No. 15-215

In The
Supreme Court of the United States

JIMMY YAMADA, RUSSELL STEWART,
and A-1 A-LECTRICIAN, INC.,
Petitioners,

v.

GREGORY SHODA, in his official capacity
as chair and member of the Hawaii
Campaign Spending Commission, *et al.,*
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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Corporate Disclosure Statement

Petitioner A-1 A-Lectrician, Inc. ("A-1"), has no parent company, and no publicly-held company owns 10 percent or more of A-1 stock. (CERT. PET. at v ("PET.v").)

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Argument

Hawaii law – rather than requiring constitutional **Track 2,** *non*-political-committee, *i.e.,* simple, one-time event-driven reports – requires a large family-owned business to be a noncandidate committee and comply with onerous **Track 1,** organizational and administrative burdens when it spends more than $1000 on newspaper issue ads.

Respondents' brief epitomizes the multi-faceted circuit splits that Petitioners Jimmy Yamada, Russell Stewart, and A-1 describe. (RESP'TS.' BR. IN OPP'N 8-32 ("OPP'N.8-32").)

I. Hawaii law fails constitutional scrutiny under the First Amendment.

By requiring an organization to be a noncandidate committee, *see* HAW. REV. STAT. 11-302 ("HRS-11-302") (defining "Noncandidate committee" and "Expenditure"), Hawaii triggers **Track 1,** registration, recordkeeping, and extensive, ongoing reporting for the organization. (PET.10-15.)

Whether government may trigger such "onerous" organizational and administrative burdens, *Citizens United v. FEC,* 558 U.S. 310, 338-39 (2010), turns first on whether organizations are "under the control of" candidates or have "the major purpose" of "nominat[ing] or elect[ing]" candidates under *Buckley*

v. Valeo, 424 U.S. 1, 79 (1976). Even when organizations have the *Buckley* major purpose, government may not trigger such burdens for organizations engaging in only small-scale speech. (PET.22, 24.)

A-1, a for-profit Hawaii electrical-construction organization, undertakes many electrical-construction projects. On the undisputed facts, A-1 biennially buys no more than three small newspaper issue ads. They do not urge the election or defeat of candidates. These $9000 in biennial issue ads are just 0.01 percent of A-1's $80 million in biennial spending (PET.2-10), which suffices *under Hawaii law* – but *not* under the *Buckley* major-purpose test – to subject A-1 to the full panoply of organizational and administrative burdens imposed on noncandidate committees.

Although A-1 is bearing noncandidate-committee burdens while bringing this challenge, *see Davis v. FEC,* 554 U.S. 724, 733-35 (2008) (holding that this goes to standing), such burdens chill many organizations' speech, thereby effectively killing the promise of *Citizens United,* 558 U.S. at 336-66, that they are free to speak. The circuit splits have percolated long enough. (PET.10-23.)

A. Hawaii's noncandidate-committee *definition* is unconstitutional under the First Amendment. Alternatively, the noncandidate-committee *burdens* are unconstitutional under the First Amendment.

1. State political-committee definitions impose political-committee burdens. These burdens are onerous under *Citizens United,* but there are multi-faceted circuit splits.

Some appellate-court holdings – including *Yamada v. Snipes,* 786 F.3d 1182 (9th Cir.2015), (CERT. PET. APP. 1-63 ("APP.1-63")) – conflict with *Citizens United's* holding that political-committee and political-committee-like (sometimes called "PAC" and "PAC-like") organizational and administrative burdens are "onerous" as a matter of law. (PET.24-26.)

Respondents' brief epitomizes the circuit splits.

• *Yamada* joins circuits holding such burdens are not "onerous" and splits with *Minnesota Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 872 (8th Cir.2012) ("*MCCL-III*") (*en-banc*). (PET.24-25.) *MCCL-III's* focus on extensive, ongoing reporting (OPP'N.16) does not diminish the circuit split over whether PAC and PAC-like burdens are "onerous" under *Citizens United.* (PET.24-25.)

Moreover, by comparing registration thresholds to assess whether law triggering such burdens is constitutional (OPP'N.16, 22-23), Respondents agree with *Yamada,* which splits with an *Iowa Right to Life Committee, Inc. v. Tooker* holding that Respondents overlook (*see* OPP'N.23): When organizations such as A-1 *lack* the *Buckley* major purpose, courts are not to compare registration thresholds to determine whether law triggering PAC or PAC-like burdens is constitutional. 717 F.3d 576, 589 (8th Cir.2013) ("*IRLC-II*"), *cert. denied,* 134 S.Ct. 1787 (2014); (PET.36).

•Respondents believe the *Citizens United* pages condemning political-committee and political-committee-like burdens, 558 U.S. at 337-40, apply only when law *bans* speech. (OPP'N.16-17.) This splits with circuits whose holdings Respondents understate: *Citizens United* pages 337-40 apply not only to speech bans but also to law – such as Hawaii's – which allows organizations to speak but requires that they *be* political committees or political-committee-like organizations and bear PAC or PAC-like burdens. (PET.24-25.)

And Respondents overlook this Court's *post-Citizens United* holding that the burdens-bans distinction is a "matter of degree" and that government may not "silence" speech with either burdens or bans. *Sorrell v. IMS Health Inc.,* 131 S.Ct. 2653, 2664 (2011) (citations omitted); (PET.25-26).

• Notwithstanding OPP'N.17-18, *MCCL-III,* 692 F.3d at 874, does hold that whether organizations are *"capable*" of complying with PAC or PAC-like burdens is irrelevant. Hence the circuit split. (PET.26 (emphasis in *MCCL-III*).) Law triggering such burdens requires more than mere "judicial 'attention'" (OPP'N.17-18) rubberstamping it. *MCCL-III,* 692 F.3d at 876 (collecting authorities).

2. The *Buckley* major-purpose test applies to state law, but there are multi-faceted circuit splits.

a. There is no constitutional way that A-1 is a political committee.

A-1 is not "under the control of a[ny] candidate[(s)]" and does not have "the major purpose" of "nominat[ing] or elect[ing]" candidates under *Buckley,* 424 U.S. at 79. (PET.27.) Respondents do not disagree. (*See* OPP'N.18-20.)

And Respondents do not – and cannot now – disagree with undisputed facts. Yet they also do not mention (*see* OPP'N.2, 5, 15, 20, 25) particularly significant undisputed facts: Given the lower courts' holdings, A-1 – being a government contractor – does *not* make or seek to make contributions. (PET.4n.4.) A-1's *only* remaining political speech is no more than three small, "rinky-dink" *Honolulu Star Advertiser* issue ads. Be-

cause these ads are the *only* speech at issue here (PET.3-4),[1] and because they are neither contributions nor independent expenditures properly understood, A-1 presents the easy case under the *Buckley* major-purpose test. (PET.27.) In this respect, A-1 neither engages, nor seeks to engage, in any "regulable, election-related speech" *under the Buckley major-purpose test. N.C. Right to Life, Inc. v. Leake,* 525 F.3d 274, 287, 289 (4th Cir.2008) ("*NCRL-III*").

b. PAC and PAC-like burdens are not the "disclosure" that *Citizens United* approved.

What Respondents assert is at the heart of the multi-faceted circuit splits (PET.29): That the *Buckley* major-purpose test does not apply to state law. (OPP'N.19, 21.) Respondents' brief epitomizes the circuit splits. (*See* PET.29-33.)

Buckley allows **Track 1** law to reach only "organizations" that "are by definition, campaign related." 424 U.S. at 79. *Buckley* protects not only organizations "engag[ing] purely in issue discussion[,]" *id.;* (OPP'N.18), but also other *non*-major-purpose organizations, including those making contributions or engaging in *Buckley* express advocacy, *IRLC-II,* 717 F.3d at 581; *MCCL-III,* 692 F.3d at 867; *NCRL-III,* 525 F.3d at

[1] Even if (past) contributions were at issue here, A-1 would still prevail. (PET.4n.4, 27-28.)

277-78, and even including for-profit organizations such as A-1. *MCCL-III,* 692 F.3d at 867.

•Respondents say *Citizens United* pages *366-71* allow Hawaii to trigger **Track 1,** PAC or PAC-like burdens beyond *Buckley*. (OPP'N.14, 17, 19, 20.)

This splits with circuits recognizing that *Citizens United* pages *366-71* do not apply here, because the reporting they address/support is only **Track 2,** *non*-political-committee, *i.e.,* simple, one-time event-driven reporting. (PET.32.)

Respondents' position even conflicts with *Citizens United* itself. *See* 558 U.S. at 369 (recalling that such **Track 2** "disclosure is a less restrictive alternative to more comprehensive [**Track 1**] regulations of speech" (citing *FEC v. Mass. Citizens for Life., Inc.,* 479 U.S. 238, 262 (1986) ("*MCFL*") (holding, in turn, that the "state interest in disclosure … can be met in a manner less restrictive than imposing the full panoply of [**Track 1**] regulations that accompany status as a political committee" and that if an organization's "independent spending bec[a]me so extensive that the organization [had the *Buckley*] major purpose ... , the [organization] would be classified as a political committee" (citing, in turn, *Buckley,* 424 U.S. at 79)))).

The *Buckley* major-purpose test is the crucial "feature[]" absent from **Track 1** law that circuits have struck down *post-Citizens United.* (OPP'N.20.) While

Respondents assert these circuits focus on smaller "features" (OPP'N.20-21), the real point of these circuits' holdings is that the *Buckley* major-purpose test applies to state law *post-Citizens United* (PET.32), just as it did *pre-Citizens United.* (PET.31-32.)

• While Respondents – like *Yamada* (PET.30) – also defend Hawaii law by asserting the government interest in disclosure/transparency/information (OPP'N.14-15, 17), that goes to the government interest part of constitutional scrutiny. *Buckley,* 424 U.S. at 66-68. But the *Buckley* major-purpose test goes to the tailoring part of constitutional scrutiny. *Wis. Right to Life, Inc. v. Barland,* 751 F.3d 804, 841-42 (7th Cir.2014) ("*Barland-II*"); *Buckley v. Valeo,* 519 F.2d 821, 869 (D.C. Cir.1975) (*en-banc*), *aff'd/rev'd on other grounds,* 424 U.S. 1 (1976); *see Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1008-12 (9th Cir.2010) ("*HLW*") (addressing – under "Tailoring Analysis" – an *HLW*-created "a priority"-"incidentally" test, a watered-down substitute for the major-purpose test), *cert. denied,* 562 U.S. 1217 (2011).

• Respondents further reject the major-purpose test for state law because they say it is just a narrowing gloss for federal law. (OPP'N.19.) This is the position of the First, Second, and Ninth Circuits, and Vermont. *Nat'l Org. for Marriage, Inc. v. McKee,* 649 F.3d 34, 59 (1st Cir.2011), *cert. denied,* 132 S.Ct. 1635 (2012);[2] *Vt.*

[2] *Followed in Vermont v. Green Mountain Future,* 86 A.3d 981, 989n.5 (Vt.2013) ("*GMF*").

Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 136 (2d Cir.2014) ("*VRLC-II*"), *cert. denied,* 135 S.Ct. 949 (2015); *HLW,* 624 F.3d at 1009-10. These circuits split with the Seventh, Eighth, and Tenth Circuits: Even if the major-purpose test were a narrowing gloss for federal law, the test would still apply as a constitutional principle to *state* law. *Barland-II,* 751 F.3d at 811, 842; *MCCL-III,* 692 F.3d at 872 (collecting authorities); *Colo. Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1153-55 (10th Cir.2007) ("*CRLC*").

• While Respondents want substantial-relation exacting scrutiny for law triggering PAC or PAC-like burdens (OPP'N.14, 18, 21), strict scrutiny *should* apply. But either way, A-1 prevails. (PET.25n.16, 28-29.)

c. The Ninth Circuit holdings are anomalous, thereby splitting with all circuits.

Rather than being "narrow" (OPP'N.14), being "fact-bound" (OPP'N.25), or addressing a "narrow question" (OPP'N.20), *Yamada* further waters down the *Buckley* major-purpose test by expanding *HLW's* anomalous "a[-]priority"-"incidentally" test into an "a[-]significant[-]participant[-]in[-the]-electoral[-]process" test. (PET.33-34.) Although no "circuit or state cases" have addressed this (OPP'N.21), these circuit-splitting Ninth Circuit creations are still anomalous.

d. *Yamada* wrongly rejects the *Buckley* major-purpose test.

Yamada wrongly rejects the *Buckley* major-purpose test for state law. (PET.35-36.) While Respondents disagree, they do not disagree (*see* OPP'N.21-22) that the test inquires after *the* major purpose of an organization. (PET.35.) Nor do they disagree (*see* OPP'N.22) that the numerator in the major-purpose test[3] includes not "political activity" in general but contributions and independent expenditures properly understood. (PET.35.)

e. The proper challenge is to the definition.

The proper challenge to law triggering PAC or PAC-like burdens is to the political-committee or political-committee-like definition. Respondents disagree (OPP'N.23), yet their brief epitomizes the circuit splits and contradicts *Buckley,* 424 U.S. at 79, itself. (PET.36-37.)

Finally, Respondents incorrectly ask the court to disregard A-1's facial challenge (OPP'N.24; PET.37) and cite inapplicable language for the facial-constitutionality test here. (*Compare* OPP'N.24 ("no

[3] The test asks in part whether organizations devote the majority of their spending to contributions to candidates or independent expenditures properly understood. (PET.27.)

set of circumstances"/"lacks any 'plainly legitimate sweep"') with APP.109 ("a *substantial* amount" (emphasis in original).)

B. Hawaii's advertisement definition and disclaimer requirement are unconstitutional under the First Amendment. However, there are circuit splits.

Respondents (OPP'N.26-28) miss A-1's First Amendment points on the advertisement definition and disclaimer requirement. HRS-11-302 (defining "Advertisement"); HRS-11-391(a)(2)(B) (requiring disclaimer). As **Track 2** law – *i.e.,* law applying to speech regardless of whether government may trigger PAC or PAC-like burdens for the speakers (PET.22-23) – Hawaii's advertisement definition and disclaimer requirement reach beyond independent expenditures properly understood and Federal Election Campaign Act ("FECA") electioneering communications. A-1's speech is neither. *Yamada* thereby splits with circuits recognizing that this goes to tailoring, which Respondents did not prove. (PET.38-39.) Besides, Hawaii law reaches genuine-issue speech such as A-1's (PET.39),[4] and the disclaimer takes up precious space. (PET.40.)

Respondents miss these points. (OPP'N.26-28.)

[4] Notwithstanding OPP'N.26, A-1 does assert its speech is not appeal-to-vote speech. (PET.46-47; *see also* PET.39.)

While Respondents say *Barland-II,* 751 F.3d at 832, has no holding on burdensome attribution and disclaimer requirements (OPP'N.27n.4), Respondents are mistaken. (PET.40.)

II. Hawaii law is unconstitutionally vague under the Fourteenth Amendment.

A. Hawaii's advertisement definition is unconstitutionally vague, but there is a circuit split.

Hawaii's advertisement definition is unconstitutionally vague, because it uses "advocates or supports" and "opposition[.]" (PET.40.)

• By holding "advocacy" is vague, *Buckley,* 424 U.S. at 42-43, ends the debate over whether "advocates" is vague. (PET.40.) Nevertheless, Respondents say *McConnell v. FEC,* 540 U.S. 93, 170n.64 (2003) – which addresses not "advocates"/"advocacy" but "promote"-"support"-"attack"-"oppose" – means "advocates" in *Hawaii* law is not vague after all, because it is more like the *McConnell* language. (OPP'N.28.)

But political speech cannot flourish when government, like Humpty Dumpty, lets words mean whatever it says they mean.

• Notwithstanding OPP'N.28-29, *Barland-II,* 751 F.3d at 826, does hold that "supports or condemns" in Wisconsin law – which is like "supports" and "opposi-

tion" in Hawaii law – is vague "*outside* the *McConnell* context," *i.e.,* political parties and federal candidates. (PET.41 (emphasis in original).)

Respondents' other responses regarding "support" and "opposition" (OPP'N.29) miss the point that these words are vague in their own right, regardless of other language, not only as-applied outside the *McConnell* context (PET.41-42) but also facially. (PET.42.)

B. Hawaii's noncandidate-committee and expenditure definitions are unconstitutionally vague. *Yamada's* narrowing gloss is improper, but there are multiple circuit splits.

Yamada's express-advocacy/appeal-to-vote-test narrowing gloss for "[i]nfluencing" and "influences" elections in Hawaii's noncandidate-committee and expenditure definitions is improper. (PET.42-47.)

• Even *Yamada* (APP.14n.2) – unlike Respondents (OPP'N.9-10) – acknowledges the split with *Virginia Society for Human Life, Inc. v. Caldwell,* 152 F.3d 268, 2[70-]71 (4th Cir.1998) ("*VSHL-I*"), over whether a narrowing gloss is proper in the first place. (*See* PET.43.) Saying this split "is not outcome-determinative" in *Yamada* (OPP'N.9) is no comfort when the narrowing gloss is otherwise wrong and otherwise creates circuit splits.

• A federal court may narrow *state* law only with a "reasonable and readily apparent" narrowing gloss. (PET.43-44.) Saying that "reasonable and readily apparent" means the same as "readily susceptible" (OPP'N.10) is inconsistent with the phrases themselves.

• In adopting the narrowing gloss, *Yamada* "disagree[s]" with A-1 when A-1 says the narrowing gloss "would not bind a state court and therefore provides insufficient protection for First Amendment values." (APP.14.) In other words, *Yamada* believes its "narrowing gloss binds a state court[.]" (PET.44.) Respondents say *Yamada* says "no such thing." (PET.11.) Respondents are mistaken. Hence the circuit split over whether a federal-court narrowing gloss binds a state court. (PET.44.)

• By holding that the appeal-to-vote test is a form of express advocacy, *Yamada* splits with other circuits. (PET.44-45.) Notwithstanding OPP'N.11-12, both *NCRL-III,* 525 F.3d at 282,[5] and *Colorado Ethics Watch v. Senate Majority Fund, LLC,* 269 P.3d 1248, 1257-58 (Colo.2012), are among the decisions supporting A-1's point that the appeal-to-vote test is *not* a form of express advocacy. (PET.44-45.)[6] A new Third Circuit

[5] Respondents say *NCRL-III* is not "the leading Fourth Circuit opinion on this issue." (OPP'N.12.) Whatever they mean by that, *NCRL-III* – being the first panel opinion on the issue – is the *controlling* one. (PET.44); *see McMellon v. United States,* 387 F.3d 329, 332-34 (4th Cir.2004) (*en-banc*).

[6] Notwithstanding OPP'N.12, *Colorado Ethics* does hold

opinion also supports A-1's point. *Del. Strong Families v. Denn,* 793 F.3d 304, 311 (3d Cir.2015) ("*DSF*") (agreeing with A-1 (PET.44) that FECA electioneering communications by definition are not expenditures/independent expenditures (citing 52 U.S.C. 30104(f)(3)(B)(ii))). Hence the circuit split. (PET.44-45.)

• Notwithstanding OPP'N.13, after *Citizens United,* the appeal-to-vote test no longer affects whether government may ban, otherwise limit, or regulate speech. (PET.45.)

As for the vagueness of the appeal-to-vote test: Even under *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 474n.7 (2007) ("*WRTL-II*"), the test is vague as to speech *other than* FECA electioneering communications. (PET.46.) After *Citizens United,* what remains from *WRTL-II* regarding the test is the conclusion that the test is vague, even *vis-à-vis* FECA electioneering communications. 551 U.S. at 492-94 (Scalia, J., concurring); (PET.46).

Respondents do not disagree (*see* OPP'N.12-13) with A-1's point that *Yamada* helps prove the test is vague by holding that A-1's newspaper ads *are* appeal-to-vote speech when the *WRTL-II* ads were not. (PET.46-47.)

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that the appeal-to-vote test applied only to FECA electioneering communications and was vague beyond that. 269 P.3d at 1257-58.

III. *Yamada* should have considered only current law, but there is a circuit split.

Respondents do not disagree (*see* OPP'N.30) that *Yamada* should have considered only current law, not old law. In addressing the merits, the Court should consider this issue. (PET.47.)

IV. A-1 has standing to challenge Hawaii's electioneering-communication law.

If Hawaii may *not* require A-1 to be a noncandidate committee – *i.e.,* if Hawaii may *not* trigger **Track 1,** PAC-like burdens for A-1 – then A-1 has standing to challenge Hawaii's **Track 2,** electioneering-communication law, HRS-11-341, in this action and need not file a new action. (PET.47.) Respondents do not disagree. (*See* OPP'N.30-32.)

But what if – as *Yamada* holds – Hawaii may require A-1 to be a noncandidate-committee? When A-1 filed its complaint in 2010, noncandidate committees did *not* have to comply with Hawaii's **Track 2,** electioneering-communication law. That changed in 2014. Nevertheless, *Yamada* holds that A-1 lacks standing to challenge the electioneering-communication law, because A-1 did not have to comply with this law *when A-1 filed its complaint.* (PET.47-48; OPP'N.31.)

In addressing the merits, the Court should consider this issue. Why make A-1 file a new action for one claim? This is not an efficient use of anyone's resources. Besides, if *Yamada* were right, then government could *always* burden similarly-situated civil-rights plaintiffs by piling on new law as soon as they file one challenge. The Court should not countenance this.

Notwithstanding OPP'N.31-32, *Yamada* splits with *Pestrack v. Ohio Elections Commission,* which holds the plaintiff "has standing to bring all of the challenges[,]" 926 F.2d 573, 577 (6th Cir.), *cert. dismissed,* 502 U.S. 1022 (1991), including to a provision enacted in 1987, *id.* at 576n.1, which was after he filed his complaint. *See Pestrack v. Ohio Elections Comm'n,* 670 F.Supp. 1368, 1369-70 (S.D.Ohio 1987). Hence the circuit split. (PET.47-48.)

Conclusion

Hawaii law – rather than requiring constitutional **Track 2,** *non*-political-committee, *i.e.,* simple, one-time event-driven reports – requires a large family-owned business to be a noncandidate committee and comply with onerous **Track 1,** organizational and administrative burdens when it spends more than $1000 on newspaper issue ads.

To resolve the many circuit splits, the Court should grant *certiorari*.

Respectfully submitted,

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