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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

AMERICAN CIVIL LIBERTIES
UNION OF HAWAII and PAMELA
G. LICHTY,

Plaintiffs,

vs.

DEAN H. SEKI, Comptroller,
Department of Accounting and
General Services, State of Hawaii, in
his official capacity,

Defendant.

CIV. NO. 14- 150
[Civil Rights Action]

COMPLAINT; EXHIBITS "1" TO
"3"; SUMMONS

COMPLAINT

Plaintiffs THE AMERICAN CIVIL LIBERTIES UNION OF HAWAII (“ACLU”) and PAMELA LICHTY (“Plaintiffs”), by and through their attorneys, for this complaint, allege and aver as follows:

INTRODUCTION

1. This action is for declaratory and injunctive relief arising out of Defendant’s violations of Plaintiffs’ civil rights and civil liberties guaranteed to them by the First Amendment to the United States Constitution.

JURISDICTION AND VENUE

2. This action is brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, to redress the deprivation, under color of law, of rights secured by the United States Constitution.

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

4. 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.

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

THE PARTIES

6. The ACLU 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 Hawaii is fundamental to the purpose of the ACLU, insofar as the ACLU frequently litigates, lobbies, and educates the public on First Amendment issues involving and/or affecting Hawaii residents and visitors.

7. PAMELA LICHTY (“LICHTY”) is a citizen of the state of Hawaii and a resident of the City and County of Honolulu. She is a member of the ACLU. She is also president of the Drug Policy Action Group (“DPAG”), an organization founded in 2004 to advocate for the development of effective drug policies that minimize economic, social, and human costs and to promote the consideration of pragmatic approaches to drug policy.

8. Defendant DEAN H. SEKI (“SEKI”), in his official capacity as Comptroller for the State of Hawaii’s Department of Accounting and General Services (“DAGS”), directs and coordinates DAGS’ management of

a wide range of State programs and activities, including overseeing a permit scheme for the use of State buildings and facilities.

9. The violations of Plaintiffs' First Amendment rights, as set forth herein, were the result of employees and/or agents of SEKI acting pursuant to the official policies and/or customs of the State, and because those actions have been approved, ratified, and/or enforced by persons and/or entities with decision-making authority. SEKI is sued for prospective relief intended to prevent future violations of Plaintiffs' First Amendment rights. The ACLU also sues SEKI for nominal damages arising out of past violations of the ACLU's First Amendment rights.

FACTUAL ALLEGATIONS

10. Section 26-6(d) of the Hawaii Revised Statutes ("HRS") authorizes DAGS, *inter alia*, to "adopt rules as may be necessary or desirable for the operation and maintenance of public buildings."

11. Ostensibly pursuant to this authority, DAGS has promulgated administrative rules entitled "State Facilities and Grounds" (Hawaii Administrative Rules ("HAR"), Chapter 111).

12. These administrative rules "govern the use of and activities upon facilities under [DAGS'] jurisdiction, management and operation," HAR § 3-111-2, which facilities are defined as "buildings and parking

structures of the State of Hawaii, including the grounds thereof.” HAR § 3-111-3.

The Permit Scheme

13. HAR §§ 3-111-25 and 3-111-26 establish a permit system (“the permit scheme”) for gatherings of twenty-five or more people on state property.

Twenty-five person requirement

14. HAR § 3-111-25 provides that any public assembly, meeting, gathering, demonstration, parade or like event “resulting in assemblies of twenty-five or more individuals” is permissible only if the Comptroller of DAGS has issued a Special Use Permit for the event under HAR § 3-111-26.

15. The twenty-five person requirement applies to *all* properties under the control of DAGS, across the entire state of Hawaii, regardless of the size of the venue. HAR §§ 3-111-2, -3, -4.

16. The twenty-five person requirement therefore prohibits anonymous speech for all but the smallest groups, regardless of the size of the State property at issue.

Advance notice requirement

17. A permit application must be submitted in writing to the Comptroller at least fourteen business days before the proposed event. HAR § 3-111-26(a).

18. DAGS has applied this provision to require receipt of all permit applications at least ten business days prior to the relevant event. DAGS Special Use Permit revised January 2011 (“Permit Form”) at 4, attached hereto as Exhibit 1.

19. The advance notice requirement applies to *all* properties under the control of DAGS, across the entire State of Hawaii. HAR §§ 3-111-2, -3, -4.

Indemnification clause and waiver

20. DAGS imposes various “minimum insurance requirements” on all permittees, including “liability waivers and indemnification agreements.” *See* Comptroller’s Memorandum 2010-08 dated February 1, 2010 (“Comptroller’s Memorandum”), § 6, attached hereto as Exhibit 2; Permit Form at 3-4, Ex. 1.

21. Specifically, the Permit Form (revised January 2011) requires permit applicants to agree to indemnify the State of Hawaii and its officers, employees and agents (“the indemnification clause”):

The undersigned individual(s), group(s) and/or organization(s), his or their heirs, personal representatives and assigns, or its officers, directors, members, agents, employees, successors and assigns, for and in consideration of the State of Hawaii permitting and allowing the use of the designated rooms, buildings and/or facilities jointly or severally agree(s) to indemnify, hold harmless and defend the State of Hawaii, their officers, employees, and agents from and against all liability, loss, damage, cost and expense, including all attorneys' fees, and all claims, suits, and demands therefore, arising out of or resulting from the acts or omissions of the undersigned in the use of the designated rooms, buildings and/or facilities.

(All capital letter format omitted.)

22. The Permit Form also requires permit applicants to agree to waive causes of action against the State ("the waiver clause"):

Permittee waives any cause of action against the State of Hawaii for any injuries or damages arising from the use of the state facility or grounds authorized by this permit and releases the State of Hawaii from any liability arising from the same.

23. The indemnification and waiver requirements apply to *all* properties under the control of DAGS, across the entire State of Hawaii.

HAR §§ 3-111-2, -3, -4.

24. On information and belief, DAGS' personnel will, at times, waive these requirements. However, there appear to be no standards by which DAGS officials determine which speakers are entitled to a waiver of these permitting requirements.

25. These regulations are overbroad and restrict far more speech than is necessary to accomplish whatever goal(s) Defendant SEKI may have and are therefore facially unconstitutional and/or unconstitutional as applied to Plaintiffs.

26. On information and belief, DAGS and/or the Department of the Attorney General revised the indemnification clause and prepared an amended Special Use Permit form, revised June 2011. The June 2011 version adds the phrase “negligent or willful” to the indemnification clause, such that the clause requires the permittee to indemnify the State for all liability “arising out of or resulting from the **negligent or willful** acts or omissions” of the permittee. However, DAGS does not appear to use this revised form, insofar as the January 2011 form is the only Special Use Permit form on its website, and DAGS issued multiple permits in 2013 using the January 2011 form.

27. Regardless of whether DAGS is using the January 2011 or June 2011 Special Use Permit form, however, the indemnification clause is unconstitutional.

The ACLU has been injured by the permit scheme

28. The above-referenced permit scheme applies to events held at the State Capitol.

29. The State Capitol's central location and symbolic power as the seat of democracy make it an ideal location for ACLU events. The ACLU feels its events can make a bigger impact if members of the public and media can easily attend the events; if there is a sizeable volume of traffic near the event, so as to get its message out to passersby; and if they are in the same area as the Legislature and Governor. This is particularly true when an event is designed to support or to oppose a legislative measure that the Legislature is considering at the time.

Twenty-five person requirement

30. The ACLU frequently holds rallies at the State Capitol where expected attendance is more than twenty-five persons, but fewer than seventy-five persons. ACLU staff must invest time and effort into applying for the permit and obtaining insurance, and must wait to publicize events until confirming that the permit has been granted.

Advance notice requirement

31. The Hawaii State Legislature often schedules issues for debate and/or hearing with very little warning. Indeed, Committees in the House of Representatives may generally hold hearings on measures with as little as forty-eight hours' notice to the general public (though this notice requirement may be waived), and Committees in the Senate may generally

hold a hearing with as little as seventy-two hours' notice (which can likewise be waived). *See* Rule 11.5, Rules of the House of Representatives, State of Hawaii (2013-14), <http://www.capitol.hawaii.gov/session2013/docs/2013HouseRules.pdf>; Rule 21, Rules of the Senate, State of Hawaii (2013-14), <http://www.capitol.hawaii.gov/session2013/docs/2013-2014SenateRules.pdf>.

32. The ACLU, which frequently works on issues being debated in the Legislature, would like to hold events that respond to new developments as they occur.

33. The advance notice requirement either prevents the ACLU from organizing such events or adds a level of uncertainty about whether these events are possible.

34. This uncertainty prevents the ACLU from adequately publicizing the event to its members, the media and the general public.

Indemnification requirement

35. It is Plaintiffs' understanding that the indemnification clause and the waiver in the Permit Form require a permittee to indemnify, and waive any cause of action against, the State for any damages "arising out of

or resulting” from the permittee’s use of the facilities – regardless of whether the damage was caused by a third party.

36. The ACLU has agreed to the Special Use Permit’s indemnification clause for past events, and thus assumed financial liability for incidents that could have occurred during the course of such events.

37. The ACLU is frequently involved in civil rights/civil liberties issues that are contentious and that provoke strong reactions from those who disagree.

38. Many of the events the ACLU has organized in the past have had a tense atmosphere in which physical confrontations have occurred.

39. Specifically, an employee of the ACLU witnessed several incidents at a November 12, 2013 demonstration in favor of marriage equality for which the ACLU held a permit. In one instance, an opponent of marriage equality ran his motorized wheelchair over the feet of those who had gathered. This action appeared to cause physical pain to those individuals. At other marriage equality rallies at the State Capitol, supporters of marriage equality were pushed, spit upon, and hit with flag poles and flags being waved by opponents of marriage equality, creating the possibility of personal injury and/or property damage.

40. The ACLU fears that by indemnifying the State of Hawaii for any damages caused during the course of an event, it may be required to pay for incidents caused by third parties outside of its control. There are no fences or gates surrounding the State Capitol area, and anyone could come onto the premises and cause damage for which the ACLU would then be liable.

41. Similarly, the ACLU fears that by waiving all possible causes of action against the State for injuries arising out of its permitted events, the ACLU itself could be financially liable for incidents caused by third parties outside its control.

42. The ACLU is entitled to nominal damages for the harm set forth above.

The ACLU has specific plans for future events that will be subject to the unconstitutional permit scheme.

43. The ACLU has specific and concrete plans to hold a rally at the State Capitol in late January 2015 relating to drug policy (likely marijuana decriminalization), and at other times during the 2015 legislative session when the Legislature debates or holds hearings related to the issue of marijuana decriminalization.

44. The ACLU expects more than twenty-five people, but fewer than seventy-five people, to attend these rallies.

45. The ACLU will have little forewarning that the Legislature will be debating or holding hearings on the issue of marijuana decriminalization and will likely be unable to submit a permit application more than ten days before each event.

46. Because the ACLU cannot be sure whether DAGS will allow the event to move forward, the ACLU will not be able to publicize the event to its members, the media, and the general public.

47. Given the contentious nature of marijuana decriminalization, the ACLU worries it is exposing the organization to risk by agreeing to the indemnification provisions.

The ACLU's members have been injured by the permit scheme

48. The ACLU has roughly 2,000 members. Some of the ACLU's members choose to exercise their First Amendment rights by holding demonstrations on state property (including but not limited to the State Capitol).

49. One ACLU member who chooses to exercise her First Amendment rights by holding demonstrations on state property is Plaintiff LICHTY.

Lichty has been injured by the permit scheme, and has specific plans for future events that will be subject to the unconstitutional permit scheme

50. LICHTY has organized and attended events at the State Capitol that have required the submission of a Special Use Permit application.

51. In June of 2011, LICHTY, as president of DPAG, submitted a use permit for the Capitol for a small drug policy event in which she expected a few dozen (but more than twenty-five) people to participate.

52. LICHTY was required to and did sign the permit application, which included the indemnification and waiver clauses.

53. LICHTY intends to hold another event at the Capitol in or around January 2015 to coincide with the beginning of the legislative session.

54. LICHTY also intends to hold rallies and/or press conferences whenever the Legislature debates or holds hearings on bills that are germane to DPAG's policy goals.

55. LICHTY expects that more than twenty-five people, but fewer than seventy-five people, will attend these events.

56. LICHTY will have little forewarning that the Legislature will be debating or holding hearings on bills that relate to DPAG's goals and will likely be unable to submit a permit application more than ten days before each event.

57. The inability to obtain a permit due to an untimely application may prevent the event from going forward.

58. Even if the event is allowed to go forward, because LICHTY cannot be sure whether DAGS will allow the event to move forward, she and DPAG will not be able to publicize the event to DPAG members, the media, and the general public.

59. Given the contentious nature of drug laws, LICHTY worries she is exposing herself and her organization to financial liability by agreeing to the indemnification and waiver provisions.

Attempts to resolve this issue without litigation

60. On September 7, 2010, the ACLU, through counsel Daniel M. Gluck, sent a letter to then Comptroller Russ K. Saito and to James Richardson, Administrator, Central Services Division, expressing concern about the constitutionality of DAGS' enforcement of rules for those wishing to assemble on government property. The letter asked that the ordinance be amended forthwith. That letter is attached hereto as Exhibit 3.

61. On September 28, 2010, Comptroller Saito replied that he was consulting with the Attorney General's office and would respond at a later date.

62. After receiving no further correspondence, Gluck sent a follow-up letter, dated January 12, 2011, to then Comptroller Bruce Coppa.

63. Shortly after the January 12, 2011 letter was sent, Gluck exchanged one or more e-mails and/or telephone calls with the Department of the Attorney General regarding this issue.

64. On April 18, 2011, Gluck sent an e-mail to a Deputy Attorney General to ask for an update on the matter, and received an email in response on April 21, 2011.

65. From June 2011 to October 2011, Gluck corresponded on numerous occasions with the Deputy Attorney General to follow up on whether progress had been made on this issue.

66. From 2011 to 2013, the ACLU received a number of inquiries from individuals and organizations seeking to hold events on State property, all of whom expressed concerns regarding their rights to protest/demonstrate on State property. The ACLU provided assistance to several individuals and organizations in navigating the permit process.

67. On at least one occasion, Gluck telephoned a Deputy Attorney General to discuss what progress, if any, had been made regarding this issue.

68. On April 9, 2012, Gluck spoke with a Deputy Attorney General who told him that a student had been working on the matter but had left, and no further progress had been made.

69. Gluck inquired as to when changes would be complete, and was told that the Department of the Attorney General hoped the changes would be completed by that summer.

70. Gluck expressed frustration regarding the delays, and asked what permit applicants could do in the meantime for assistance.

71. Gluck was told that the ACLU would be sent a point of contact in the Central Services Division, with whom permit applicants could speak regarding their applications.

72. On June 28, 2013, Gluck sent a request to access government records, pursuant to Hawaii's Uniform Information Practices Act ("UIPA"), Hawaii Revised Statutes chapter 92F, to James Kurata, Acting Administrator, Central Services Division, Department of Accounting and General Services. In this request, Gluck asked DAGS to produce all rules, regulations, policies, memoranda and practices relating to the permit scheme.

73. Gluck received a response to this request on July 10, 2013, informing him that the Central Services Division has no rules, regulations,

policies, memoranda and practices related to the permit scheme other than HAR Chapter 111 of Title 3, the Comptroller's Memorandum, the Permit Form itself and its instructions.

74. Insofar as over three and a half years have passed since the ACLU first brought these unconstitutional conditions to the attention of State officials, and no changes have been made to remedy these deficiencies, Plaintiffs now seek declaratory and injunctive relief from this Court, in addition to nominal damages for Plaintiff ACLU.

DECLARATORY AND INJUNCTIVE RELIEF

75. 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. 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.

76. Specifically, Plaintiffs seek a declaration that HAR §§ 3-111-25 and 3-111-26 are facially unconstitutional and/or unconstitutional as applied to Plaintiffs pursuant to the First Amendment.

77. 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.

CLAIM FOR RELIEF
VIOLATION OF THE FIRST AMENDMENT TO
THE UNITED STATES CONSTITUTION,
ACTIONABLE PURSUANT TO 42 U.S.C. § 1983
(Freedom of Speech)

78. Plaintiffs reallege and incorporate by reference as though fully contained herein, the allegations set forth in Paragraphs 1 through 77, above.

79. Defendant has and enforces a policy and/or custom of interfering with speech and/or conduct protected by the First Amendment to the United States Constitution by imposing a permit scheme that is overbroad in its exclusion of private citizens from state property.

80. Specifically, DAGS' permit scheme is not narrowly tailored for three reasons:

- a) a permit is required for gatherings of twenty-five people or more;
- b) a prospective permittee must apply for a permit ten business days in advance of the proposed event; and

c) a permit holder must indemnify the State, and prospectively waive all causes of action against the State, in order to receive a permit.

81. On information and belief, DAGS' personnel will, at times, waive these requirements. However, there appear to be no standards by which DAGS officials determine which speakers are entitled to a waiver of these permitting requirements.

82. The absence of standards for waivers of these permitting requirements invites content-based discrimination by government officials, and is therefore unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray 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. Award nominal damages against Defendant for the violation of the ACLU's rights under the United States Constitution occasioned by the permit scheme;

E. 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;

F. 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;

G. Order such other relief as this Court deems just and proper.

Dated: Honolulu, Hawaii, March 27, 2014.

Respectfully submitted,

/s/ Alexandra R. Rosenblatt
ALEXANDRA R. ROSENBLATT
CHUN KERR LLP

LOIS K. PERRIN
DANIEL M. GLUCK
ACLU OF HAWAII FOUNDATION

Attorneys for Plaintiffs

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
SPECIAL USE PERMIT

1. Location or Building: _____
2. Date Requested: _____ Time: _____ to _____
3. Group Requesting Permit: _____
4. Name of Responsible Person: _____
 - a. Title: _____
 - a. Address: _____
 - b. Telephone/Cell No.: _____
 - c. Fax No.: _____ E-Mail Address: _____
5. Purpose of Gathering: _____

6. Kind of Activity Planned (attach additional sheets, if necessary): _____

7. Support Equipment Provided by Permittee (sound systems, signs, tables, etc.): _____

8. Area to be Used: _____

9. Approximate Number of People Participating: _____

PERMIT PROVISIONS

1. PERMITTEE AND/OR PARTICIPANTS SHALL NOT BAR THE PUBLIC FROM ANY ACTIVITY APPROVED BY THIS PERMIT.
2. PERMITTEE SHALL NOT STATE, IMPLY OR OTHERWISE SUGGEST THAT ANY ACTIVITY APPROVED UNDER THIS SPECIAL USE PERMIT IS SANCTIONED OR ENDORSED BY THE STATE OF HAWAII.
3. PERMITTEE SHALL PROVIDE ALL NECESSARY SUPPORT EQUIPMENT AND PERSONNEL RELATED TO THE ACTIVITY APPROVED UNDER THIS SPECIAL USE PERMIT.
4. SOLICITATION, INCLUDING THE SALE OF GOODS AND SERVICES, IS PROHIBITED.
5. PERMITTEE ASSURES THE STATE OF HAWAII THAT ALL ACTIVITIES SHALL BE IN FULL COMPLIANCE WITH THE LAWS, RULES AND REGULATIONS OF THE STATE OF HAWAII AND THE COUNTY.
6. PERMITTEE AND/OR PARTICIPANTS SHALL NOT ATTACH SIGNS OR POSTERS TO ANY PART OF THE BUILDING WITHOUT WRITTEN AUTHORIZATION OF THE DEPARTMENT.
7. PERMITTEE AND/OR PARTICIPANTS SHALL NOT PREPARE FOOD AND OTHER REFRESHMENTS IN ANY FACILITY UNDER THE JURISDICTION OF THE DEPARTMENT. OPEN FIRES OF ANY KIND ARE PROHIBITED.
8. PERMITTEE AND/OR PARTICIPANTS SHALL NOT ENGAGE IN ANY ACTIONS OR CONDUCT WHICH DESTROY OR DAMAGE ANY FACILITY, INCLUDING BUT NOT LIMITED TO, IMPROPERLY DISPOSING OF RUBBISH, CAUSING FILTH, CREATING HAZARDS TO PERSONS, THROWING ARTICLES, CLIMBING THE FACILITY, WRITING GRAFFITI, AND REMOVING PROPERTY OF THE STATE OF HAWAII.
9. PERMITTEE AND/OR PARTICIPANTS SHALL COMPLY WITH ALL OFFICIAL SIGNS AND DURING EMERGENCIES, COMPLY WITH ALL INSTRUCTIONS OF AUTHORIZED PERSONNEL.
10. PERMITTEE AND/OR PARTICIPANTS SHALL NOT ENGAGE IN ANY CONDUCT WHICH IMPEDES OR DISTURBS EMPLOYEES OF THE STATE OF HAWAII IN THE PERFORMANCE OF THEIR DUTIES, OR THE GENERAL PUBLIC FROM OBTAINING THE PUBLIC SERVICES AVAILABLE IN OR ON THE FACILITY. SUCH PROHIBITED CONDUCT INCLUDES, BUT SHALL NOT BE LIMITED TO, CREATION OF LOUD OR UNUSUAL NOISES, AND OBSTRUCTION OF PEDESTRIANS OR VEHICLES, ENTRANCES, FOYERS, CORRIDORS, OFFICES, ELEVATORS, OR STAIRWAYS, AND VERBAL OR PHYSICAL HARASSMENT OF EMPLOYEES OR VISITORS OF THE FACILITY. ANY ACTIVITY WHICH PRESENTS A CLEAR AND PRESENT DANGER TO THE PUBLIC HEALTH AND SAFETY IS PROHIBITED.
 - a. DURING LEGISLATIVE SESSION (JANUARY THROUGH MAY) AT THE STATE CAPITOL, SOUND SYSTEMS, MUSIC OR ANY OTHER ACTIVITY THAT MAY BE CONSIDERED DISRUPTIVE TO THE CONDUCT OF THE BUSINESS OF THE LEGISLATURE WHENEVER THE LEGISLATURE IS IN SESSION IN EITHER OR BOTH CHAMBERS (9:00 A.M. TO 1:00 PM) SHALL NOT BE ALLOWED.
11. PERMITTEE AND/OR PARTICIPANTS SHALL NOT USE, POSSESS, OR SELL ANY ALCOHOL OR ILLEGAL DRUGS. ANY PERSON WHO IS UNDER THE INFLUENCE OF ALCOHOL OR DRUGS TO SUCH A DEGREE THAT THE PERSON PRESENTS A DANGER TO HIMSELF OR TO OTHERS IS PROHIBITED FROM ENTERING OR REMAINING IN OR ON THE FACILITY.
12. PERMITTEE AND/OR PARTICIPANTS SHALL NOT CARRY ANY FIREARMS OR OTHER DANGEROUS WEAPONS OR EXPLOSIVES, EXCEPT AS PERMITTED BY LAW.
13. PERMITTEE AND/OR PARTICIPANTS SHALL NOT INSTALL ANY MEMORIAL, MONUMENT OR OTHER COMMEMORATIVE PIECE.

- 14. PERMITTEE AND/OR PARTICIPANTS SHALL NOT INSTALL ANY TEMPORARY STRUCTURE, SHELTER OR SLEEPING ACCOMMODATION, WITHOUT PRIOR AUTHORIZATION FROM THE DEPARTMENT.
- 15. INSURANCE IS REQUIRED FOR USE OF STATE FACILITIES AND GROUNDS IN ACCORDANCE WITH COMPTROLLER'S MEMORANDUM 2010-08 (REFER TO SPECIAL USE PERMIT INSTRUCTIONS).
- 16. PERMITTEE SHALL DISPLAY A COPY OF THIS PERMIT IN PLAIN VIEW DURING THE ACTIVITY AT THE PERMITTED LOCATION.

THE UNDERSIGNED INDIVIDUAL(S), GROUP(S) AND/OR ORGANIZATION(S), HIS OR THEIR HEIRS, PERSONAL REPRESENTATIVES AND ASSIGNS, OR ITS OFFICERS, DIRECTORS, MEMBERS, AGENTS, EMPLOYEES, SUCCESSORS AND ASSIGNS, FOR AND IN CONSIDERATION OF THE STATE OF HAWAII PERMITTING AND ALLOWING THE USE OF THE DESIGNATED ROOMS, BUILDINGS AND/OR FACILITIES JOINTLY OR SEVERALLY AGREE(S) TO INDEMNIFY, HOLD HARMLESS AND DEFEND THE STATE OF HAWAII, THEIR OFFICERS, EMPLOYEES, AND AGENTS FROM AND AGAINST ALL LIABILITY, LOSS, DAMAGE, COST AND EXPENSE, INCLUDING ALL ATTORNEYS' FEES, AND ALL CLAIMS, SUITS, AND DEMANDS THEREFORE, ARISING OUT OF OR RESULTING FROM THE ACTS OR OMISSIONS OF THE UNDERSIGNED IN THE USE OF THE DESIGNATED ROOMS, BUILDINGS AND/OR FACILITIES.

PERMITTEE WAIVES ANY CAUSE OF ACTION AGAINST THE STATE OF HAWAII FOR ANY INJURIES OR DAMAGES ARISING FROM THE USE OF THE STATE FACILITY OR GROUNDS AUTHORIZED BY THIS PERMIT AND RELEASES THE STATE OF HAWAII FROM ANY LIABILITY ARISING FROM THE SAME.

THE UNDERSIGNED INDIVIDUAL(S), GROUP(S) AND/OR ORGANIZATION(S) CERTIFY THAT THE INFORMATION PROVIDED IN THIS SPECIAL USE PERMIT APPLICATION IS TO THE BEST OF THEIR KNOWLEDGE TRUE AND CORRECT, AND THAT THEY HAVE READ AND AGREE TO THE SPECIAL PROVISIONS LISTED ABOVE.

Signed: _____
Signature of Responsible Person/Requestor

For Office Use Only:

Request Approved :

Request Disapproved :

State Comptroller
(or Authorized Representative)

cc: Lt. Governor
Senate Sgt. at Arms
House Sgt. at Arms
State Sheriff
Automotive Management Division
Central Services Division

Instructions for Special Use Permit (CSD-SUP Form 1)

Applications for Special Use Permits, together with all required insurance certificates, must be received ten (10) working days prior to the date of the planned event or activity to allow for adequate time for processing and approval.

1. Complete the form in its entirety. Type or print legibly.
2. Signature of Responsible Person required.
3. Send in the completed Special Use Permit form at least ten (10) business days prior to the requested date of the event by mail, facsimile, or email attachment.

Mail: State of Hawaii
Central Services Division
729 Kakoi Street
Honolulu, HI 96819
Attn: James Hisano

Facsimile: 831-6750

Email: centralservices@hawaii.gov

4. Keep a copy for your record.
5. Request will be reviewed and approved or disapproved within 3 working days of receipt.
6. Questions may be referred to the Central Services Manager at 831-6733.

Comptroller's Memorandum 2010-08 Requirements:

Insurance Requirements for Use of State Facilities and Grounds.

Following are the minimum insurance requirements for facilities or grounds use permits:

1. All users must have general liability of no less than \$500,000 per occurrence and \$1 million in the aggregate.
2. Users selling food items must also have products and completed operations coverage of no less than \$500,000 per occurrence and \$1 million in the aggregate (applicable only if solicitation and preparation of food are allowed in facility).
3. Organizations operating motor vehicles must have automobile liability of no less than \$500,000 per occurrence and \$1 million in the aggregate.
4. The State of Hawaii is to be named as an additional insured.
5. Certificates of Insurance are to be provided to the permitting agency.
6. Liability waivers and indemnification agreements are required from all users.

Departments may require higher insurance limits, if warranted, for specific types of use of the facilities and grounds, or waive certain insurance requirements, if deemed appropriate, subject to approval by the Risk Management staff before issuing the permit.

LINDA LINGLE
GOVERNOR



RUSS K. SAITO
COMPTROLLER
SANDI YAHIRO
DEPUTY COMPTROLLER

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
P.O. BOX 119, HONOLULU, HAWAII 96810-0119

RISK 10.285

February 1, 2010

COMPTROLLER'S MEMORANDUM 2010-08

TO: Heads of Departments and Agencies

FROM: Russ K. Saito
State Comptroller 

SUBJECT: Insurance Requirements for Use of State Facilities and Grounds

Standardizing the insurance requirements for the use of State facilities and grounds will provide adequate liability protection for the State. To achieve this standardization, effective immediately, the following are the minimum insurance requirements for facilities or grounds use permits:

1. All users must have general liability of no less than \$500,000 per occurrence and \$1 million in the aggregate.
2. Users selling food items must also have products and completed operations coverage of no less than \$500,000 per occurrence and \$1 million in the aggregate.
3. Organizations operating motor vehicles must have automobile liability of no less than \$500,000 per occurrence and \$1 million in the aggregate.
4. The State of Hawaii is to be named as additional insured.
5. Certificates of Insurance are to be provided to the permitting agency.
6. Liability waivers and indemnification agreements are required from all users.

Departments should review the potential risk exposure and require higher insurance limits, if warranted, for specific types of use of the facilities and grounds. Individual agencies may establish limits below the requirements or waive certain insurance requirements, if deemed appropriate, subject to approval by the Risk Management staff before issuing the permit. If Risk Management approval is not obtained, the department or agency will be financially responsible for the difference between the insurance requirements established by the department or agency and the amount set forth in this memorandum.

If organizations or individuals do not have, or are unable to secure, insurance, there are numerous insurance companies or vendors, either locally or via the internet, that can provide special events insurance that will meet these requirements for a reasonable cost.

If you, or your staff, have any questions, please call Ms. Julie Ugalde, Risk Management Officer, at 586-0550.

EXHIBIT 2



September 7, 2010

Russ K. Saito
Comptroller
Department of Accounting and General Services
Kalanimoku Building
1151 Punchbowl Street
Honolulu, HI 96813

James Richardson
Administrator, Central Services Division
Department of Accounting and General Services
729 Kakoi Street
Honolulu, HI 96819

Re: Permitting Requirements and Chalking on Public Property

Dear Comptroller Saito and Mr. Richardson:

We understand that, effective May 1, 2010, the Department of Accounting and General Services ("DAGS") has begun enforcing rules for individuals and groups wishing to assemble on government property. Specifically, we understand that individuals and groups wishing to gather in groups of twenty-five or more people must now:

1. Submit a request for a permit no later than ten working days prior to the event (*see* Instructions for Special Use Permit (CSD-SUP Form 1));
2. Obtain "general liability [insurance] of no less than \$500,000 per occurrence and \$1 million in the aggregate," which requirement may be waived by DAGS staff (*see id.*, citing Comptroller's Memorandum 2010-08); and
3. Agree to indemnify and hold harmless the State of Hawaii for all liability/injury arising from the event.¹

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OFFICERS AND DIRECTORS
BARBARA A. ANKERSMIT
PRESIDENT

VANESSA Y. CHONG
EXECUTIVE DIRECTOR

¹ Specifically, permit applicants must agree to the following:

THE UNDERSIGNED INDIVIDUAL(S), GROUP(S) AND/OR ORGANIZATION(S), HIS OR THEIR HEIRS, PERSONAL REPRESENTATIVES AND ASSIGNS, OR ITS OFFICERS,

All three of these provisions are facially unconstitutional. We ask that you reconsider these rules and respond to us, no later than October 12, 2010, to inform us as to how the permitting rules will be changed.

Furthermore, we ask that you examine all policies relating to “chalking” (*i.e.*, writing with erasable, washable, non-permanent chalk) on sidewalks, inasmuch as some individuals have reported being harassed by State officials (and threatened with arrest) for chalking.

A. The Existing Permitting Regulations Are Unconstitutional.

1. The ten-day rule prohibits spontaneous demonstrations, and is therefore facially unconstitutional.

First, the ten-day rule completely prohibits “spontaneous events,” and thus violates the First Amendment to the United States Constitution. *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 there is no provision for spontaneous demonstrations – that is, because DAGS now requires ten days’ notice for *all* events – the rules are facially unconstitutional.

DIRECTORS, MEMBERS, AGENTS, EMPLOYEES, SUCCESSORS AND ASSIGNS, FOR AND IN CONSIDERATION OF THE STATE OF HAWAII PERMITTING AND ALLOWING THE USE OF THE DESIGNATED ROOMS, BUILDINGS AND/OR FACILITIES JOINTLY OR SEVERALLY AGREE(S) TO INDEMNIFY, HOLD HARMLESS AND DEFEND THE STATE OF HAWAII, THEIR OFFICERS, EMPLOYEES, AND AGENTS FROM AND AGAINST ALL LIABILITY, LOSS, DAMAGE, COST AND EXPENSE, INCLUDING ALL ATTORNEYS’ FEES, AND ALL CLAIMS, SUITS, AND DEMANDS THEREFORE, ARISING OUT OF OR RESULTING FROM THE ACTS OR OMISSIONS OF THE UNDERSIGNED IN THE USE OF THE DESIGNATED ROOMS, BUILDINGS AND/OR FACILITIES.

PERMITTEE WAIVES ANY CAUSE OF ACTION AGAINST THE STATE OF HAWAII FOR ANY INJURIES OR DAMAGES ARISING FROM THE USE OF THE STATE FACILITY OR GROUNDS AUTHORIZED BY THIS PERMIT AND RELEASES THE STATE OF HAWAII FROM ANY LIABILITY ARISING FROM THE SAME.

2. The insurance requirements allow DAGS officials to grant waivers based on the content of the permittees' speech, and are therefore unconstitutional.

The insurance requirements are unconstitutional insofar as they give DAGS officials complete and unfettered discretion in determining whether to waive the insurance requirements. The permit states that "Departments may require higher insurance limits, if warranted, for specific types of use of the facilities and grounds, or waive certain insurance requirements, if deemed appropriate, subject to approval by the Risk Management staff before issuing the permit." Because the regulations do not provide any criteria upon which DAGS officials can determine whether to grant a waiver of the insurance requirement,² the permitting scheme runs afoul of the First Amendment. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) ("Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review." (citation omitted)); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (holding that a permitting scheme "may not delegate overly broad licensing discretion to a government official"). Consequently, the insurance requirements must be changed.

3. The insurance requirements contain no exception for indigence, and are therefore unconstitutional.

The regulations do not contain an indigence exception for would-be demonstrators, such that the permitting scheme is unconstitutional. See, e.g., *Coe v. Blooming Grove*, 567 F. Supp. 2d 543, 564 (S.D.N.Y. 2008) ("The burden that the failure to exempt indigent persons from the insurance requirement places on the exercise of First Amendment rights is too great to justify whatever marginal benefit this provision confers on the Town."). As the United States Supreme Court has explained, "any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). A restriction that completely prohibits indigent would-be demonstrators from assembling at the State Capitol, for example – a forum for which no reasonable alternative exists – is an invalid prior restraint on speech.

4. The indemnification provision is overbroad, and therefore unconstitutional.

The indemnification and hold-harmless provisions, which provide that "permittee waives any cause of action against the State of Hawaii for any injuries or damages arising from the use of the State facility . . . and releases the State of Hawaii from any liability arising from the same," are substantially similar to provisions recently struck down by the Ninth Circuit Court of Appeals. As the court explained:

² If our understanding on this point is incorrect and DAGS does, in fact, have internal guidelines upon which to make these determinations, we request that you provide those guidelines to our office.

[T]he clause requires that the permittees agree, as a condition of obtaining a permit to engage in expressive speech, to forgo recovery on any cause of action they might otherwise have against the City. The clause encompasses not only liability for physical harm to the permittees, but also for deprivation of permittees' constitutional rights. . . . We think it obvious that permittees cannot be required to waive their right to hold the City liable for its otherwise actionable conduct as a condition of exercising their right to free speech.

Long Beach Area Peace Network, 574 F.3d at 1040. *See also id.* ("The indemnification and hold-harmless clauses contain no exclusion for losses to the City occasioned by the reaction to the permittees' expressive activity. The clauses thus allow the City impermissibly to shift some of the costs related to listeners' reactions to speech from the City to the permittees."). In short, the indemnification and hold-harmless clauses are in direct violation of recent, clear, and binding case law on the First Amendment, and are facially unconstitutional.

5. The permit rules apply to small groups, and are therefore unconstitutional.

The fact that these requirements are imposed on groups as small as twenty-five is also facially unconstitutional.³ As the Ninth Circuit Court of appeals 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 State Capitol, it is unlikely that the courts would uphold DAGS' policy of requiring permits for groups as small as twenty-five. *See id.* at 1021 (discussing long-standing presumptions that prior restraints and regulations affecting speech in traditional public forums are unconstitutional).

In light of the clarity of the law in this area, we trust that you will reconsider these rules and exempt free speech activities from the insurance requirement, ten-day notice requirement, and indemnification/hold-harmless requirements, and that you revise the rules relating to permit requirements for small groups. Accordingly, please contact us no later than Tuesday, October 12, 2010, to inform us as to the steps you plan to take to address the issues raised herein.

³ Again, it is our understanding – and please correct us if we are mistaken – that a permit is required for any gathering of twenty-five or more individuals on State property.

B. Threats and Harassment of Individuals for “Chalking” are Unconstitutional

We have received numerous complaints that officials from DAGS and the State Sherriff’s Office at the State Capitol and at the University of Hawaii Manoa campus have threatened individuals with arrest and desecration charges (and, in some cases, have sent bills for “clean-up” charges) for using chalk on the sidewalk and promenade outside the Capitol. We are unaware of any penal statute or administrative rule prohibiting such use, and the Ninth Circuit has been clear that chalking does not constitute desecration. *See Mackimmey v. Nielsen*, 69 F.3d 1002, 1005 (9th Cir. 1995) (“No reasonable person could think that writing with chalk would damage a sidewalk.”). Accordingly, no later than October 12, 2010, please provide our office with all rules, statutes, or regulations that purport to limit the use of chalk on public sidewalks, the University of Hawaii, and/or the grounds surrounding the State Capitol.

If you have any questions, please do not hesitate to contact me at 808-522-5908 or dgluck@achuhawaii.org.

Sincerely yours,



Daniel Gluck
Senior Staff Attorney

Cc: James Propotnick, Deputy Director
Department of Public Safety, Sheriff Division
Pier 20
Honolulu, Hawaii 96817