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IN THE UNITED STATES DISTRICT COURT
OF THE STATE OF HAWAII

MITCHELL KAHLE and KEVIN
HUGHES,

Plaintiffs,

v.

BIENVENIDO VILLAFLOR (in his individual and official capacities); DOYLES ARAKAKI (in his individual and official capacities); FREDDIE CARABBACAN (in his individual and official capacities); DANIEL KWON (in his individual and official capacities); RAYMOND A. SCHWARTZ (in his individual and official capacities); BETTY MURAKI (in her individual and official capacities); DARYL NAAUAO (in his individual and official capacities); JAYSON M. WATTS (in his individual

CIVIL NO. 10-00764 LEK-KSC

**BRIEF OF *AMICUS CURIAE*
ACLU OF HAWAII
FOUNDATION IN SUPPORT
OF PLAINTIFFS'
OPPOSITION TO
DEFENDANTS' MOTION FOR
JUDGMENT ON THE
PLEADINGS FILED
SEPTEMBER 21, 2011;
DECLARATION OF DANIEL
M. GLUCK; EXHIBITS "A"
AND "B"**

Hearing on Defendants' Motion:

DATE: January 17, 2012

TIME: 9:45 a.m.

JUDGE: Hon. Leslie E. Kobayashi

and official capacities); PAUL REID (in his individual and personal capacities); REID OGATA (in his individual and personal capacities); STATE OF HAWAII; JOHN DOES 1-10; AND JANE DOES 1-10,

Defendants.

**BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS’
OPPOSITION TO DEFENDANTS’ MOTION FOR JUDGMENT ON THE
PLEADINGS FILED SEPTEMBER 21, 2011**

I. INTRODUCTION

On April 29, 2010, Plaintiff Hughes had a clearly established First Amendment right to videotape law enforcement officials. Defendants violated that right by interfering with Hughes’ right to videotape and by assaulting him (and damaging his camera). Defendants’ Motion for Judgment on the Pleadings (hereinafter, Defendants’ Motion) does not address this First Amendment claim at all; instead, Defendants’ Motion lumps all of the Plaintiffs’ First Amendment claims together – even the imagined claims of Plaintiff Kahle’s wife, Holly Huber, who is not even a party to the instant case. *See* Memorandum in Support of Defendants’ Motion at 6.

Even if Defendants’ Motion were construed to address Plaintiff Hughes’ First Amendment claim for videotaping, Defendants’ Motion would fail: the Ninth Circuit acknowledged, long before the case at bar, that there is a “First Amendment

right to film matters of public interest.” *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). The instant memorandum discusses the First Amendment right to record law enforcement officers’ actions, as well as the emerging, disturbing trend, both here in Hawaii and nationwide, of law enforcement officers interfering with this First Amendment right – a trend that, unfortunately, may increase with the proliferation of video-capable cell phones.

II. ARGUMENT

A. Defendants’ Motion Does Not Address Plaintiff Hughes’ First Amendment Claim.

Defendants’ Motion does not address Plaintiff Hughes’ claim that Defendants¹ interfered with his First Amendment right to videotape law enforcement officials.² Defendants assert that the entirety of Plaintiffs’ First Amendment argument is based on Plaintiff Kahle and Ms. Huber’s speech inside the Legislature on April 29, 2010. Memorandum in Support of Defendants’

¹ Given the number of defendants and the number of claims – and given the narrow focus of the instant memorandum – *amicus* will simply refer to the various state officials/entities collectively as “Defendants.”

² In assaulting Plaintiff Hughes, Defendants also violated Hughes’ rights in numerous other ways (including, but not limited to, his Fourth Amendment right to be free from unreasonable seizures and his corresponding rights under the Hawaii Constitution). The instant memorandum focuses only on the First Amendment implications of Defendants’ actions on Hughes (though this analysis may impact Kahle’s First Amendment claims to the extent Defendants’ actions also interfered with Kahle’s right to record law enforcement officers).

Motion at 6. Defendants state only that Plaintiff Kahle “did not have a protected right of free speech,” *id.* at 14, but Defendants do not advance any arguments with respect to the violation of Plaintiff Hughes’ First Amendment right to record law enforcement officials. *See* Plaintiffs’ First Amended Complaint (hereinafter, “FAC”) ¶¶56, 60, 65-73. As discussed *infra*, however, even if Defendants had addressed this argument, Defendants would not be entitled to judgment on the pleadings (or summary judgment) as to this claim.

B. Plaintiff Hughes Had A First Amendment Right To Film Law Enforcement Officials In Public.

The Ninth Circuit Court of Appeals has acknowledged that there is a “First Amendment right to film matters of public interest.” *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). In *Fordyce*, the plaintiff was filming a public protest when law enforcement officials arrested him for violation of a state wiretapping statute. *Id.* at 438. The court noted the lack of a prior explicit ruling on this issue and remanded to determine if the defendant had interfered with the plaintiff’s First Amendment right to gather news. *Id.* at 442. In so holding, the Court impliedly ruled that such a right was already clearly established, such that qualified immunity was not available. *See id.* at 439 (holding that “a genuine issue of material fact does exist regarding whether [plaintiff] was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest”). *See also Cuvillo v.*

City of Oakland, C 06-05517, 2007 WL 2349325 (N.D. Cal. Aug. 15, 2007) (citing *Fordyce* for the proposition that filming a matter of public interest “constitutes free speech under the First Amendment,” though ultimately basing its ruling on the California Constitution pursuant to the constitutional avoidance doctrine). In Hawaii, within the last year alone, both the Honolulu and Hawaii County Police Departments have expressly recognized the right to film in public. *See* Section D, *infra* (pp. 9-13).

In a decision in August 2011, the First Circuit Court of Appeals considered *Fordyce* and concurred with the result: while the right to film “may be subject to reasonable time, place, and manner restrictions . . . peaceful recording of an arrest in a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.” *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). In *Glik*, the plaintiff was arrested pursuant to a Massachusetts wiretapping statute for recording several police officers’ arrest of another individual.³ As the First Circuit explained, citing to *Fordyce* and other Circuit Courts, “though not unqualified, a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public

³ Massachusetts’ wiretapping statute is broader than Hawaii’s (and most other jurisdictions’ statutes) and is not restricted to recordings that are made with a reasonable expectation of privacy. The court in *Glik*, however, found that because the plaintiff had been recording openly, there was no violation of the wiretapping statute. *See Glik*, at 655 F.3d at 86.

space is a basic, vital, and well-established liberty safeguarded by the First Amendment.” *Id.* at 85.

Multiple other courts have concluded that individuals have a First Amendment right to film and that this right is clearly established. *See, e.g., Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”), *cert. denied*, 531 U.S. 978; *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir. 1969) (holding that the plaintiffs’ request for an injunction to protect their “constitutional right to gather and report news and to photograph events” stated a claim under § 1983), *overruled on other grounds by City of Kenosha v. Bruno*, 412 U.S. 507 (1973). *See also Glik*, 655 F.3d at 83 (collecting cases). To counsel’s knowledge, the only Circuit Court decision granting qualified immunity on this type of First Amendment claim is *Kelly v. Borough of Carlisle*, 622 F.3d 248, 260 (3rd Cir. 2010) (concluding that any First Amendment right to film law enforcement officers during a traffic stop was not clearly established).⁴

⁴ Pursuant to *Pearson v. Callahan*, 555 U.S. 223 (2009), the *Kelly* court did not decide whether the plaintiff did, in fact, have such a First Amendment right, but decided the case on the basis that such a right was not clearly established. In so ruling, however, the *Kelly* court placed great emphasis on the fact that plaintiff’s videotaping incident occurred during a traffic stop (which the court declared to be an “inherently dangerous situation[.]”). *Kelly*, 622 F.3d at 262. In contrast, in the instant case, Hughes’ First Amendment claim arose outdoors at the Hawaii State

These rulings, of course, comport with long-standing Supreme Court proclamations on the scope of the First Amendment. *See 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.”); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (“[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”); *Garrison v. State of La.*, 379 U.S. 64, 77 (1964) (holding that there is a “paramount public interest in a free flow of information to the people concerning public officials, their servants”).

In sum, recording matters of public interest – including the actions of law enforcement officials – is a right guaranteed by the First Amendment, and one that is clearly established within the Ninth Circuit. As such, Defendants’ Motion ought to be rejected outright.

Capitol, a public forum *See Glik*, 655 F.3d at 84 (“Glik filmed the defendant police officers in the Boston Common, the oldest city park in the United States and the apotheosis of a public forum. In such traditional public spaces, the rights of the state to limit the exercise of First Amendment activity are “sharply circumscribed.” (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983))).

C. Defendants Violated Plaintiff Hughes' First Amendment Right to Videotape.

As alleged in the First Amended Complaint (hereinafter, FAC), Plaintiff Hughes was attacked by several of the Defendants while recording Plaintiff Kahle after Kahle had been ejected from the Senate Chambers. FAC ¶¶29, 45, 58-60, 66-70. Again, to be clear: at the time Hughes was assaulted, he was *outside* of the Senate Chamber, in the rotunda area open to the public; he had every right to be present in the rotunda area and to film there. Defendant Villafor approached Hughes and, without warning, punched Hughes' video camera and proceeded to say, "Stop it [recording]!" FAC ¶¶59, 60. Villaflor then said, "Get that camera." FAC ¶65. Defendants Watts, Arakaki, Reid, and others then surrounded and attacked Hughes, preventing Hughes from further recording the incident. *Id.* ¶¶66-70. Hughes sustained injuries to both his person and video camera as a direct result of Defendants' actions. *Id.* ¶67. There is no evidence to suggest that Hughes was interfering with any law enforcement activity or that he was in violation of any laws when the attack occurred; indeed, no charges were filed against Hughes.

Hughes has demonstrated that his First Amendment rights were violated. As the Ninth Circuit has explained:

In order to demonstrate a First Amendment violation, a plaintiff must provide evidence showing that by his actions the defendant deterred or chilled the plaintiff's political speech and such deterrence

was a substantial or motivating factor in the defendant's conduct. . . . [T]he proper inquiry asks whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.

Mendocino Env'tl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999)

(citations, brackets, and internal quotation signals omitted from original). Again,

in the instant case, Defendant Villaflor punched Hughes' camera, and then said,

"Get that camera" – after which various state officials tackled Hughes to the

ground. Defendant Villaflor's motivation is explicit – to put an end to Hughes'

filming. There is no question that an ordinary person would be deterred from

repeating this conduct after being punched and tackled (and having to go to the

Emergency Room as a result, FAC ¶91).

For the foregoing reasons, *amicus* respectfully requests that the Court deny Defendants' Motion.

D. Defendants' Actions Are Part Of A Disturbing Trend Of Similar First Amendment Violations Statewide and Nationwide.

In Hawaii, in the last year alone, there have been three separate instances of individuals being assaulted and/or harassed – and having their cameras damaged or destroyed – by law enforcement officers. The ACLU of Hawaii is concerned that, with the proliferation of cell-phone cameras and small video-cameras, these incidents will become more common (notwithstanding the clarity of the law in the Ninth Circuit).

On April 12, 2011, Tommy Russo (a publisher of MauiTime.com) was speaking with Maui Police Department Officer Nelson Johnson.⁵ Mr. Russo was filming his conversation with Officer Johnson when Officer Johnson hit Mr. Russo's camera. The video continues, and Officer Johnson can be seen and heard stating the following: "I don't want to be filmed. And if I don't want to be filmed, I don't have to be filmed. . . . You cannot film me without my consent. You cannot use my image without my consent."⁶ These statements have no basis in law.

On August 6, 2011, blogger Damon Tucker ("Tucker") had a similar encounter with Hawaii County Police Department officers.⁷ Tucker claims that he was filming the officers' arrest of other individuals, when an officer slammed him

⁵ According to Mr. Russo, he called the Maui Police Department after being punched – and having his camera thrown to the ground – by members of the security team for Duane "Dog the Bounty Hunter" Chapman. Tommy Russo, MauiTime Publisher Tommy Russo Assaulted By MPD, MAUITIME.COM (April 13, 2011), <http://www.mauitime.com/Articles-i-2011-04-14-75934.113117-Does-Duane-Chapman-aka-Dog-The-Bounty-Hunter-Agree-It-Should-Be-Illegal-To-Film-Police.html>.

⁶ *Id.*

⁷ Damon Tucker, *Abused by the Big Island Police and Arrested for Taking Cell Phone Pictures and Camera Photos*, HAWAII NEWS AND ISLAND INFORMATION (Aug. 6, 2011), <http://damontucker.com/2011/08/06/abused-by-the-big-island-police-and-arrested-for-taking-cell-phone-pictures-and-camera-photos/>.

to the ground and confiscated his camera/phone.⁸ Tucker was arrested for obstructing government operations, though charges were dropped shortly thereafter.⁹ According to the Big Island Chronicle, Assistant Police Chief Henry Tavares later stated that “the media and the public have every right to photograph police activity in a public place from a safe distance.”¹⁰

In a third incident from December 2010, journalists had their camera damaged by a Honolulu Police Department (“HPD”) officer after the journalists were pulled over near President Obama’s vacation home.¹¹ The journalists reported that HPD officers followed them after they left the area in an attempt to comply with orders from the Secret Service to leave the private road on which the

⁸ *Id.*

⁹ See Declaration of Daniel M. Gluck, Exs. “A,” “B” (count list and docket sheet from Mr. Tucker’s criminal case); see also Damon Tucker, *Obstruction of Government Operation Charges Dismissed Against Me – Pictures Released From the Night I Got Arrested at Pahoia Village Cafe*, HAWAII NEWS AND ISLAND INFORMATION (Nov. 10, 2011), <http://damontucker.com/2011/11/10/obstruction-of-government-operation-charges-dismissed-against-me-pictures-released-from-the-night-i-got-arrested-at-pahoia-village-cafe/>.

¹⁰ Tiffany Edwards Hunt, *Hawaii News — Police Issue Statement On Tucker’s Police Brutality Allegations*, BIG ISLAND CHRONICLE (Aug. 10, 2011), <http://www.bigislandchronicle.com/2011/08/10/hawaii-news-%E2%80%94-police-issue-statement-on-tuckers-police-brutality-allegations/>.

¹¹ See Daryl Huff, *TV Crew Covering President Claims Mistreatment*, KITV (Dec. 30, 2010), <http://www.kitv.com/news/26327764/detail.html>.

President was staying.¹² After the journalists pulled into a gas station, an HPD officer approached the car and – seeing the video camera – said something to the effect of “put that camera off of me”; a moment later, the journalists recounted, an officer grabbed the camera and smashed it on the roof of the car.¹³ According to KITV’s coverage of this event, the HPD Officer who damaged the camera seemed to recognize that his behavior was unlawful: he provided the journalists with his name and badge number, along with information on how to complain to the Honolulu Police Commission.¹⁴ Darryl Huff, who reported the story for KITV, stated: “Asked if it was legal for police officers to stop someone from videotaping an officer in a public place, the [police] department said citizens are allowed to video in public places.”¹⁵

Far from being contained in Hawaii, interference with the First Amendment right to record law enforcement officials is a national problem. The American Civil Liberties Union’s website includes just a few examples from across the country: in May 2011, a woman in New York was unlawfully arrested for

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* See also John Temple, *Hawaii Public Has Right Record Police*, HONOLULU CIVIL BEAT (Aug. 23, 2011), <http://www.civilbeat.com/posts/2011/08/23/12612-hawaii-public-has-right-to-record-police/>.

videotaping a traffic stop in her front yard, and in June 2011, two journalists recording a public meeting of the Washington DC Tax Commission were arrested; one for taking a photograph of the meeting and the other for filming his fellow journalist's arrest.¹⁶ In Maryland, the ACLU represented Anthony Graber who, in March 2010, was subjected to an unlawful search and arrest after posting a video on YouTube of a traffic stop; criminal charges for filming the officer were dismissed, and the court concluded by stating: "Those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public. When we exercise that power in public fora, we should not expect our actions to be shielded from public observation."¹⁷ The ACLU of Maryland has a similar lawsuit pending against Baltimore police,¹⁸ and last year, the ACLU of

¹⁶ See Jay Stanley, *You Have Every Right to Photograph That Cop*, AMERICAN CIVIL LIBERTIES UNION (Sept. 7, 2011), <http://www.aclu.org/free-speech/you-have-every-right-photograph-cop>.

¹⁷ *State v. Graber*, Case No.12-K-10-647, Order Granting Defendant's Motion to Dismiss Counts One, Two, Three, and Seven, (Harford County, MD Circuit Court Sept. 27, 2010), p. 18, available at http://www.aclu-md.org/aPress/Press2010/Court_Opinion_092710.pdf; see also Meredith Curtis, *ACLU Defends Rights of Citizens to Monitor Police by Representing Motorcyclist Prosecuted by State Police* (May 28, 2010), http://www.aclu-md.org/aPress/Press2010/052810_Motorcyclist.html.

¹⁸ *ACLU Sues Baltimore Police Over Man's Wrongful Detention, Camera Seizure at Preakness* (Aug. 31, 2011), http://www.aclu-md.org/aPress/Press2011/083111_preakness.html.

Louisiana issued a report of fifteen events between 2005 and 2009 in which individuals were stopped (and sometimes arrested) for videotaping police.¹⁹

The above-mentioned cases are just a few examples of the many instances involving law enforcement officials' obstruction of First Amendment rights. Unfortunately, such occurrences are so common that there is an entire blog dedicated to documenting violations of First Amendment rights by law enforcement officials.²⁰ Given this disturbing nationwide trend of interference with individuals' First Amendment right to record public officials, *amicus* respectfully asks this Court to rule on this important, recurrent constitutional question.

III. CONCLUSION

Defendants' Motion fails to address Plaintiff Hughes' clearly established First Amendment right to record law enforcement officials in public. Violations of this right are part of a disturbing trend both in Hawaii and throughout the nation,

¹⁹ *ACLU Urges New Orleans Police Department To Conduct First Amendment Training* (June 8, 2010), <http://www.aclu.org/free-speech/aclu-urges-new-orleans-police-department-conduct-first-amendment-training>. The ACLU of Louisiana's report is available at http://www.laclu.org/PDF_documents/Observing_photographing_filming_NOPD.pdf (this hyperlink will not work from a PDF; to view, please copy and paste the entire link into your internet browser).

²⁰ Carlos Miller, PHOTOGRAPHY IS NOT A CRIME, <http://www.pixiq.com/contributors/248>.

and *amicus* respectfully requests that this Court deny Defendants' Motion as to this claim.

DATED: Honolulu, Hawaii, January 9, 2012.

Respectfully submitted,

/s/ Daniel M. Gluck

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