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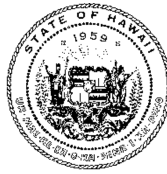

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STATE OF HAWAI'I
CAMPAIGN SPENDING COMMISSION

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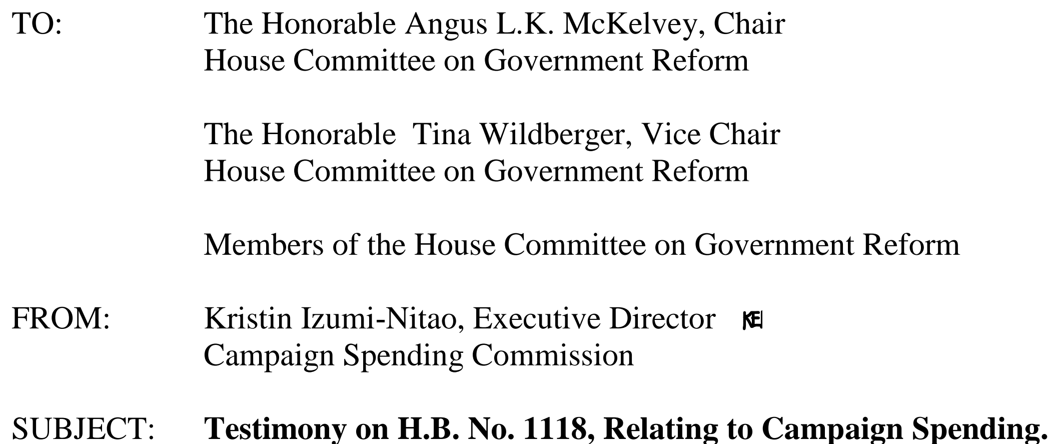
February 11, 2021



TO: The Honorable Angus L.K. McKelvey, Chair
House Committee on Government Reform

The Honorable Tina Wildberger, Vice Chair
House Committee on Government Reform

Members of the House Committee on Government Reform

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

SUBJECT: **Testimony on H.B. No. 1118, Relating to Campaign Spending.**

Friday, February 12, 2021
10:00 a.m., Via Video Conference

Thank you for the opportunity to testify on this bill. The Campaign Spending Commission ("Commission") opposes this bill.

Section 1 of the bill, in part, states that "the legislature finds that dark money is defined as funds raised for the purpose of influencing elections by nonprofit organizations that are not required to disclose the identities of their donors. Dark money sometimes comes from Internal Revenue Code 501(c)(4) organizations that are not required to disclose the identity of their donors. By doing so, there is a lack of transparency that fails to inform the public on who is trying to influence an election. Although dark money can come in through different tax-exempt organizations, this Act attempts to address one area of dark money through the 501(c)(4) organizations." Section 1 goes on to find that IRC 501(c)(4) organizations are tax-exempt social welfare organizations that can engage in some political activity, so long as that is not the organizations' primary activity. Section 1 concludes that the purpose of this Act is to provide more transparency in elections by requiring any organization financially involved in the political process to file disclosure reports with the Commission and "removing an exemption to do so."

Section 2 of the bill amends the definition of "noncandidate committee" in Hawaii Revised Statutes ("HRS") §11-302 by deleting the requirement that a person "has the purpose of making or receiving contributions." The Commission cautions against amending the definition of noncandidate committee. The definition of noncandidate committee, as presently written, was challenged as being unconstitutionally overbroad in federal court following the United States Supreme Court's decision in Citizens United. The Hawaii federal trial court upheld the

definition of noncandidate committee. Yamada v. Weaver, 872 F.Supp.2d 1023 (D. Haw. 2012). The trial court's decision was affirmed on appeal. Yamada v. Snipes, 786 F.3d 1182 (9th Cir. 2015). If the Legislature changes the definition of noncandidate committee, then the Yamada cases will no longer control this issue. A future challenge to the definition could very well have a different outcome. The amendment proposed by this bill clearly makes the definition of noncandidate committee broader.

Section 3 of the bill amends HRS §11-335(b)(1)(B) by deleting a Super PAC's option to provide, "An acknowledgment that the contributing entity is not subject to any state or federal disclosure reporting requirements regarding the source of the contributing entity's funds." Thus, if this bill is passed, a Super PAC will either have to (1) identify the internet address where the contributing entity's disclosure report can be publicly accessed if the contributing entity is subject to state or federal disclosure reporting requirements, or (2) provide the name, address, occupation of each funding source that contributed more than $100 to the contributing entity in the election period. If a 501(c)(4) organization is a "contributing entity" to a Super PAC, the use of option (1) is not available because disclosure reporting requirements do not exist for a 501(c)(4) organization. Also, merely deleting the "contributing entity is not subject to any state or federal disclosure reporting requirements" option[1] will not necessarily require the Super PAC to rely on option (2) and report the identifying information of each source of funding over $100 to the 501(c)(4) organization. This is because federal law does not require 501(c)(4) organizations to disclose their donors. There is probably a good reason for this and at the very least, the issue of whether a state can force the disclosure of a 501(c)(4) organization's donor,[2] where federal law allows for the nondisclosure of its donors, needs to be addressed.

The Commission opposes this bill and asks this Committee to defer or hold this bill until the Hawaii Attorney General can weigh in on this bill.

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[1] The reason this option was put in the law may have been the drafter's recognition that the state cannot mandate the disclosure of a contributing entity's donors where state or federal law does not require or prohibits the disclosure of the entity's donors.
[2] The donor to the 501(c)(4) organization did not donate to the Super PAC, rather the 501(c)(4) organization made the contribution to the Super PAC.