BY FAX & E-MAIL

September 14, 2011

Keith Kaneshiro
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Re: Jamie and Tess Meier (City and County of Honolulu ("CCH") Complaint & Summons # 6058290MO and # 6058291MO)

Dear Mr. Kaneshiro:

The ACLU of Hawaii Foundation and Davis Levin Livingston represent Tess and Jamie Meier in the above-referenced matters. In that capacity, we write to request that your office immediately dismiss the charges against Jamie and Tess Meier for violating Revised Ordinances of Honolulu ("ROH") § 10-1.3(a)(5). As fully set forth below, the charges against our clients cannot be sustained as a matter of law. First, the referenced ordinance is inapplicable to the exercise of First Amendment rights on public sidewalks. Additionally, even if ROH § 10-1.3(a)(5) governs the sidewalk where the protest occurred, the ordinance is both unconstitutional on its face and as applied to the Meiers' exercise of their First Amendment rights.

On August 21, 2011, at approximately 3:00 p.m., Tess Meier and another woman participated in a nationwide protest opposing gender discrimination. Their protest consisted of standing on a Kalakaua Avenue sidewalk,[1] waving signs and asking supporters to sign a petition

[1] The protesters were on the makai side of Kalakaua Avenue, just Diamondhead of the intersection of Kalakaua and Uluniu. There is a small, circular driveway adjacent to the grassy stage, and there is a large banyan tree under which the protest occurred. The protesters stood on the sidewalk fronting Kalakaua Ave. until HPD instructed them to move out of the view of

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supporting women's rights. One held a clipboard with the petition, and each held a sign opposing gender discrimination. Shortly thereafter, two Honolulu Police Department ("HPD") squad cars with three officers arrived and questioned both women about their protest. Tess explained to the HPD officer that their protest was lawful and produced a copy of the court decision in support. *See State v. Crenshaw*, 61 Haw. 68, 597 P.2d 13 (1979). An HPD officer told them, with no apparent legal basis, that their protest could create traffic problems, so the women moved to an area on the sidewalk that was not in view of traffic. Another HPD squad car arrived with two additional officers who hovered around the women. An HPD officer eventually asked for identification from both women and wrote down their information. Around 3:30 p.m., Jamie Meier arrived to participate in the protest with Tess; the other woman departed. An HPD officer asked Jamie for identification and wrote down his information. HPD officers remained at the protest site until 4:30, at which time an officer told Jamie that he and Tess would be cited for not having a permit and that they needed to leave after he gave them the citation or he would arrest them. At that time he asked Jamie and Tess whether they had a permit and they said no. Jamie and Tess were cited for violating ROH § 10-1.3(a)(5) (failing to obtain a parks department permit for "meetings or gatherings or other similar activity held by organizations, associations or groups"). *See* City and County of Honolulu Complaint & Summons #6058290MO and #6058291MO.

The Meiers' protest was part of National Go Topless Day, an event to support women's constitutional right to go bare-chested in public. This event has been held for the last four years in late August to honor Women's Equality Day on August 26, which commemorates the 1920 passage of the 19th Amendment to U.S. Constitution, granting women the right to vote. This is the second year that the Meiers have participated in National Go Topless Day. Because the Meiers were engaged in the expression of political and social ideas (specifically, the need for gender equality), the First Amendment must afford them the broadest protection in order "'to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). In fact, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). *See also Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). Indeed, the First and Fourteenth Amendments embody our "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Garrison v. Louisiana*, 379 U.S. 64 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Kalakaua Ave. traffic. It is unclear whether they were on a public sidewalk or in a public park at the time they were cited; nevertheless, as set forth more fully *infra*, regardless of whether they were standing on a sidewalk or in a park, HPD's actions were unconstitutional.

I. The Meiers Were Lawfully Present in a Traditional Public Forum When They Were Cited for Violating ROH § 10-1.3(a)(5).

The U.S. Supreme Court has constructed an analytical framework known as "forum analysis" for evaluating First Amendment claims relating to speech on government property. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *see also Cornelius v. NAACP*, 473 U.S. 788, 800 (1985). The ability to restrict speech in public fora, whether traditional public fora or designated public fora, is "sharply circumscribed." *Perry*, 460 U.S. at 45; *see also Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994) (quoting *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) ("Public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales")). Both the nature of the grounds and the governing law confirm that Kuhio Beach Park and the sidewalk along Kalakaua Ave. are, and have always been, a traditional public forum.

Parks, streets and sidewalks and other government owned property "traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *United States v. Grace*, 461 U.S. 171, 179 (1983). That is because "'time out of mind' public streets and sidewalks have been used for assembly and debate, the hallmarks of a traditional public forum." *Frisby v. Schultz*, 487 U.S. at 480 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). "Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views . . . must not, in the guise of regulation, be denied." *Hague*, 307 U.S. at 515-516.

II. By Its Plain Language, ROH § 10-1.3(a)(5) Does Not Apply to Public Sidewalks.

If the Meiers were standing on a sidewalk, rather than in a park, then criminal charges must be dismissed immediately because ROH § 10-1.3(5) does not apply to public sidewalks.

As you know, the Department of Parks and Recreation ("DPR") manages, maintains, and operates all parks and recreational facilities for the City and County of Honolulu. The governing ordinances for the use of park property DPR are set forth in Chapter 10 of the ROH. The cited ordinance, ROH § 10-1.3(a)(5), applies only to "recreational and other areas and facilities under the control, maintenance, management and operation of the department of parks and recreation." Our understanding is that the sidewalk on which the Meiers began their protest is outside of the public park; as such, it appears that HPD inappropriately applied the ordinance to halt protected

First Amendment activities that took place outside of the public park.[2] As such, ROH § 10-1.3(a)(5) is inapplicable to the Meiers' conduct.

Moreover, it is settled that a permit is not required for a small group to protest on public sidewalks in the City and County of Honolulu. *See,* http://www1.honolulu.gov/dts/usage/parades.htm#hours (requiring permits only for those events that disrupt normal traffic regulation and controls).

Accordingly, if the Meiers were on a public sidewalk, no permit would have been necessary, such that the pending criminal charges against the Meiers should be dismissed.

III. Even if the Cited Conduct Occurred on Park Property, the Criminal Charges Must Be Dismissed Because ROH § 10-1.3(a)(5) is Unconstitutional on its Face and As Applied to the Meiers' Conduct.

In the event that the Kalakaua sidewalk is construed to be within the jurisdiction of the public parks, the charges against the Meiers must nevertheless be dismissed. The cited ordinance, ROH § 10-1.3(a)(5), is rife with constitutional infirmities such that it is unconstitutional both on its face and as applied to the Meiers' conduct. To require "a permit . . . before authorizing public speaking, parades, or assemblies" in a street, sidewalk, or park, "the archetype of a traditional public forum, is a prior restraint on speech." *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 130 (1992) (citation omitted). R.O.H. §10-1.3(a)(5) is unconstitutional for at least the following reasons:

A. Spontaneous demonstrations are prohibited

First, ROH § 10-1.3(a)(5) prohibits "spontaneous events," and thus violates the First Amendment to the United States Constitution (and its Hawaii analog in Article 1, § 4). *See, e.g.*, *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1038 (9th Cir. 2009) (striking down a 24-hour notice requirement because the ordinance in question was "not narrowly tailored to regulate only events in which there is a substantial governmental interest in requiring such advance notice"), *cert. denied*, 130 S. Ct. 1569 (2010). Because neither Chapter 10 of the ROH nor its implementing regulations provide for an exception governing spontaneous demonstrations – that is, because CCH requires a permit obtained three weeks in advance for *all* meetings and gatherings or other similar activities held by organizations, associations or groups – the ordinance is unconstitutional.

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[2] As discussed more fully in Section III, *infra*, even if the Meiers were inside a City and County park, prosecution is still unfounded because ROH § 10-1.3(a)(5) is unconstitutional (both facially and as applied to the Meiers).

B. A permit is required for groups as small as two

The fact that ROH § 10-1.3(a)(5) is imposed on groups as small as two is also unconstitutional. As the Ninth Circuit recently explained:

> Although it is a close question, we hold that a group of seventy-five people using a public open space . . . is large enough to warrant an advance notice and permitting requirement . . . . Advance notice and permitting requirements applicable to smaller groups would likely be unconstitutional, unless such uses implicated other significant governmental interests, or where the public space in question was so small that even a relatively small number of people could pose a problem of regulating competing uses.

Long Beach Area Peace Network, 574 F.3d at 1034. Given the large physical area of the Kalakaua sidewalk and adjacent beach park, courts undoubtedly would strike down the requirement that groups as small as two obtain permits for all park meeting and events. *See id.* at 1021 (discussing long-standing presumptions that prior restraints and regulations affecting speech in traditional public forums are unconstitutional).

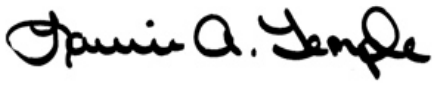
C. The park director is allowed unbridled discretion to determine whether to permit activities in parks

Finally, ROH § 10-1.3(a)(5) requires a permit to meet in parks but fails to provide any standards by which the parks director must abide in determining whether to permit an activity. The regulations simply provide, "Make sure that the park director of that park has approved the activity you are requesting." *See Use of Park Facilities*, available at http://www1.honolulu.gov/parks/parkuse.htm. When "a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity," as here, "one who is subject to the law may challenge it facially." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755 (1988). The ordinance and the implementing regulations confer excessive discretion on the parks director with respect to granting permits. This permit scheme violates the First Amendment on its face and as applied because the excessive discretion allows for content-based discrimination, which imminently threatens the abridgement of the Meiers' First Amendment rights.

For all of the reasons set forth above, we insist that your office dismiss with prejudice the charges against Jamie and Tess Meier. Given the upcoming arraignment on September 19, 2011, we would appreciate your written response no later than 12:00 p.m. on September 16, 2011. Absent a dismissal, we will be compelled to file pre-trial motions and to take civil action as appropriate.

Please feel free to contact me at 522-5905 or lt@acluhawaii.org. Thank you for your prompt attention to this matter.

Sincerely yours,



Laurie A. Temple
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Attch.

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