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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

NELDON MAMUAD, Plaintiff, vs. COUNTY OF MAUI, a municipal corporation, Defendant.	CIV. NO. 14-00102 JMS-BMK [CIVIL RIGHTS ACTION] **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; CERTIFICATE OF WORD COUNT; CERTIFICATE OF SERVICE**

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REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Defendant County does not dispute that, at the time Plaintiff filed his Motion for Preliminary Injunction, he was entitled to injunctive relief from this Court. That is, Defendant does not dispute that (1) Plaintiff is likely to win on the merits because his constitutional rights were violated, (2) Plaintiff had been suffering irreparable harm, (3) the balance of equities tips in Plaintiff's favor, or (4) the public interest favors an injunction.

The County's only arguments are that Director Regan's April 17 letter, by itself, makes Plaintiff's request moot, and that this Court is incapable of fashioning an order that will comply with Fed. R. Civ. P. 65(d). Both arguments are without merit.

Under well-established Supreme Court and Ninth Circuit precedent, Defendant faces a "heavy" and "formidable" burden to demonstrate mootness. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189-90 (2000). Defendant cannot meet that burden here. Defendant provides no assurances (and offers no evidence) to suggest that Plaintiff is able to engage in protected free speech without being threatened, interrogated, and/or punished in the future, nor does the County exonerate Plaintiff for his past protected speech or promise that it

will not reinstate the punishment against him. Instead, the April 17 letter states only that Plaintiff will not be punished *at this time*.

Furthermore, even if the April 17 letter permanently rescinds the January 21 disciplinary letter against Plaintiff – a dubious proposition, given that Director Regan can retract his April 17 letter just as quickly as he issued it – the letter does not "completely and irrevocably" remedy the harm suffered by Plaintiff. Plaintiff's uncontroverted declaration states that his speech has been chilled since long before the January 21 letter. Declaration of Neldon Mamuad ("Mamuad Decl.") ¶¶ 25-26, 30, 33, 37. Additionally, the Violence in the Workplace Action Plan ("Action Plan") continues to state that Plaintiff can be disciplined if his protected free speech "bothers" another employee regardless of whether such "bother" is within the physical workplace – and Defendant promises no changes in policy or practice to ensure that the Action Plan will be applied in a constitutional manner going forward.

Defendant's Fed. R. Civ. P. 65 argument is similarly baseless. As an initial matter, Defendant apparently fails to see the irony in its argument: while the County has never informed Plaintiff as to what he has done to violate the Action Plan, and the Action Plan itself is vague and overbroad as applied to Plaintiff (thus causing the instant dispute), Defendant now claims that any order requiring the County to comply with the First Amendment would itself be overbroad and vague.

Defendant's argument – that the Court is prohibited from getting involved in this matter because any order requiring the County to comply with the First Amendment would be vague and overbroad – is without legal basis.

Nevertheless, Defendant's Rule 65 argument is not about whether Plaintiff has met his burden to obtain an injunction, but rather the remedy to be ordered by the Court upon issuance of the injunction. Plaintiff has every confidence that the Court is capable of issuing a clear ruling on this matter, and the requested relief – an order prohibiting Defendant from threatening and punishing Plaintiff for speaking, in his private capacity, about matters of public concern – is sufficiently specific to satisfy Rule 65.

II. STATEMENT OF FACTS

Director Regan's April 17 letter – issued four days before the due date for Defendant's opposition brief – is explicit in its purpose: "to resolve this matter without the need for further litigation." Regan Decl., Ex. A. The letter does not purport to demonstrate any change in policy; to the contrary, the letter demonstrates an intent to maintain the exact same procedures and policies that led to the instant dispute: "This letter should not be taken as an admission that the January 21, 2014 letter was inappropriate in any way." *Id*.

The April 17 letter does not resolve all the harm that Defendant has caused (and continues to cause) to Plaintiff. Plaintiff's uncontroverted declaration states

that his speech was chilled long before the issuance of the January 21 letter. *See* Mamuad Decl. ¶ 37 ("Since my interview with Gary Murai [on October 16, 2013], I have held back from posting items regarding Officer Taguma that I otherwise would have done, and I continue to hold back from posting items about Officer Taguma and other County employees that I want to post."). Similarly, in his Supplemental Declaration (attached hereto), which responds only to the April 17 letter, Plaintiff states that he continues to be chilled in the exercise of his speech and continues to refrain from engaging in certain speech on his Facebook page. Supplemental Declaration of Neldon Mamuad, ¶¶ 2-4.

III. ARGUMENT

Defendant's two arguments are without merit. First, Defendant has a "heavy" and "formidable" burden to prove mootness, and has not met that burden here. Second, the requested injunctive relief – an order prohibiting Defendant from interfering with Plaintiff's First Amendment rights in the ways outlined in Plaintiff's Motion for Preliminary Injunction – is both clear and specific. Each argument is addressed in turn.

A. Defendant Has Not Met its "Heavy Burden" to Prove Mootness

1. A Defendant Claiming Mootness Based on Voluntary Cessation of Unlawful Conduct Bears a "Formidable" Burden

In cases of voluntary cessation, the defendant bears a "formidable" burden; it must be "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 190 (emphasis added); *accord Already, LLC v. Nike,* 133 S. Ct. 721, 726-27 (2013). The defendant must demonstrate that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). This standard is "stringent," and the party claiming mootness bears the heavy burden of showing it is satisfied. *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000). *See also R.G. v. Koller*, 415 F. Supp. 2d 1129, 1138-39 (D. Haw. 2006) (discussing mootness based on voluntary cessation). Post-litigation change in conduct is generally insufficient to moot a case for a simple reason: "If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Friends of the Earth*, 528 U.S. at 189 (internal quotation signals and alterations omitted).

A legislative body may render a case moot by amending a statute or ordinance (because such changes make any future harm unlikely). *See Smith v. Univ. of Washington*, 233 F.3d 1188, 1195 (9th Cir. 2000), *cert. denied*, 532 U.S.

1051 (2001). By contrast, a voluntary change in policy – let alone a unilateral, reversible action by a single County official – is generally insufficient to satisfy a defendant's heavy burden. *See*, *e.g.*, *Bell v. City of Boise*, 709 F.3d 890, 900 (9th Cir. 2013) ("Even assuming Defendants have no intention to alter or abandon the Special Order, the ease with which the Chief of Police could do so counsels against a finding of mootness[.]"); *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007) (letter by state official promising not to take legal action against plaintiff insufficient to establish mootness); *DiLoreto v. Downey Unified School District*, 196 F.3d 958 (9th Cir. 1999) (holding that a school district's voluntary change of policy did not moot the litigation), *cert. denied*, 529 U.S. 1067 (2000); *accord Armster v. U.S. Dist. Court for Cent. Dist. of California*, 806 F.2d 1347, 1357-60 (9th Cir. 1986) (rejecting mootness claim).

Courts are particularly skeptical of defendants' claims of voluntary cessation where, as in the instant case, the defendant refuses to admit to any wrongdoing. *See*, *e.g.*, *Knox v. Serv. Employees Intern. Union, Local 1000*, 132 S.Ct. 2277, 2287 (2012) ("[S]ince the union continues to defend the legality of the Political Fight–Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future."); *Porter*, 496 F.3d at 1017 (defendant's insistence on legality of its actions weighs against mootness); *Armster*, 806 F.2d at 1359 ("It has long been recognized that the likelihood of recurrence of challenged

activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct."); *accord Sheely v. MRI Radiology Network*, 505 F.3d 1173, 1187 (11th Cir. 2007) ("[A] defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains." (collecting cases)).

The Ninth Circuit recently articulated several salient factors (collected from established caselaw) when determining whether a government agency's voluntary change in policy can render an issue moot:[1]

> [M]ootness is more likely if (1) the policy change is evidenced by language that is broad in scope and unequivocal in tone; (2) the policy change fully addresses all of the objectionable measures that the Government officials took against the plaintiffs in the case; (3) the case in question was the catalyst for the agency's adoption of the new policy; (4) the policy has been in place for a long time when we consider mootness; and (5) since the policy's implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiff. On the other hand, we are less inclined to find mootness where the new policy could be easily abandoned or altered in the future.

[1] In the instant case, Defendant is not even offering to change its policies; instead, Defendant maintains that it will continue to enforce its existing policies, but to avoid litigation, it will not enforce the policy *at this time*. Nevertheless, the factors listed by the court are instructive.

Rosebrock v. Mathis, ___ F.3d ___, No. 11–56256, 2014 WL 982897, *6 (9th Cir. March 14, 2014) (internal citations, quotation signals, and alterations omitted).[2]

2. Defendant County Has Not – and Cannot – Meet its Burden

Defendant County has not met its "heavy" and "formidable" burden here for two reasons: first, the April 17 letter does not eliminate all the harm to Plaintiff, such that Plaintiff continues to suffer irreparable harm; second, the County has presented no evidence to suggest that Plaintiff will not be disciplined in the future for his protected speech (either for his past speech or for engaging in that speech in the future). To the contrary, Defendant has indicated that it intends to continue enforcing the Action Plan as it has done in the past. Each of these issues is addressed in turn.

a. Plaintiff Continues to Suffer Irreparable Harm

The April 17 letter neither addresses the harm suffered by Plaintiff prior to the issuance of the January 21 letter nor the Action Plan itself, which is unconstitutional as applied to Plaintiff and which continues to chill his speech. As such, the April 17 letter does not "completely and irrevocably eradicate[] the effects of the alleged violation." *County of Los Angeles*, 440 U.S. at 631.

[2] Petition for *en banc* review filed April 28, 2014.

i. The April 17 Letter Does Not Eradicate All Effects of Defendant's Constitutional Violations

While the April 17 letter purports to remove any findings or discipline against Plaintiff, it does nothing to address the threats that Plaintiff received prior to issuance of the January 21 letter. As set forth in his declaration, Plaintiff's speech was chilled long before he received the January 21, 2014 letter: Plaintiff declares that he met with Patrick Wong on or about July 24 and August 11, 2013 (*before* Officer Taguma filed a workplace harassment complaint on August 13, *see* Mamuad Decl., Ex. 3), and that he (Plaintiff) felt "pressure[] . . . to stop speaking via the Facebook page." Mamuad Decl. ¶ 25. Plaintiff declares that the meetings "made me feel like the County was coming after me, and that they were trying to silence me." *Id.* ¶ 26. He was forced to submit to an interview with Gary Murai, which made him feel "nervous" such that "I didn't post things about Officer Taguma that I ordinarily would have done." *Id.* ¶ 33. *See also id*. ¶ 37 ("I am afraid [to post on Facebook] because of the actions the County has taken against me. Since my interview with Gary Murai, I have held back from posting items . . . that I otherwise would have done[.]"). The April 17 letter does not address these harms.[3]

[3] Indeed, Defendant concedes as much when it says, "*Most* of the relief requested addressed the January 21, 2014 letter which has been rescinded." Opposition at 8 (emphasis added).

ii. The Violence in the Workplace Plan Remains in Full Force and Effect, and is Unconstitutional As Applied to Plaintiff's Protected Speech

The Action Plan continues to apply to Plaintiff, and it continues to contain vague and overbroad language that unconstitutionally restricts Plaintiff's First Amendment rights. *See* Mamuad Decl., Ex. 2 at 2 (defining "harassment" as prohibiting any conduct that "continually bothers an individual"). Defendant does not suggest (and there is no evidence to suggest) that the County intends to amend the Action Plan or enforce it differently into the future. Insofar as Plaintiff does not know what speech purportedly violated the Action Plan in the first instance, Mamuad Decl. ¶ 32, and insofar as Defendant has not taken any steps to ensure that the Action Plan excludes protected First Amendment activities, Plaintiff cannot know what speech (otherwise protected by the First Amendment) will subject him to discipline in the future. The continued existence (and enforcement) of the Action Plan warrants injunctive relief.

iii. Defendant Offers No Evidence to Suggest that Plaintiff Can Engage in Protected Speech Without Fear of Further Discipline, or that the County Will Not Rescind the April 17 Letter

Defendant neither exonerates Plaintiff's past speech nor makes any effort to suggest that it has changed (or will change) its policies going forward. The April 17 letter – signed four days before the County's opposition brief was due – is explicitly designed to moot the litigation, and is not done pursuant to any policy.

Regan Decl., Ex. A ("In an effort to resolve this matter without the need for further litigation, I am now informing you that the letter is rescinded and that the investigation is closed."). The County provides no evidence to suggest that the April 17 letter is permanent, such that it cannot (or will not) re-open the investigation or re-assert their demand that Plaintiff attend counseling or cease posting on Facebook. *See Bell*, 709 F.3d at 900 (rejecting mootness argument under circumstances very similar to the instant case).

Similarly, Defendant makes no admissions of wrongdoing, nor does Defendant make any suggestion that such constitutional violations will not happen again. Indeed, media statements made by several Maui County Councilmembers suggest that, absent a ruling from this Court, the County may be *more* aggressive in suppressing the free speech rights of County employees under the guise of addressing "cyberbullying." *See* MauiNow, *Council Approves Funds to Fight Mamuad Lawsuit*, MAUINOW.COM, April 4, 2014, available at http://mauinow.com/2014/04/04/council-discusses-cyberbullying-vs-first-amendement-in-mamuad-lawsuit/ (quoting County Councilman Don Couch as saying, "It was portrayed in one of the newspapers . . . that this was a First Amendment issue, and it certainly is not"; quoting County Councilman Riki Hokama as saying, "This member considers cyberbullying to be a very serious issue. It's already something that our sister counties deal with. It's an issue that we

need to deal with in greater intensity; but for me, it's not a one-sided issue of what is before the body").

Defendant contends that any harm to Plaintiff is "remote and speculative" because the County will only investigate Plaintiff pursuant to the Action Plan if another employee files a complaint against Plaintiff. Opposition at 6-7. This argument is without merit. First, nothing in the plain language of the Action Plan itself suggests that the County is prohibited from investigating and/or disciplining an employee unless another employee files a harassment complaint. Indeed, such a construction would be implausible: the County cannot possibly be serious in suggesting that it is prohibited from taking action against an employee who is acting violently towards another employee unless the victim of that violent behavior first files a complaint. Nevertheless, the uncontroverted facts of this case refute the County's assertions: Corporation Counsel Wong began threatening Plaintiff on July 24, and continued to do so on August 11, prior to Officer Taguma's filing of a harassment complaint against Plaintiff on August 13. *See* Mamuad Decl. ¶¶ 23, 25; *id.* Ex. 3.

b. Defendant's Voluntary Cessation Fails Even the* Rosebrock *Test for Mootness

Even if this Court were to treat the April 17 letter as a new "policy," and thereby apply the factors in the manner described in *Rosebrock* (*see* page 7, *supra*),

Defendant's actions fail the test for mootness.[4] First, *Rosebrock* draws on well-settled law to hold that a change in policy (as opposed to a statutory change) must be "evidenced by language that is 'broad in scope and unequivocal in tone'" to support mootness. *Rosebrock*, 2014 WL 982897 at *6 (quoting *White*, 227 F.3d at 1243). In the instant case, Defendant's April 17 letter is explicitly equivocal: the letter states that "[t]his letter should not be taken an as admission that the January 21, 2014 letter was inappropriate in any way." The April 17 letter is also narrow, insofar as it addresses only the January 21, 2014 letter but fails to address the broader problem of future enforcement of the Action Plan itself. Second, *Rosebrock* requires that the policy change "fully 'address[] all of the objectionable measures that the Government officials took against the plaintiffs in the case[.]'" *Rosebrock*, 2014 WL 982897 at *6 (quoting *White*, 227 F.3d at 1243) (brackets omitted). As set forth *supra* at pages 9-12, however, the April 17 letter does not satisfy this factor. The third and fourth factors are that "(3) the case in question was the catalyst for the agency's adoption of the new policy" and that "(4) the

[4] In *Rosebrock*, the defendant had a long-standing published federal regulation (enshrined in the C.F.R.) that was facially constitutional, and the plaintiff alleged inconsistent (and unconstitutional) enforcement of that policy. By contrast, in the instant case, the Defendant is maintaining a policy that is *unconstitutional* as applied to Plaintiff, and presents no evidence to suggest that the policy will not be applied against Plaintiff in a similarly unconstitutional manner in the future. As such, Defendant has announced no change in policy, such that the *Rosebrock* test ought not apply at all; nevertheless, as discussed more fully *infra*, Defendant cannot meet even this more generous test for mootness.

policy has been in place for a long time when we consider mootness[.]" *Rosebrock*, 2014 WL 982897 at 6 (internal quotation signals, citations, and brackets omitted). While the April 17 letter is explicit that this litigation prompted the letter, the letter was issued less than two weeks ago (and just four days before Defendant filed its opposition brief). Fifth, *Rosebrock* looks to whether the government has "engaged in conduct similar to that challenged by the plaintiff" since enacting the new policy. *Id*. There is no evidence on this point either way, though counsel for Defendant suggests that the County will continue to enforce the Action Plan in the future as it has always done, irrespective of the First Amendment concerns raised by the instant case. *See* Opposition at 7-9.

The *Rosebrock* court further acknowledges, however, that it is "less inclined to find mootness where the 'new policy . . . could be easily abandoned or altered in the future.'" *Rosebrock*, 2014 WL 982897 at *6 (quoting *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013)) (alteration in original). In the instant case, Defendant Regan signed the April 17 letter, but there is nothing prohibiting him from rescinding the April 17 letter at any point in the future: there is no evidence that anyone else within the County knows about the April 17 letter, and retraction of the letter would not contradict any existing County policy. By contrast, in *Rosebrock*, the government agency disseminated its policy instructions widely, and retraction of the e-mail would run counter to existing policy (thus providing some

measure of reassurance that retraction was not likely).[5] The April 17 letter is clear – the intent is not to prevent future problems, the intent is to make this case go away.

Defendant's Opposition does not cite to *Rosebrock*, but does cite to *Doe No. 1 v. Reed*, 697 F.3d 1235 (9th Cir. 2012), to support its claim that this case is moot. In *Reed*, the plaintiffs sought to prohibit disclosure of certain government records. The Court held that the request for an injunction was moot because, after litigation had commenced, those records were posted on the internet for anyone to see, such that the court could not grant meaningful relief. *Id.* at 1237. Defendant's block quote of *Reed* also contains a reference to *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008), in which plaintiffs sought humane eradication of feral pigs; the court held that the request for injunctive relief was made moot after all the pigs were killed. These cases are a far cry from the instant case, in which the harm to Plaintiff is ongoing and in which a single County official can undo the April 17 letter with a stroke of his pen.

[5] To be clear, Plaintiff's counsel from the ACLU of Hawaii Foundation disagree with the holding in *Rosebrock*, and the plaintiff in *Rosebrock* (represented by the ACLU Foundation of Southern California) has filed a petition for rehearing *en banc*. Indeed, the ruling in *Rosebrock* (the ultimate conclusion regarding mootness, not the test used to determine mootness) appears to conflict with several other Ninth Circuit cases, *see Bell*, 709 F.3d at 900; *DiLoreto*, 196 F.3d at 963 n.1; *Armster*, 806 F.2d at 1357-60. Nevertheless, as discussed herein, the facts and the holding in *Rosebrock* are easily distinguishable from the facts of the instant case.

In sum, the April 17 letter is a classic example of voluntary cessation of unlawful conduct, and Defendant has presented no evidence to demonstrate its permanence. Nothing in the record suggests that the letter cannot (or will not) be rescinded the moment the Court looks the other way. Nothing in the record suggests that Defendant recognizes its past conduct to be unlawful; to the contrary, the April 17 explicitly disclaims any wrongdoing. Courts justifiably disfavor such gamesmanship, and Defendant's letter does not moot Plaintiff's motion.

B. The Requested Relief Satisfies Fed. R. Civ. P. 65

Defendant County does not dispute that it violated Plaintiff's constitutional rights by threatening him for exercising his First Amendment rights. This Court can, consistent with Fed. R. Civ. P. 65(d), issue an injunction to prevent these threats from continuing into the future.

Defendant argues that this Court cannot craft an injunction that can satisfy Fed. R. Civ. P. 65. Opposition at 8-14. This is not an argument about *whether* Plaintiff has met his burden to obtain an injunction, however, but rather an argument about the proper *remedy* to be ordered by the Court. Nevertheless, this argument is without merit.

Plaintiff has never sought (and does not now seek) an order "giving him unlimited rights in his role as a County employee," Opposition at 12, nor does Plaintiff seek an order striking down the Action Plan on its face. Plaintiff agrees

that the County ought to have a policy that prohibits workplace violence, as well as a policy that prohibits workplace harassment on the basis of certain protected categories. An order from this Court can make clear that the County is free to investigate and/or discipline Plaintiff for unprotected speech and conduct (including such things as threats of physical violence and sexual harassment), for Plaintiff's speech made as an employee, *see Garcetti v. Ceballos*, 547 U.S. 410 (2006), or for speech that is otherwise subject to regulation pursuant to *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and its progeny. Nevertheless, a County policy cannot violate the Constitution, and Defendant has repeatedly – and continuously – violated Plaintiff's rights. Plaintiff has met his burden for issuance of an injunction, the contours of which satisfy Rule 65, with the following terms:

- The January 21 letter violates Plaintiff's First Amendment rights and is therefore unenforceable. As such, the January 21 letter shall be removed from Plaintiff's personnel file(s), and the County is prohibited from considering the January 21 letter (or the investigation leading up to that letter) in the future, should Plaintiff apply for a position as a County employee/officer.
- Defendant County shall be prohibited from using the Action Plan to discourage, prohibit, or punish the type of speech at issue in the instant case. Specifically, Defendant shall be enjoined from disciplining

Plaintiff, threatening to discipline him, or requiring him to submit to interviews/investigations for speech that:

- is protected by the First Amendment;
- takes place outside of the workplace;
- arises from Plaintiff's status as a private citizen (rather than as a County employee/official); and
- is about a matter of public concern.

- Defendant County shall take reasonable steps to ensure that application of the Action Plan to Plaintiff comports with well-settled First Amendment principles;
- The Action Plan may remain in effect, and may apply to Plaintiff, to allow the County to investigate threats of violence or other kinds of harassment except as set forth herein.

This prohibition shall be limited, temporally, to the time in which Plaintiff has a position as an official/employee of Maui County.

As in the instant case, courts frequently grant injunctions prohibiting defendants from violating certain legal principles, even when such injunctions reference other sources of law. *See, e.g.*, *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1021-22 (9th Cir. 1985) (upholding order enjoining defendant from "'using any name, designation or material . . . likely to cause

confusion, mistake or deception as to source relative to plaintiff's trademark'"), *cert. denied*, 474 U.S. 1059 (1986). As the Ninth Circuit has explained, "We will not set aside injunctions under Rule 65(d) 'unless they are so vague that they have no reasonably specific meaning.'" *United States v. V-1 Oil Co.*, 63 F.3d 909, 913 (9th Cir. 1995) (rejecting vagueness challenge to injunction that required defendant to submit to administrative, warrantless searches) (quoting *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir.1992)), *cert. denied*, 517 U.S. 1208 (1996).

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant Plaintiff's Motion for a Preliminary Injunction.

Dated: Honolulu, Hawaii, May 1, 2014.

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CERTIFICATE OF WORD COUNT

I certify that the foregoing document complies with Local Rule 7.5(b) and (e). The document is set in Times New Roman 14 point type and contains 4,425 words, excluding the caption, table of contents, table of authorities, and signature block, as counted by the Microsoft Word software used to prepare the document.

Dated: Honolulu, Hawaii, May 1, 2014.

/s/ Daniel M. Gluck
Daniel M. Gluck