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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Plaintiff, v. ANNE E. LOPEZ, in her official capacity as Attorney General of Hawai'i, and NADINE ANDO, in her official capacity as Director of Hawai'i Department of Commerce and Consumer Affairs, Defendants.	1:26-cv-00497-LEK-KJM Motion for Leave to File Brief of Hawai'i Legislators, Former Officials, and a Legal Scholar as Amici Curiae in Support of Defendants; Memorandum in Support; Exhibit A; Certificate of Service. Judge: Hon. Leslie E. Kobayashi Hearing: None requested (LR7.1(c)) Trial Date: None set Relates to: ECF No. 10 (Plaintiff's Motion for Preliminary Injunction)

MOTION FOR LEAVE TO FILE BRIEF OF HAWAI'I LEGISLATORS, FORMER OFFICIALS, AND A LEGAL SCHOLAR AS AMICI CURIAE IN SUPPORT OF DEFENDANTS

Hawai'i Legislators, Former Officials, and a Legal Scholar ("Amici") move for leave to file a brief as amici curiae in support of Defendants. The proposed

brief is attached as Exhibit A. The individual amici, identified in the proposed brief, are the senator who introduced S.B. 2471, which became Act 11; two members of the House of Representatives who passed it; a former legislator who served in both the House and the Senate; a former Associate Justice of the Hawai'i Supreme Court; and the author of the state corporate-law framework adopted in Act 11, who assisted the Legislature in drafting S.B. 2471. The brief addresses a question the Court must decide on the Chamber's motion: whether the Chamber is likely to succeed on the merits.

Counsel has notified the parties of Amici's intention to submit this brief. Pursuant to LR7.1(c), Amici do not request a hearing on this motion and submit that the motion may be decided without one. This motion is supported by the accompanying memorandum, the proposed brief submitted herewith, the records and files in this action, and such further argument as the Court may permit.

Pursuant to the Disclosure and Certification Requirements — Generative Artificial Intelligence issued by the Chambers of United States District Judge Leslie E. Kobayashi, and consistent with Rule 11(b) of the Federal Rules of Civil Procedure, the undersigned discloses that generative artificial intelligence tools (Claude, developed by Anthropic, PBC, and ChatGPT, developed by OpenAI) were used in the preparation of portions of this motion. The undersigned certifies that the undersigned has checked the accuracy of every portion of this document

drafted with the assistance of generative artificial intelligence, including all citations and legal authority.

Dated: Honolulu, Hawaii, October 27, 2026.

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Plaintiff, v. ANNE E. LOPEZ, in her official capacity as Attorney General of Hawai'i, and NADINE ANDO, in her official capacity as Director of Hawai'i Department of Commerce and Consumer Affairs, Defendants.	1:26-cv-00497-LEK-KJM Memorandum in Support of Motion for Leave to File Brief of Hawai'i Legislators, Former Officials, and a Legal Scholar as Amici Curiae in Support of Defendants Judge: Hon. Leslie E. Kobayashi Hearing: None requested (LR7.1(c)) Trial Date: None set Relates to: ECF No. 10 (Plaintiff's Motion for Preliminary Injunction)

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF HAWAI'I LEGISLATORS, FORMER OFFICIALS, AND A LEGAL SCHOLAR AS AMICI CURIAE IN SUPPORT OF DEFENDANTS

Amici offer the perspective of people who have made, administered, and interpreted Hawai'i's law, on a question Plaintiff CHAMBER OF COMMERCE

OF THE UNITED STATES OF AMERICA's ("the Chamber's") motion requires the Court to decide.

1. The Court Should Allow Amici to Offer Their Perspective on the Chamber's Likelihood of Success.

District courts have broad discretion in allowing amici curiae to file briefs. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). Amici offer a perspective that the parties' briefing does not, one that may assist the Court. *See Miller-Wohl Co. v. Comm'r of Lab. & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (describing "the classic role of amicus curiae" as "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration").

Defendants oppose the Chamber's motion on the ground that the Chamber has not shown irreparable harm. ECF No. 33. For purposes of that motion only, they "do not contest the Chamber's argument that it has met its burden to establish a likelihood of success." *Id.* at 1; *see id.* at 2 n.2. They do not dispute that the Court must still consider it. *Id.* at 3 n.3; *see Baird v. Bonta*, 81 F.4th 1036, 1046 (9th Cir. 2023). The proposed brief addresses that question. It raises no new issue: likelihood of success is the Chamber's own first argument, ECF No. 10-1 at 8–26, and an element on which it must make "a clear showing," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). It explains why the Chamber has not made

the clear showing a preliminary injunction requires. Every claim the Chamber brings depends on a question of Hawai'i corporate law: what powers a corporation holds in Hawai'i. The brief also explains why the Court may certify that question to the Hawai'i Supreme Court, which can answer it before Act 11 takes effect on July 1, 2027.

2. Amici's Interest and Disclosure

Amici appear as individuals. They are identified, with a short description of each, in the proposed brief. Titles and affiliations are given for identification only.

No counsel for a party authored the proposed brief in whole or in part. No party or counsel for a party contributed money intended to fund its preparation or submission. No person other than amici or their counsel contributed money intended to fund its preparation or submission.

Pursuant to the Disclosure and Certification Requirements — Generative Artificial Intelligence issued by the Chambers of United States District Judge Leslie E. Kobayashi, and consistent with Rule 11(b) of the Federal Rules of Civil Procedure, the undersigned discloses that generative artificial intelligence tools (Claude, developed by Anthropic, PBC, and ChatGPT, developed by OpenAI) were used in the preparation of portions of this memorandum. The undersigned certifies that the undersigned has checked the accuracy of every portion of this

document drafted with the assistance of generative artificial intelligence, including all citations and legal authority.

3. The Motion is Timely

This motion and the proposed brief are submitted more than three weeks before the November 19 hearing. They are also submitted before the Chamber's optional reply, due November 5, so that the Chamber may respond to the brief in that reply. The Court's consideration of the brief will not delay the resolution of the motion or prejudice any party.

Conclusion

Amici request that the Court grant leave to file the accompanying brief.

Dated: Honolulu, Hawai'i, October 27, 2026.

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Plaintiff, v. ANNE E. LOPEZ, in her official capacity as Attorney General of Hawai'i, and NADINE ANDO, in her official capacity as Director of Hawai'i Department of Commerce and Consumer Affairs, Defendants.	1:26-cv-00497-LEK-KJM Brief of Hawai'i Legislators, Former Officials, and a Legal Scholar as Amici Curiae in Support of Defendants; Certificate of Compliance; Certificate Regarding Use of Generative Artificial Intelligence Judge: Hon. Leslie E. Kobayashi Hearing Date: November 19, 2026 Time: 10:30 a.m. Trial Date: None set

BRIEF OF HAWAI'I LEGISLATORS, FORMER OFFICIALS, AND A LEGAL SCHOLAR AS AMICI CURIAE IN SUPPORT OF DEFENDANTS

Relates to: ECF No. 10 (Plaintiff's Motion for Preliminary Injunction); ECF No. 33 (Defendants' Memorandum in Opposition)

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I. IDENTITY AND INTEREST OF AMICI CURIAE

Amici are a bipartisan group of Hawai'i legislators, former officials, and a legal scholar: Senator Karl Rhoads, who introduced S.B. 2471, which became Act 11; Representatives Della Au Belatti and Kanani Souza, members of the House of Representatives that passed it; Gilbert Keith-Agaran, who served in the Hawai'i House of Representatives from 2009 to 2013 and the Hawai'i Senate from 2013 to 2023; Michael D. Wilson, Associate Justice of the Hawai'i Supreme Court from 2014 to 2023; and Tom Moore, adjunct associate professor of law at the American University Washington College of Law and the author of the state corporate-law framework adopted in Act 11. Each appears in an individual capacity, with titles for identification only.

Amici have made, administered, and interpreted Hawai'i's law. They share one interest in this motion: that the people of Hawai'i, through their Legislature, continue to decide what powers corporations will hold in Hawai'i.

II. INTRODUCTION

Citizens United v. FEC, 558 U.S. 310 (2010), is, indisputably, the law of the land. But it is not a law of nature. *Citizens United* is a judicial decision about a federal statute and the corporation before the Supreme Court in 2010. Its holding governs plaintiffs materially similar to the Virginia corporation that brought that lawsuit: corporations the Court presumed state law had empowered to spend

through their charters. *See Citizens United*, 558 U.S. at 386 (Scalia, J., concurring) ("To be sure, . . . corporations could pursue only the objectives set forth in their charters . . . .").

Nowhere in that decision is a command that States are required to create the sort of corporation Virginia had created, nor a command to keep defining corporations the way they did at that moment. Those matters have belonged to the States throughout the history of our country.

Long ago, the people of Hawai'i, through their laws, gave corporations broad powers to do all things necessary or convenient to carry out their business. That decision, made here and elsewhere, created corporations that have achieved things that could never have been accomplished by individuals or general partnerships.

Less fortunately, those statutes have also unleashed corporate treasuries on Hawai'i's political system. Since *Citizens United*, the States' periodic efforts to regulate corporate political spending have largely been blocked under the reasoning of *Citizens United*: because independent spending cannot be corrupting, it cannot be limited.

With Act 11, the people of Hawai'i, through their elected Legislature and the affirmative action of the Governor of the State of Hawai'i to enact the law, took the Supreme Court at its word. Instead of limiting the spending, the 2026 Hawai'i

State Legislature re-examined a prior Legislature's decision and amended statutes that previously awarded broad powers to corporations — that is, the Hawai'i State Legislature reconsidered and redefined what corporations in Hawai'i are empowered to do.

A corporation holds no inherent right to any power, or even to its existence. The people of Hawai'i have reached for the most fundamental tool in their legal toolbox: the power of creation. They could do so because the same laws that granted corporations their powers reserved the authority to revisit those powers, authority the Supreme Court has held to be broad.

Act 11 does not regulate speech. It redefines what corporations are empowered to do within the boundaries of the State of Hawai'i. It makes every corporation acting in Hawai'i, wherever chartered, materially different from *Citizens United*'s plaintiff: a corporation without the capacity to deploy treasury funds within the State of Hawai'i to influence elections. Act 11 does not violate *Citizens United*; it presents a question *Citizens United* did not decide. That question and the others Act 11 raises belong before the Hawai'i Supreme Court. Act 11 is Hawai'i deciding, with the authority it has always held as a sovereign State, what corporations are empowered to do within the State's borders.

No Supreme Court decision needs to be overturned to uphold Act 11. Its exercise of the State's authority to set the powers corporations hold in Hawai'i is well within the body of precedent governing that authority.

A holding that the First Amendment requires a State to confer the power Act 11 withholds would be shattering. It would tell the people of Hawai'i that they may not reconfigure the corporations they created: that their creations have escaped their control. It would hold, for the first time since the *Lochner* era, that the powers a State grants its corporations do not determine what those corporations can do. It would fly in the face of two centuries of the law of corporate creation. And it would tell the people that the Constitution, which never mentions corporations, privileges the people's creations over the people themselves.

The Supreme Court recognized in *Citizens United* that an association of citizens does not lose its rights when it takes on the corporate form. But there is another, larger association of citizens — the polity — that first gathers to create the corporate form itself and to decide what sorts of forms the State shall offer.

States do not give corporations — or people — their rights. The Constitution does not give corporations — or people — their rights. Courts do not give corporations — or people — any rights. Rights exist independently of government. Government exists, in part, to protect their exercise. It does not create them.

When a court makes a constitutional decision, it does not give the plaintiff a right or create a new one. It recognizes a right that has always existed and decides how the government must protect it going forward.

Powers are different. States give corporations their powers. A corporation holds no others. The First Amendment protects a corporation in exercising the powers it holds. It does not supply them. The people of Hawai'i, through their Legislature, decide what powers a corporation holds in Hawai'i. Whether Hawai'i law leaves the Chamber the power it claims is the threshold question this motion presents. It is a question of Hawai'i law that belongs first with the Hawai'i Supreme Court.

The Court need not answer that question alone, or answer it now. The Chamber's motion depends on a rule no court has adopted: that the First Amendment requires a State to endow corporations with the capacity to deploy treasury funds in its elections. That is not the clear showing a preliminary injunction requires. The Court may deny Plaintiff's motion on that ground. It may also ask the Hawai'i Supreme Court what Hawai'i law confers. Act 11 does not take effect until July 1, 2027. There is time. Neither course asks the Court to doubt a word of *Citizens United*.

III. ARGUMENT

A. The Chamber Must Still Show that It Is Likely to Succeed

Plaintiff CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA ("the Chamber") asks the Court to enjoin Act 11 before it takes effect. ECF No. 10. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Defendants ANNE E. LOPEZ and NADINE ANDO, in their official capacities as Attorney General of Hawai'i and Director of Hawai'i Department of Commerce and Consumer Affairs, respectively ("Defendants"), rest their opposition on the absence of imminent irreparable harm. For purposes of this motion only, they "do not contest the Chamber's argument that it has met its burden to establish a likelihood of success." ECF No. 33 at 1; *see id.* at 2 n.2. They do not dispute that the Court must consider it; they proceed "even assuming such likelihood is established." *Id.* at 3 n.3. A court "confronted with a constitutional claim may not . . . skip over evaluating a movant's likelihood of success on that claim." *Baird v. Bonta*, 81 F.4th 1036, 1046 (9th Cir. 2023).

Likelihood of success is the Chamber's own first argument. ECF No. 10-1 at 8–26. It "is a threshold inquiry." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). An element assumed for argument is not an element shown.

In deciding that element, the Court "retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). The burden of a clear showing stays with the Chamber.

Amici also agree with Defendants that the Chamber faces no imminent harm. Because Act 11 does not take effect until July 1, 2027, the planning the Chamber describes is not subject to it. 2026 Haw. Sess. Laws Act 11, § 27; ECF No. 33 at 4–6. The presumption of harm the Chamber claims rests on a constitutional violation it has not shown. ECF No. 10-1 at 26–27; *see CTIA–The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 851 (9th Cir. 2019).

B. Act 11 Defines Corporate Powers; It Does Not Restrict Speech

The Chamber's motion moves in two pages from the statute's text to the State's burden. ECF No. 10-1 at 8–10. It treats as answered the question on which this case turns: whether Hawai'i law confers the power the Chamber claims. Amici do not dispute that election advocacy is political speech at the core of the First Amendment, or that a corporation holding the capacity to deploy treasury funds in a State is protected there in exercising it. But that an activity is political speech does not show that a State must empower a corporation to engage in it. The Chamber must show that withholding the power is itself an infringement.

A corporation has only the powers the law gives it. "Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). Its powers "are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes." *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 43 (1900); *see CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). Act 11 withholds one power expressly, from domestic and foreign corporations alike. *See infra* Part III.D. No incidental power survives an express withholding. The Chamber therefore needs an affirmative constitutional rule requiring a State to confer the power it withholds. Decisions protecting the exercise of powers already conferred do not supply that rule. The Chamber cites none that does.

The Chamber reads *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), to supply it. ECF No. 10-1 at 14. *Bellotti* rejected the view that the States are "free to define the rights of their creatures without constitutional limit." *Bellotti*, 435 U.S. at 779 n.14. Amici agree. Act 11 defines no right. It declines to confer a power. *Bellotti* reviewed "a state criminal statute" that forbade speech the corporations were presumed empowered to make. *Id.* at 767. When Massachusetts defended the statute as protecting dissenting shareholders, the Court's answer was corporation law. Shareholders "may decide, through the procedures of corporate

democracy, whether their corporation should engage in debate on public issues," and may "insist upon protective provisions in the corporation's charter." *Id.* at 794–95 (footnote omitted). They may also sue derivatively to challenge disbursements alleged to have been "made for improper corporate purposes." *Id.* at 795. Chief Justice Burger added that "the charter of a nonmedia corporation may be so framed as to render such activity or expression ultra vires." *Id.* at 797 n.1 (Burger, C.J., concurring). *Bellotti* did not place the capacity to deploy treasury funds beyond the reach of a corporation's charter. It treated the charter as a place where that capacity may be defined. A power the State's corporation law withholds does not exist in the State. *See Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629, 634–35 (1936).

Citizens United treats the charter the same way. A federal statute prohibited the plaintiff corporation from using a power the Court presupposed it held. *See* 558 U.S. at 319–21. Whether a State must confer that power was not before the Court. Justice Scalia described the matter in charter terms. "[I]n 1791 (as now)," he wrote, "corporations could pursue only the objectives set forth in their charters . . . ." What the dissent had not shown was that "their speech in the pursuit of those objectives could be censored." *Id.* at 386 (Scalia, J., concurring). Even if the common law had treated corporate political expenditures as ultra vires, he added, that "would have nothing to do with whether political expenditures that were

authorized by a corporation's charter could constitutionally be suppressed." *Id.* at 389 n.5 (Scalia, J., concurring).

Neither passage is a holding. Both take the charter as given. Neither says that a charter must authorize political expenditures. The conditional was sound. Its predicate, a corporation empowered to spend, was assumed.[1] Once Act 11 takes effect, that predicate will be absent in Hawai'i for every corporation outside § 414D-52(g),[2] wherever chartered, the Chamber included. The Chamber calls Act 11 an "end run around settled First Amendment law." ECF No. 10-1 at 1. It is nothing of the kind. *Citizens United* held what a government may not do to a corporation that holds the power. It did not take the corporation code from the States.

A State that declines to provide a mechanism for political speech does not abridge that speech. When Idaho ended payroll deductions for union political contributions, the Court held that the State's decision "is not an abridgment of the unions' speech." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009). Idaho

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[1] The Chamber pairs *Citizens United* with *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. 516 (2012) (per curiam). ECF No. 10-1 at 15. Montana's election code likewise prohibited expenditures by corporations already empowered to spend. The limits struck in *National Republican Senatorial Committee v. FEC*, 609 U.S. 908 (2026), on which the Chamber relies throughout, ECF No. 10-1 at 9–19, applied to party committees already empowered to spend.

[2] Citations to sections of chapter 414D that Act 11 amends are to those sections as amended, effective July 1, 2027. *See* Act 11, §§ 8–11, 27.

did "not suppress political speech but simply decline[d] to promote it." *Id.* at 361. *Davenport v. Washington Education Ass'n* upheld Washington's consent requirement for a public-sector union's use of nonmembers' fees because the union's entitlement to those fees came from the State. 551 U.S. 177, 185, 187 (2007). The Ninth Circuit has applied the principle at the preliminary-injunction stage. *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 892 (9th Cir. 2018) ("there exists no standalone right to receive the funds necessary to finance one's own speech").

So it is with a corporate treasury. The money in it belongs to the corporation. The treasury exists only because corporation law partitions it from the members' assets and shields it from their creditors. Each State's corporation law determines the purposes a treasury may serve there.

The Chamber says Act 11 "begins from a premise the Supreme Court has already condemned: that the State may suppress political speech because it believes some voices have become too influential." ECF No. 10-1 at 14. *Citizens United* rejected that premise as a justification for 2 U.S.C. § 441b, a federal prohibition on corporations that held the power to spend. *See* 558 U.S. at 348–56. A legislature's judgment about what belongs in the corporate form needs no such justification. An exercise of an unconditional reserved power stands "whatever may have been the reasons which influenced the legislature to enact it."

Greenwood v. Freight Co., 105 U.S. 13, 18 (1882). Choosing the corporation code is not an evasion either. In *Regan v. Taxation With Representation of Washington*, the Court upheld Congress's choice to define the § 501(c)(3) form so that substantial lobbying fell outside it. 461 U.S. 540, 545–46 (1983). Act 11 makes that choice for the corporate form.

C. "Shall Not Have the Power" Is the Language of Capacity

Once Act 11 takes effect, Hawai'i's nonprofit code will provide that "a corporation operating under the jurisdiction of this State shall not have the power to expend moneys on or participate in any election activity or ballot-issue activity." Act 11, § 10 (adding Haw. Rev. Stat. § 414D-52(b)). That is the result of a definition and a grant. The definition: "[a]rtificial-person powers" exclude any power to engage in "election activity or ballot-issue activity." Haw. Rev. Stat. § 414D-14. The grant: every corporation "shall have artificial-person powers." *Id.* § 414D-52(c). The same section confers the excluded power on candidate committees and noncandidate committees, "provided that the committees exist solely for those purposes and claim no charter privilege other than limited liability." *Id.* § 414D-52(g). Act 11 withholds one capacity: to deploy treasury funds to support or oppose a candidate, political committee, or political party, or a ballot question once certified or submitted to the electors. *See id.* § 414D-14.

The Chamber reads "shall not have the power," ECF No. 10-1 at 16, as if it said "shall not *do*." "Shall not do" is a command. It tells a corporation that holds a power not to use it. "Shall not have the power" describes the corporation itself, for everyone who deals with it. The Supreme Court drew that line more than a century ago: the objection to an ultra vires contract "is, not merely that the corporation ought not to have made it, but that it could not make it." *Cent. Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 59 (1891).

Section 441b, the statute at issue in *Citizens United*, was the first kind. It made it "unlawful for . . . any corporation whatever . . . to make a contribution or expenditure in connection with" federal elections. 2 U.S.C. § 441b(a) (2006). Section 414D-52(b) is the second kind. It sits in the nonprofit code's "General powers" section. It makes nothing unlawful. A corporation can lack the power to do what anyone may lawfully do. What the statute does, not either side's description of it, sets the Court's starting point.

The Chamber calls the words "ultra vires and void" "prohibitory language." ECF No. 10-1 at 16. They are the language of capacity. Act 11 supplies its own rule for the power it withholds: an act that constitutes election activity or ballot-issue activity "shall be ultra vires and void." Haw. Rev. Stat. § 414D-52(f); *see also id.* § 414D-54(d). The remedies the Chamber calls "severe," ECF No. 10-1 at 4, run to the entity alone, to what the State confers on it, including its authority to

operate or transact business in the State, its eligibility for state contracts, its tax exemption, its compliant status, its charter, its existence. Act 11, § 23. A corporation has long been subject to losing its charter "for that which, though innocent in itself, is beyond the power conferred upon it as an artificial person." *Standard Oil Co. of Ind. v. Missouri ex rel. Hadley*, 224 U.S. 270, 288–89 (1912). The remedy presupposes the limit. It does not turn the limit into a command.

D. Hawai'i Law Determines a Foreign Corporation's Powers in the State

The Chamber contends that if Act 11 "truly operated only by defining the powers of entities Hawai'i creates, there would be no basis for applying it to foreign corporations at all." ECF No. 10-1 at 17. Settled, well-established law supplies that basis. The law of the jurisdiction of incorporation sets what a corporation is constituted to do. The law of the host State sets which corporate powers exist there at all. Every power a corporation exercises outside its chartering State "depends for its validity upon the laws of the sovereignty in which it is exercised." *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839). In Hawai'i, a foreign corporation's powers are therefore the intersection of two grants: what its charter confers and what Hawai'i law extends. Where a State's law places foreign corporations on a par with its own, a rule the State may impose "upon domestic corporations" reaches foreign corporations too: each "is subject to the same rule." *Phillips Petroleum*, 297 U.S. at 633–34. Within Hawai'i, the

Chamber holds only the powers Hawai'i law confers. The Chamber's contrary premise draws on the Attorney General's testimony on an earlier draft of the bill. ECF No. 10-1 at 5–6, 16–17; ECF No. 10-3 at 1–3. How Hawai'i law treats an unregistered foreign corporation is a question the Court may certify. *See infra* Part III.G.

Comity does not change the answer. It "is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1869), *overruled in part on other grounds by United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533 (1944). Courts presume "the tacit adoption of [foreign laws]" only "[i]n the silence of any positive rule." *Bank of Augusta*, 38 U.S. (13 Pet.) at 589 (internal quotation marks omitted). Comity is itself Hawai'i's "voluntary act." *Id.* Hawai'i's corporation law supplies a positive rule: it treats foreign and domestic corporations alike.

A foreign corporation with a certificate of authority "has the same rights and enjoys the same privileges as . . . a domestic corporation of like character." Haw. Rev. Stat. § 414D-275(b). Those "rights" are the statutory incidents of corporate status, not constitutional rights. Every amendment of the chapter governs "all domestic and foreign corporations subject to this chapter." *Id.* § 414D-2. When the Legislature redefines the powers of a domestic corporation, it redefines identically

the powers it extends to a foreign one. That is the "basis for applying [Act 11] to foreign corporations" the Chamber says does not exist. ECF No. 10-1 at 17. Act 11 puts the Chamber on equal footing with a Hawai'i corporation: a foreign corporation "shall have no greater rights or privileges than" a domestic one. Haw. Rev. Stat. § 414D-52(e). The Chamber asks to be treated *better* than one.

The Chamber is incorporated in the District of Columbia. Decl. of Jennings Imel ¶ 3, ECF No. 10-2. Because it claims no certificate of authority, Act 11 reaches it through the deeming provision, § 414D-52(e), which treats certain foreign corporations that engage in election activity or ballot-issue activity as "transacting business in the State." A foreign corporation "otherwise transacting business" in the State "shall be subject to this section." § 414D-52(e). Deciding what counts as transacting business is an ordinary task of corporation law. *See id.* § 414D-271(b). The deeming provision follows *Bank of Augusta*. A corporation that deploys treasury funds in Hawai'i politics acts there through agents and contracts, exercising a corporate power that "depends for its validity upon the laws" of Hawai'i. *Bank of Augusta*, 38 U.S. (13 Pet.) at 589. Without the provision, a foreign corporation could hold a power Hawai'i withholds from its own corporations by declining to register.

The Chamber's internal-affairs argument rests on a sentence the Supreme Court never wrote. In *CTS*, no principle was "more firmly established" than "a

State's authority to regulate domestic corporations." 481 U.S. at 89. The Chamber gives that rank to a clause from *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). ECF No. 10-1 at 17. It stops quoting *MITE* just before the Court defines internal affairs: "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." 457 U.S. at 645. Act 11 defines the powers corporations possess in Hawai'i, not those relationships. The chapter Act 11 amends disclaims any authority "to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this State." Haw. Rev. Stat. § 414D-275(c). *MITE*'s plurality "spoke to a law that directly regulated out-of-state transactions by those with no connection to the State." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 377 n.1 (2023). The Chamber's claim concerns the deployment of corporate treasury funds in Hawai'i elections.

E. The People of Hawai'i Reserved the Power to Redefine What They Grant

Since *Dartmouth College*, American corporation law has rested on a reserved power. When a State creates the corporate form, it creates an artificial person that can hold assets of its own, shielded from its members' creditors, and outlive everyone who forms it. The State keeps the power to define and redefine what that person can do. The Chamber asks the Court to hold that one corporate power lies beyond that reach: once a State has let corporations spend in its

elections, its people may never decide otherwise, even through the law that makes corporations what they are.

Hawai'i reserved that power long before Act 11. The Legislature "has power to amend or repeal all or part of this chapter at any time," and "all domestic and foreign corporations subject to this chapter are governed by the amendment or repeal." Haw. Rev. Stat. § 414D-2. Under a reservation of this kind, the "organic law on which the corporate existence of the company depends" may be repealed, "so that it shall cease to be a law," or the legislature "may adopt the milder course of amending the law in matters which need amendment." *Greenwood*, 105 U.S. at 17. A statute enacted under the reserved power may be "tested as if, by the use of reserved power to amend, it was added to the charter" of each domestic corporation it governs. *Phillips Petroleum*, 297 U.S. at 634. The Hawai'i Constitution adds a separate rule: "[t]he power of the State to act in the general welfare shall never be impaired by the making of any irrevocable grant of special privileges or immunities." Haw. Const. art. I, § 21.

The reserved power "is not unlimited." *Phillips Petroleum*, 297 U.S. at 634. Arkansas, the State in that case, "might have refrained from enactment of statutes creating or authorizing organization of corporations." But it "may not enforce any part of the charter of a domestic corporation or any provision of its laws relating to admission of a foreign corporation that is repugnant to the Federal Constitution."

prohibiting speech" by corporations that held the power to spend. *Citizens United*, 558 U.S. at 351. It did not decide which powers a State must confer.

The First Amendment would still bar a State from conferring corporate powers by viewpoint, or from singling out the press. Act 11 does neither.

Nor is § 414D-52(a) an admission that Act 11 trades corporate benefits for the surrender of rights. *Contra* ECF No. 10-1 at 20. Section 414D-52(a) describes corporate existence as "a conditional grant of legal status by this State" that "shall remain subject to complete withdrawal at any time." It confirms that the grant is revocable, as § 414D-2 provides. It demands no right in exchange. The Chamber's principal authority for this claim bars conditions that "leverage funding to regulate speech outside the contours of the program itself." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214–15 (2013). Act 11 reaches nothing outside the corporate form. It defines the form itself.

F. The Discrimination Claims Assume What the Chamber Has Not Shown

Each of the Chamber's discrimination arguments, ECF No. 10-1 at 10–12, presupposes that Act 11 restricts speech. Act 11 is viewpoint-neutral. It withholds the power from every corporation other than the committees described in § 414D-52(g). A corporation that wanted to support Act 11 or its sponsors stands where the Chamber stands. A law does not discriminate based on viewpoint merely because those most likely to oppose it are among those it affects. *Cf. Davenport*, 551 U.S.

at 189–90. The exclusion for "any bona fide news story, commentary, or editorial" turns on the activity, not on whether the publisher is a media corporation. Haw. Rev. Stat. § 414D-14; *see Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

The committee provision allocates the power among entity forms. It favors no viewpoint. Committee status turns on what an organization is constituted to do, not on what it believes. *Citizens United*'s PAC passage is not to the contrary. The Court held that § 441b "is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak." *Citizens United*, 558 U.S. at 337. The option to form PACs did not create that ban. It failed to cure it. That holding presupposed a corporation empowered to spend. The question whether an alternative cures a burden on speech arises only after a burden is found. It does not arise here.

The Chamber cites *Chiles v. Salazar*, 607 U.S. 627, 640–41 (2026). ECF No. 10-1 at 10–11, 18. *Chiles* applies the content-based rule of *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015), and *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–66 (2011), once a law has been classified as a regulation of speech. Act 11 defines a power. Corporation codes commonly define powers by purpose. Hawai'i's nonprofit code already does so. It empowers a corporation to make donations "for the public welfare or for charitable, religious, scientific, or

educational purposes, and for other purposes that further the corporate interest." Haw. Rev. Stat. § 414D-52(c)(13).

The Supreme Court has upheld a line of this kind drawn around election spending. Washington required public-sector unions to obtain a nonmember's consent before spending the nonmember's agency fees for election-related purposes. *Davenport*, 551 U.S. at 180. The union called that line content-based. The Court found the contention "off the mark." *Id.* at 188. For "an extraordinary and totally repealable authorization to coerce payment from government employees," a content-based line is permissible so long as "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 189 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)). Hawai'i's grant is likewise repealable. *See* § 414D-2. Act 11 withholds the power from corporations of every viewpoint. No suppression of ideas is afoot.

Chiles warns that "[t]he First Amendment is no word game" and that its protections cannot be "nullified by mere labels." 607 U.S. at 645 (internal quotation marks omitted). That warning binds both sides. What matters "is whether, in fact, the law regulates speech in the case at hand." *Id.* Colorado could not turn Ms. Chiles's own speech into conduct by calling it treatment. *Id.* Nor does a heading that says Act 11 "Categorically Bans" speech make it so. ECF No. 10-1 at 8. Here the answer turns on a prior question of Hawai'i law: whether the

corporation holds the power at all. Act 11 sorts no empowered speaker's acts. It decides, under powers Hawai'i has always held, which capacities a corporation will have in Hawai'i.

"First Amendment protections do not disappear when individuals join together through corporations and other associations," the Chamber argues. ECF No. 10-1 at 15. They do not. Every natural person associated with the Chamber can speak, spend, and associate without any grant from the State. Act 11 leaves all of that in place. The corporate form still adds powers to what those persons hold. Once Act 11 takes effect, the form adds fewer. The Chamber's rule would make one corporate power a constitutional entitlement that every State offering the corporate form must confer. No First Amendment principle requires that result.

Because Act 11 does not abridge speech, the overbreadth claim fails at the first step. *See United States v. Dang*, 488 F.3d 1135, 1142 (9th Cir. 2007). The Court "need go no further" than the threshold. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018) (internal quotation marks omitted).

G. The Court May Certify the Determinative Questions of Hawai'i Law

Every claim the Chamber makes rests on one premise: that once Act 11 takes effect, the Chamber will still hold, in Hawai'i, the power to deploy treasury funds in Hawai'i elections. Whether Hawai'i law will then confer that power is a question of Hawai'i law. An injunction against Defendants would not supply that

power. No Hawai'i court has construed Act 11. Amici know of no Hawai'i decision on the reservation in § 414D-2, the parity rule of § 414D-275(b), or whether an unregistered foreign corporation holds in Hawai'i a power Hawai'i withholds from its own corporations.

The Hawai'i Supreme Court may answer a question of Hawai'i law certified by this Court that is "determinative of the cause" where "there is no clear controlling precedent in the Hawai'i judicial decisions." Haw. R. App. P. 13(a). Certification is appropriate where a state-court construction "would avoid or substantially modify the federal constitutional challenge to the statute." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (quoting *Bellotti v. Baird*, 428 U.S. 132, 148 (1976)). So it would here. If, under Hawai'i law, the Chamber holds the power notwithstanding Act 11, it has no claim. If it does not, its claim reduces to a rule no decision has adopted: that the First Amendment requires a State to confer the power. Certification is especially warranted for an enacted statute no state court has construed: "the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at 79.

The Court may certify on its own motion. *See Murray v. BEJ Mins., LLC*, 924 F.3d 1070, 1071 (9th Cir. 2019) (en banc) ("We may elect to certify a question *sua sponte*."); *St. Paul Fire & Marine Ins. Co. v. Bodell Constr. Co.*, No. 1:20-cv-

00288-DKW-WRP, slip op. at 2 n.1 (D. Haw. Oct. 28, 2022), ECF No. 213 (citing *DW Aina Le'a Dev., LLC v. Haw. Land Use Comm'n*, 918 F.3d 602, 609 n.6 (9th Cir. 2019)). This Court has certified before. *Burdick v. Takushi* was a First Amendment challenge to a Hawai'i election law. The Ninth Circuit had vacated a preliminary injunction entered here, reasoning that "consideration of the federal constitutional question" was "premature" until Hawai'i law was settled. *Burdick v. Takushi*, 504 U.S. 428, 430–31 (1992). On remand, this Court certified the state-law questions to the Hawai'i Supreme Court. The federal claim was decided in light of the answers. *Id.* at 431–32. Act 11 does not take effect until July 1, 2027. There is time for the Hawai'i Supreme Court to answer. Questions like these would serve:

1. Does a nonprofit corporation organized under the laws of another jurisdiction, and holding no certificate of authority to transact business in Hawai'i, possess in Hawai'i a power that Hawai'i law does not confer on a domestic nonprofit corporation of like character? *See* Haw. Rev. Stat. §§ 414D-52(e), 414D-272(e), 414D-275(b).
2. Beginning July 1, 2027, does a nonprofit corporation, domestic or foreign, other than a committee described in § 414D-52(g), lack the power under Hawai'i law to expend moneys on

"election activity" or "ballot-issue activity," or hold that power subject to a prohibition?

3. Is any power that a nonprofit corporation has held or exercised in Hawai'i, including by comity, subject to the power reserved in § 414D-2 to amend or repeal chapter 414D, read in light of article I, section 21 of the Hawai'i Constitution?

If the Court certifies these questions, it should deny the motion or, at a minimum, deny it without prejudice to renewal before the effective date.

IV. CONCLUSION

For the foregoing reasons, the Chamber has not shown that it is likely to succeed or that it faces imminent harm. Amici respectfully request that the Court deny Plaintiff's motion. If the Court finds the determinative questions of Hawai'i law unsettled, Amici further request that the Court certify them to the Hawai'i Supreme Court and, at a minimum, deny the motion without prejudice.

DATED: Honolulu, Hawai'i, October 27, 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to LR7.4(e), I certify that the foregoing brief is in 14-point Times New Roman, double-spaced, and contains 6,243 words, exclusive of the case caption, tables of contents and authorities, and certificates, as counted by the word-processing system used to produce it, in compliance with LR7.4(b) and (d).

DATED: Honolulu, Hawai'i, October 27, 2026.

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CERTIFICATE REGARDING USE OF GENERATIVE ARTIFICIAL INTELLIGENCE

Pursuant to the Disclosure and Certification Requirements — Generative Artificial Intelligence issued by the Chambers of United States District Judge Leslie E. Kobayashi, and consistent with Rule 11(b) of the Federal Rules of Civil Procedure, the undersigned discloses that generative artificial intelligence tools (Claude, developed by Anthropic, PBC, and ChatGPT, developed by OpenAI) were used in the preparation of portions of this brief. The undersigned certifies that the undersigned has checked the accuracy of every portion of this document drafted with the assistance of generative artificial intelligence, including all citations and legal authority.

DATED: Honolulu, Hawai'i, October 27, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all counsel of record through the Court's CM/ECF system.

Dated: Honolulu, Hawai'i, October 27, 2026.

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