

ACLU OF HAWAII FOUNDATION

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

AMERICAN CIVIL LIBERTIES
UNION OF HAWAII; MELE
STOKESBERRY; and CHARLES M.
CARLETTA,

Plaintiffs,

vs.

COUNTY OF MAUI,

Defendant.

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

JUN 20 2013
at 11 o'clock and 30 min. M.
SUE BEITIA, CLERK

CIV. NO. **CV13 00307 LEK KSC**

[CIVIL RIGHTS ACTION]

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF AND
DAMAGES; SUMMONS IN A
CIVIL CASE**

COMPLAINT

Plaintiffs THE AMERICAN CIVIL LIBERTIES UNION OF HAWAII, MELE STOKESBERRY, and CHARLES M. CARLETTA (collectively, “Plaintiffs”), by and through their attorneys, for this complaint, allege and aver as follows:

INTRODUCTION

1. Plaintiffs STOKESBERRY and CARLETTA are long-time peace advocates. For years, they have organized and participated in demonstrations within Maui County, including engaging in a classic form of free speech: standing and/or marching on sidewalks adjacent to roadways while displaying signs, so as to deliver their message to their fellow community members.

2. Defendant MAUI COUNTY, however, restricts these quintessential free speech activities in ways that infringe upon Plaintiffs’ First Amendment rights (as well as the First Amendment rights of all residents of and visitors to Maui County). Specifically, Defendant prohibits Plaintiffs (and all others within Maui County, including the islands of Maui, Lanai, and most of the island of Molokai) from displaying signs within fifty feet of every traffic signal within the entire County, within twenty feet of

every crosswalk within the entire County, and within six feet of all road surfaces within the entire County.

3. These regulations constitute invalid time, place and manner restrictions and violate Plaintiffs' First Amendment rights in two distinct ways:

- a. These regulations are not narrowly tailored, and therefore burden substantially more speech than is necessary to achieve any purported goal(s) the County may have;
- b. These regulations are enforced erratically, such that Defendant COUNTY is engaged in content-based discrimination and viewpoint-based discrimination. This occurs in two ways:
 - i. Defendant COUNTY enforces (and/or threatens to enforce) these regulations against some protesters but not others; and
 - ii. Defendant COUNTY routinely permits its own agents – specifically, Maui Police Department (“MPD”) Officers – to violate the ordinance when promoting County-sponsored messages, while threatening

bearers of other messages with criminal sanctions for engaging in identical conduct.

4. In April 2013, counsel for Plaintiffs wrote to the Department of Corporation Counsel for Defendant COUNTY to express concern over these regulations and to ask that they be amended. Defendant COUNTY refused.

5. This action seeks declaratory and injunctive relief and damages, which includes an order:

- a. declaring that subsections (B)(1), (B)(2), and (B)(5) of Maui County Code (“MCC”) § 12.42.030 are facially unconstitutional and unconstitutional as applied to Plaintiffs;
- b. prohibiting Defendant from enforcing MCC § 12.42.030(B)(1), (B)(2), and (B)(5) against Plaintiffs and/or others;
- c. requiring that Defendant pay nominal damages to Plaintiffs STOKESBERRY and CARLETTA for wrongfully violating their constitutional rights; and
- d. ordering such other relief as the Court deems proper, including but not limited to attorneys’ fees and costs pursuant to 42 U.S.C. § 1988 and other applicable laws.

JURISDICTION AND VENUE

6. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation, under color of law, of rights secured by the United States Constitution.

7. This Court has jurisdiction in this case pursuant to 28 U.S.C. §§ 1331 and 1343.

8. This Court is authorized to order declaratory and injunctive relief pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.

9. Venue is properly in this district pursuant to 28 U.S.C. § 1391(b) because Defendant resides in this district and the events giving rise to these claims occurred in this district.

THE PARTIES

Plaintiffs

The ACLU of Hawaii

13. THE AMERICAN CIVIL LIBERTIES UNION OF HAWAII (hereinafter, “THE ACLU OF HAWAII”) is a statewide, nonpartisan, non-profit organization of approximately 2,000 members dedicated to protecting the principles of liberty and equality enshrined in the United States Constitution, including the right to free speech guaranteed by the First

Amendment. Protecting the First Amendment rights of individuals within Maui County is germane to the purpose of THE ACLU OF HAWAII, insofar as THE ACLU OF HAWAII frequently litigates, lobbies, and educates the public on First Amendment issues involving and/or affecting Hawaii residents and visitors, including Maui County residents and visitors.

14. THE ACLU OF HAWAII has over 150 members who reside in Maui County. Some of the members of THE ACLU OF HAWAII who reside within Maui County choose to exercise their First Amendment rights by displaying signs along roadways and near intersections. Some of these members fear that these actions will make them subject to criminal liability under MCC § 12.42.030. These members would have standing in their own right to challenge MCC § 12.42.030, insofar as they have been (and continue to be) chilled in the exercise of their First Amendment rights.

15. Some of the ACLU members who choose to exercise their First Amendment rights by displaying signs along roadways and near intersections, and who fear liability under MCC § 12.42.030, include Plaintiffs MELE STOKESBERRY and CHARLES M. CARLETTA.

Mele Stokesberry

16. Plaintiff STOKESBERRY is a member of THE ACLU OF HAWAII. She is a resident of Maui County. Within the last two years, she has displayed signs within six feet of roadways, within twenty feet of crosswalks, and within fifty feet of traffic signals in Maui County. She has specific and concrete plans to display signs within six feet of the roadway, within twenty feet of crosswalks, and within fifty feet of traffic signals in contravention of MCC § 12.42.030 again in the immediate future; these plans include a march on the sidewalk in Central Maui while displaying one or more signs on International Peace Day, September 21, 2013, and a march on the sidewalk in Wailuku while displaying one or more signs on Martin Luther King, Jr. Day, January 20, 2014.

Charles M. Carletta

17. Plaintiff CARLETTA is a member of THE ACLU OF HAWAII. He is a resident of Maui County. Within the last two years, he has displayed signs within six feet of roadways, within twenty feet of crosswalks, and within fifty feet of traffic signals in Maui County. He has specific and concrete plans to display signs within six feet of the roadway, within twenty feet of crosswalks, and within fifty feet of traffic signals in contravention of MCC § 12.42.030 again in the immediate future; these

plans include a march on the sidewalk in Central Maui while displaying one or more signs on International Peace Day, September 21, 2013, and a march on the sidewalk in Wailuku while displaying one or more signs on Martin Luther King, Jr. Day, January 20, 2014. Plaintiff STOKESBERRY and Plaintiff CARLETTA are married to one another.

Defendant

18. Defendant COUNTY is a municipal corporation in Hawaii and the local governing body for the County of Maui, Hawaii. Defendant COUNTY is the legal and political entity responsible for the actions of County officials, employees and/or agents complained of herein, which constitute official policies and/or customs.

19. At all times relevant herein, the officials, employees and/or agents of Defendant COUNTY were acting pursuant to the official policies and customs of the County and/or those actions have been approved of, ratified, and/or enforced by the persons and/or entities with final decision-making authority.

20. Defendant COUNTY (or its agents or employees) acted under color of law as to the matters set forth herein. Defendant COUNTY knows of and/or is responsible for the decisions, policies, practices or customs set forth herein.

FACTUAL ALLEGATIONS

MCC § 12.42.030

21. MCC § 12.42.030, entitled “Regulation of signs,” provides in relevant part:

A. Every person who wishes to hold or display a sign within the right-of-way boundary of any highway in the county of Maui shall be subject to the provisions herein.

B. No person shall hold or display a sign within the right-of-way boundaries of any highway in any manner which draws, is intended to draw, or may draw the attention of occupants of motor vehicles using a highway if the person and/or the sign is:

1. Within fifty feet of any traffic control signal;
2. Within twenty feet of a pedestrian crosswalk;
- ...
5. Closer than six feet to the edge of the pavement or other surface of the highway[.]

22. MCC § 12.42.030, by its plain terms, prohibits sign-waving and picketing throughout large portions of Maui County: it severely restricts sign-waving in much of downtown Wailuku, Kahului, and Lahaina, where sidewalks (which, themselves, are frequently narrower than six feet) are often immediately adjacent to the roadway and traffic signals and crosswalks are common. Its prohibitions – ostensibly enacted to promote traffic safety –

apply with equal force to the entirety of the island of Lanai and nearly all of the island of Molokai, where little traffic exists.

23. The ordinance is overbroad: it restricts far more speech than is necessary to accomplish whatever goal(s) Defendant COUNTY may have, and is therefore facially unconstitutional. Furthermore, MCC § 12.42.030 not only impacts the First Amendment rights of those who wish to speak, but also the First Amendment rights of those Maui County residents and visitors to hear and see those speakers' messages.

January 2013: MPD Threatens to Enforce MCC § 12.42.030

24. Plaintiffs STOKESBERRY and CARLETTA are long-time organizers for Maui Peace Action, a small local Maui non-profit committed to ho'omaluhia (making peace). Maui Peace Action encourages disarmament through peaceful international cooperation, protests preemptive aggression, promotes non-violent solutions to world conflict, and educates for social justice.

25. For the last several years, Plaintiffs STOKESBERRY and CARLETTA have participated in marches and parades on Martin Luther King, Jr. Day. They participate in the marches to commemorate Dr. Martin Luther King, Jr. and to emphasize, with signs, his commitment as a peace maker.

26. This year was no different: Plaintiffs STOKESBERRY and CARLETTA chose to honor Dr. King's legacy of peace and justice by participating in a march along the sidewalks through downtown Wailuku, Maui on Martin Luther King, Jr. Day, January 21, 2013.

27. The march started out near the Maui County building on High Street, went north to Main Street, and turned right onto Main Street; it then went a few blocks before turning left on to Market Street. The march was held on the sidewalk except when crossing the streets at intersections.

28. On High Street – including the portion right in front of the County Building – Plaintiffs STOKESBERRY and CARLETTA (and the other march participants) walked on the sidewalk on the east side of the street. That sidewalk is immediately adjacent to the road, as are the sidewalks along Main Street and Market Street. On information and belief, the sidewalk is narrower than six feet along some of the march route, and passes within fifty feet of numerous traffic signals and within twenty feet of numerous crosswalks.

29. Prior to this year's march – around January 9, 2013 – Plaintiff STOKESBERRY received news via e-mail that anyone participating in the march would be prohibited from carrying signs, other than photos of Dr. King or banners of the participants' organizations.

30. Confused about this restriction on displaying signs, around January 11, 2013, Plaintiff STOKESBERRY spoke with Officer Aylett Wallwork from the Community Policing division of the Maui Police Department (“MPD”) via telephone. She asked Officer Wallwork about the restrictions on holding signs during the march, and Officer Wallwork confirmed that he had told the organizers of the march that the Maui Ordinance prohibiting signs would be enforced against participants in the march. Plaintiff STOKESBERRY told Officer Wallwork that, in her opinion, the ordinance was unenforceable and unconstitutional, and that she wanted to display signs along the roadway in the future. Officer Wallwork told Plaintiff STOKESBERRY that the ordinance was necessary for traffic control and safety.

31. That same day, Officer Wallwork sent an e-mail to Plaintiff STOKESBERRY with a link to a webpage, where Plaintiff STOKESBERRY searched for and found MCC § 12.42.030.

32. Plaintiff STOKESBERRY shared this information with her husband, Plaintiff CARLETTA. They were both worried about the possibility of displaying signs during the Martin Luther King, Jr. Day march, but they believed it was important to assert their First Amendment right to protest and speak freely via their signs in public. Therefore, Plaintiffs

STOKESBERRY and CARLETTA decided that they would carry signs during the march even though there was a risk they could face criminal penalties as a result.

33. Plaintiffs STOKESBERRY and CARLETTA felt nervous, worried, and/or threatened as they arrived at and participated in the march. To date, however, neither Plaintiff STOKESBERRY nor Plaintiff CARLETTA has been ticketed, arrested, or otherwise cited for her/his speech or actions leading up to or arising out of the Martin Luther King, Jr. Day march.

34. Because of MCC § 12.42.030 and the possibility of incurring criminal penalties, Plaintiffs STOKESBERRY and CARLETTA brought fewer signs with them to the January 21, 2013 march than in past years. Although both carried signs, and were willing to risk being ticketed or arrested, they were still worried about what might happen.

35. Plaintiffs STOKESBERRY and CARLETTA handed out a few signs to people who wanted to carry them and understood about the possibility of incurring criminal penalties, but the number of signs they handed out was far fewer than in the past marches. Plaintiff STOKESBERRY's impression was that there were fewer individuals

holding signs in this year's march than in past Martin Luther King, Jr. Day marches.

36. Both Plaintiff STOKESBERRY and Plaintiff CARLETTA fear prosecution or enforcement under MCC § 12.42.030 for displaying signs.

Erratic enforcement by MPD

37. MCC § 12.42.030 is enforced inconsistently: although MPD announced its intention to enforce the ordinance against those participating in the march to commemorate Martin Luther King, Jr., individuals participating in other sign-waving demonstrations (both prior to and subsequent to January of 2013) were not threatened with enforcement of the ordinance.

38. Indeed, by its terms, MCC § 12.42.030 applies to all signs that are displayed, regardless of whether the signs are held by a person at the time they are displayed. Yet there are commercial signs all over Maui County – both permanent signs and temporary signs – that violate the text of the ordinance. Indeed, there are myriad signs along and near the march route – for restaurants, real estate, the State Office Building (at the corner of High Street and Main Street in Wailuku), and so on – that violate MCC § 12.42.030. As such, there appear to be no standards by which Maui County determines how or when to enforce MCC § 12.42.030.

39. More troubling, however, MPD officers *themselves* have repeatedly engaged in sign-waving that violates the ordinance. On or about March 23, 2012, MPD officers joined with community members for a traffic safety rally along Kaahumanu Avenue in front of Baldwin High School. Photos of the event (publicly available on the internet) feature MPD officers holding signs and standing with community members on the sidewalk immediately adjacent to the roadway, within six feet of the surface of the roadway.

40. Similarly, on or about December 13, 2011, MPD officers engaged in sign-waving as part of an “Arrive Alive” rally along Kaahumanu Avenue; again, a photo of the event (publicly available on the internet) features MPD officers holding signs and standing with community members on the sidewalk immediately adjacent to the roadway, within six feet of the surface of the roadway.

41. Likewise, according to press releases available on the internet, on or about May 20, 2010 and April 15, 2011, MPD officers participated in sign-waving events at Wailuku Elementary School and Lihikai Elementary School, respectively; based on the descriptions of the events, and the layout of those schools (specifically, the placement and width of the sidewalk with

respect to the street), it is likely that the demonstrators and/or the MPD officers themselves violated MCC § 12.42.030 on those occasions as well.

42. To be clear, Plaintiffs have no objection to MPD officers' participation in these demonstrations (in their individual capacities), nor do Plaintiffs take issue with the many community members who took time to participate in these rallies. Although the goals of these demonstrations are laudable, Defendant COUNTY cannot enforce (or threaten to enforce) a restriction on speech against demonstrators at some events, while allowing, encouraging, and participating alongside demonstrators (engaged in identical conduct) at other events.

Attempts to resolve this issue without litigation

43. In April 2013, Plaintiffs' counsel sent a letter to Corporation Counsel Patrick Wong, expressing concern over MCC § 12.42.030 and the threats of enforcement directed towards participants in the Martin Luther King, Jr. Day march. The letter asked that the ordinance be amended forthwith.

44. Corporation Counsel responded by letter in May 2013, but rejected Plaintiffs' counsel's request. Instead, Corporation Counsel insisted that the ordinance is constitutional.

DECLARATORY AND INJUNCTIVE RELIEF

45. An actual and immediate controversy has arisen and now exists between Plaintiffs and Defendant, which parties have genuine and opposing interests and which interests are direct and substantial. Defendant has failed and continues to fail to comply with the United States Constitution for at least the reasons set forth herein. Plaintiffs are therefore entitled to a declaratory judgment as well as such other and further relief as may follow from the entry of such a declaratory judgment.

46. Specifically, Plaintiffs seek a declaration that MCC §§ 12.42.030(B)(1), (B)(2), and (B)(5) are facially unconstitutional, and unconstitutional as applied to Plaintiffs, pursuant to the First Amendment.

47. Plaintiffs have no adequate remedy at law. Unless enjoined by the Court, Defendant will continue to infringe upon Plaintiffs' constitutionally protected rights and will continue to inflict irreparable injury. This threat of injury to Plaintiffs from continuing violations requires preliminary and permanent injunctive relief.

FIRST CLAIM FOR RELIEF

“As Applied” Violation of the First and Fourteenth Amendments to the United States Constitution (Actionable Pursuant to 42 U.S.C. § 1983) (Infringement of Right to Free Speech) (By All Plaintiffs Against Defendant)

48. Plaintiffs reallege and incorporate by reference as though fully contained herein, the allegations set forth in Paragraphs 1 through 47, above.

49. By its policies, practices, and customs of prohibiting the carrying or displaying of signs, Defendant has, without adequate justification, intentionally interfered with Plaintiffs’ right to free speech in violation of the First Amendment to the United States Constitution.

50. Defendant COUNTY has no standards by which MCC § 12.42.030 is enforced, and/or makes exceptions to MCC § 12.42.030 depending upon whether the County approves of the message being delivered, resulting in unconstitutional content discrimination and viewpoint discrimination.

SECOND CLAIM FOR RELIEF

“Overbreadth” Violation of the First and Fourteenth Amendments to the United States Constitution (Actionable Pursuant to 42 U.S.C. § 1983) (By All Plaintiffs Against Defendant)

51. Plaintiffs reallege and incorporate by reference as though fully contained herein, the allegations set forth in Paragraphs 1 through 50, above.

52. MCC § 12.42.030 is overbroad, and is therefore facially unconstitutional because it burdens substantially more speech than is necessary. The ordinance does not have a limiting construction or partial invalidation that narrows it so as to remove this threat or deterrence to constitutionally protected expression. Further, the ordinance is overbroad because its sanctions may apply to constitutionally protected conduct including the exercise of free speech, free expression and assembly.

53. Defendant COUNTY has no standards by which MCC § 12.42.030 is enforced, and/or makes exceptions to MCC § 12.42.030 depending upon whether the County approves of the message being delivered, resulting in unconstitutional content discrimination and viewpoint discrimination.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays that this Court:

- A. Assume jurisdiction over this action;
- B. Issue a declaratory judgment stating that Defendant has violated the First Amendment to the United States Constitution;
- C. Issue a preliminary and permanent injunction enjoining Defendant (and its divisions, officers, servants, employees,

attorneys, agents and representatives, successors-in-office and all persons acting or purporting to act in concert or in cooperation with Defendant or pursuant to Defendant's authority) from subjecting Plaintiffs to the customs, policies, practices, rules, regulations, acts and omissions set forth in this Complaint;

- D. Retain jurisdiction over Defendant until such time as the Court is satisfied that Defendant's unlawful customs, policies, practices, rules, regulations, acts and omissions complained of herein no longer exist and will not recur;
- E. Award reasonable attorneys' fees, costs and other expenditures incurred as a result of bringing this action, pursuant to 42 U.S.C. § 1988 and other applicable laws;
- F. Award damages to Plaintiffs for the violations of clearly established law set forth herein; and
- G. Order such other relief as this Court deems just and proper.

Dated: Honolulu, Hawaii, June 20, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. M. Gluck', written in a cursive style.

DANIEL M. GLUCK

LOIS K. PERRIN
DANIEL M. GLUCK

ACLU OF HAWAII FOUNDATION

Attorneys for Plaintiffs