 8 of Title 1 of the Beverly Hills Municipal Code regarding definitions is hereby revised to amend the following definitions and insert the following amended definitions in alphabetical order:

“ADVERTISEMENT: Shall have the same meaning as set forth in Government Code section 84501, except that it will also include communications that are designed to Attempt to Influence Municipal Legislation.

QUALIFYING PAYMENT: Any payment, binding promise to pay, contribution, expenditure or independent expenditure of two hundred fifty dollars (\$250.00) or more made by a Ballot Measure Committee or Committee for an Advertisement to support or oppose a City Ballot Measure or Candidate or Attempt to Influence Municipal Legislation. All payments to the same payee in a calendar year shall be aggregated for the purpose of determining the two hundred fifty dollar (\$250.00) threshold.”

Section 2. Subsection A of Section 1-8-5 of Chapter 8 of Title 1 of the Beverly Hills Municipal Code regarding filing disclosure requirements for committees and ballot measure committees is hereby amended to read as follows:

“A. In addition to the requirements of this Chapter, every Committee and Ballot Measure Committee shall comply with the registration and reporting requirements set forth in the Political Reform Act applicable to committees. In addition to other reports required by law, any Committee and Ballot Measure Committee that makes a qualifying payment shall, by five thirty post meridian (5:30 PM) of the third day after making the first such qualifying payment, file in the office of the City Clerk:

1. A letter containing the name and address of the Committee, the full street address of the Committee, the FPPC/Secretary of State identification number of the Committee, the name of the treasurer of the Committee, if applicable, the identifying letter

or number of the City Ballot Measure(s) supported or opposed by such Qualifying Payment and, if applicable, the Candidate supported or opposed by such Qualifying Payment. It shall be unlawful for any person or Committee to knowingly file or publish any name or street address for a Committee that is not the complete and accurate name and/or street address of the Committee.

2. A completed version of a form provided by the City to be posted on the City's website that reports the following information, if applicable:

- i. The names of all Contractors, Developers, Legislative Advocates, and Legislative Advocacy Firms that contributed to the Committee or Ballot Measure Committee within the last 12 months.
- ii. For Contractors listed pursuant to this subsection, Committees and Ballot Measure Committees shall provide a short description, which need not exceed twenty-five words, of the services provided under each listed Contractor's Contract or Contracts with the City that each Contractor has entered into within the last 12 months or that each Contractor is currently bidding on.
- iii. For Legislative Advocates and Legislative Advocacy Firms listed pursuant to this subsection, Committees and Ballot Measure Committees shall list all of the projects in the City that each Legislative Advocate or Legislative Advocacy Firm has advocated in support of or in opposition to within the last 5 years, starting with the project with the highest amount of total fees that have been, or are expected to be, paid to the Legislative Advocate or the Legislative Advocacy Firm and listing the projects in descending order of fees paid, or expected to be paid. Provided, however, that in no event shall a Legislative Advocate or Legislative Advocacy Firm be required to list more than the top 5 projects, beginning with the highest amount of total fees that have been, or are expected to be, paid to the Advocate or the Firm.
- iv. For Developers listed pursuant to this subsection, Committees and Ballot Measure Committees shall list all projects in the City that the Developer is building or has built in the last 12 months starting with the development that has the highest building permit valuation and listing developments in descending order of building permit valuation.

Additionally, if any of the information changes in the reports required by this Subsection A, the Committee or Ballot Measure Committee shall report such changes at the time of the next pre-election statement required by the Political Reform Act or subsection B of the Section, on forms provided by the City.”

Section 3. Subsection I is hereby added to Section 1-8-5 of Chapter 8 of Title 1 of the Beverly Hills Municipal Code regarding disclosure requirements for certain contributors to read as follows:

“I. Every Contractor, Legislative Advocate, Legislative Advocacy Firm, or Developer that makes a contribution to a Committee or Ballot Measure Committee shall provide the following information to the Committee or Ballot Measure Committee at the time the Contribution is submitted, reporting the information on a form provided by the City:

1. The name of the Contractor, Legislative Advocate, Legislative Advocacy Firm, or Developer;
2. The address of the Contractor, Legislative Advocate, Legislative Advocacy Firm, or Developer;
3. The date of the Contribution;
4. For Contractors, a list of any Contracts with the City and a short description, which need not exceed twenty-five words, of the services provided under each listed Contract or Contracts with the City that the Contractor has entered into within the last 12 months or that the Contractor is currently bidding on;
5. For Legislative Advocates and Legislative Advocacy Firms, a list of the top five projects in the City that a Legislative Advocate or Legislative Advocacy Firm has advocated in support of or in opposition to within the last 5 years, starting with the project with the highest amount of total fees that have been, or are expected to be, paid to the Legislative Advocate or the Legislative Advocacy Firm and listing the top five projects in descending order of fees paid, or expected to be paid; and
6. For Developers, a list of all projects in the City that the Developer is building or has built in the last 12 months starting with the development that has the highest building permit valuation and listing developments in descending order of building permit valuation.”

Section 4. Subsection J is hereby added to Section 1-8-5 of Chapter 8 of Title 1 of the Beverly Hills Municipal Code regarding liability for Committees and Ballot Measure Committees to read as follows:

“J. Notwithstanding Section 1-8-7 of this Chapter, a Committee or Ballot Measure Committee shall only be liable for a violation of Subsection (A)(2) of this Section 1-8-5 if the Committee or Ballot Measure Committee fails to disclose reportable information that was provided by the Contractor, Legislative Advocate, Legislative



Advocacy Firm, or Developer to the Committee or Ballot Measure Committee pursuant to Subsection I of this Section 1-8-5.”

Section 5. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance or the application thereof to any person or place, is for any reason held to be invalid or unconstitutional by the final decision of any court of competent jurisdiction, the remainder of this Ordinance shall be and remain in full force and effect.

Section 6. Publication. The City Clerk shall cause this Ordinance to be published at least once in a newspaper of general circulation published and circulated in the City within fifteen (15) days after its passage in accordance with Section 36933 of the Government Code, shall certify to the adoption of this Ordinance, and shall cause this Ordinance and her certification, together with proof of publication, to be entered in the Book of Ordinances of the Council of this City.

Section 7. Effective Date. This Ordinance shall go into effect and be in full force and effect at 12:01 a.m. on the thirty-first (31st) day after its passage.

Adopted:  
Effective:

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Mayor of the City of  
Beverly Hills, California

ATTEST:

(SEAL)

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HUMA AHMED  
City Clerk

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

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LAURENCE S. WIENER  
City Attorney

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GEORGE CHAVEZ  
City Manager



GOVERNMENT ▾ RESIDENT ▾ BUSINESS ▾ ART, CULTURE & EVENTS ▾ COMMUNITY ▾ I WANT TO ▾



MENU ▾

## ☞ SUNSHINE TASK FORCE ☞

### Sunshine Task Force

**Find past meetings [on demand](#).**

The Mayor's Sunshine Task Force was established to study measures to advance greater transparency and public involvement in local government operations. The Sunshine Task Force consists of active local residents and meets once a month.

#### Staff Liaisons:

- Huma Ahmed, City Clerk
- Nancy Hunt-Coffey, Assistant City Manager

Staff Contact: (310) 285-1013

#### Upcoming Meetings:

May 23, 2022 @ 5:00pm

June 27, 2022 @ 5:00pm

TO: **SUNSHINE TASK FORCE COMMITTEE MEMBERS**

FROM: **STEVE MAYER**

DATE: **JUNE 24, 2021**

RE: **RESTRICTING CONTINUANCES**

### **Proposal**

Introduce wording to the “Rules of Procedure For The City’s Commissions” to govern when a “continuance” can be granted.

### **Background**

On March 11th, a Planning Commission public hearing was held on whether to approve or deny a proposed project at 331 North Oakhurst.

The Planning Commission unanimously voted to deny a project.

Twenty-one minutes later, after a recess, ***after the public had left***, the Planning Commission reversed its vote, at the request of the Developer.

Then, it separately ***voted to continue the public hearing*** to a “date uncertain” to allow the Developer to submit yet another revised design, ***for a 7th time (and an 8th public hearing)***.

***Usually, there is no fee charged to the Developer***, for a continuance. If there is any cost, it is comparatively minor.

### **Proposed Additions**

It is proposed adding to the “Rules Of Procedure For The City’s Commissions” (and/or the BHMC) definitions as well as conditions as to when “Continuances” can be granted.

The types of continuances would be defined as:

- ▶ “Administrative Continuance”
- ▶ “Minor Design Change Continuance”
- ▶ “Major Design Change Continuance”

**Sunshine Task Force Committee  
Restricting Continuances  
June 24, 2021  
Page 2.**

In addition, there would be a section defining additional costs to an Developer asking for a “Major Design Change Continuance.”

**What Is A “Continuance”?**

A “Continuance” is not defined within the “*Resolution of the Council of the City of Beverly Hills Establishing Rules of Procedure For The City’s Commissions.*”

Such “Rules” were adopted on January 9, 2020, as part of a change to Beverly Hills Municipal Code 2-2-107A.

In practice, there are three types of “Continuances”:

**Administrative Continuance**

At the Planning Commission level, a public hearing may be “continued” to allow Staff to prepare a Resolution which reflects the Commission direction.

Such a continuance could be defined as an “Administrative Continuance.”

**Minor Design Change Continuance**

At the Planning, Architectural, and Design Review Commissions it is not uncommon for the Commissioners to ask for comparatively minor changes.

In such cases, the Developer returns with the revised plans, and the Commission renders its final decision.

An example of a “Minor Design Change” for the Planning Commission would be when an Applicant changed the way dirt was reallocated on the property, so as to reduce external hauling.

**“Major Design Change Continuance”**

What is not uncommon at the Planning Commission, during a Public Hearing on a specific project, for a Developer to request a continuance to submit a completely changed design (if the Developer believes the project will be rejected).

The Planning Commissioners then vote to continue the public hearing on the *original* application until a date uncertain.

It typically takes six to twelve months for the “continued” hearing to take place, and the new design to be presented.

Often, another hearing is required for the Developer to provide even further “refinements”

**What Is The Cost A “Major Design Change Continuance”?**

**The City**

In the case of the March 11th hearing Applicant, who had submitted 6 previous designs (and had 7 public hearings), the cost to the City was in the range of \$250,000 to \$300,000 in unbilled costs.

**Who Is Hurt By A “Major Design Change Continuance”?**

**The Neighborhood**

It is not uncommon for a group of neighborhood residents to spend 100 to 200 hours preparing for the first public hearing.

The preparation time for a “continued public hearing” for a major redesign can actually involve more time.

In addition, it is not uncommon for the neighborhood residents to pay professionals to gain a greater understanding about the revised Application.

It is unfair to the residents to have to return again and again to preserve their neighborhoods and quality of life.

**Sunshine Task Force Committee  
Restricting Continuances  
June 24, 2021  
Page 4.**

**What Is The Way To Curb A “Major Design Change Continuance”?**

There should be an incentive to a Developer to “get it right the first time.”

If the Developer asks for a “Major Design Change Continuance,” it is proposed that the Developer pay a special “continuance” fee. That fee should be substantially more than the original application fee.

**TO: SUNSHINE TASK FORCE COMMITTEE MEMBERS**  
**FROM: STEVE MAYER**  
**DATE: JUNE 24, 2021**  
**RE: INTERESTED PARTY - EMAIL SIGN UP**

**Proposal**

Allow property owners to sign-up to receive email notices of the filing of permits and/or applications within a specific radius of their property.

The origin of this suggestion is from Lionel Ephraim who proposed the concept to the Sunshine Task Force several years ago, but there is no record of implementation.

**Background**

Currently, within the Planning Division, “Interested Parties” are notified by email of public hearings

Separately, the City’s “Online Business Center” allows contractors and property owners to receive notices of permit filings and inspections under “My Permits.”

Last, within the City’s Open Data, there is the technological capability of generating a map of all permits / applications with a defined geographic area around the property owner’s Assessor Parcel Number (APN).

Technically, the City has the ability to “push” new filings of permits and/or applications to anyone who requests such information by email.