

AMERICAN CIVIL LIBERTIES UNION
OF HAWAII FOUNDATION

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ROBERT REES,) Civil No. _____
)
Plaintiff,)
)
vs.) COMPLAINT; SUMMONS
)
PETER CARLISLE, City and County of)
Honolulu Prosecuting Attorney, in his)
official and individual capacities,)
)
Defendant.)
_____)

COMPLAINT

I. Nature of the Case

In the general election held on November 5, 2002 a majority of the Hawaii electorate voted in favor of a state constitutional amendment (hereinafter “the amendment”) that grants prosecutors, including Defendant Carlisle, expanded power to charge individuals with “infamous crimes” without first having to present evidence to a grand jury or before a judge in a preliminary hearing showing that there is a sufficient legal basis (i.e.- probable cause) for the

charges. In the months preceding the ratification vote on the amendment, Defendant Carlisle used public money, time, and materials to advocate for passage of the amendment and the consequential expansion of his power to charge individuals with crimes. Such use of taxpayer money and resources to advocate for a particular outcome in an election did not serve a public purpose, constituted improper use of public money and resources, violated the free speech rights of taxpayers who opposed the amendment, undermined the fundamental fairness of the election, and violated City and County of Honolulu (hereinafter “the City”) ordinances prohibiting the use of public resources for campaign activities.

This action seeks taxpayer compensation payable to the City for the public money and resources illegally used by Defendant Carlisle to advocate for passage of the amendment. This action further seeks a declaration that Defendant Carlisle’s use of taxpayer funds to advocate for a particular outcome in an election was improper and an injunction prohibiting him from misusing taxpayer funds in this manner in the future.

II. Parties

1. Plaintiff ROBERT REES is a resident, taxpayer, and registered voter in the State of Hawaii (hereinafter “the State”) and the City and County of Honolulu. He is opposed to the amendment to the Hawaii State Constitution allowing prosecution by written information and cast a “no” vote in the general election of November 5, 2002, on Ballot Question Number 3, pertaining to this amendment.

2. Defendant PETER CARLISLE is the duly elected prosecuting attorney for the City and County of Honolulu. As the prosecuting attorney, Defendant Carlisle is charged under the City Charter with the responsibility of conducting prosecutions for offences against the laws of the State and the ordinances, rules and regulations of the City. Defendant Carlisle is further

responsible for the training, supervision, control, assignment and discipline of all personnel employed by the Department of the Prosecuting Attorney. Defendant Carlisle instigated, participated in, approved, and/or ratified the unconstitutional or illegal acts complained of herein. At all times relevant herein, Defendant Carlisle was acting under the color of law. He is sued in his official and individual capacities.

III. Facts

3. Senate Bill No. 996 (S.B. 996), proposing amendment of Article I, Section 10 of the State Constitution, to permit the initiation of felony prosecutions by written information ("the amendment"), was introduced in the 2001 Hawaii State Legislative session.

4. S.B. 996 was enacted, triggering the ratification process and a ratification vote in the November 5, 2002 general election.

5. The constitutional amendment allows a person to be held to answer for a capital or otherwise infamous crime "upon written information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide."

6. In the November 5, 2003 election, 217,163 voters, or 60% of voters state wide, voted "yes" to the amendment, while "no" and blank votes totalled 161,411, or 40%.

7. An original action is pending in the Hawaii Supreme Court challenging the ratification of the amendment on constitutional procedure grounds.

8. If upheld, the amendment would eliminate long-existing constitutional protections and grant prosecutors, including Defendant Carlisle, expanded power to charge individuals with "infamous crimes" without first having to present evidence to a grand jury or before a judge in a preliminary hearing showing that there is a sufficient legal basis (i.e.- probable cause) for the charges.

9. In the months preceding the ratification vote on the amendment, Defendant Carlisle actively campaigned in his official capacity for passage of the amendment.

10. Defendant Carlisle authorized the use of at least \$2,404.27 of taxpayer money to purchase office supplies for printing brochures urging voters to vote “yes” on Ballot Question 3.

11. Defendant Carlisle used the labor of city employees to print these brochures.

12. The brochures were donated, at the direction of Defendant Carlisle, to Victims Voice, a private political organization, which did not compensate the City for these brochures.

13. Defendant Carlisle was compensated by Victim’s Voice for his personal expenses in campaigning for passage of the amendment, including expenses as small as \$4.16 for envelopes.

14. Defendant Carlisle campaigned for passage of the amendment, attended speaking engagements where he advocated for the amendment, and waived signs instructing voters to “vote yes” to Ballot Question #3, all during business hours. Defendant Carlisle was compensated by the City for the time that he spent campaigning during business hours.

15. Defendant Carlisle encouraged, intimidated, or otherwise induced his employees to campaign in favor of the amendment, attend speaking engagements where they advocated for passage of the amendment, or waive signs instructing voters to “vote yes” to Ballot Question #3, all during business hours. These individuals were compensated by the City for the time that they spent campaigning during business hours.

16. Defendant Carlisle encouraged, intimidated, or otherwise induced Deputy prosecutors under his supervision to pass out brochures to grand jury members urging them to “vote yes” to the amendment. Deputy prosecutors suggested to grand jury members that grand jury duty would no longer be necessary if the amendment allowing direct charging passed.

17. Defendant Carlisle also used the taxpayer supported website of the Office of the Prosecuting Attorney to post materials arguing in favor of the amendment and to encourage voters to vote “yes” on Ballot Question 3.

18. Defendant Carlisle used public employees to design and post the campaign materials on the website, and to maintain the website thereafter, at taxpayer expense.

19. In October 2002, Public Defender Jack Tonaki approached the State of Hawaii Attorney General’s Office regarding clearance to similarly use government facilities, equipment, and taxpayer money to advocate *against* passage of the proposed amendment.

20. In a letter to the Public Defender on October 24, 2002, Assistant Attorney General Thomas Keller instructed Mr. Tonaki that public agencies could not lawfully use any public time or resources to advocate for a particular outcome in an election.

21. The October 24, 2002 letter instructed the Public Defender that: “Official communications paid for with public funds or presented on public time should not include words such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot,’ ‘vote against,’ ‘defeat,’ ‘reject,’ or other equivalent language.”

22. The Public Defender’s Office heeded the instruction of the Attorney General’s Office and did not use public resources to advocate to voters for passage of the amendment.

23. Defendant Carlisle did not seek approval from the Attorney General’s Office to use public money, time, and materials to advocate for passage of the amendment.

24. Defendant Carlisle knowingly and intentionally disregarded the advice of the Hawaii State Ethics Commission that he should seek clearance from the Attorney General’s Office prior to using public money, time, and materials to advocate for passage of the amendment.

25. Defendant Carlisle continued to use public money, time, and materials to advocate for passage of the amendment, even after the Attorney General's letter to the Public Defender prohibiting such use was known to Defendant Carlisle and made public in newspaper articles.

26. On October 30, 2002, Plaintiff Rees sent a letter to the Assistant Attorney General Thomas Keller asking that he investigate Defendant Carlisle's illegal use of public money, time, and materials to advocate for passage of the amendment.

27. Assistant Attorney General Thomas Keller did not respond to Rees's letter of October 30, 2002

28. Use of taxpayer money and resources to campaign for a particular outcome in an election did not serve a public purpose, but served Defendant Carlisle's purpose in promoting his personal opinion as to the appropriateness of the amendment, which would expand his own power as prosecutor.

29. Revised Ordinances of Honolulu § 3-8.6 provides in part that an exempt officer or employee shall not:

Coerce, demand, or otherwise require a campaign contribution or campaign assistance from another officer or employee. ROH § 3-8.6(c)(1)

Request another officer or employee to provide a specified or minimum amount of campaign assistance. ROH § 3-8.6(c)(7)

Solicit or receive any campaign contribution from a person, including another officer or employee, in a building or facility during its use for official city functions. ROH § 3-8.6(c)(1)

30. An exempt officer or employee also may not request or direct another exempt officer or employee to engage in any of the above activities.

31. Defendant Carlisle is an exempt officer of the City and County of Honolulu and is subjected to the provisions of ROH § 3-8.6.

32. "Campaign assistance" is defined by ROH § 3-8.6 to include "any service, including donating time or anything of value," "to assist the effort to approve or reject a question which is on an election ballot." ROH § 3-8.6 (b)(2)(B).

33. The actions of Defendant Carlisle violated Revised Ordinances of Honolulu § 3-8.6.

34. ROH § 3-8.5 provides that a public official who violates ROH § 3-8.6 is guilty of a petty misdemeanor and commits an impeachable offence.

35. While the prosecuting attorney is generally responsible for prosecutions under ROH § 3-8.6, the ordinance provides that: "If the prosecuting attorney becomes disqualified, the state attorney general shall have the responsibility for prosecution."

36. On February 1, 2003, Plaintiff Rees sent a letter to Attorney General Mark Bennett, again asking that the Attorney General's Office investigate Defendant Carlisle's illegal use of public money, time, and materials to campaign for passage of the amendment.

37. Attorney General Mark Bennett failed to respond to Rees's February 1, 2003 letter.

38. In response to a follow-up letter sent by the American Civil Liberties Union on February 18, 2003, on behalf of Plaintiff Rees, Attorney General Mark Bennett indicated that his office would not take any action to hold Defendant Carlisle responsible for the misuse of public resources and time to illegally campaign for passage of the amendment.

39. In addition to criminal penalties and impeachment, ROH § 3-8.5 provides that the city, by the corporation counsel, may recover any fee, compensation, gift or profit received by any person as a result of a violation of ROH § 3-8.6.

40. Corporation Counsel David Arakawa has not responded to a letter dated February 18, 2003, requesting that he respond within ten days as to whether he intends to fulfil his responsibility to recover the value of the taxpayer resources illegal used by Defendant Carlisle to campaign for passage of the amendment.

41. Other than through this taxpayer's action, taxpayers are unlikely to recoup the value of city resources and services illegally used by Defendant Carlisle to campaign in violation of the laws of the City and County of Honolulu and the State and Federal Constitutions.

IV. Legal Claims

Count I –Free Speech

Hawaii State Constitution, Article I, § 4; United States Constitution First Amendment, 42 U.S.C. § 1983

42. Plaintiff realleges and incorporates by reference as if fully set forth herein the allegations set forth above.

43. Defendant Carlisle's use of government resources to advocate for passage of the proposed amendment violated the free speech rights of citizens and taxpayers who have contrary views, and constituted forced speech in violation of Hawaii State Constitution, Article I, § 4; and the United States Constitution First Amendment, actionable pursuant to 42 U.S.C. § 1983.

Count II – Elections-Fundamental Fairness; Due Process
Hawaii State Constitution, Article I. § 5; United States Constitution Fourteenth
Amendment, 42 U.S.C. § 1983

44. Plaintiff realleges and incorporates by reference as if fully set forth herein the allegations set forth above.

45. Defendant Carlisle’s use of public resources and time to advocate for a particular outcome in the election compromised the bedrock principle of government neutrality in elections.

46. Defendant Carlisle’s placing of government resources in support of one side over another in the election compromised the right of all citizens to a free and fair election.

47. Defendants Carlisle’s use of public resources to campaign for passage of the amendment infringed upon fundamental voting rights in violation of the Hawaii State Constitution, Article I. § 5, and the United States Constitution Fourteenth Amendment, which is actionable pursuant to 42 U.S.C. § 1983.

Count III- Common Law Qui Tam

48. Plaintiff realleges and incorporates by reference as if fully set forth herein the allegations set forth above.

49. Defendant Carlisle’s use of public resources to campaign for passage of the ballot question authorizing prosecution by written information violated Articles I, §§ 4 and 5 of the Hawaii State Constitution, the First and Fourteenth Amendments of United States Constitution, and ROH § 8.6, which explicitly prohibits use of public resources and employees to provide campaign assistance.

50. Defendant Carlisle's use of public resources and employees to campaign for passage of a ballot question also exceeded any authority granted to the Prosecuting Attorney by the City Charter, or any other applicable law.

51. Plaintiff has made demands upon the State and City officials primarily responsible for recouping the value of taxpayer resources illegally used by Defendant Carlisle, and these officials have declined to take any action to carry out their responsibilities.

52. Under such circumstances at common law, Plaintiff is authorized to seek relief on behalf of taxpayers and demand compensation payable to the City for the public money and resources illegally used by Defendant Carlisle, and hereby seeks such relief of behalf of the taxpayers of the City and County of Honolulu.

Count IV-Declaratory Action
H.R.S. § 632-1

53. Plaintiff realleges and incorporates by reference as if fully set forth herein the allegations set forth above.

54. As detailed above, Plaintiff contends that Defendant Carlisle's use of public resources to campaign for passage of the ballot question authorizing prosecution by written information violated Articles I, §§ 4 and 5 of the Hawaii State Constitution, the First and Fourteenth Amendments of United States Constitution, and ROH § 8.6, which explicitly prohibits use of public resources and employees to provide campaign assistance.

55. Defendant Carlisle has publicly denied that his use of public resources was a violation of Articles I, §§ 4 and 5 of the Hawaii State Constitution, the First and Fourteenth Amendments of United States Constitution, and ROH § 8.6, and claims that he is authorized by H.R.S. § 28-10.6 to use public resources to advocate to voters on ballot questions.

56. Plaintiff contends that while H.R.S. § 28-10.6 authorizes the *Attorney General* to make recommendations regarding crime prevention and the criminal justice system to the governor, the legislature, criminal justice agencies, and the general public, it does not grant the Attorney General the power to use public resources to tell voters how they should vote on a ballot question to amend the State Constitution, nor could H.R.S. § 28-10.6 constitutionally grant such authority.

57. Moreover, plaintiff contends even if the Attorney General has been granted authority by the legislature to use public resources to campaign on ballot questions, H.R.S. § 28-10.6 does not grant the county prosecutor this power. Rather, H.R.S. § 28-10.6 authorizes the Attorney General to perform a number of functions, such as creating government agency study teams and establishing trust funds or accounts, clearly not within the authority of the county prosecutor.

58. There is an actual controversy between the parties as to the legality of Defendant Carlisle's use of public resources to campaign in a general election for passage of an amendment to the State Constitution and declaratory relief is thus appropriate under H.R.S. § 632-1.

THEREFORE THE PLAINTIFFS REQUEST THE FOLLOWING RELIEF:

A. A declaratory judgment pursuant to H.R.S. § 632-1 that Defendant Carlisle's use of taxpayer funds to advocate for a particular outcome in the election was improper and in violation of the Hawaii State Constitution, Article I, § 4 and the First Amendment to the United States Constitution.

B. A declaratory judgment pursuant to H.R.S. § 632-1 that Defendant Carlisle's use of taxpayer funds to advocate for a particular outcome in the election infringed upon

fundamental voting rights in violation of the Hawaii State Constitution, Article I, § 5 and the Fourteenth Amendment to the United States Constitution.

C. A declaratory judgment pursuant to H.R.S. § 632-1 that Defendant Carlisle's use of taxpayer funds and resources to advocate for a particular outcome in the election violated ROH § 8.6.

D. An injunction ordering Defendant Carlisle to compensate the City for all taxpayer resources used by Defendant Carlisle and/or the Office of Prosecuting Attorney to promote passage of the amendment.

E. An injunction ordering Defendant Carlisle to compensate the City for the portion of the salaries paid to employees of the Office of Prosecuting Attorney for time spent campaigning for passage of the amendment.

F. An injunction prohibiting Defendant Carlisle from campaigning, or requesting that city employees provide campaign assistance, on City time or using taxpayer funds to campaign on ballot questions in the future, including any future ballot question relating to information charging.

G. An award of plaintiffs' costs of suit and reasonable attorneys' fees; and

H. Such other relief as the court deems justified, appropriate, and necessary in the interests of justice.

DATED: Honolulu, Hawaii, May 21, 2003.

BRENT T. WHITE
Attorney for Plaintiff

