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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,

CIV. NO. 14-00102 JMS-BMK

[CIVIL RIGHTS ACTION]

MOTION FOR TEMPORARY RESTRAINING ORDER AND LOCAL RULE 10.2(g) STATEMENT; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF NELDON

Defendant.	**MAMUAD & EXHIBITS 1-7; DECLARATION OF MARCUS LANDSBERG & EXHIBITS 1-3; DECLARATION OF DANIEL GLUCK & EXHIBITS 1-11; CERTIFICATE OF SERVICE** HEARING DATE: To be set TIME: To be set JUDGE: To be set

MOTION FOR TEMPORARY RESTRAINING ORDER AND LOCAL RULE 10.2(g) STATEMENT

Plaintiff Neldon Mamuad, by and through his attorneys, hereby moves this Honorable Court for a temporary restraining order prohibiting Defendant from interfering with Plaintiff's right to speak freely, as guaranteed by the First Amendment to the United States Constitution. Defendant's ongoing and persistent violations of Plaintiff's constitutional rights have caused, and continue to cause, irreparable injury to Plaintiff.

As an immediate remedy and to maintain the status quo while more permanent solutions can be considered, Plaintiff asks that the Court order Defendant to cease interfering with Plaintiff's right to speak freely.

Additionally, Defendant County has ordered Plaintiff to submit to "[m]andatory enrollment and attendance in a County of Maui sponsored Employee

Assistance Program," as well as "[e]nrollment and attendance in a County of Maui training on the Violence in the Workplace Action Plan conducted by the Department of Personnel Services," no later than April 21, 2014, and the County has threatened further disciplinary action against Plaintiff if he does not comply with these directives. As such, Plaintiff respectfully requests an order from this Court prohibiting Defendant from compelling Plaintiff's attendance at those sessions (and/or threatening him with further discipline for failing to attend).

As an immediate remedy and to maintain the status quo while more permanent solutions can be considered, Plaintiff asks that the Court:

1. Prohibit Defendant from disciplining (or threatening to discipline) Plaintiff for exercising his right to speak freely;
2. Prohibit Defendant from disciplining (or threatening to discipline) Plaintiff for refusing to enroll in and attend a County of Maui sponsored Employee Assistance Program and/or a training on the County of Maui Violence in the Workplace Action Plan.

Due to the immediate irreparable harm currently being suffered by the Plaintiff, Plaintiff asks that the temporary injunction issue immediately and remain in force until Defendant remedies its constitutional violations.

This Motion is brought pursuant to Rules 7 and 65 of the Federal Rules of Civil Procedure and Local Rule 7.2 for the District Court for the District of

Hawaii. This Motion is supported by the attached Memorandum, the declarations and exhibits thereto, the records and files in this action, and any additional submissions and oral argument that may be considered by the Court upon any hearing of this Motion.

LOCAL RULE 10.2(g) STATEMENT

At the time Plaintiff filed the Complaint in the instant case, Counsel for the Plaintiff did not anticipate that a Motion for Temporary Restraining Order would be filed in this case (let alone that it would be filed within twenty-eight days of the filing of the Complaint).

The Complaint in the instant case was filed on March 3, 2014; a Motion for Preliminary Injunction ("Plaintiff's Motion") was filed on March 4. Prior to filing the Complaint and the Motion for Preliminary Injunction, Plaintiff and his counsel believed Plaintiff's Motion would be heard in the normal course, such that a motion for temporary restraining order would be unnecessary. However, it has become apparent in the last week that this is not feasible.

As explained more fully in the Declaration of Daniel Gluck (March 13, 2014, attached to the instant Motion) ¶¶ 16-20, Defendant County intends to retain special counsel to defend the instant case, but the County will not have approval from the County Council to retain special counsel until March 25 or 27 at the earliest. According to the Department of the Corporation Counsel, special counsel

will be making litigation decisions in this case, such that Defendant County will not take any substantive positions until special counsel is retained and familiar with the case. Consequently, our understanding is that Defendant County will not be able to respond to Plaintiff's Motion in the immediate future (nor will Defendant County agree to any interim measures pending the retention of special counsel), nor will the County be able to participate meaningfully in a status conference, such that Plaintiff has no recourse but to seek immediate relief.

DATED: Honolulu, Hawai'i, March 13, 2014.

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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] **MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER; CERTIFICATE OF WORD COUNT**

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Plaintiff Neldon Mamuad has engaged in speech on matters of public concern by posting comments and questions on the internet regarding the Maui Police Department, the use of police resources, and the methods used by one particular police officer in enforcing the law. Although Plaintiff Mamuad is employed by (and is a volunteer Liquor Commissioner for) Defendant Maui County, Plaintiff Mamuad was, at all times, speaking as a private citizen. Plaintiff's speech was completely "protected" speech – that is, none of his speech constituted a true threat, fighting words, or any other category of speech that falls outside the First Amendment.

Defendant County, apparently upset by the content and/or viewpoint of Plaintiff's speech, has punished Plaintiff for his past speech and has ordered Plaintiff to refrain from speaking into the future. These actions have chilled (and continue to chill) his speech, and are thus causing Plaintiff irreparable harm.

The Supreme Court and the Ninth Circuit have repeatedly held that the First Amendment prohibits Defendant County from doing precisely what it did in the instant case: punishing the Plaintiff for his past speech, and prohibiting him from future protected speech, where Plaintiff spoke as a private citizen (rather than as an employee) on matters of public concern.

Plaintiff respectfully requests an order preserving the status quo before this dispute arose – removing both the immediate threat of sanctions and the order prohibiting him from speaking into the future – pending a hearing on Plaintiff's Motion for Preliminary Injunction (filed on March 4, 2014).

Plaintiff respectfully requests an order from this Court prior to April 21. Defendant County has ordered Plaintiff to submit to "[m]andatory enrollment and attendance in a County of Maui sponsored Employee Assistance Program," as well as "[e]nrollment and attendance in a County of Maui training on the Violence in the Workplace Action Plan conducted by the Department of Personnel Services," no later than April 21, 2014, and the County has threatened further disciplinary action against Plaintiff if he does not comply with these directives.

II. STATEMENT OF FACTS

A. Plaintiff Mamuad and the Creation of TAGUMAWatch

Plaintiff Mamuad currently holds two positions with Maui County: he is a volunteer Liquor Commissioner (a position he has held since March 2012), and he works approximately ten to fifteen hours a week as an aide to a County Council Member (a position he has held since January 2013 and for which he is paid hourly). Declaration of Neldon Mamuad ("Mamuad Decl.") ¶¶ 3-4. He does not have regular hours in any County building, but works a flexible schedule – nearly all of which is done from home or otherwise outside of County facilities. *Id.* ¶ 4.

From 2002 to 2007 – long before he became an officer/employee of Maui County – Plaintiff Mamuad was the host of a morning radio program. *Id.* ¶ 8. Around 2004 or 2005, he created a segment on the show called "TAGUMAWatch." *Id.* ¶ 9. "TAGUMA" referred to Maui Police Department ("MPD") Officer Keith Taguma, who has a reputation on Maui for being prolific in issuing traffic citations (and therefore "thorough" or "overzealous" in his performance of his job functions, depending on one's point of view). *Id.* ¶¶ 5-6, 39-40, and Exs. 5, 6; Declaration of Daniel Gluck ("Gluck Decl.") Exs. 8-11. This segment of the radio show was very popular – the phone lines would ring non-stop during the segement of the show, as listeners/callers would voice their opinions about Officer Taguma and his methods of law enforcement. Mamuad Decl. ¶ 10. Some callers stated that they believed Officer Taguma was doing a very good job; others had the opposite view. *Id.* ¶ 11. Plaintiff Mamuad believes that he and callers to the show had good discussions regarding the proper role of police officers and the use of police resources. *Id.*

Six years after leaving radio, Plaintiff Mamuad was reminiscing about TAGUMAWatch with friends, and he had an idea to create a Facebook Fan Page with the same name. *Id.* ¶ 12. On July 7, 2013, he created the page and posted a number of entries designed to spur conversation regarding Officer Taguma and police tactics on Maui. Mamuad Decl. ¶ 13, 38, & Ex. 4 (entries from July 7, 2013

including: (1) "Just doing his job, or power tripping? What say YOU?"; (2) a discussion of a rumor – as well as his belief that the rumor was untrue – that Officer Taguma was so ruthless he ticketed his own mother; (3) a poll, asking those who had been stopped by Officer Taguma whether Officer Taguma ticketed the individual or let the individual go with a warning; and (4) a discussion of the purpose of the page, stating that "[t]his is a forum where you can express your point of view both positive and negative as allowed by the First Amendment" and that Officer Taguma's characteristics and job performance "are what the history books were made for"). Mamuad Decl. ¶ 38 and Ex. 4.

The page quickly became very popular. Indeed, just three days after its creation, the "TAGUMAWatch" page was featured on the nightly television news. *See* Lisa Kubota, *Maui Police Officer Turns Into Social Media Star*, HAWAII NEWS NOW, July 10, 2013, http://www.hawaiinewsnow.com/story/22811250/maui-police-officer-turns-into-social-media-star (last accessed February 27, 2014). The news story reports that "Officer Keith Taguma is well-known for ticketing drivers for everything from speeding to expired parking meters" and that "he is a familiar figure out on the roads." *Id.* TAGUMAWatch garnered 6,000 Facebook "likes" by July 10, 2013 (that is, within three days of its creation). MAUIWatch, https://www.facebook.com/MAUIWatch (last accessed March 3, 2014). The page

– now known as MAUIWatch (for reasons discussed more fully *infra*) – currently has over 25,000 "likes."[1] *Id.*

TAGUMAWatch, though, was not (and is not) limited to matters involving Officer Taguma. The Facebook page provides information about traffic, missing persons and pets, shark sightings, public events, and other news targeted to Maui residents and visitors. MAUIWatch, https://www.facebook.com/MAUIWatch (last accessed March 3, 2014). The Facebook page also offers a space for readers to comment on a wide range of issues: recent topics have included civil rights in Russia during the Winter Olympics, the Super Bowl, and conspiracy theories offered by so-called "birthers" in the wake of the death of Department of Health Director Loretta Fuddy. *Id.* Furthermore, Plaintiff Mamuad is not the only administrator of the site (that is, he is not the only person who can post, edit, and delete content). Mamuad Decl. ¶ 17; Gluck Decl. Ex. 1 (Transcript of Interview of Neldon Mamuad, Oct. 16, 2013) at 24:5-24.

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[1] Based solely on the number of "likes," MAUIWatch's popularity dwarfs that of other news sites specific to Maui County, with more "likes" by far than Maui's major daily newspaper, The Maui News (fewer than 5,700, https://www.facebook.com/MauiNews, last accessed February 28, 2014), the news site Mauinow.com (fewer than 18,000, https://www.facebook.com/mauinow, last accessed February 28, 2014), the Maui Police Department (fewer than 2,500, https://www.facebook.com/pages/Maui-Police-Department/176665472380309, last accessed February 28, 2014), or the County of Maui (fewer than 4,800, https://www.facebook.com/pages/County-of-Maui/150618851661152, last accessed February 28, 2014).

Plaintiff Mamuad's work with the County and his participation in MAUIWatch do not overlap. Mamuad Decl. ¶ 18. He has never put his name anywhere on the Facebook site. *Id.* Nothing on the Facebook page has ever indicated or implied that the administrator(s) of the site has/have any sort of employment relationship with the County. *Id.* Plaintiff Mamuad has never suggested, in any way, that he was speaking on behalf of the County of Maui. *Id.* He has never purported to speak as an employee on matters relating to the internal workings of the Liquor Commission or the County Council. *Id.* He has never made any statements or done any work on the Facebook page on County time or on County equipment. *Id.* ¶ 20. Instead, Plaintiff Mamuad's speech is consistently that of an observer to Officer Taguma's actions (and the apparent policies driving those actions), a perspective that is available to every other individual on Maui and that does not arise from his position as an employee or Commissioner. *Id.* ¶ 20; MAUIWatch, https://www.facebook.com/MAUIWatch (last accessed March 3, 2014).

Indeed, until very recently, Plaintiff Mamuad took great pains to shield his identity from the general public. Mamuad Decl. ¶¶ 17-19, 23, 30-31. He wanted to speak anonymously because he "wanted it to be about Officer Taguma and the political issues we were discussing, not about me." *Id.* ¶ 19. He also wanted his speech to remain anonymous because he wanted to make sure that his speech could

not be attributed to the Council Member for whom he worked – that is, to make sure that his private activities were private. *Id.* He only revealed his involvement to the County after County officials started taking steps to suppress his speech, as set forth more fully *infra.* His involvement with MAUIWatch was not confirmed publicly until just a few weeks ago, when a miscommunication with a reporter resulted in the publication of the fact that Plaintiff created the Facebook site. *Id.* ¶ 41.

B. Defendant County's Initial Efforts to Suppress Plaintiff's Speech

Less than three weeks after its inception, Defendant County began taking steps to interfere with Plaintiff Mamuad's speech.

Corporation Counsel Patrick Wong met with Plaintiff Mamuad on July 24. Corporation Counsel Wong made clear to Plaintiff Mamuad that he (Mr. Wong), on behalf of the County, was very upset with the page and wanted it to stop. *Id.* ¶ 41. Specifically, Corporation Counsel wanted an end to discussions of Officer Taguma on Facebook. *Id.* Mr. Wong told Plaintiff Mamuad that, if Plaintiff Mamuad knew who was involved with the TAGUMAWatch Facebook page, Mr. Wong wanted it taken down. *Id.* At that point, Plaintiff Mamuad wanted to remain anonymous, and did not admit his involvement with the Facebook page to Mr. Wong. *Id.*

Two weeks later, after a Maui Time blog discussed TAGUMAWatch and suggested that Plaintiff Mamuad was involved with the page, Corporation Counsel Wong again met with Plaintiff Mamuad (this time, along with the County Council Member for whom Plaintiff works). *Id.* ¶¶ 24-25. During this second meeting, Corporation Counsel Wong said that, during the first meeting, he had instructed Plaintiff Mamuad to shut the page down entirely within two weeks of the first meeting. *Id.* ¶ 25. Plaintiff Mamuad was very upset that Corporation Counsel Wong continued to pressure him to stop speaking via the Facebook page; the meetings made him feel like the County was "coming after" him and trying to silence him. ¶¶ 25-26.

During the second meeting, Corporation Counsel Wong said he wanted Plaintiff Mamuad to change the name of the site. Plaintiff Mamuad agreed to change the name; he did not want to do so, but he thought doing so would help to ease tensions and make the County leave him alone. *Id.* ¶ 27. Consequently, Plaintiff Mamuad changed the name of the page to MAUIWatch. *Id.* After doing so, he thought that this issue was resolved. *Id.* He was wrong – the County did not stop its attempts to stifle Plaintiff Mamuad's speech.

C. Harassment Complaint, Investigation, and County Disciplinary Action Against Plaintiff

In August 2013, Officer Taguma submitted a complaint to Keith Reagan, Managing Director for the County of Maui, complaining that he was being

harassed via the TAGUMAWatch site.[2] *Id.* ¶ 28 & Ex. 1. In a letter dated September 12, 2013, Deputy Corporation Counsel Gary Murai informed Plaintiff Mamuad that a harassment complaint was filed against him (Plaintiff Mamuad), and that Plaintiff Mamuad was expected to attend an interview with Mr. Murai and Deputy Director of Personnel Services David Underwood the following week. *Id.* Ex. 1.

The September 12, 2013 letter did not indicate what, if anything, Plaintiff Mamuad had done to harass any other individual. *Id.* In the weeks that followed, Plaintiff Mamuad's counsel repeatedly asked Deputy Corporation Counsel Gary Murai for an explanation of what Plaintiff Mamuad had allegedly done to violate a County policy. Landsberg Decl. ¶¶ 4-5 & Exs. 1-2. In a letter dated September 27, 2013, Mr. Murai stated that the applicable policy was the Violence in the Workplace Action Plan (attached as Mamuad Decl., Ex. 2). Landsberg Decl. Ex. 3. Neither Mr. Murai nor any other representative from Defendant County has ever provided any information as to what, exactly, Plaintiff Mamuad had done to violate the Action Plan (except as otherwise set forth herein).

[2] Plaintiff Mamuad has never been permitted to view the complaint. His counsel was permitted to view the complaint, but was forbidden from making a photocopy of it. Declaration of Marcus Landsberg ¶¶ 7-8 & Ex. 3; Mamuad Decl. ¶ 28.

Defendant County's Violence in the Workplace Action Plan states that an employee shall "[a]void or refrain from acts of violence, threats of violence, and harassment at work." The Action Plan defines harassment as follows:

> **"Harassment"** includes but is not limited to intentionally or knowingly causing unwelcome conduct directed towards an individual that seriously alarms, disturbs, consistently or continually bothers an individual, and that serves no legitimate purpose.

Mamuad Decl. Ex. 2 at 2. The Action Plan further defines "Work sites" or "Workplace" as "anywhere employees are authorized to conduct official County business including sites away from the office or base." *Id.* at 3.

On October 16, 2013, Plaintiff Mamuad (accompanied by counsel) attended the interview with Deputy Corporation Counsel Gary Murai and Gary Underwood from the Department of Personnel Services, as required by the September 21, 2013 notice. Mamuad Decl. ¶ 29. At the inception of the interview (which was transcribed by a court reporter), Mr. Murai stated that, "As a Council employee and County officer, you are obligated to cooperate with investigations, and you are prohibited from making false statements. Failure to do so may result in disciplinary action." Gluck Decl. Ex. 1 at 5:19-22; *see also id.* at 8:9-11 ("as a county employee, you're obligated to cooperate with investigations and not make false statements"). In a later exchange with counsel, Mr. Murai similarly stated that "Neldon is required to cooperate" with the investigation. *Id.* at 18:20. Mr. Murai

also repeatedly stated that the investigation process was confidential. *Id.* at 5:22-6:6; 45:11-17.

When Plaintiff Mamuad began the interview, he wanted to maintain his anonymity regarding his involvement with TAGUMAWatch/MAUIWatch. During the interview, however, he was pressured by Deputy Corporation Counsel Murai to reveal his involvement with the site. Mr. Murai repeatedly stated that Plaintiff Mamuad was obligated to comply with the investigation; Mr. Murai also stated that Plaintiff Mamuad could face disciplinary action for not cooperating with the investigation. Mamuad Decl. ¶ 30-31; Gluck Decl. Ex. 1 at 5:19-22. Mr. Murai repeatedly threatened to end the interview altogether when Plaintiff Mamuad's counsel asserted Plaintiff Mamuad's right to speak anonymously. Gluck Decl. Ex. 1 at 19:13-14; 20:18-25.

Faced with the choice of being found to have refused cooperate with a government investigation, or revealing his involvement with the Facebook page, Plaintiff Mamuad decided to answer Mr. Murai's questions. His decision to do so was based solely on the threat of disciplinary action against him, Gluck Decl. Ex. 1 at 22:14-23, and Plaintiff Mamuad was upset that the County had forced him to reveal his role in what he had wanted to be anonymous speech. Mamuad Decl. ¶¶ 30-31.

During the interview, Plaintiff Mamuad's counsel repeatedly asked Mr. Murai for an explanation of what Mr. Mamuad had allegedly done to violate a County policy. Gluck Decl. Ex. 1 at 13:12-22; 19:4-20; 21:1-6. Neither Mr. Murai nor Mr. Underwood answered Plaintiff's counsel's questions. Mamuad Decl. ¶ 32. Instead, Mr. Murai stated only that he was going to ask questions, and that if counsel instructed Mr. Murai not to answer, then he would terminate the interview. *Id.*; Gluck Decl. Ex. 1 at 19:13-14, 20:24-25.

Plaintiff Mamuad answered Mr. Murai's questions and otherwise cooperated with the investigation, but after the interview, was nervous about what was going to happen. Mamuad Decl. ¶¶ 31-33. He continued to work on the MAUIWatch page, but he refrained from posting items regarding Officer Taguma that he ordinarily would have done. *Id.* ¶¶ 33, 37. He continues to refrain from posting items about Officer Taguma and/or other County employees that he wishes to post. *Id.* at ¶¶ 33, 37.

On January 24, 2014, Plaintiff Mamuad received a letter (dated January 21, 2014) from Keith Regan, Managing Director for the Department of Management for Maui County, stating that Plaintiff Mamuad had violated the Violence in the Workplace Action Plan as a Liquor Commissioner.[3] *Id.* ¶ 34 & Ex. 3. The letter

[3] Plaintiff Mamuad expects to receive, but has not yet received, correspondence from the County Council indicating whether he did or did not violate any County

does not indicate what, precisely, Plaintiff Mamuad allegedly did to have violated the Violence in the Workplace Action Plan. *Id.* Ex. 3. It states only that "the complaint, in summary, alleged that you subjected a fellow County employee to harassment and cyber-bullying through the use of an online social media website." *Id.* It further states that "the completed investigation determined that a violation of the Violence in the Workplace Action Plan did occur." It contains no other information about how, when, where, or why Plaintiff Mamuad is alleged to have violated the Action Plan. *Id.*

The January 21, 2014 letter requires Plaintiff Mamuad to enroll in and attend an Employee Assistance Program "to address harassment and cyber-bullying," as well as a separate "training on the Violence in the Workplace Action Plan conducted by the Department of Personnel Services," within 90 days of the date of the letter (*i.e.*, by Monday, April 21, 2014). *Id.* It further instructs Plaintiff Mamuad that "No further violations of the County of Maui Violence in the Workplace Action Plan occur." *Id.* Plaintiff Mamuad does not know how to comply with this final directive, insofar as he still does not know what he did to have allegedly violated the Action Plan in the first instance. Mamuad Decl. ¶ 34.

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policy in his capacity as an executive aide to a County Council Member. Mamuad Decl. ¶ 36.

As a result of Defendant County's actions (and threats of future disciplinary action), Plaintiff Mamuad is afraid to speak regarding Officer Taguma and the broader issues of misallocation of police resources on Maui. He has held back from posting certain items on Facebook because of these actions and threats. *Id.* ¶¶ 33, 37. Plaintiff Mamuad is also worried that these "findings" (that he violated the Action Plan) are now part of his employment/service record for the County, and that this matter will impede his ability to obtain/maintain employment with the County and/or with other employers into the future.[4] *Id.* ¶ 35.

D. Lack of Administrative Appeal Process

There does not appear to be an appeal mechanism whereby Plaintiff can challenge the findings against him. Plaintiff's counsel contacted the Department of Corporation Counsel, the Department of Management, and the Department of Personnel Services, each of whom either (1) stated that no appeal existed with that agency, (2) did not know the answer, and/or (3) did not provide a substantive response. Gluck Decl., ¶¶ 5-9 & Exs. 2-4. Consequently, it appears as though no administrative appeal exists (though even if an administrative appeal exists, it would not bar the instant action).

[4] Plaintiff's counsel has submitted requests to access government records (pursuant to Hawaii's Uniform Information Practices Act, Hawai'i Revised Statutes chapter 92f), to see what information is kept within Plaintiff's personnel files. Gluck Decl. ¶¶ 9-11 & Exs. 5-7.

Plaintiff lodged the Complaint under seal in the instant case on March 3, 2014, and is awaiting responses from Defendant and the Court as to whether this matter should remain under seal.

III. STANDARD OF REVIEW

To obtain a temporary restraining order or a preliminary injunction, a plaintiff must demonstrate that (1) he is likely to succeed on the merits; (2) in the absence of preliminary relief he is likely to suffer irreparable harm; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). The Ninth Circuit has "also articulated an alternate formulation of the *Winter* test, under which 'serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.'" *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)) (internal quotation signals omitted).

Plaintiff seeks a prohibitory injunction, maintaining the status quo pending trial, and Plaintiff has met his burden here. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009) (discussing the standard of review for both prohibitory and mandatory injunctions). The status quo

means "the last, uncontested status which preceded the pending controversy." *Id.* at 879 (citations and quotation signals omitted). In the instant case, the status quo is allowing Plaintiff Mamuad to speak freely absent interference by the County.

IV. ARGUMENT

Plaintiff easily meets the standard for issuance of a temporary restraining order and/or preliminary injunction. First, Plaintiff has a substantial likelihood of success on the merits of his claim because Defendant's interference with Plaintiff's free speech rights is clearly unlawful. Second, Plaintiff is suffering – and is likely to continue suffering – irreparable harm, insofar as his constitutional rights have been and continue to be violated. Third, the balance of equities tips in Plaintiff's favor: there is no hardship to Defendant, because Defendant gains nothing by punishing Plaintiff for his speech. Fourth, remedying constitutional violations is in the public interest.

A. Plaintiff Is Clearly Likely To Succeed On The Merits

"It is well settled that the state may not abuse its position as employer to stifle 'the First Amendment rights [its employees] would otherwise enjoy as citizens to comment on matters of public interest.'" *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)) (alteration in original), *cert. denied*, 558 U.S. 1110 (2010). *See generally Garcetti v. Ceballos*, 547 U.S. 410 (2006).

The Ninth Circuit has repeatedly set forth a five-part test for retaliation claims,[5] asking:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Dahlia v. Rodriguez, 735 F.3d 1060, 1067 (9th Cir. 2013) (en banc) (quoting *Eng*, 552 F.3d at 1070). Plaintiff Mamuad bears the burden of proof on items 1, 2, and 3; the burden shifts to the government to prove items 4 and 5. *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1103 (9th Cir. 2011); *Eng*, 552 F.3d at 1070-71.

Plaintiff easily meets each of the five factors set forth by the Ninth Circuit, and is therefore likely to succeed on the merits.

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[5] The Ninth Circuit's five-part test appears to be the most straightforward way to analyze the instant case. Although Plaintiff's Complaint alleges that the Violence in the Workplace Action Plan is unconstitutional as applied to him, the Action Plan is essentially irrelevant. Instead, the only pertinent issue is whether Defendant violated Plaintiff's First Amendment rights (regardless of whether such violation was pursuant to a County policy) because a County policy cannot trump the First Amendment.

Nevertheless, the Court could instead analyze the Violence in the Workplace Action Plan itself and its application to the Plaintiff. Insofar as the Action Plan is vague and overbroad as applied to Plaintiff, the Court could strike the policy as unconstitutional (and thereby void any actions taken against Plaintiff pursuant to that policy).

1. Plaintiff Spoke on Matters of Public Concern

As the Ninth Circuit has explained, "Speech involves a matter of public concern when it can fairly be considered to relate to any matter of political, social, or other concern to the community." *Eng*, 552 F.3d at 1070 (internal quotation marks and citations omitted). "[S]peech that deals with individual personnel disputes and grievances and that would be of no relevance to the public's evaluation of the performance of governmental agencies is generally not of public concern." *Id.* (internal quotation marks and citations omitted). The form of the speech is also a factor: "Although not dispositive, a small or limited audience weighs against a claim of protected speech." *Clairmont*, 632 F.3d at 1094 (citations, internal quotation signals, and brackets omitted).

The Ninth Circuit has "defined the scope of the public concern element broadly, and adopted a liberal construction of what an issue of public concern is under the First Amendment." *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709–10 (9th Cir. 2009) (internal quotation marks, ellipsis, and citations omitted). *See also Connick v. Myers*, 461 U.S. 138, 147-48 (1983) ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."). These First Amendment protections extend not only to dry political commentary but also to hyperbole and even to offensively vulgar personal attacks on public figures. *See*

generally Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); *Rankin v. McPherson*, 483 U.S. 378 (1987).

Plaintiff Mamuad's speech on his Facebook page – both as "TAGUMAWatch" and as "MAUIWatch" – involves matters of public concern. The speech was directed to the general public, to an audience on Facebook that now numbers over 25,000; the Facebook page was featured on the nightly news within three days of its creation. Gluck Decl. Ex. 9; MAUIWatch, https://www.facebook.com/MAUIWatch (last accessed March 3, 2014). Plaintiff's clear purpose in creating the page – as he set forth the day he created the page – was to foster dialogue regarding the proper (or improper) use of police resources and to offer tongue-in-cheek commentary on that Officer's methods of enforcing Maui's traffic laws:

> The Tag-Man [*i.e.*, Officer Taguma] has gained the most notoriety because he is the Top Gun (no pun intended) in his field; a true legend of Maui with people all across the island and from all different age groups having an opinion or a story about the man. Having those kinds of traits are what the history books were made for. That's something to be proud of, right guys? This is a forum where you can express your point of view both positive and negative as allowed by the First Amendment.

Mamuad Decl. Ex. 4; *see also id.* ¶ 38. This post was written on July 7, 2013, the day Plaintiff created the Facebook page (before any attempts by Defendant County

to suppress his speech). *Id.* ¶ 38 & Ex. 4; *see also id.* Ex. 4 (additional posts from July 7, 2013, discussed *supra* at pp. 3-4).

In sum, MAUIWatch stirs debate regarding the functioning of government and evaluating the performance of governmental agencies, and thus meets the public concern test easily. *See Eng*, 552 F.3d at 1072-73 (communications relating to the functioning of government and/or to the public's evaluation of the performance of government constitute matters of public concern); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

2. Plaintiff Spoke as a Private Citizen, not a Public Employee

Pursuant to the Supreme Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), Plaintiff must demonstrate that he spoke "in the capacity of a private citizen and not a public employee." *Eng*, 552 F.3d at 1071 (citing *Garcetti*, 547 U.S. at 421-22). "Statements are made in the speaker's capacity as citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform." *Id.* (internal quotation signals and citations omitted). *See also Dahlia*, 735 F.3d at

1068-1076 (discussing the private citizen/public employee distinction at length, and collecting cases).

The *Dahlia* court (en banc) held that, "because of the fact-intensive nature of the inquiry, no single formulation of factors can encompass the full set of inquiries relevant to determining the scope of a plaintiff's job duties." *Dahlia*, 735 F.3d at 1074. Nevertheless, the court held that "existing case law and common sense dictate a few guiding principles relevant to the case before us," including (1) "whether or not the employee confined his communications to his chain of command," (2) "the subject matter of the communication," and (3) whether the employee "speaks in direct contravention to his supervisor's orders." *Id.* at 1074-75. *See also id.* at 1074 n.13 (citing factors used by the First and Sixth Circuits to evaluate similar claims).

Simply put, there is no connection whatsoever between Plaintiff's official positions with the County (as a Liquor Commissioner or as an executive aide to a County Council Member) and Plaintiff's speech. Every single factor mentioned by the Ninth Circuit (and the First Circuit and the Sixth Circuit, *see id.*) weighs in Plaintiff's favor. Plaintiff spoke to the general public, not his chain of command. Mamuad Decl. ¶¶ 13, 15, 38 & Exs. 3, 4; MAUIWatch, https://www.facebook.com/MAUIWatch (last accessed March 3, 2014). He spoke on matters completely unrelated to his workplace. Mamuad Decl. ¶¶ 17-18. As a

Liquor Commissioner, he has no direct supervisor; nevertheless, he spoke in direct contravention of the orders of Corporation Counsel Wong. *Id.* ¶¶ 23, 25; *see Dahlia*, 735 F.3d at 1075 ("[T]he fact that an employee is threatened or harassed by his superiors for engaging in a particular type of speech provides strong evidence that the act of speech was not, as a 'practical' matter, within the employee's job duties[.]"). His speech was not rooted in concerns regarding his own workplace, but was directed at the police department – a completely separate part of County government. Mamuad Decl. ¶ 20, Ex. 4. He spoke using his own equipment, outside of County buildings, on his own time. *Id.* ¶ 20. He spoke with no special authority or knowledge regarding MPD business. *Id.*; MAUIWatch, https://www.facebook.com/MAUIWatch (last accessed March 3, 2014). He attempted to conceal the very fact of his identity so as to avoid even the slightest perception that he was speaking on behalf of the County or as an employee, Mamuad Decl. ¶ 19, and other individuals are participating in the speech. *Id.* ¶¶ 17, 19; MAUIWatch, https://www.facebook.com/MAUIWatch (last accessed March 3, 2014).

Consequently, Plaintiff satisfies the second prong of the five-part test.

3. ***Plaintiff's Speech Was a Substantial or Motivating Factor in the Adverse Employment Action***

a. Plaintiff's speech was the only reason for Defendant's actions

The instant case is far simpler than many retaliation claims, in that Defendant County does not pretend that it had other bases on which to take action against the Plaintiff. Although Defendant has failed to identify what speech, precisely, violated its Violence in the Workplace Action Plan, Defendant informed Plaintiff that Officer Taguma's August 13, 2013 complaint "alleged that [Plaintiff] subjected a fellow County employee to harassment and cyber-bullying through the use of an online social media website." Mamuad Decl. Ex. 3. Defendant County offers no other explanation for its actions. As such, Plaintiff's speech was not just a "substantial or motivating" factor, it was the *only* factor.

b. Defendant's actions, which chilled Plaintiff's speech, constituted "adverse employment action"

The chilling of Plaintiff's speech, by itself, is "adverse employment action." Defendant County ordered Plaintiff to cease "harassing" Officer Taguma and threatened further disciplinary action if Plaintiff did not comply with this directive. Mamuad Decl. Ex. 3. As the Ninth Circuit recently explained:

> "To constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind. Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden." *Coszalter v. City of Salem,* 320 F.3d 968, 975 (9th Cir.2003). In *Coszalter*, we said that, in First

> Amendment retaliation cases, "[t]he goal is to prevent, or redress, actions by a government employer that 'chill the exercise of protected' First Amendment rights." *Id.* at 974–75 (quoting *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)). Therefore, we held that the proper inquiry is whether the action is "reasonably likely to deter employees from engaging in protected activity." *Id.* at 976 (internal quotation marks omitted); *see also id.* (holding that "if the plaintiffs in this case can establish that the actions taken by the defendants were 'reasonably likely to deter [them] from engaging in protected activity [under the First Amendment],' they will have established a valid claim under § 1983" (alterations in original)).

Dahlia, 735 F.3d at 1078 (alterations in original). *See also Coszalter*, 320 F.3d at 975 ("Various kinds of employment actions may have an impermissible chilling effect. Depending on the circumstances, even minor acts of retaliation can infringe on an employee's First Amendment rights."). The *Dahlia* court also noted that, insofar as the government employer's conduct "was intended to chill [the employee's] protected speech, it may qualify as an adverse employment action." *Dahlia*, 735 F.3d at 1079 n.24. The court cited to *Allen v. Scribner*, 812 F.2d 426, 434 n. 17 (9th Cir.), *amended*, 828 F.2d 1445 (9th Cir. 1987), for the proposition that "in a First Amendment § 1983 retaliation case[,] . . . a valid claim can be stated '[w]here comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse . . . action will follow the failure to accede to the official's request [that the employee curtail his first

amendment rights.]'" *Dahlia*, 735 F.3d at 1079 n.24 (quoting *Allen*, 812 F.2d at 434 n.17) (some alterations in original and some added).

Defendant has threatened to discipline Plaintiff if he speaks further. Mamuad Decl., Ex. 3. Defendant has also ordered Plaintiff to submit to "[m]andatory enrollment and attendance in a County of Maui sponsored Employee Assistance Program," as well as "[e]nrollment and attendance in a County of Maui training on the Violence in the Workplace Action Plan conducted by the Department of Personnel Services," no later than April 21, 2014, and has threatened further disciplinary action against Plaintiff if he does not comply. Mamuad Decl. Ex. 3. Plaintiff's speech has been chilled, in that Plaintiff has refrained (and continues to refrain) from speaking about Officer Taguma and other County employees. *Id.* ¶¶ 33, 37. Plaintiff feels as though Defendant County is "coming after [him]," *id.* ¶ 26, and is afraid to continue speaking. *Id.* ¶ 37. He is also worried about the effect that these "findings" will have on his record (and his ability to secure future employment). *Id.* ¶¶ 35.

In sum, Plaintiff's speech was the only factor motivating Defendant's actions against him. Defendant has ordered Plaintiff to stop violating a vague and overbroad policy (or face further discipline), and has ordered him to attend counseling/training sessions (or face further discipline). These actions have chilled Plaintiff's speech. Plaintiff meets the third prong of the Ninth Circuit's test.

4. ***Defendant had no adequate justification for treating Plaintiff differently from other members of the general public***

Defendant County has the burden to prove an adequate justification for treating Plaintiff Mamuad differently from other members of the general public (who maintain a First Amendment right to speak via the MAUIWatch page). Defendant cannot satisfy its burden.

Under the *Pickering* balancing test, Defendant County must have some reason to treat Plaintiff differently from other members of the general public. Defendant cannot meet this burden, because *Plaintiff is acting no differently* from other members of the general public – that is, he has no special means of communicating, no special substance to his communications, and no special access to Officer Taguma's workplace, as compared with any other member of the general public.

a. Defendant must demonstrate actual disruption (or the threat thereof) to the workplace, and must gain efficiency, integrity, or improved discipline in the workplace

Defendant County has the burden to prove that its *legitimate* administrative interests outweigh Plaintiff's First Amendment interests. *Eng*, 552 F.3d at 1071. "This inquiry, known as the *Pickering* balancing test, asks 'whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.'" *Id.* (quoting *Garcetti*,

547 U.S. at 418). "These interests include promoting efficiency and integrity in the discharge of official duties and maintaining proper discipline in the public service." *Clairmont*, 632 F.3d at 1107 (citing *Connick v. Myers*, 461 U.S. 138, 150-51 (1983)). To weigh the parties' respective interests, the Court "examine[s] disruption resulting both from the act of speaking and from the content of the speech." *Id.* Any restrictions imposed by the County, as an employer, "must be directed at speech that has some potential to affect the entity's operations." *Garcetti*, 547 U.S. at 418. "For a court 'to find that the government's interest as an employer in a smoothly-running office outweighs an employee's first amendment right, defendants must demonstrate actual, material and substantial disruption, or reasonable predictions of disruption in the workplace.'" *Anthoine v. N. Cent. Counties Consortium*, 605 F.3d 740, 752 (9th Cir. 2010) (quoting *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009), *cert. denied*, 558 U.S. 1110 (2010)).

Defendant cannot satisfy its burden here: even if Defendant can identify a legitimate interest, that interest does not justify treating Plaintiff differently from other members of the general public. In other words, Defendant's interests are outweighed by Plaintiff's First Amendment interests.

b. Defendant County has no legitimate interest in suppressing Plaintiff's speech

Defendant County has no legitimate interest in suppressing Plaintiff Mamuad's speech, for two reasons: first, criticism of a police officer by someone outside the police department does not have the "potential to affect the entity's operations." *Garcetti*, 547 U.S. at 418. Second, while promoting a workplace free from violence *is* a legitimate goal, Plaintiff Mamuad and Officer Taguma do not work together, such that there is no rational connection between the County's purported goal and its methods.

i. Defendant County has no legitimate interest in quashing criticism of its police officers.

The Hawai'i state courts recognize that harsh treatment from the public is merely a "hazard[] of the trade":

> A person may not be arrested for disorderly conduct as a result of activity which annoys only the police, for example. Police officers are trained and employed to bear the burden of hazardous situations, and it is not infrequent that private citizens have arguments with them. Short of conduct which causes "physical inconvenience or alarm to a member or members of the public" arguments with the police are merely hazards of the trade, which do not warrant criminal penalties.

State v. Leung, 79 Hawai'i 538, 543, 904 P.2d 552, 557 (App. 1995) (quoting Commentary to Hawai'i Revised Statutes § 711-1101 (1993)) (emphases omitted) (footnote omitted in original). Further, the First Amendment protects the public's right to criticize police officers. *See City of Houston. v. Hill*, 482 U.S. 451, 461

(1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."); *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 16 (1973) ("Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer."); *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1375, 1377-78 (9th Cir. 1990) (series of expletives and an obscene hand gesture directed at police officer are protected by First Amendment).[6] Simply put, there is no support for the proposition that the general public maintains a First Amendment

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[6] Similarly, Defendant has no legitimate interest in prohibiting any member of the public from photographing or videotaping a police officer who is performing his official duties in public. Plaintiff – like every other member of the public – has a First Amendment right to videotape police officers and to gather information regarding police officers' conduct. *See Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (finding a genuine issue of fact as to whether defendant assaulted the plaintiff "in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest"). As the First Circuit Court of Appeals explained, "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The court explained that the exercise of First Amendment freedoms of expression was particularly important with respect to law enforcement officials, "who are granted substantial discretion that may be misused to deprive individuals of their liberties." *Glik*, 655 F.3d at 82. Multiple other courts have concluded that individuals have a First Amendment right to record police officers. *See, e.g., Am. Civil Liberties Union v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (enjoining enforcement of eavesdropping statute as applied to recordings of police officers), *cert. denied*, 133 S.Ct. 651 (2012); *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. *See also Glik*, 655 F.3d at 83 (collecting cases).

right to criticize the police, but that individuals give up that right if they take any government job. Suppression of this kind of criticism of the police cannot be a "legitimate" government purpose in disciplining Plaintiff.

ii. No connection exists between Defendant's goals and its methods

There is no connection whatsoever between any possible legitimate purpose and the County's actions in the instant case.

There is no question that the County has a legitimate interest in maintaining a workplace free from violence. The same is true regarding "harassment" in the general sense (though Defendant's definition of "harassment" is vague and overbroad), and Plaintiff does not take issue with the County's goal of maintaining safe workplaces where employees can perform the jobs they have been hired to do. The problem for Defendant in the instant case, however, is that Plaintiff does not share a workplace with Officer Taguma: any speech or "harassment" directed at Officer Taguma is no different coming from Plaintiff Mamuad than from any other member of the public, because the two men do not work together.

As the Supreme Court explained, a government employer must have "an adequate justification for treating the employee *differently from any other member of the general public*." *Garcetti*, 547 U.S. at 418 (emphasis added). None of Plaintiff's speech arises from his workplace, and as such, he is no different from any other member of the general public when he speaks through his Facebook

page. Plaintiff does not roam the halls of the Maui Police Department's facilities, wherein he might run into Officer Taguma on a daily basis. The two do not spend their days in adjacent cubicles, wherein Defendant could at least make a plausible claim that the office environment is tense. Indeed, as far as Plaintiff can recall, the two have never met in person. Mamuad Decl. ¶ 5. Plaintiff has no special access to Officer Taguma; instead, Plaintiff has only the possibility – shared by every other individual on Maui – that the Officer may pull him over while driving, or that the two of them may see one another at Costco.

Defendant County employs over 2,500 people, in twenty departments, on three islands. *About Us*, County of Maui, http://www.mauicounty.gov/index.aspx?NID=1753 (last accessed February 28, 2014). The thousands of employees who work for the County do not all share the same workplace, however, any more than the millions of employees who work for the federal government share a workplace. Essentially, Defendant County wants the ability to silence speech from *any* County employee/officer directed at *any other* County employee/officer; if this were true, then every single County employee/officer must forfeit her/his First Amendment right to criticize the Mayor, the County Council Members, Maui Police Department and its officers, and every member of every Board and Commission. If the County's position were legally defensible, it would apply equally to other governmental entities – such that, for

example, meat inspectors with the USDA would be prohibited from saying anything that might "bother" an astronaut with NASA, because both worked for the federal government.

This far exceeds the bounds of the *Pickering* test, which requires "actual, material and substantial disruption, or reasonable predictions of disruption *in the workplace*." *Anthoine*, 605 F.3d at 752 (emphasis added) (internal quotation signals and citation omitted). As the Ninth Circuit explained in *Clairmont*, 632 F.3d at 1107:

> In examining whether a public employee's act of speaking disrupted the workplace, we review "the manner, time, and place in which" the employee's speech took place. *Connick*, 461 U.S. at 152, 103 S.Ct. 1684. In *Connick*, the fact that the employee's speech took place at the office supported the Court's determination that the speech disrupted the efficiency of the workplace. *Id.* at 153, 103 S.Ct. 1684. The Court contrasted the situation with that in *Pickering*, where the employee's speech occurred during the employee's free time away from the office. *Id.*

The special circumstances that exist inside the workplace, where employees see each other on a daily basis and are working together towards common coals, simply do not exist in this case. In short, Defendant has no legitimate interest justifying its actions. On the other hand, Plaintiff's First Amendment rights are clear (as set forth *supra*), and outweigh whatever illusory benefit Defendant claims to gain from threatening Plaintiff Mamuad.

5. *Plaintiff Mamuad's Speech is the Only Basis for the County's Actions*

"[I]f the government fails the *Pickering* balancing test, it alternatively bears the burden of demonstrating that it would have reached the same adverse employment decision even in the absence of the employee's protected conduct." *Eng*, 552 F.3d at 1072 (internal quotation signals, brackets, and citations omitted). Defendant cannot meet this burden, insofar as there is no other purported justification for Defendant's actions: the only proffered reason for taking action against Plaintiff is his speech via his Facebook page. In sum, but for Plaintiff's speech, he would not have been ordered to attend counseling/training, he would not have been threatened with further discipline, and he would not have been ordered to stop speaking.

Based on the foregoing, Plaintiff is clearly likely to succeed on the merits of his First Amendment claim.

B. Plaintiff Is Suffering Irreparable Harm

Defendant is chilling Plaintiff's speech: Plaintiff is refraining from speaking on certain matters on the MAUIWatch page because of fears of further discipline as a Liquor Commissioner and as an executive aide to a County Council member. Mamuad Decl. ¶ 37. Defendant County has ordered Plaintiff to comply with vague

and overbroad restrictions on his future speech,[7] ordered him to attend counseling/training sessions, and threatened him with further discipline for failure to comply. *Id.* Ex. 3.

This chilling of Plaintiff's speech harms him irreparably. As the Supreme Court held, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009), *cert. denied*, 559 U.S. 972 (2010). *See also Goldie's Bookstore, Inc. v. Super. Ct. of California*, 739 F.2d 466, 472 (9th Cir. 1984) ("An alleged constitutional violation will often alone constitute irreparable harm."). Plaintiff will continue to suffer these harms unless Defendant is enjoined by this Court. *See* 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3531.2 (3d ed. 2013) (a plaintiff seeking injunctive relief must show that he or she "can reasonably expect to encounter the same injury in the future") (discussing *Los Angeles v. Lyons*, 461 U.S. 95 (1983)).

[7] Insofar as Defendant County has never identified any statements or actions by Plaintiff Mamuad that purportedly violate the Violence in the Workplace Action Plan, and Mr. Mamuad does not know what statements the County considers to violate the Action Plan, he cannot know what speech is allowed and what is prohibited.

C. The Balance of Equities Tips in Plaintiff's Favor

Defendant would suffer no discernable harm by the issuance of an injunction, and the balance of equities tips decidedly in favor of an injunction. *See Int'l Soc'y for Krishna Consciousness v. Kearnes*, 454 F. Supp. 116, 125 (E.D. Cal. 1978) (ruling, in a discussion on the First Amendment, that the existence of constitutional questions "weighs heavily in the balancing of harms, for the protection of those rights is not merely a benefit to plaintiff but to all citizens"). While Plaintiff will continue to suffer irreparable harm, insofar as he will continue to be deprived of the ability to exercise his right to speak freely, Defendant will not suffer any harm whatsoever. Officer Taguma, as a Maui Police Department Officer, can and should expect to be criticized by the general public. That is part of his job. *See State v. Leung*, 79 Hawai'i 538, 543, 904 P.2d 552, 557 (App. 1995). As discussed more fully *supra*, Defendant has no legitimate interests at stake, and therefore will suffer no harm if an injunction issues.

D. An Injunction is in the Public Interest.

Securing constitutional rights is clearly in the public interest, and courts have consistently recognized the significant public interest in protecting fundamental rights. *See United States v. Raines*, 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]"). This is particularly true for cases involving First Amendment

freedoms. *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles."), *abrogation on other grounds recognized by Dex Media West, Inc. v. Seattle*, 2011 WL 1771036, at *11 n. 8 (W.D. Wash. May 8, 2011); *see also Int'l Soc'y for Krishna Consciousness*, 454 F. Supp. at 125. The First Amendment was designed to protect the very kind of criticism the County is now trying to suppress. The public has a right to criticize its police force, and the public benefits from a vibrant discussion regarding the proper role of police officers. The public also benefits when government employees maintain their right to participate in public debate.

In sum, an injunction will protect Plaintiff's First Amendment rights, and will similarly serve to protect the rights of government employees more generally. Issuance of an injunction is in the public interest.

V. NO SECURITY SHOULD BE REQUIRED

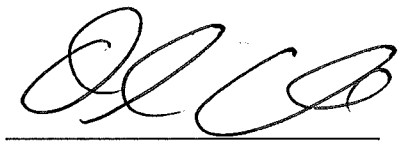
Waiver or imposition of a minimal bond is appropriate under Fed. R. Civ. P. 65(c) where, as here, a public interest organization is enforcing public rights on behalf of an individual plaintiff. *See Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2004) (recognizing the court's "long-standing precedent that requiring nominal bonds is perfectly proper in public interest litigation");

Barahona–Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999) (district courts have discretion to waive Rule 65(c)'s bond requirement). A bond is unnecessary "when [the district court] concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Jorgensen v. Cassiday,* 320 F.3d 906, 919 (9th Cir. 2003). Plaintiff requests that the Court set the bond amount at zero, or, in the alternative, set a minimal bond of no more than $100.00.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant Plaintiff's Motion for a Temporary Restraining Order.

Dated: Honolulu, Hawaii, March 13, 2014.



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