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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEGAN WONG,)	
)	
NOELLE WONG,)	
)	
KA'IULANI EDENS,)	CV07-
)	
JESSE BROWN-CLAY,)	EMERGENCY MOTION
)	UNDER CIRCUIT RULE 27-3
MARCIA SACCO,)	
)	
JEFF SACHER,)	
)	
LEA TADDONIO,)	
)	
RICHARD COON,)	
)	
ANDREA BROWER,)	
)	
FABIENNE CHRISTE)	
)	
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FERN ANUENUE HOLLAND)	
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JAY H. TAYLOR)	
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LEE TEPLEY,)
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))
DAVID RICHARD MIRELES)
))
MICHAL FREIGANG)
))
JONATHAN JAY)
))
CORY (MARTHA) HARDEN)
))
HOPE KALLAI)
))
Appellants)
))
v.)
))
GEORGE W. BUSH, President of the)
United States of America and)
Commander in Chief, Armed)
Forces of the United States)
))
MICHAEL CHERTOFF, Secretary of)
United States Department)
of Homeland Security,)
))
THAD W. ALLEN, Commandant,)
United States Coast Guard,)
))
SALLY BRICE-OHARA,)
Rear Admiral, United States)
Coast Guard, Command of the)
14th District,)
))
Appellees)
))
_____)

CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3(a)(3)(i), the telephone numbers, office addresses, and email addresses for the parties are:

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Pursuant to Circuit Rule 27-3(a)(3)(ii), the facts showing the existence and nature of the emergency are set forth below.

Pursuant to Circuit Rule 27-3(a)(3)(iii), Appellants certify that copies of this motion and exhibits were delivered electronically and physically to the offices of all counsel of record for Appellees on the morning of Tuesday, October 9, 2007 and that Appellants' counsel called the offices of Appellees' counsel on Tuesday morning, October 9, 2007 to notify them of the motion being filed.

This motion arises from CV07-0048 before Chief Judge Helen Gillmor, United States District Judge for the District of Hawaii.

Judge Gilmore denied Appellants' Motion for a Temporary Restraining Order on Friday, October 5, 2007.

Pursuant to Circuit Rule 27-3(a)(4), Appellants certify that Appellants submitted to the District Court all grounds advanced herein in support of said motion.

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MOTION FOR TEMPORARY RESTRAINING ORDER

Now come Appellants, pursuant to Circuit Rule 27-3(a) and move this Honorable Court to grant a Temporary Restraining Order prohibiting Appellees from activating a security zone that will in turn facilitate the entry, docking, unloading, loading, and exit of the Hawai'i Superferry from Nawiliwili Harbor on the Island of Kaua'i, Islands of Hawai'i.

INTRODUCTION

This case asks the Federal Judiciary to place the full weight of Federal authority behind people who are pledged to jump into the waters of Nawiliwili Harbor on the Island of Kaua'i in the Islands of Hawai'i to block the entrance of the Hawai'i Superferry into the harbor. Obviously, such a request is highly unusual and perhaps outside the comfort zone for a Federal judge. In this case, however, the extraordinary circumstances warrant and compel just such intervention by the Federal Judiciary.

For reasons that remain to be clarified, the arrival of the Hawai'i Superferry in Hawaiian waters caused the disintegration of the rule of law.

Shortly before the Hawai'i Superferry was to begin operating, the Hawai'i Supreme Court issued an opinion that the Hawai'i Department of Transportation (HDOT) had erred in not requiring preparation of an environmental assessment (EA) that would encompass the State-funded

harbor improvements enabling the Hawai'i Superferry to operate and the operation of the Hawai'i Superferry itself. The Sierra Club v. The Hawai'i Department of Transportation,

<http://www.state.hi.us/jud/opinions/sct/2007/27407.pdf>

This ruling was the first time that Superferry's attempts to evade environmental accountability failed. Exhibit 1 (Superferry evading Federal agency requests for consultation).

The Hawai'i Supreme Court remanded the case to the court in Mau'i from which the appeal arose for further proceedings.

Despite the fact that state law and prior opinions of the Hawai'i Supreme Court clearly required the completion and acceptance of the EA prior to further operation of the Hawai'i Superferry, the Director of the HDOT issued his opinion that the Superferry could continue to operate while the State prepared the required EA.

The office issuing the opinion was precisely the agency responsible for initially failing to require preparation of an EA. If that error requires the Hawai'i Superferry to cease operation while an EA is prepared, the Hawai'i Superferry will not survive economically. The decisions of the Director of the HDOT will be one root of that failure.

Ignoring the obvious conflict of interest surrounding the opinion of the Director of the HDOT, neither the Governor nor the Director of the HDOT sought clarification of that issue from the State Attorney General.

Originating in the opinion of the Director and fueled by political pressure, a pattern of illegal and/or legally erroneous behavior began to cascade through government agencies and the courts.

After the HDOT Director issued his opinion, the following took place:

(1) The Governor embraced the HDOT interpretation of the law.

Exhibit 2.

(2) On remand, the state court on the Island of Mau'i entered a temporary restraining order and then a preliminary injunction preventing the Hawai'i Superferry from entering the Mau'i harbor.

The court then proceeded to open an evidentiary hearing on whether the Superferry would cause environmental damage, if allowed to operate while the State prepared the EA. Exhibit 3. The court essentially began conducting its own EA outside the normal process in which judicial review would occur after completion of an EA, with the burden on plaintiffs to

produce evidence of environmental damage prior to the initiation of the EA. See Exhibit 4 (firm hired to do statewide EA selected October 6, 2007).¹

(3) Superferry accelerated initiation of service, dropped fares from more than \$100 to \$5, loaded up the boat, and went to the Island of Kaua'i.

(4) Hundreds of people on Kaua'i turned out to protest the ship coming into their harbor before the EA had been completed. A number of people jumped into the water to prevent the ship's entrance.

(5) With assistance of the United States Coast Guard, the Superferry reached the dock and began unloading the cars and people on board. The confrontation then moved onto land where people tried to block the cars coming off the boat. Violence erupted at various times and locations where protestors and law enforcement interacted.

(6) The next day, when Superferry returned, far more people jumped into the water. The Coast Guard was unable to clear the harbor. Superferry left without docking.²

¹ The law states that the "burden of preparing an environmental assessment is on the applicant." Kahana Sunset Owners Ass'n v. County of Maui, 86 Haw. 66, 74; 947 P.2d 378, 386 (1997). The applicant is supposed to provide the public "with the information necessary to evaluate the potential environmental effects of a proposed action." 86 Haw. 72; 947 P.2d. 384.

² At www.youtube.com, a search for "Superferry" will produce numerous videos of the people in the water and on land opposing Superferry.

(7) Superferry's CEO responded by canceling further service to Kaua'i, terming the blockade "unprecedented." Exhibit 5. The CEO further stated that Superferry would not return to Kaua'i without assurances from the Coast Guard of safe passage for the ferry into Nawiliwili Harbor. Id.

8) The Coast Guard used a regulation meant to prevent terrorism, sabotage, and subversion to adopt a rule establishing a security zone in Nawiliwili Harbor encompassing part of the harbor waters and much of the surrounding land. The purpose of the zone was to prevent people from entering the pathway of the Hawai'i Superferry. Anyone entering the zone would be subject to up to ten years in jail and to being prosecuted for other offenses. Exhibit 6.

(9) The Governor then formed a Unified Command of Federal, State, and local law enforcement to enforce the Coast Guard security zone and announced the return of Superferry to Kaua'i. Exhibit 7.

(10) The Director of the HDOT tried to expedite the selection of the firm to do the required EA. In the course of justifying expedition, the Director revealed that the outcome of the EA is predetermined.

"The ferry service is highly desired and environmental review is needed to enable its operation, the DOT must accomplish the EA (environmental assessment) in the shortest time possible to avoid the loss of the ferry operator," Barry Fukunaga, director of the state Department of Transportation, said in the request for an exemption to procurement law.

Exhibit 8 (emphasis added).³

(11) When the Governor went to Kaua'i to announce the return of Superferry and demand compliance with the security zone, more than 1,000 people vociferously rejected her demand, with many promising to reenter the water to block the return of Superferry. Exhibit 9.⁴

(12) The people of Kaua'i filed a petition with the Coast Guard to repeal the security zone rule. Exhibit 10. The Coast Guard did not respond to the petition.

(13) A state court on the Island of Kaua'i ruled that plaintiffs could not seek injunctive relief preventing the Hawai'i Superferry from returning to Kaua'i based on the Supreme Court decision requiring preparation of an EA because the plaintiffs had not challenged the earlier decision of the State Department of Transportation to exempt the Superferry improvements from preparing an EA. The court essentially ruled that the plaintiffs could not

³ In Metcalf v. Daley, 241 F.3d 1135, 1143-46 (9th Cir. 2000), the Court found an EA to be invalid because the agency had already made an agreement to implement the proposal before preparing the EA, which meant the EA was not sufficiently objective. That same reasoning would seem to apply in this case to the EA now being prepared.

⁴ A search of www.youtube.com for the term “Lingle” will produce numerous videos of the meeting on Kaua'i and related events.

enforce a Supreme Court ruling because plaintiffs had not been part of the litigation process producing the ruling.

(14) Appellants, many of whom entered the waters of the harbor to block the Superferry and/or intend to enter the water if Superferry returns, sought a temporary restraining order in Honolulu Federal Court. Appellants based their request for a TRO, in part, on grounds that the opinion of the Hawai'i Supreme Court in The Sierra Club v. The Hawai'i Department of Transportation and Hawai'i law required the Superferry to stop operation.

The Federal District Court ruled that the court did not have jurisdiction to “review” the Hawai'i Supreme Court decision. Appellants had asked the Court to apply the decision and the law to the facts of this case, not to review the decision for correctness.

(15) In response to the actions of the HDOT, the Governor, the Coast Guard, the Department of Homeland Security, and other law enforcement agencies, the people of Kaua'i repeatedly made clear that they intended to enforce the law and protect their island by blocking the entrance of Superferry into their harbor, should the Superferry return. The people of Kaua'i consider their only remedy for the official lawlessness arrayed against them to be self-help resistance.

(16) On the lawful side, a State Representative filed a formal complaint with the state Public Utility Commission requesting suspension of Superferry's operating certificate based on the absence of an EA. The Complaint claims "Superferry is in willful violation of its operating certificate." Exhibit 4.

(17) The pressure to save the Superferry project became so intense that the Legislature is being asked to consider a special session to somehow exempt the Superferry from the environmental laws that apply to all other projects involving state funding and potential environmental impacts. Exhibit 11.

Under these extraordinary circumstances of wide spread lawlessness backed by threats of force, a request from the people of Kaua'i for intervention by the Federal Judiciary to protect them from lawlessness and possible physical injury or death is totally appropriate.

STATEMENT OF FACTS SHOWING EXISTENCE AND NATURE OF EMERGENCY

1. The Hawai'i Superferry (hereinafter "Superferry") is a large ship capable of moving at high speeds and carrying up to 800 people and 260 cars within the Hawaiian Islands.
2. The Superferry presents itself as a private business operation.
3. The Superferry did receive federal government loan guarantees.

4. The State of Hawaii funded improvements to harbors in various islands, including the Island of Kaua'i, to make it possible for the Superferry to operate.

5. The Superferry is the subject of extensive litigation and public opposition centering, in part, on the failure of the State of Hawai'i Department of Transportation (HDOT) to prepare an environmental assessment evaluating the harbor improvements and the potential environmental impacts resulting from the operation of the Superferry.

6. The Hawaii Supreme Court found that the HDOT violated state law by not preparing an environmental assessment (EA) for the operations of the Hawaii Superferry.

7. With the issuance of the Supreme Court ruling, the controversy over the Superferry became even more intense.

8. The Supreme Court remanded the case for further proceedings to the Mau'i lower court which had dismissed the case and from which the plaintiffs had taken an appeal.

9. Upon remand from the Supreme Court, the state judge on the Island of Mau'i entered a temporary restraining order preventing Superferry from entering the Mau'i harbor.

10. The Mau'i suit seeks to enjoin the operation of Superferry until an EA is completed and accepted by the Governor or the Department of Transportation.

11. A second suit filed in state court on the Island of Kaua'i sought a preliminary injunction to prevent Superferry from using Nawiliwili Harbor on the Island of Kaua'i until an environmental assessment is prepared.

12. Concerned that Superferry would fail economically, if required to wait for the preparation of an EA before operating, State officials rushed to salvage the project.

13. The Director of the HDOT announced his opinion that Superferry could continue operating while preparing an EA.

14. State officials also announced their opinion that the Supreme Court decision applied only to the Mau'i harbor, so that Superferry service to Kaua'i could continue.

15. State officials did agree to prepare a statewide environmental assessment of Superferry environmental impacts.

16. At the same time, in an obvious demonstration of a predetermined decision, the HDOT Director declared the need to finish the EA "in the shortest time possible to avoid the loss of the ferry operator."

17. The Mau'i judge subsequently entered a temporary injunction for the purpose of holding evidentiary hearings.

18. The Mau'i court is conducting a hearing on whether the operation of Superferry will have adverse environmental consequences, if operations are allowed while the State prepares an environmental assessment.

19. The Kaua'i suit is on appeal from a ruling that plaintiffs could not seek an injunction based on the Supreme Court ruling because plaintiffs did not participate in the challenge to the agency decision that led to the Supreme Court decision.

20. Those opposed to Superferry assert that the Supreme Court decision meant that Superferry could not continue to operate until the EA was completed and accepted by the Governor or the HDOT.

21. Immediately after the Supreme Court ruling and the announced opinions of State officials noted above at ¶¶ 13, 14, 16, Superferry moved up the date for launching its service.

22. Superferry also lowered its fares for vehicles and people from more than \$100 to \$5.

23. The responses of State officials and Superferry to the Supreme Court decision only exacerbated the public discontent.

24. After the Supreme Court decision and with cases pending in two lower courts, Superferry loaded passengers and vehicles destined for the Island of Kaua'i.

25. The Governor and the HDOT refused to intervene to prevent Superferry from accelerating the date of operation.

26. The Governor and the HDOT refused to intervene to prevent Superferry from making the trip to Kaua'i.

27. When Superferry reached Kaua'i on August 26, 2007, hundreds of people on the island turned out to protest.

28. Some of those protesting entered the waters of Nawiliwili Harbor and attempted to block Superferry from entering the harbor.

29. Appellee Coast Guard used their boats to move the protestors out of the way and clear a passage for Superferry.

30. Appellee Coast Guard was surprised by the passion and determination of the people seeking to prevent Superferry's entrance.

31. Coast Guard personnel at one point de-tarped a large caliber machine gun and personnel assumed an operational position on the gun.

32. On August 27, 2007, the protestors again blocked Superferry's passage.

33. Their numbers had grown sufficiently that Appellee Coast Guard was unable to clear the harbor.

34. The Superferry captain decided to leave Kaua'i without entering the harbor.

35. The Superferry company then announced a suspension of service to Kaua'i.

36. The Superferry company stated that they would not return to Kaua'i unless the United States Coast Guard could clear the harbor of protestors.

37. With the departure of Superferry, the protestors ceased any effort to close the harbor.

38. Subsequent to the events of August 26 and 27, Appellee Coast Guard declared an emergency existed, created by the "non-compliant protestors" in Nawiliwili Harbor, not the Superferry, on those dates.

39. In response to this perceived emergency, Appellee Coast Guard immediately adopted a temporary final rule establishing a security zone that encompasses waters in and lands bordering Nawiliwili Harbor on Kaua'i.

40. Appellee Coast Guard adopted the rule pursuant to a regulation that permits creation of such zones to prevent terrorism, sabotage, and subversion.

41. This security zone will only be activated when the Superferry enters, is docked within, or leaves Nawiliwili Harbor.

42. Anyone entering the security zone without the permission of the Appellee Coast Guard is subject to arrest and prosecution for state and federal offenses.

43. Penalties just for entering the zone range up to ten years in prison.

44. Anyone entering the security zone on a flotation device, such as a boat or surf board, is subject to have that device seized and forfeited.

45. Nothing in the rule precludes the use of lethal force, if necessary, to accomplish the purposes of the rule.

46. The Governor, the Coast Guard, and other State and local law enforcement formed a Unified Command dedicated to clearing the waters of Nawiliwili Harbor in Kaua'i to permit the Superferry to enter.

47. The Coast Guard, the Governor, and Superferry announced their intent to activate the security zone and bring Superferry into Nawiliwili Harbor on September 26, 2007.

48. The Unified Command issued a two page list of potential offenses that might be charged against anyone attempting to prevent Superferry from entering the harbor.

49. Subsequently, the Governor went to Kaua'i to tell the people that Superferry was coming and that the full weight of the law would be brought down on anyone violating the security zone.

50. At least 1,000 people showed up, mostly opponents of Superferry.

51. When the Governor announced the return of Superferry on September 26, the hall erupted.

52. People screamed, cursed, and otherwise berated the Governor.

53. At one point, the crowd chanted "E I S" over and over to express their opposition to the Superferry being allowed to operate without the State having prepared the necessary environmental documentation.

54. Public concerns include: (1) potential Whale deaths from strikes by the high speed Superferry; (2) increased introduction of invasive species from one island to another through the Superferry vector; (3) overloading the infrastructure of small islands, like Kaua'i, by the arrival of hundreds of cars each week on the Superferry; (4) depletion of natural resources essential to the survival and way of life of indigenous residents of the smaller islands; (5) the introduction of drugs through a vector that is not subject to inspection as are other modes of transportation to the outer islands, such as airlines; and (6) the procedural violation of not preparing an EA.

55. One speaker after another stood to announce their intention to

enter the waters of Nawiliwili Harbor to block the Superferry's return.

56. That same day, the Superferry announced suspension of service to Kaua'i in the interest of public health and safety.

57. The suspension expired on September 30, 2007.

58. The Coast Guard adoption of the security zone makes the return of Superferry to Kaua'i possible.

59. As of the time this Motion for Injunctive Relief is filed, the Superferry is taking reservations to Kaua'i for October 12, 2007 at www.superferry.com.

60. Appellants in this case unsuccessfully sought a Temporary Restraining Order to prevent the Coast Guard from activating the security zone and making it possible for Superferry to return to Kaua'i.

61. The people on Kaua'i and others are determined to prevent the entry of the Superferry into the harbor.

62. The protestors view themselves as attempting to enforce the law because they have been abandoned by law enforcement agencies and state officials supporting the continued operation of Superferry.

63. The protestors base their legal position on Hawai'i Revised Statutes § 343-5, which states that, when an EA is required, the completion and acceptance of that EA is a "condition precedent" to implementation of

the action at issue. The protestors takes the position that this law means that the EA for Superferry operations has to be completed and accepted prior to any further operation of Superferry using the State-funded harbor improvements.

64. The protestors view themselves as pursuing a self-help remedy in a generally lawless situation.

65. The protestors view their getting in the water to block Superferry as an exercise of their First Amendment rights to petition for redress of grievances and their general right to exercise constitutional rights in a manner that makes such exercise effective.

66. A potential for serious injury and even death now exists, should the confrontation now planned by the Superferry, the Governor, the Coast Guard, other State and local law enforcement, and the Department of Homeland Security take place.

ARGUMENT

FIRST QUESTION PRESENTED

Under Hawai'i Revised Statutes § 343-5 and in light of the decision in The Sierra Club v. The Hawai'i Department of Transportation, can the Hawai'i Department of Transportation permit the Hawai'i Superferry to use the state-funded harbor improvements prior to the State of Hawai'i completing, and the Governor or Department of Transportation accepting, a final environmental assessment addressing the potential environmental impacts of Superferry's operations?

This first question is simply a question of statutory interpretation.⁵

The simple answer to this question is: “No.” Once the Hawai'i Supreme Court ruled that the State of Hawai'i is required to prepare an environmental assessment for the harbor improvements and for the operation of the Superferry itself, the law requires completion and acceptance of that environmental assessment prior to any further operations by the Superferry.

In The Sierra Club vs. The Hawai'i Department of Transportation, the Hawai'i Supreme Court found:

Stated simply, the record in this case shows that DOT did not consider whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both primary and secondary, on the environment. Therefore, based on this record, we can only conclude that DOT's determination that the improvements to Kahului Harbor are exempt from the requirements of HEPA was erroneous as a matter of law. **The exemption being invalid, the EA requirement of HRS § 343-5 is applicable.** This issue being dispositive, we need not consider Appellants' other arguments.

<http://www.state.hi.us/jud/opinions/sct/2007/27407.pdf> at 101-102

(hereinafter “HSCt. op”) (emphasis added). Having found that an EA had to be prepared, the Supreme Court stated that HRS Section 343-5 applied without making any further findings.

⁵ The District Court avoided this question altogether. The Court ruled that it lacked jurisdiction to “review” decisions by the Hawai'i Supreme Court and, therefore, provided no discussion of that opinion in the Court's oral ruling. Appellants had argued that the Court should apply the decision and the law to the facts in this case, not review the decision for correctness.

Plaintiffs in the case had sought injunctive relief to prevent the implementation of the harbor improvements and of the Superferry project itself “until and unless an acceptable EA is prepared.” Ibid. at 20-21.

The Hawai'i Supreme Court left further actions up to the lower court and did not state the obvious regarding whether an injunction should issue preventing further use of the harbor improvements by the Hawai'i Superferry until the State completed and accepted the EA. Ibid. at 103.

The law in question states in relevant part:

Acceptance of a required final statement shall be a condition precedent to implementation of the proposed action.

HRS § 343-5(b) (emphasis added). See also HAR § 11-200-23(c)

(Acceptance of a required statement shall be a condition precedent to the use of state or county lands or funds in implementing the proposed action.); see also Kepoo v. Kane, 106 Haw. 270, 291, 103 P.3d 939, 960 (2005) (an EIS must be final before lease of state land or lease is void)

In Kahana, supra, the Court said:

HRS § 343-5(c) provides that “acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of proposed action.” Where the legislative mandate is clear, we will not excuse compliance with the plain language of the statute

86 Haw. 66, 73; 947 P.2d 378, 385 (1997). See also “Guidebook for the Hawaii State Environmental Review Process” (2004) published by the

Hawaii Office of Environmental Quality Control at 9 (final EIS accepted before project can proceed) and 13 (environmental review process must be completed before final approval of an action can be granted.)

The Hawaii Supreme Court has consistently upheld this legal principle. See e.g. Pearl Ridge Estates Comm. Ass'n v. Lear Siegler, Inc., 65 Haw. 133, 648 P.2d 702 (1982), (voided boundary amendment because EA had not been prepared prior to approval); Molokai Homesteaders. v. Cobb, 63 Haw. 453, 466, 629 P.2d 1134, 1144 (1981) (environmental compliance required “prior to a governmental approval”).

There is no colorable question of law regarding the application of HRS § 343-5 to the facts in this case. The law mandates that the Hawai'i Superferry cease all use of harbor improvements made by the State of Hawai'i to facilitate Hawai'i Superferry's operation until such time as the State of Hawai'i completes an environmental assessment of the harbor improvements and of the operations of the Hawai'i Superferry and that assessment is accepted by the Governor or the HDOT.

Given the clarity of the statute in question, as reinforced by court decisions, any attempt by the Hawai'i Superferry to resume operations using such improvements prior to completion and acceptance of the environmental assessment is an illegal act.

SECOND QUESTION PRESENTED

If the law requires Superferry to cease operations until such time as an EA is completed and accepted, are all Federal, State, and local law enforcement agencies and the Executive Branch of the State obligated to desist from facilitating the continued operation of the Hawai'i Superferry?

The question answers itself. All Federal, State, and local law enforcement personnel are, by definition, bound to uphold the constitution and laws of the United States.

If the statutes of Hawai'i and the decisions of Hawai'i's highest court forbid the Superferry to continue operating, then law enforcement personnel are obligated to refrain from taking any actions that facilitate or encourage Superferry to continue operating.

Such actions would constitute *ultra vires* actions, making those engaged in such actions personally liable for any adverse consequences arising from their violation of law.

THIRD QUESTION PRESENTED

Is the security zone created by the United States Coast Guard an illegal action to facilitate the continued operation of Superferry?

After the first confrontations in Nawiliwili Harbor, Superferry announced that it would not return to Kaua'i without assurances that the Coast Guard would clear the harbor ahead of the boat. Exhibit 5.

The Superferry Security Zone Rule is specifically and exclusively

meant to make it possible for Superferry to enter, dock, unload, reload, and exit the Nawiliwili Harbor on Kaua'i. Federal Register / Vol. 72, No. 171 / Wednesday, September 5, 2007 / Rules and Regulations at 50877) ("Hereinafter Fed. Reg. Rule").

To the extent that the activation of this security zone rule encourages Superferry to continue operations and to the extent those operations are made possible by the existence of the security zone, the adoption of the security zone rule constitutes aiding and abetting the breaking of the law.

There is obviously no obligation on the part of Appellee Coast Guard to guarantee the right of unobstructed navigation to a ship operating illegally. To the contrary, Appellee Coast Guard has an obligation to prevent such violations of law and does so on a regular basis by intercepting drug smugglers and other illegal users of the maritime waters.

FOURTH QUESTION PRESENTED

Is the security zone improperly based on a regulation intended to prevent terrorism, subversion, and sabotage?

Security zones are meant for security threats and as a response to 9/11. 14328 Federal Register / Vol. 68, No. 57 / Tuesday, March 25, 2003 / Rules and Regulations.

Security zones are established for Presidential or Vice Presidential visits, high profile events such as the Olympics, controversial events such as transport of spent nuclear fuel, and in response to the threat of

terrorist attacks.

Dept of Homeland Security Delegation No.0170.1, 1406 Security Zone

Regulations ... 1625-AA87, 73338 Federal Register / Vol. 71, No. 237

/Monday, December 11, 2006 / Unified Agenda.

The regulation establishing security zones states the following:

“(b) The purpose of a security zone is to safeguard from destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of a similar nature: (1) Vessels, (2) Harbors, (3) Ports, and (4) Waterfront facilities: in the United States and all territory and water, continental or insular, that is subject to the jurisdiction of the United States.”

33 CFR § 165.30 Subpart D Security zones.

The Superferry Security Zone, on the other hand,

is intended to enable the Coast Guard and its law enforcement partners to better protect people, vessels, and facilities in and around Nawiliwili Harbor in the face of non-compliant protesters who have impeded passage of the Hawaii Superferry to its dock in the harbor.

Fed. Reg. Rule at 50877.

The “non-compliant protesters” have demonstrated no intent to destroy, cause the loss of, or cause injury to the Superferry or to any other vessel, harbor, port, or waterfront facility. The “non-compliant protesters” have not demonstrated any intent to commit sabotage or other subversive acts, cause an accident, or otherwise cause any harm at all. Paddling out on a surf board to a place in the path of the Superferry is not “similar” to

“sabotage or other subversive acts.” The “non-compliant protesters” were engaging in non-violent acts meant to enforce the law and protect the security of their homeland.

As Appellee Brice-OHara stated: “These weren't terrorists.” Exhibits 7 at 2. As Appellee Brice-OHara further stated, the protestors are “people who want to make a statement.” Id.

The actions taken by citizens in Nawiliwili Harbor discouraged Superferry from returning to the harbor and, thereby, cost Superferry revenues. The imposition of the rule is meant solely to prevent a private corporation from losing such revenues.

Superferry was a speculative investment made at a time when conditions existed that could foreclose the Superferry from ever going into operation, such as pending litigation. HSCt. op at 2. (Superferry knew as early as July 2005 that the decision of the lower court had been appealed). The investors now stand to lose their investment. That kind of speculation and risk-taking is garden variety business practice. Some lose. Some win.

It is not up to the State or Federal Government to now use force to make a winner out of a business, whose risk assessment turned out to have been wrong.

Nothing in 33 CFR § 165.30 Subpart D authorizes the creation of a

security zone to stop non-violent acts of protest or to ensure a private enterprise realizes its profit-making goals.

To the extent that the security zone activation, without benefit of an EA by either the State or the Coast Guard, results in Superferry adversely impacting the environment of Kaua'i, the activation is counter to "protection of natural resources." Dept of Homeland Security Delegation No.0170.1, supra. To the extent the activation supports lawlessness and erodes people's faith in their government, the goal of "national security" is defeated. Id.

The regulation does not permit the creation of a security zone for the circumstances described in the preamble to the rule at issue. Defendant Bryce-OHara acted *ultra vires* when she adopted the rule. The rule itself has no basis in law and is void.⁶

FIFTH QUESTION PRESENTED

Does the Coast Guard security zone violate the First Amendment rights of protestors?

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

⁶ In Court on October 5, Appellees announced that the Coast Guard had issued a permanent rule the day before. Appellants have received no information regarding any such rule, despite requests to Appellees' attorneys.

Subject to strict scrutiny, the government may impose reasonable restrictions on the time, place, and manner of protected speech, provided that the restrictions are (1) justified without regard to the content of the regulated speech, (2) narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels in which persons may communicate the subject information. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Bay Area Peace Navy v. United States, 914 F.2d 1224, 1226-27 (9th Cir. 1990).

The security zone in this case fails all three parts of the test and unconstitutionally restricts Appellants' First Amendment rights.

1. The Superferry Security Zone Rule is not content neutral.

The whole purpose of the security zone is to prevent protestors from blocking the passage of a private ship. The discussion of the rule referred to the target as “non-complaint protesters.” Fed. Reg. Rule at 50877. Anyone else can ask permission to enter the zone. Exhibit 12. (Declaration filed by Appellees in District Court). There is certainly nothing in the security zone rule that would prohibit granting permission for someone to enter the zone in order to hold up a sign saying “Welcome Superferry.”⁷

⁷ There is also the question of how the Coast Guard could distinguish between a protestor intent on entering the zone only to shout displeasure at

The discretionary character of the exclusion offers the Coast Guard the opportunity to exclude speech based on content and discriminate on the basis of viewpoint in determining who gets into the zone. Thus, the security zone rule “has the potential to ‘contravene the fundamental principle that underlies [the Supreme Court’s] concern about ‘content-based speech regulations: that ‘government may not grant the use of a forum to people whose views if [sic] finds acceptable, but deny use to those wishing to express less favored or more controversial views.’” John Doe v. Alberto Gonzales, <http://www.aclu.org/pdfs/safefree/nsldecision.pdf> (SDNY Sept. 6, 2007) at 31-32 citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49 (1986) quoting Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

The nature of the speech is action placing the protestor peacefully in front of the Superferry, similar to the classic picture of the Chinese man in front of the tank in Tiananmen Square. Preventing that action is the purpose of the security zone.

The rule on its face describes speech by its content and, therefore, is not content neutral. See Menotti v. City of Seattle,, 409 F.3d 1113,

the passing boat (compliant) and a protestor intending to get in front of the boat (non-compliant).

1128-29 (9th Cir. 2005) (“we look at the literal command of the restraint . . . whether a [restraint] is content neutral or content based is something that can be determined on the face of it; if the [restraint] describes speech by content then it is content based.”) citing City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002).

Because the exclusion created by the security zone is not content neutral, the rule fails the first Ward test. Ward v. Rock, 491 U.S. at 791 citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986).

2. The Superferry Security Zone Rule is not narrowly tailored to serve a significant government interest.

Rather than serving a significant government interest, the rule harms such interests.

Interests in navigation or public health and safety only arise if Superferry returns to Kaua’i.

The Superferry company stated that the boat would not return to Kaua’i without Coast Guard protection. Exhibit 5 at 2.

Appellees acknowledged that the Superferry’s master already demonstrated that he will not enter the harbor, if there are protestors present and the Coast Guard is not able to clear the channel. Exhibit 13 (Defendants’ Opposition to Plaintiffs’ Motion for Temporary Restraining Order at 4.)

Appellee Coast Guard acknowledged that the security zone is required to give the Coast Guard sufficient authority to clear the harbor. Fed. Reg. Rule at 50877 [“because the vessel remained outside the harbor, and because the protesters did not approach to within 100 yards of the vessel, the existing security zone (see 33 CFR 165.1410) did not provide the Coast Guard with the authority to control protestor entry into Nawiliwili Harbor or clear the channel of protesters before the Hawaii Super Ferry commenced its transit into the harbor.”]

Thus (1) the corporation stated it will not send the boat back to Kaua’i without a Coast Guard commitment to clear the harbor, (2) the Captain demonstrated that he will not enter the Harbor unless the Coast Guard clears the harbor, and (3) the Coast Guard concedes it cannot clear the harbor without the security zone authority. Absent the security zone, therefore, and faced with intense public opposition, Superferry will not return to Kaua’i.

If Superferry will not return to Kaua’i without Coast Guard promising to clear the harbor of protestors, then ensuring navigation and protecting public health and safety can be easily and completely achieved by not adopting a security zone, not promising Superferry protection, and not encouraging Superferry to return to Kaua’i. No zone, no confrontation, no threat to navigation or public health and safety – just that simple.

This no action alternative does not impinge at all on Plaintiffs' First Amendment rights. The choice of the security zone alternative does adversely affect those rights. That choice does not meet the second test of Ward v. Rock Against Racism, 491 U.S. 781, 291 (1989) because a means exists of achieving the same end without any restriction on constitutionally protected rights.

Granting a Temporary Restraining Order will essentially restore the *status quo ante* that existed prior to the adoption of the security zone rule and prevent all harm.

3. The Superferry Security Zone Rule does not permit Plaintiffs to exercise their First Amendment rights effectively.

Appellees argued to the District Court that there are ample alternative channels of communication. Exhibit 14 at ¶ 8 (Declaration filed by Appellees to the District Court).

Appellees attempted to distinguish the action from the message. If people can hold up signs or otherwise manifest their feelings outside the security zone and within visible range and earshot of the Superferry, then, according to Appellees, their exercise of First Amendment rights is adequately protected. Id.

Plaintiffs are (1) delivering a message that continued operation of the Superferry is illegal after the Hawai'i Supreme Court ruling, (2) petitioning

for redress of a grievance by engaging in the self help of physically preventing the illegal action from taking place, and (3) peacefully assembling in the path of Superferry to be sure the message is received.

The dramatic means of delivering their message got the attention of the Governor. Exhibit 9 at 3 (Governor agrees that she would not have come to Kaua'I, if the people had not jumped into the water).

The court is dealing with a group of people who, rightly or wrongly, view themselves as victims of continuing illegal activity.

United Steelworkers v. Phelps Dodge Corp., 865 F. 2d 1539, 1553 (9th Cir. 1989) (Trott, dissenting).

To characterize the citizen law enforcement actions as subversion would be to deter future expressions of free speech and to deter legitimate self help. Ibid. at 1553-54 (“chill the very conduct ... laws are designed to protect.”)

That the Unified Command has brought together Federal, State, and local law enforcement to aid and abet Superferry’s illegal operation is unfortunate. Their presence, however, does not change the intent of Plaintiffs’ exercise of their First Amendment rights nor the method required to deliver the message.

Permitting the Plaintiffs and others of like mind to stand or float to the side, while a violation of law is taking place, with the opportunity to wave

signs, shout, or otherwise communicate with the law breakers, is not sufficient and forecloses “an entire medium of public expression,” Menotti supra at 1138 citing Ctr. for Fair Pub Policy v. Maricopa County, 336 F.3d 1153, 1170 (9th Cir. 2003), i.e. self help.

The alternative provided is equivalent to permitting a homeowner to stand by waving a sign saying “Burglary is Illegal” while a burglar breaks into his house. In this case, however, there is both legal and political content to the speech as protestors seek to illuminate the illegal nature of the political decisions permitting Superferry to continue operating in violation of the law.

An alternative that merely offers citizens the possibility of protesting illegal action without permitting any activity that would actually prevent the illegal activity does not foreclose the illegal activity from taking place; the alternative does not prevent Plaintiffs being harmed. Cf. Dean v. Trans World Airlines, 924 F.2d 805, 809 (9th Cir. 1991)

As this Court has repeatedly stated, [footnote omitted], these rights [of free speech and of assembly] are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be

Brown v. State of La., 383 U.S. 131, 141-142 (1966).

SIXTH QUESTION PRESENTED

If those responsible for enforcing the law are breaking the law, openly and notoriously, do the people affected have the right to resist?

If Plaintiffs are correct on the law regarding HRS § 343-5 requiring Superferry to cease operations until the EA is complete, then all actions by the Federal, State, and local governments that further the continued operation of Superferry are simply aiding and abetting the breaking of the law. The activation of the security zone rule would be just such an aiding and abetting.

Abandoned by those responsible for law enforcement and awaiting court processes that take time to resolve, those who entered the waters of Nawiliwili Harbor to prevent the entry of Superferry and who intend to do so again, including some Appellants herein, acted and intend to act again, to enforce the law. Exhibits 15 (Declaration of Megan Wong), 16 (Declaration of Noelle Wong), 17 (Declaration of Richard Coon), 18 (Declaration of Barbara Wiedner), and 19 (Declaration of Lea Taddonio)]

In response to Appellants' intent to enforce the law, Appellees express their intent to arrest, prosecute, imprison, fine, and otherwise punish Appellants and others similarly committed to enforcing the law. Exhibit 6.

Appellants have their own list of illegal acts Appellees are on the verge of committing. Exhibit 20.

Faced with the Unified Command aiding and abetting Superferry in breaking the law by assembling massive force, Exhibit 21 (Coast Guard boats assembled in Nawiliwili Harbor) and faced with arrest, Appellants are entitled to assert their common law right of self help to resist an unlawful arrest. U.S. v. Garcia, 516 F.2d 318, 320 (9th Cir. 1975) (citation omitted) (right exists when there is “bad faith, unreasonable force, or provocative conduct on the part of the arresting officer”); U.S. v. Moore, 483 F. 2d 1361, 1364 (9th Cir. 1973) citing John Bad Elk v. U.S., 177 U.S. 529, 535 (1900) (right to resist unlawful arrest well established in common law).

The purpose of the privilege is to deter abuses of police authority. Moore, supra. at 1365. The Unified Command is engaged in just such an abuse.

A second purpose is:

to preserve the sense of personal liberty and integrity inherent in our system of constitutional government by protecting from punishment persons who reasonably resist unlawful intrusions by government agents.

Id.

Rather than acting lawlessly or violently, those in the water in August simply placed themselves peacefully in the path of Superferry.

If Superferry returns to Kaua’i, some Appellants intend to again peacefully place themselves in front of the Superferry to prevent Superferry

from breaking the law and inflicting harm on the kai (ocean) or the ‘aina (land).

Appellees, on the other hand, intend to act in bad faith, with unreasonable force, and through provocative conduct to aid and abet the breaking of the law. That intent includes an intent to unlawfully arrest anyone trying to prevent Superferry from breaking the law. Appellees intend to use the powers conferred by the adoption of a security zone rule to pursue their unlawful plan. That intent includes inflicting on Kaua’i whatever environmental or other damage can result from permitting Superferry to operate.

These facts are one fundamental basis for Appellants seeking a Temporary Restraining Order from this Honorable Court.

The courts provide the mechanism for the peaceful resolution of disputes that might otherwise rise to attempts at self help.

Operating Engineers Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988) citing Talamini v. All-State Insurance Co., 470 U.S. 1067 (1985) (Stevens, J., joined by Brennan, Marshall, and Blackmun, concurring).

THE FACTS AND LAW SUPPORT ISSUANCE OF A TEMPORARY RESTRAINING ORDER

Granting the Temporary Restraining Order will stop the lawlessness and remove the need for Plaintiffs to engage in self help to enforce the law.

The standard for granting a TRO is the same as the standard for granting a preliminary injunction:

A court may grant a preliminary injunction if a plaintiff shows (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest. Alternatively, a court may grant a preliminary injunction if a plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable harm, or that serious questions are raised and the balance of hardships tips sharply in his favor.

Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1158 (9th Cir. 2006)

(reversing denial of injunction where court required more than “mere

possibility of irreparable harm.”) See also Caribbean Marine Services Co.,

Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988):

Thus, under the “traditional test” typically used in cases involving the public interest, the district court should consider (1) the likelihood that the moving party will prevail on the merits, (2) whether the balance of irreparable harm favors the plaintiff, and (3) whether the public interest favors the moving party. Northern Alaska Environmental Center v. Hodel, 803 F.2d 466, 471 (9th Cir. 1986). We have allowed the district court some latitude in assessing the first two factors as it fashions appropriate relief. In some cases, we have stated that a plaintiff may meet its burden by demonstrating a combination of probable success on the merits and a possibility of irreparable injury. *E.g.*, Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1201 (9th Cir.1980) At other times, we have stated that where the balance of hardships tips decidedly toward the plaintiff, the district court need not require a

robust showing of likelihood of success on the merits, and may grant preliminary injunctive relief if the plaintiff's moving papers raise "serious questions" on the merits. *Id.* at 1201, 1203 & n. 9. This latter formulation is known as the "alternative test." Under either test, however, the district court must consider the public interest as a factor in balancing the hardships when the public interest may be affected. *See id.* at 1200; see also *American Motorcyclist Association v. Watt*, 714 F.2d 962, 967 (9th Cir.1983).

Whatever test the Court chose to apply, the issuance of a Temporary Restraining Order is clearly warranted by the law and circumstances presented herein.

When official lawlessness is implicated, the public interest in preserving the peace and restoring legality to all aspects of public official behavior weighs heavily in Appellants' favor.

When official lawlessness may result in physical injury and even death to Appellants, there is no real balancing necessary or even appropriate.

The financial loss of a private business, which is a loss that does not affect Appellees, can hardly tilt the scales at all in the other direction.

The potential harm to Appellants, particularly those Appellants most committed to defending the Constitution and laws of the United States, mandates the issuance of a temporary restraining order.

The entry of a temporary restraining order preventing Appellee Coast Guard from activating the Superferry Security Zone along with a finding that Appellants are likely to prevail on the merits, particularly in terms of the

continued operation of Superferry being illegal, should put an end to the threat hanging over Appellants.

CONCLUSION

The facts and arguments set forth herein support granting the relief requested by Appellants in the form of a Temporary Restraining Order.

Respectfully submitted,

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Attorney for Appellants

Dated: October 9, 2007