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AMERICAN CIVIL LIBERTIES UNION OF HAWAII FOUNDATION

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

STATE OF HAWAII,

Plaintiff,

v.

LAULANI TEALE,

Defendant.

NO. 1P1120005320

**MOTION FOR LEAVE TO FILE
BRIEF OF *AMICUS CURIAE* ACLU
OF HAWAII FOUNDATION RE:
HAWAII GUERRILLA VIDEO HUT'S
APPLICATION FOR EXTENDED
COVERAGE; MEMORANDUM IN
SUPPORT OF MOTION;
[PROPOSED] BRIEF OF *AMICUS
CURIAE* ACLU OF HAWAII
FOUNDATION; CERTIFICATE OF
SERVICE**

Hearing Date: October 17, 2012

Hearing Time: 1:30 p.m.

Judge: Honorable Dean E. Ochiai

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* ACLU OF
HAWAII FOUNDATION RE: HAWAII GUERRILLA VIDEO HUI'S
APPLICATION FOR EXTENDED COVERAGE**

The American Civil Liberties Union of Hawaii Foundation (“ACLU of Hawaii”), by and through its attorneys, hereby moves this Court for leave to appear as *amicus curiae* and to file a brief concerning Hawaii Guerrilla Video Hui’s Application for Extended Coverage, filed on or about August 22, 2012.

This Motion is made pursuant to Rule 7 of the Hawaii District Court Rules of Civil Procedure, Hawaii Revised Statutes § 604-7(e), the attached memorandum, and the pleadings and records in this matter, and is submitted in the interests of justice for the benefit of the Court.

DATED: Honolulu, Hawaii, October 15, 2012.

Respectfully submitted,

/s/ Brandon M. Segal

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**MEMORANDUM IN SUPPORT OF
MOTION**

MEMORANDUM IN SUPPORT OF MOTION

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights and the nation’s civil rights laws. *Amicus curiae* the American Civil Liberties Union of Hawaii Foundation (“ACLU of Hawaii”), the state affiliate of the ACLU, has over 2,000 members in the State of Hawai‘i and is similarly dedicated to defending and protecting civil rights and civil liberties.

First Amendment rights – including the media’s right to cover judicial proceedings, at issue in the instant case – strike at the core of the ACLU of Hawaii’s mission and, therefore, the ACLU of Hawaii and its members have a vested organizational interest in the outcome of the submitted application for extended media coverage in this case. The ACLU of Hawaii routinely advocates on behalf of individuals’ First Amendment rights: in the past two years alone, the ACLU of Hawaii represented two individuals who were wrongfully cited by police (and charged criminally) for failing to obtain a permit for a two-person demonstration on a public sidewalk; a public high school coach who was threatened with being fired for exercising his First Amendment rights in speaking out against gender discrimination; and a physician threatened by

state officials for exercising his First Amendment rights in speaking to patients about the use of medical marijuana. In advance of the 2011 Asia Pacific Economic Cooperation Conference, the ACLU created a First Amendment Toolkit, a comprehensive overview of the rules regarding the right to protest on Oahu, and also worked diligently to develop and maintain relationships with various government entities to ensure that protesters' First Amendment rights were respected.

In the instant case, the ACLU of Hawaii wishes to appear as an *amicus curiae* concerning Hawaii Guerrilla Video Hui's Application for Extended Coverage, submitted herein on or about August 22, 2012. The ACLU of Hawaii believes that its brief will provide the Court with a more in-depth analysis of the First Amendment right of the media to access and record court proceedings. Accordingly, the ACLU of Hawaii respectfully requests that the Court grant the Motion and issue an order allowing the filing of the *amicus* brief.

DATED: Honolulu, Hawaii, October 15, 2012.

Respectfully submitted,

/s/ Brandon M. Segal

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**[PROPOSED] BRIEF OF AMICUS
CURIAE ACLU OF HAWAII
FOUNDATION RE: HAWAII
GUERRILLA VIDEO HUT'S
APPLICATION FOR EXTENDED
COVERAGE**

Hearing Date: October 17, 2012

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Judge: Honorable Dean E. Ochiai

**[PROPOSED] BRIEF OF *AMICUS CURIAE* ACLU OF HAWAII FOUNDATION RE:
HAWAII GUERRILLA VIDEO HUI'S APPLICATION FOR EXTENDED COVERAGE**

I. INTRODUCTION

The American Civil Liberties Union of Hawaii Foundation (“ACLU of Hawaii”) respectfully submits this *amicus* brief to clarify the rules, case law and Hawaii's public policy on the media's right to access and record court proceedings.

On September 19, 2012, the Honorable Paula Devens-Matayoshi ordered that this Court (the Honorable Dean E. Ochiai) reconsider its decision granting the August 22, 2012 application for Application for Extended Media Coverage submitted by Hawaii Guerilla Video Hui (the “Hui”). Judge Devens-Matayoshi's rationale is not clear, but it may involve questions triggered by the Hui's name and legitimacy as a media organization rather than any evidence that the Hui's presence would threaten the decorum of the courtroom. *Amicus's* interest is to ensure that rulings on Applications for Extended Coverage are based on the factors listed in the Rules of the Supreme Court of Hawaii (“RSCH”), and not on the journalistic viewpoint (perceived or actual) of the applicant.

II. FACTUAL BACKGROUND

The Hui applied for permission to provide extended videotape coverage of the criminal prosecution of Defendant Laulani Teale (“Teale”). The Application was granted by the Court (the Hon. Dean E. Ochiai, presiding). Subsequently, on September 19, 2012, the Hon. Paula Devens-Matayoshi (presiding judge) continued Teale's trial and expressed concern that, based on her review of the Hui's Application and the Court's Order, the Application may not have been “providently granted.”

The Record is unclear as to why Judge Devens-Matayoshi apparently *sua sponte* directed reconsideration. In the absence of any explanation, it appears the Court was motivated by

concern—triggered only by the Hui’s name--that it is not a “real” media organization and that it might disrupt courtroom decorum. A further hearing on the Hui’s Application was set for October 17, 2012, the same date as Ms. Teale’s continued trial.

III. ARGUMENT

A. The Media has a Constitutional Right to Access Judicial Proceedings, Regardless of Editorial Viewpoint or Stance

The Hawaii and United States Constitutions guarantee the press a right of access to judicial records and proceedings, with primary underpinnings in the First Amendment. U.S. Const. amend. I; Haw. Const. art. I, § 4; *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 603 (1982) (“[T]he press and general public have a constitutional right of access to criminal trials. . . . [T]his right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment.”). This fundamental premise is grounded in three important policy concerns: to “(1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding.” *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)), *superseded by rule on other grounds as stated in Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009).¹

¹ See also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”). Hawai‘i public policy supports these principles: Hawaii’s legislature enacted the Uniform Information Practices Act, Hawaii Revised Statutes (“HRS”) § 92F-1 *et seq.*, with the view that “an open government is the cornerstone of our democracy” and that “the discussions, deliberations, and action of government agencies . . . shall be conducted as openly as possible.” *State of Hawaii Organization of Police Officers v. Society of Professional Journalists-Univ. of Hawaii Chapter (ASHOPO)*, 83 Hawai‘i 378, 383, 927 P.2d 386, 391 (1996) (quoting Conf. Comm. Rep. No. 112-88, in 1988 House Journal, at 817); HRS § 92F-2.

Once a governmental entity permits television cameras to record events, those governmental entities (including courts) cannot discriminate against media outlets on the grounds of their editorial viewpoints or affiliations. *See, e.g., Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001) (state restrictions on speech in limited public forums “must not discriminate against speech on the basis of viewpoint”). Therefore, a court cannot prevent a media entity from exercising its fundamental right to access court proceedings simply because it may not agree with that entity’s viewpoint or editorial stance. *C.f. McCoy v. Providence Journal Co.*, 190 F.2d 760, 765-66 (1st Cir. 1951) (municipality’s denial of right of one media entity to access public records, while allowing a competitor to inspect the same records, constitutes a denial of equal protection).

Hawaii’s public policy supports these principles and contains an expansive definition of who qualifies as a member of the media. Hawaii’s “media shield law,” enacted in 2008, protects any individual from judicial compulsion of his or her information sources regardless of viewpoint or station affiliation so long as the journalist is conducting the same kind of function as a traditional journalist, and “regularly and materially participate[s] in the reporting or publishing of news or information of substantial public interest for the purpose of dissemination to the general public by means of tangible or electronic media.” H.B. 2557, S.D. 1, § 210, Sess. Law. 2008.² For purposes of the “media shield law,” it makes no difference whether the journalist is affiliated with a “traditional” media outlet like the Honolulu Star-Advertiser or Hawaii Public Radio, or an “alternative” media outlet (which may include entities like the Hui), so long as the individual seeking protection of the statute meets the requirements of the statute. As discussed below, the same is true with respect to RSCH Rule 5.1.

² Act 210 was extended by operation of H.B. 1376, S.D. 1, Sess. Law. 2011 (available at http://www.capitol.hawaii.gov/session2011/bills/HB1376_SD1_.htm).

B. RSCH Rule 5.1’s Liberal Definition of “Media” Allows for Virtually All Types of Journalistic or Reporting Entities to Access and Record Court Proceedings

Under RSCH 5.1(c)(10), the term “media” broadly “means any news gathering or reporting agencies and the individual persons involved, and includes newspapers, radio, television, radio and television networks, news services, magazines, trade papers, in-house publications, professional journals, or other news reporting or news gathering agencies whose function it is to inform the public or some segment thereof.” This broad definition extends to virtually any type of media outlet, as long as the extended coverage “is conducted in compliance with the guidelines in Rule 5.2 so as not to be distracting and not to interfere with the solemnity, decorum, and dignity [of the proceedings].” RSCH 5.1(h)(1). The Court cannot *assume* that a media entity will impair decorum simply based on its viewpoint, editorial stance, or name; rather, the Court can only limit or terminate extended coverage “[if] a judge finds that the provisions of this rule or the guidelines in Rule 5.2 have been violated by those seeking extended coverage or the continuation thereof” RSCH 5.2(h)(2).

Therefore, any entity who meets the broad definition of “media” under RSCH 5.1(c)(10) should be allowed to access and record court proceedings in accordance with the technical requirements of RSCH 5.2, and should not be excluded based on the entity’s name, viewpoint, or status as an “alternative” or “non-traditional” media outlet.

IV. CONCLUSION

Amicus ACLU of Hawaii respectfully requests that this Court consider the above mentioned legal doctrines and policies as part of its disposition of Hawaii Guerrilla Video Hui’s Application for Extended Coverage.

DATED: Honolulu, Hawai'i, _____

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I hereby certify that copies of the American Civil Liberties Union of Hawaii Foundation's Motion for Leave to File Brief of *Amicus Curiae* re: Hawaii Guerrilla Video Hui's Application for Extended Coverage, Memorandum in Support of Motion, and [Proposed] Brief of *Amicus Curiae* will be served upon the following persons via hand delivery or U.S. Postal Mail.

Via Hand Delivery:

Department of the Prosecuting Attorney
1060 Richards Street
Honolulu, HI 96813

Hawaii Guerrilla Video Hui
Attn: H. Doug Matsuoka
1560 Thurston Avenue, Apt. 1101
Honolulu, HI 96822

Via U.S. Mail:

Laulani Teale
45-666 Uhilehua Street
Kaneohe, HI 96744

DATED: Honolulu, Hawaii, October 15, 2012.

/s/ Brandon M. Segal

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