

AMERICAN CIVIL LIBERTIES UNION  
OF HAWAII FOUNDATION

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**UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF HAWAII**

THE CENTER, a non-profit organization,  
by and through KEN MILLER, acting on  
his own behalf and on behalf of members  
of the organization; and CARLOS  
HERNANDEZ, an individual,

Plaintiffs,

v.

LINDA LINGLE, in her official capacity  
as Governor of the State of Hawaii; and  
MARK J. BENNETT, in his official  
capacity as the Attorney General of the  
State of Hawaii,

Defendants.

CIVIL NO. \_\_\_\_\_

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF;  
SUMMONS**

**I. INTRODUCTION**

1. A new Hawaii law is being used to deprive Hawaii's residents of their fundamental constitutional rights. This statute, H.R.S. § 708-814, which

was amended by Act 50 of 2004 (hereinafter referred to as “§ 708-814” or “the statute”), allows any police officer or authorized person to ban an individual from *public* property based on nothing more than the officer’s or person’s prejudices and predilections. Under the statute, a person need not engage in any misconduct to be banned from public property. Rather, it is enough that the police officer or authorized person finds the individual to be unsavory or disagrees with the content or message of the individual’s speech or activity. The statute subjects Hawaii’s residents and visitors to discrimination and to a panoply of other constitutional violations. The statute is patently unconstitutional and must be stricken.

2. This is an action for declaratory and permanent injunctive relief to enjoin the enforcement of H.R.S. § 708-814 as presently enacted and to declare the statute unconstitutional on its face. This action also seeks a declaration that the statute is unconstitutional as applied to Plaintiff Hernandez and to Plaintiff The Center. Act 50, which was signed into law on May 4, 2004, amended H.R.S. § 708-814 to allow any police officer or other authorized individual to issue a written trespass warning statement that bans an individual from any public property for a period of up to one year from the date of the notice. H.R.S. § 708-814(1)(b)(i). Under the statute, once someone has received a trespass warning, if he or she returns to that public property within the bar time, he or she

may be arrested and subjected to prosecution for criminal trespass in the second degree, a misdemeanor. H.R.S. § 708-814(1)(b)(i).

3. The statute allows a police officer or authorized person to ban someone from public property for a period of up to one year simply by issuing a “warning statement advising the person that the person’s presence is no longer desired on the property . . . .” H.R.S. § 708-814(1)(b)(i). An authorized person under the statute includes owners, lessees and their authorized agents. The statute fails to define what conduct would justify a one-year ban and fails to provide any criteria for individuals to determine what conduct is permitted as opposed to prohibited on public property. Rather, the decision to ban an individual from a public place rests entirely on the discretion of the authorized individual who issues the trespass notice.

4. The statute applies to Hawaii’s sidewalks, streets, beaches, highways, libraries, courthouses, government offices and other public property without limitation. Indeed, the statute is completely devoid of any substantive standards at all. The absence of any standards for determining when speech and conduct will be allowed and when they will be prohibited renders the statute a classic, standardless law in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 5 of the Hawaii Constitution.

5. Furthermore, the statute fails to provide any procedure (judicial or otherwise) by which an individual may challenge or seek review of a trespass warning once given. The lack of procedural protections constitutes a violation of the Due Process Clause of the Fourteenth Amendment and of Article I, Section 5 of the Hawaii Constitution.

6. The only limitation in § 708-814 is its inapplicability to conduct or activities that are subject to regulation by the National Labor Relations Act. H.R.S. § 708-814(1)(b). The statute's facial content and subject matter distinction also violates the First and Fourteenth Amendments of the United States Constitution and Article I, Sections 4 and 5 of the Hawaii Constitution.

7. The statute contains no limitations that exclude from its reach individuals who are legally asserting their First Amendment rights of free speech and free association. It permits the defendants (and others acting in concert with them or pursuant to their authority), the police and other authorized persons to exclude people from public property for exercising their constitutional right to free speech because the defendants disagree with the content of the speech or the viewpoint of the speaker. The statute thus creates an unacceptable risk of application to a substantial amount of protected conduct and is unconstitutionally overbroad.

8. The statute also limits the public spaces that the public may access without fear of criminal prosecution. The statute thus improperly infringes on Plaintiffs' and the public's fundamental right to move from place to place, to walk freely on city streets and to stand under open sky as protected by substantive due process guarantees and by Article I, Section 2 of the Hawaii Constitution.

## **II. JURISDICTION AND VENUE**

9. This Court has jurisdiction over the federal constitutional and statutory claims pursuant to 28 U.S.C. § 1331.

10. 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.

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

12. This Court may exercise supplemental jurisdiction over the state constitutional claims pursuant to 28 U.S.C. § 1367(a).

13. Venue properly lies before this Court under 28 U.S.C. § 1391(b). Defendants all reside in this district and the act or omissions giving rise to Plaintiffs' claims have occurred or will occur in this district.

### **III. PARTIES**

14. Plaintiff The Center is a nonprofit organization based in Hawaii that provides services and programs to the local lesbian, gay, bisexual, transexual, intersex and questioning (“LGBTIQ”) communities and attempts to create bridges to the community-at-large. The Center is dedicated to providing inter-island coordination and a variety of programs. The Center also advocates full equality for the LGBTIQ communities of Hawaii. The Center brings this action by and through its Executive Director and member Ken Miller, who is a resident of the State of Hawaii. The Center sues on its own behalf and on behalf of its members.

15. Plaintiff Carlos Hernandez is a natural person, a citizen of the United States and a resident and taxpayer of the State of Hawaii.

16. Defendant Linda Lingle is a resident of and the Governor of the State of Hawaii. Defendant Linda Lingle is the chief executive officer of the State of Hawaii. She is sued in her official capacity only.

17. Defendant Mark J. Bennett is a resident of and the Attorney General of the State of Hawaii. Defendant Mark J. Bennett is the chief legal officer of the State of Hawaii, and as such, has the ultimate responsibility for enforcement (or preventing enforcement) of penal laws of statewide application, including the statute. He is sued in his official capacity only.

#### **IV. FACTUAL ALLEGATIONS**

##### **A. The Statute**

18. On May 1, 2004, Governor Lingle, one of the defendants, signed Act 50 into law. Act 50 amended H.R.S. § 708-814 to apply the offense of criminal trespass in the second degree, a petty misdemeanor, to persons who enter or remain unlawfully on any public or private property after a reasonable warning or request to leave has been given by a police officer or any authorized person.

19. The term “reasonable warning” is not defined in H.R.S. § 708-814 other than to require that the warning be given in writing “within a one-year period inclusive of the date the incident occurred.” H.R.S. § 708-814(1)(b). The term “incident” is not defined in the statute.

20. The term “public property” is not defined in the statute either. Public property thus necessarily includes sidewalks, streets, beaches, highways, libraries, courthouses, government offices and other publicly owned property.

21. Rather, the statute provides only that the “reasonable warning” may (but is not required to) contain the following information: “(i) A warning statement advising the person that the person’s presence is no longer desired on the property for a period of one year from the date of the notice, that a violation of the warning will subject the person to arrest and prosecution for trespassing

pursuant to section 708-814(1)(b), and that criminal trespass in the second degree is a petty misdemeanor; (ii) The legal name, any aliases, and a photograph, if practicable, or a physical description, including but not limited to sex, racial extraction, age, height, weight, hair color, eye color, or any other distinguishing characteristics, of the person warned; (iii) The name of the person giving the warning along with the date and time the warning was given; and (iv) The signature of the person giving the warning, the signature of a witness or police officer who was present when the warning was given and, if possible, the signature of the violator.” H.R.S. § 708-814(1)(b).

22. Once a “reasonable warning” is given pursuant to the statute, the individual has no avenue to challenge or otherwise appeal the ban. If the individual returns to the public property from which he or she has been banned within the ban period, he or she may be subjected to prosecution for criminal trespass in the second degree.

23. The statute also provides that it “shall not apply to any conduct or activity subject to regulation by the National Labor Relations Act.” H.R.S. § 708-814(1)(b). The statute is thus not content or subject matter neutral.



**B. Use of The Statute to Ban Individuals From Public Property**

24. According to the legislative history (S.B. 2294), Act 50 of 2004 was originally proposed in the Hawaii legislature to address perceived problems of squatters living on public beaches. On information and belief, since the statute became law, police officers and other authorized persons have used it to ban members of the homeless population from public beaches and public parks for a period of time up to one-year. On information and belief, since the statute became law, police officers have issued trespass citations to individuals who have returned to the public property from which they were banned during the ban period.

25. In addition, on information and belief, police officers and other authorized persons have used the statute as a threat — warning members of the homeless population that if they do not immediately vacate the public property then the officer or agent will issue a written warning banning them from the public property for a one-year period.

26. The enforcement of the statute has not been limited to the homeless population, however. For example, the statute has been used on at least two occasions to ban individuals from the Hawaii State Library, 478 S. King Street, Honolulu, Hawaii, 96813, for a one-year period.

27. Plaintiff Carlos Hernandez frequently used the Hawaii State Library to access the Internet for informational and communicative purposes.

28. On or about May 18, 2004, Plaintiff Hernandez used one of the computers at the Hawaii State Library to access the Internet. On that date, Plaintiff Hernandez was issued a written trespass warning by one of the Hawaii State Library's security guards because the security guard did not approve of the chat room that Mr. Hernandez had accessed.

29. On information and belief, the Hawaii State Library contracts with Burns Security International to provide security at the facility. As such the security guard is an authorized agent of the Hawaii State Library and was at all times acting under color of state law. Plaintiff Hernandez now cannot return to Hawaii State Library until May 18, 2005, or he risks prosecution for criminal trespass under the provisions of the statute.

30. The stated reason for Plaintiff Hernandez's ban from the Hawaii State Library is "Pornagraph [sic] Site. Chat room." The website that Mr. Hernandez accessed, [www.gayhawaii.com](http://www.gayhawaii.com) is not pornographic, but rather is a community resource for the LGBTIQ community in Hawaii; the chat room that he was accessing is a text-based method of communicating with others of the LGBTIQ community.

31. Plaintiff Hernandez was not causing a disturbance of any kind at the Hawaii State Library at the time he received the written trespass warning. Instead, the security guard used his personal discretion to ban Plaintiff Hernandez from public property, while Plaintiff was engaged in protected free speech activities.

32. During the last two weeks of May 2004, Plaintiff Hernandez and at least one other individual contacted Plaintiff The Center to complain about the trespass warnings given at the Hawaii State Public Library and the fact that the individuals were banned from the Library for a one-year period.

33. On or about May 27, 2004, Ken Miller, Executive Director and a member of The Center, spoke to Marya B. Zoller, Head of Library Operations at the Hawaii State Library. During that meeting Mr. Miller asked Ms. Zoller to inquire into the basis for banning at least two individuals from the Hawaii State Library pursuant to the statute.

34. The next week, Ms. Zoller telephoned Mr. Miller and explained that the individuals were banned for accessing gay-related websites. Ms. Zoller commented that the security guard who had issued the trespass warnings did so because the websites contained photos of men without shirts. Ms. Zoller also stated that although she believed the security guard was being too harsh, there was “nothing that she could do” about the trespass warnings or the ban.

35. In view of the complaints received by The Center, its members, including Ken Miller, are hesitant to access any gay related materials at the Hawaii State Library. Mr. Miller has also begun warning members of The Center and of the public of the risks associated with accessing gay-related materials at the Hawaii State Library. The statute is thus chilling the exercise of constitutionally protected speech.

36. In addition, one of the services offered by The Center is the provision of Internet access and educational materials. The Center cannot provide Internet access to all of its members and all others interested in The Center's subject matter. If members are banned from the State's libraries, The Center will be overwhelmed with a demand for services that it cannot meet.

37. Because the statute contains no standards or procedures, it permits any police officer or authorized person to ban an individual from public property for up to one year because that person is engaged in activity protected by the First Amendment. Thus, under the statute, a lifeguard can ban someone from a beach for carrying a paper sign protesting pollution of the waters. The lifeguard can do so even while allowing another individual to carry a sign favoring the industry or agency engaged in the pollution.

38. Because the statute contains no standards or procedures, it permits any police officer or authorized person to ban an individual from public property

for up to one year because the officer or authorized person wants to prevent the individual from exercising the constitutional right of access to the courts. Thus, under the statute, the defendant Governor can ban the Plaintiffs in this case from the courthouse to prevent the filing of this case.

39. Because the statute contains no standards or procedures, it permits any police officer or authorized person to ban an individual from public property because the officer or authorized person wants to prevent the individual from exercising the constitutional right to vote. The defendants can ban all Democrats from schools, post offices and other facilities set up for voting in state and national elections.

40. Because the statute contains no standards or procedures, it permits any police officer or authorized person to discriminate on the basis of race, sex, religion, national origin or other protected bases. Thus, under the statute, defendants could bar all Native Hawaiians from the grounds of the State Capitol.

41. In short, the lack of standards and procedures allows any police officer or authorized person to use the statute to deny people a large number of unquestionably constitutionally protected rights including the right to free speech, the right to assembly, the right to petition for redress of grievances, the right of association, the right to vote, the right to access to the courts, the right to

travel and the right not to be discriminated against on the basis of race, sex, religion, national origin or other protected bases.

42. Each of these actions (as set forth in paragraphs 37-41 of this Complaint), as applied in a particular case, would likely violate a separate provision of the United States and/or Hawaii Constitutions. The facial vagueness and overbreadth of the statute permit each of these applications.

#### **V. DECLARATORY AND INJUNCTIVE RELIEF**

43. For reasons including those stated in this Complaint, an actual and immediate controversy has arisen and now exists between Plaintiffs and defendants, which parties have genuine and opposing interests and which interests are direct and substantial. The statute fails to comply with provisions of the United States and Hawaii Constitutions for at least the reasons set forth in this Complaint. Plaintiffs are, thus, entitled to a declaratory judgment as well as such other and further relief as may follow from the entry of such a declaratory judgment.

44. Plaintiffs have no adequate remedy at law. Unless enjoined by the Court, police officers and other authorized persons will continue to infringe Plaintiffs' and the public's constitutionally protected rights and thereby cause irreparable injury. This threat of injury to Plaintiffs and the public from continuing violations requires permanent injunctive relief.

## **FIRST CAUSE OF ACTION**

### ***Void for Vagueness in Violation of the Fourteenth Amendment of the U.S. Constitution, Actionable Pursuant to 42 U.S.C. § 1983, and Article I, Section 5 of the Hawaii Constitution***

45. Plaintiffs reallege and incorporate by reference as though fully contained herein, the allegations set forth in Paragraphs 1 through 44, above.

46. The statute is unconstitutionally vague because it fails to adequately define with sufficient clarity what conduct is permissible as opposed to prohibited on public property such that ordinary citizens are able to conform their conduct accordingly and/or because it authorizes and even encourages arbitrary and discriminatory enforcement.

47. The statute also violates the requirement that a legislature establish minimal guidelines to govern law enforcement. Because the law vests absolute discretion to police officers and any authorized person to issue a trespass warning banning an individual from public property for a period of up to one year, the statute fails to meet constitutional standards for definitiveness and clarity.

## **SECOND CAUSE OF ACTION**

### ***Lack of Procedures in Violation of the Fourteenth Amendment of the U.S. Constitution, Actionable Pursuant to 42 U.S.C. § 1983, and Article I, Section 5 of the Hawaii Constitution***

48. Plaintiffs reallege and incorporate by reference as though fully contained herein, the allegations set forth in Paragraphs 1 through 47, above.

49. The statute is devoid of any procedures to challenge a trespass warning once given. An individual banned cannot return to the public property during the ban period without risking prosecution for criminal trespass.

50. Defendants (and those acting in concert with them or pursuant to their authority) in enforcing the statute deprive individuals of their liberty interests and of their right to engage in a host constitutionally protected activities. The lack of procedural protections in the statute constitutes a violation of the Due Process Clause of the Fourteenth Amendment and of Article I, Section 5 of the Hawaii Constitution.

## **THIRD CAUSE OF ACTION**

### ***Overbroad in Violation of the First and Fourteenth Amendments of the U.S. Constitution, Actionable Pursuant to 42 U.S.C. § 1983, and Article I, Section 4 of the Hawaii Constitution***

51. Plaintiffs reallege and incorporate by reference as though fully contained herein, the allegations set forth in Paragraphs 1 through 50, above.



52. The statute punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep. The statute does not have a limiting construction or partial invalidation that narrows it so as to remove this threat or deterrence to constitutionally protected expression.

53. The application of the statute to protected speech is substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications. The statute is overbroad because its sanctions may apply to constitutionally protected conduct including the exercise of free speech, free expression and assembly.

#### **FOURTH CAUSE OF ACTION**

##### ***Violation of the First and Fourteenth Amendments of the U.S. Constitution, Actionable Pursuant to 42 U.S.C. § 1983, and Article I, Sections 4 and 5 of the Hawaii Constitution***

54. Plaintiffs reallege and incorporate by reference as though fully contained herein, the allegations set forth in Paragraphs 1 through 53, above.

55. The statute provides that it "shall not apply to any conduct or activity subject to regulation by the National Labor Relations Act." H.R.S. § 708-814(1)(b). Exempting conduct and activity that is subject to regulation by the National Labor Relations Act is an impermissible content and subject matter distinction. The statute singles out union related conduct for favorable treatment

and denies similar treatment to all other constitutionally protected speech and conduct.

56. The statute, on its face, violates the First and Fourteenth Amendments of the United States Constitution and Article I, Sections 4 and 5 of the Hawaii Constitution because it is not content or subject matter neutral and is not narrowly tailored to serve a substantial government interest.

### **FIFTH CAUSE OF ACTION**

#### ***Violation of the Fourteenth Amendment of the U.S. Constitution, Actionable Pursuant to 42 U.S.C. § 1983, and Article I, Section 2 of the Hawaii Constitution***

57. Plaintiffs reallege and incorporate by reference as though fully contained herein, the allegations set forth in Paragraphs 1 through 56, above.

58. Statutes that authorize limitation of the public's access to Hawaii's sidewalks, beaches, libraries, courthouses, government offices and other publicly owned places are whittling away at those remaining parts of our State that the public may freely enjoy. The liberty of our residents and visitors is increasingly infringed as the places in which they are allowed to travel are hedged and bordered by the growing number of public spaces that they cannot access for fear of criminal prosecution.

59. The right to move freely, as guaranteed by substantive due process and by Article I, Section 2 of the Hawaii Constitution, is a crucial part of our

liberty and is constitutionally protected. The statute impermissibly infringes upon plaintiffs' and the public's fundamental right to move from place to place, to walk freely on city streets, to stand under open sky and to enjoy the public beaches.

### **SIXTH CAUSE OF ACTION**

#### ***The Statute As Applied Violates the First and Fourteenth Amendments of the U.S. Constitution, Actionable Pursuant to 42 U.S.C. § 1983, and Article I, Sections 4 and 5 of the Hawaii Constitution***

60. Plaintiffs reallege and incorporate by reference as though fully contained herein, the allegations set forth in Paragraphs 1 through 59, above.

61. The statute allows police officers and other authorized agents to effectively censor speech and expression by banning individuals with whom they disagree from public property. Plaintiff Hernandez's right to free speech and expression, guaranteed by the First and Fourteenth Amendments of the United States Constitution and Article I, Sections 4 and 5 of the Hawaii Constitution, were violated when he was banned from the Hawaii State Library for accessing gay-related materials on the Internet.

62. Plaintiff Hernandez was banned from the Hawaii State Library based on disagreement with the content of his speech. Hernandez's speech did not cause any disruption of normal library activities or interfere in any manner with the function of Hawaii State Library.

63. In view of the acts performed pursuant to the statute, The Center and its members, including Ken Miller, are hesitant to access any gay related materials at the Hawaii State Library. Mr. Miller has also begun warning members of The Center and of the public of the risks associated with accessing gay-related materials at the Hawaii State Library. The statute is thus chilling the exercise of constitutionally protected speech.

**WHEREFORE, plaintiffs pray for the following relief:**

(a) A judgment declaring that § 708-814, violates the Constitution and laws of the United States and the Constitution and laws of the State of Hawaii on its face;

(b) A judgment declaring that § 708-814, violates the Constitution and laws of the United States and the Constitution and laws of the State of Hawaii as applied to Plaintiffs;

(c) A preliminary and permanent injunction enjoining defendants (and their 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 defendants or pursuant to defendants' authority) from continuing to enforce § 708-814, as presently enacted;

(d) An award of 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; and

(e) Such other relief as this Court deems just and proper.

**Dated:** Honolulu, Hawaii, September 7, 2004.

Respectfully submitted,

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LOIS K. PERRIN  
ACLU of Hawaii Foundation

*Attorney for Plaintiffs*