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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

KIRK C. FISHER,	)	
	)	Civil No. 11-00589 ACK-BMK
Plaintiff,	)	
	)	Honolulu, Hawaii
vs.	)	June 14, 2012
	)	10:42 a.m.
LOUIS KEALOHA, as an	)	
individual and in his	)	
official capacity as	)	
Honolulu Chief of Police;	)	
PAUL PUTZULU, as an	)	
individual and in his	)	
official capacity as former	)	
Honolulu Acting Chief of	)	
Police; CITY AND COUNTY OF	)	
HONOLULU; HONOLULU POLICE	)	
DEPARTMENT and DOE	)	
DEFENDANTS 1-50,	)	
	)	Motion for Preliminary
Defendants.	)	Injunction

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE ALAN C. KAY  
UNITED STATES DISTRICT COURT SENIOR JUDGE

APPEARANCES:

For the Plaintiff:	DONALD L. WILKERSON, ESQ. TE-HINA ICKES, ESQ. 841 Bishop Street, Suite 2201 Honolulu, Hawaii 96813
For the Defendants:	D. SCOTT DODD Deputy Corporation Counsel City and County of Honolulu 530 S. King Street, Rm. 110 Honolulu, Hawaii 96813
Court Reporter:	Katherine Eismann, CSR, CRR, RDR United States District Court 300 Ala Moana Boulevard, C-338 Honolulu, Hawaii 96850 (808)541-2062 ke@hid.uscourts.gov

1 Proceedings reported by machine shorthand, transcript produced  
2 by computer-aided transcription.

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1 (Thursday, June 14, 2012, 10:42 a.m.)

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3 COURTROOM MANAGER: Calling the case of Civil  
4 11-00589 ACK-BMK, Kirk C. Fisher versus Louis Kealoha, et al.  
5 This hearing has been called for plaintiff's motion for a  
6 preliminary injunction.

7 Counsel, your appearances for the record, please.

8 MS. ICKES: Good morning, Your Honor. Te-Hina Ickes  
9 and Don Wilkerson here for Plaintiff Kirk Fisher.

10 THE COURT: Good morning.

11 MR. DODD: Good morning, Your Honor. Scott Dodd on  
12 behalf of the City defendants.

13 THE COURT: Good morning. Please be seated. Does  
14 either side wish to put on any evidence or testimony?

15 MS. ICKES: I am sorry, Judge. I am sorry. I didn't  
16 catch that.

17 THE COURT: I said does either side wish to put on  
18 any evidence or testimony?

19 MS. ICKES: No, Judge, no witnesses for plaintiff.

20 MR. DODD: No witnesses for the defendants either,  
21 Your Honor.

22 THE COURT: All right. Miss Ickes, would you  
23 proceed, please.

24 MS. ICKES: Yes.

25 THE COURT: This is your motion for preliminary

1 injunction.

2 MS. ICKES: Thank you, Judge. You know, just as a  
3 preliminary matter, plaintiff had pointed out -- we had pointed  
4 out in our reply that we had intended to amend our complaint  
5 prior t the hearing on this matter.

6 THE COURT: Yes.

7 MS. ICKES: And all parties are by now aware that I  
8 did file an amended complaint, although it was filed this  
9 morning. So, I'm -- I don't know whether or not Mr. -- well, I  
10 don't believe Mr. Dodd has had an opportunity to review and --  
11 or is prepared to argue the likelihood of success on the merits  
12 or if the Court has even had an opportunity to review the  
13 amended complaint.

14 If Your Honor would like me to continue anyway, I  
15 just wanted to make that clear before I started. Also as a  
16 preliminary matter --

17 THE COURT: I haven't seen or heard of it.

18 MS. ICKES: Okay.

19 THE COURT: I forgot to ask my clerk to check on it.

20 MS. ICKES: However, I can proceed. With regard to  
21 the amended complaint, the reason I bring this up, Judge, is  
22 because it was addressed in the City's memorandum in opposition  
23 and addressed in my reply. With regards to --

24 THE COURT: Is that a problem for you, Mr. Dodd, with  
25 our proceeding now?

1 MR. DODD: May I speak from here, Your Honor?

2 THE COURT: Yes, if you can speak into the mike.

3 MR. DODD: Thank you. Basically, Your Honor, counsel  
4 is correct. I have not had an opportunity to review the  
5 amended complaint. I got the email this morning that it was  
6 e-filed at 9:09. So I can't truly comment on the likelihood of  
7 success on the merits as to the amended complaint. Thank you.

8 THE COURT: Thank you. Are ready to go ahead with  
9 this hearing at point?

10 MR. DODD: Yes, we can submit arguments on the  
11 hearing, Your Honor.

12 THE COURT: All right.

13 MS. ICKES: Thank you, Judge. With regards to -- I  
14 am going to refer to Page 2 of City's memorandum in opposition  
15 to this motion. The second paragraph under introduction,  
16 according to the complaint, plaintiff was arrested on two  
17 counts of abuse.

18 In my response, in my reply, I dispute that.  
19 However, it's come to my knowledge since writing that reply,  
20 based on some initial disclosures by the City, that Mr. Fisher  
21 was in fact arrested on two counts of abuse. So I made that  
22 change in the amended complaint.

23 That could be relevant in our arguments or the Court  
24 may have some questions on that.

25 THE COURT: Why are there two counts?

1 MS. ICKES: Two counts of an abuse of a household  
2 member rather than two counts of harassment.

3 THE COURT: You mean the mother and the daughter?

4 MS. ICKES: Correct.

5 THE COURT: The mother and once with the daughter?

6 MS. ICKES: Correct, Your Honor. He was not --

7 THE COURT: I thought we were aware of that.

8 MS. ICKES: He was not convicted of abuse. Your  
9 Honor, the reason I bring that up is because I took issue with  
10 that in my reply to the City's memo in op. Since filing that  
11 reply, it's come to my knowledge that he was in fact arrested  
12 for abuse and not harassment. So that is an error on my part  
13 for taking issue with that fact.

14 And I have made that -- I have remedied that in the  
15 amended complaint. I just wanted to point that out.

16 THE COURT: Is that a different statute then?

17 MS. ICKES: It is a different statute. HR --

18 THE COURT: Pardon me?

19 MS. ICKES: It is a different statute. HRS 709-906.

20 THE COURT: Why have you waited to this time?

21 MS. ICKES: Well, I can speak to that, Your Honor.

22 THE COURT: It's a different analysis.

23 MS. ICKES: I would disagree. If the Court would  
24 like to hear my analysis, it's the same analysis that I have  
25 set forth in my memorandum in opposition to the City and

1 Defendant Kealoha's motions to dismiss. It's the same analysis  
2 set forth in the motion for preliminary injunction for these  
3 reasons.

4 The statute with regards to issuing a gun permit, HRS  
5 134-2, 134-7, that are at issue here, have to do with what a  
6 defendant was convicted of. Mr. Fisher was convicted of  
7 harassment.

8 THE COURT: Are you saying he -- I thought you just  
9 said he was convicted of abuse.

10 MS. ICKES: I am sorry if I misspoke, Your Honor.  
11 What I intended to say --

12 THE COURT: Okay. Let's stop.

13 MS. ICKES: -- that he was arrested for.

14 THE COURT: Stop and let's start over again.

15 MS. ICKES: Yes, Judge.

16 THE COURT: Was he charged with harassment or was he  
17 charged with abuse?

18 MS. ICKES: He was charged with harassment. He pled  
19 guilty to harassment.

20 THE COURT: Why did you bring up abuse a few minutes  
21 ago?

22 MS. ICKES: Because I had erroneously stated in my  
23 reply that Mr. Fisher was arrested for harassment. The police  
24 reports indicate that he was arrested for abuse. The  
25 prosecutors charged him with harassment and he was -- he pled

1 guilty to harassment.

2 THE COURT: Well, I hope I have that straight at this  
3 point.

4 MS. ICKES: But, Judge, I would submit that the  
5 analysis is the same, because it really doesn't matter what the  
6 facts are underlying the conviction. The statutes don't  
7 contemplate what one was arrested for or even charged with but  
8 what an applicant was convicted of.

9 And in this case, he was charged with and convicted  
10 of harassment under HRS 7-11-1106.

11 THE COURT: Okay. So we are back on the initial  
12 track now.

13 MS. ICKES: Yes, Judge.

14 THE COURT: We will erase your mistake, and we will  
15 go back to the original track.

16 MS. ICKES: Thank you, Judge.

17 THE COURT: Okay.

18 MS. ICKES: Really what this case is about is the  
19 continuing violation of Mr. Fisher's constitutional right to  
20 bear arms. That violation we submit started back in  
21 October 2009 with the initial denial of his application for a  
22 permit to acquire.

23 THE COURT: Okay. Now did he file a subsequent  
24 application?

25 MS. ICKES: He did not file a subsequent application,



1 Judge. He wrote a letter to the police chief requesting that  
2 that application be reevaluated and that --

3 THE COURT: That was the new police Chief Kealoha.

4 MS. ICKES: Correct. So the initial application was  
5 denied in October 2009 by acting -- then Acting Police Chief  
6 Paul Putzulu.

7 Through counsel, defendant asked the new police  
8 chief, Defendant Kealoha, to reevaluate that application, and  
9 Defendant Kealoha reaffirmed Paul Putzulu's prior denial of  
10 Mr. Fisher's application for permit to acquire.

11 THE COURT: Have you served Putzulu?

12 MS. ICKES: Judge, we have made numerous attempts to  
13 try and serve Mr. Putzulu and have not had any success. We  
14 initially tried to serve him through the City. They declined  
15 to accept service of process because he's no longer an  
16 employee, which we understand.

17 We tracked down -- we tried to track down his new  
18 employer, which we were unable to, and tried numerous times at  
19 his residence. Our process servers have indicated to me that  
20 he has a very large gate around his property and have not been  
21 able to locate him.

22 THE COURT: He has what?

23 MS. ICKES: A large gate around his property or the  
24 last known address that we have for Mr. Putzulu. So to this  
25 date, he has not been served.

1 THE COURT: Are you going dismiss him?

2 MS. ICKES: Judge, I haven't had an opportunity to  
3 consider that, but --

4 THE COURT: Well, what do you mean you haven't had an  
5 opportunity?

6 MS. ICKES: Well, I haven't considered it.

7 THE COURT: We have been here for several months now.

8 MS. ICKES: That's correct, and we have continued  
9 trying to serve him. It may come to a point where we have to  
10 publish. I haven't gotten there yet, but we have tried  
11 numerous times.

12 And if the Court requires, I can submit an affidavit  
13 from our process server indicating the times they have tried to  
14 serve him.

15 THE COURT: Well, you know, if you are going to  
16 pursue him, you better pursue him, and you better seek  
17 publication service then.

18 MS. ICKES: Yes, Judge.

19 So with regard to the continuing violation of  
20 Mr. Fisher's constitutional right to bear arms, plaintiff  
21 submits that it started back in October 2009 with the initial  
22 denial, continues today, and will continue if this injunction  
23 is not issued.

24 THE COURT: Now, on June 10th of 2010, you filed a  
25 motion to enforce the order permitting return of firearms.

1 MS. ICKES: Yes, Judge.

2 THE COURT: Before the family court. And that order  
3 or that motion was denied. Apparently you have not been able  
4 to find the order or any findings.

5 MS. ICKES: The order from that family court was just  
6 an order denying the motion. There were no findings of fact or  
7 conclusions of law filed with regards to that family court  
8 judge's decision. It was just a denial of the motion.

9 THE COURT: So, does that -- so is there a res  
10 judicata problem?

11 MS. ICKES: With regards to us filing the instant  
12 lawsuit?

13 THE COURT: Pardon me?

14 MS. ICKES: With regards to us filing the instant  
15 lawsuit?

16 THE COURT: To the issue of whether or not Mr. Fisher  
17 is entitled to get his guns back.

18 MS. ICKES: Well, Judge, that motion to -- was to  
19 enforce an even prior order that was issued back in 1998 by  
20 another family court judge, and that order actually ordered HPD  
21 to return Mr. Fisher's firearms which they did. So, when --

22 THE COURT: But when did they return his firearms?

23 MS. ICKES: Shortly thereafter, Judge. It was --

24 THE COURT: Shortly thereafter what?

25 MS. ICKES: 1990 -- the year was 1998. And if I

1 could just get the date for you. November 4th, 1998, a family  
2 court judge ordered an order permitting -- issued an order  
3 permitting the return of firearms.

4 And with that order being filed, it was ordered that  
5 Mr. Fisher's firearms be returned to him. And I don't have the  
6 exact date, Judge, but following this November 4th, 1998,  
7 order, HPD promptly returned Mr. Fisher's firearms.

8 THE COURT: So sometime in '98 or '99.

9 MS. ICKES: Yes, Judge, late '98 or early '99.

10 THE COURT: So what was this -- then he filed an  
11 application to purchase a new firearm; is that right?

12 MS. ICKES: That's correct, Your Honor, more than 10  
13 years later.

14 THE COURT: And that was in 2009?

15 MS. ICKES: Yes, the fall of 2009. The denial came  
16 in October of 2009. October 1st, 2009, shortly after -- during  
17 the fall of 2009 is when he applied to get a new firearm.

18 THE COURT: And then in October 1 of 2009, Defendant  
19 Putzulu, the acting chief, directed him to surrender his  
20 firearms which apparently he did.

21 MS. ICKES: Yes.

22 THE COURT: According to paragraph 25 of your  
23 complaint. And then in June of -- June 10th of 2010, plaintiff  
24 submitted this motion to -- to the family court to enforce the  
25 order permitting return of firearms.

1 MS. ICKES: That's correct. Because it was a prior  
2 family court order and the order was not being honored by HPD  
3 at that point, counsel thought that the family court could  
4 order that the previous order be complied with.

5 THE COURT: Well then my question to you is is that  
6 order from the family court denying your motion res judicata?

7 MS. ICKES: Judge, I don't believe so, because the  
8 order is just denying the motion to enforce the order. We are  
9 not exactly asking this Court to enforce that prior order, but  
10 to overturn HPD's decision to deny Mr. Fisher's new  
11 application.

12 THE COURT: But the order -- I mean the issue in both  
13 that order and this matter is whether Mr. Fisher is entitled to  
14 possession of his firearms based on his prior conviction of  
15 harassment.

16 MS. ICKES: The order -- the initial order from 1998  
17 allowed Mr. Fisher to -- or ordered HPD to return the firearms  
18 to Mr. Fisher. In 2009 HPD required Mr. Fisher to return those  
19 firearms that they had previously returned to him back in 1998  
20 based on his new permit or application for permit to acquire.

21 At that time, apparently HPD looked through the  
22 file -- the old 1997 file and saw the underlying facts of  
23 Mr. Fisher's original arrest. And based on that research, they  
24 decided that he was ineligible, and, therefore, required him to  
25 return whatever firearms he had in his possession.

1           Now there has never been an order by any court  
2 reversing that initial order to return Mr. Fisher's firearms.  
3 I'm not sure if I'm answering Your Honor's question. But we  
4 are seeking an order today requiring HPD to issue a permit,  
5 because Mr. Fisher is not statutorily disqualified under the  
6 Hawaii revised statutes. So I don't -- I don't believe it's  
7 the same issue.

8           THE COURT: Well, isn't the issue whether -- because  
9 of his prior conviction of harassment, whether he's entitled to  
10 possess a firearm?

11           And in one case you are talking about return of  
12 firearms and in another case you are talking about application  
13 to purchase a new firearm. And aren't both of those based on  
14 whether or not he's precluded from possessing a firearm based  
15 on his prior conviction of harassment?

16           MS. ICKES: Yes, Judge.

17           THE COURT: Is that res judicata?

18           MS. ICKES: May I have a moment?

19           THE COURT: You may.

20           (Brief pause.)

21           MS. ICKES: Thank you, Judge. Mr. Wilkerson  
22 actually -- with respect to that motion to enforce the prior  
23 order, Mr. Wilkerson was present at that hearing, the motion to  
24 enforce order permitting firearms on June 10th, 2010. And  
25 although I have not attached a copy of the order, that order

1 was denied. No findings of fact or conclusions of law were  
2 entered.

3           However, I believe the basis or the basis that Judge  
4 Choy indicated for denying that motion was that he -- that the  
5 family court did not have jurisdiction over that matter.

6           Secondly, as I think I was trying to point out --

7           THE COURT: How are we going to know that?

8           MS. ICKES: Judge, I believe the judicial retention  
9 statutes regarding transcripts are 10 years. Obviously, I  
10 don't have the transcripts before me, but I can -- I can try to  
11 obtain them.

12           As I said, co-counsel, Mr. Wilkerson, did attend that  
13 hearing and argued that motion. And that was what the basis of  
14 the denial was. And --

15           (Brief pause.)

16           MS. ICKES: Excuse me, Judge. May I have a moment to  
17 confer with co-counsel? Thank you.

18           (Brief pause.)

19           MS. ICKES: Thank you, Judge. I just wanted to get  
20 some further clarification on that motion to enforce the order.

21           Now the prior order that we were discussing, that of  
22 November 4th, 1998, essentially states that HPD should return  
23 Mr. Fisher's firearms so long as he's statutorily qualified.  
24 The language of the order is set forth in our complaint.

25           With regards to the motion to enforce the order

1 permitting, with -- excuse me -- with respect to the motion to  
2 enforce that prior order, I believe it was Judge Choy's  
3 position with the family court that although that order was  
4 enforceable, he's not in a position to determine whether or not  
5 Mr. Fisher is statutorily qualified or disqualified.

6 And that's what we are asking you to decide, Judge.  
7 Our argument is that Mr. Fisher is not statutorily  
8 disqualified. Another argument that --

9 THE COURT: So you are changing your position then.  
10 You are not saying that the order -- the family court order was  
11 denied because they did not have jurisdiction, but its order  
12 had always been conditioned on a determination of -- by the HPD  
13 of whether or not Mr. Fisher was permitted to receive the  
14 weapons back.

15 MS. ICKES: Yes, Judge, after further clarification  
16 with co-counsel, and thank you for giving me that opportunity  
17 to clarify that. That was the position of the family court in  
18 2010 with respect to the motion to enforce.

19 THE COURT: And how do I know that with regard to the  
20 second order?

21 MS. ICKES: Well, Judge, I don't have -- excuse me.

22 THE COURT: As far as the second order that didn't  
23 have any findings or conclusions?

24 MS. ICKES: I am -- I don't have any transcripts to  
25 turn over to the court at this time. I can certainly try to



1 obtain them. The family court order was just a standard order  
2 denying the -- denying the motion.

3 THE COURT: So you think you can get the transcript  
4 for me?

5 MS. ICKES: I can certainly try, Judge. Just based  
6 on some prior research I have done on this case, I know  
7 generally the retention statute for transcripts are 10 years.

8 I'm not sure if the family court has a different  
9 system, but as you can see, the hearing was held on -- in 2010,  
10 which was just about two years ago. So, I -- when I get back  
11 to my office today, I will try and order those transcripts and  
12 get them to the Court if I can.

13 THE COURT: I forgot now. Do we have the motion? We  
14 probably have the motion, don't we?

15 MS. ICKES: The motion to enforce the --

16 THE COURT: Yes.

17 MS. ICKES: I did not attach that motion to any of my  
18 moving papers or opposition.

19 THE COURT: Who prepared the order denying the  
20 motion?

21 MS. ICKES: Mr. Wilkerson is informing me that there  
22 was none. That the denial was just made on the record and a  
23 paper one was not filed. I would have to do some further  
24 research on that, Your Honor.

25 I -- I'm reading what I have in my complaint and what

1 I have in my motion, but that is essentially the information  
2 that I have before me and that I can argue this morning. If  
3 the Court requires additional information, like the actual  
4 motion, I can take steps today to get that information over to  
5 the Court.

6 THE COURT: Well, I wish you good luck. I'm not  
7 sure. I am not too confident you are going to be able to find  
8 any transcript. Their records are not very substantial.

9 MS. ICKES: Well, I will attempt to anyway, Your  
10 Honor, but I certainly have a copy of the motion that was  
11 filed.

12 THE COURT: I have a copy.

13 MS. ICKES: Okay. With regards to -- I believe this  
14 may address one of the Court's prior questions.

15 What we are seeking today is injunctive relief,  
16 requesting that HPD or in this case Chief Kealoha grant  
17 Mr. Fisher's application for permit to acquire a new firearm  
18 that was initially submitted in the fall of 2009.

19 The order regarding the return of firearms from 1998  
20 had to do with HPD returning those firearms that he had  
21 surrendered previous to his harassment conviction. So,  
22 after -- and after his conviction for harassment, the family  
23 court ordered that so long as Mr. Fisher's statutorily  
24 qualified, HPD should return his guns. And at that time, HPD  
25 returned his guns.

1 Ten years later, when he applied to obtain a new  
2 firearm, they said -- HPD informed him that he needed to --  
3 that his application was denied, and that he needed the turn  
4 over all the firearms or dispose of firearms in his possession,  
5 and he has lawfully dispose of them. However, they are not in  
6 HPD's possession, so we are not asking HPD --

7 THE COURT: They are destroyed?

8 MS. ICKES: Correct. We are not asking that HPD  
9 return any firearms that are subject to that initial order.  
10 What we are asking for is that HPD reevaluate or grant  
11 Mr. Fisher's permit -- application for permit to acquire  
12 additional firearms.

13 THE COURT: So, let me -- I haven't really read this  
14 motion closely, the motion filed with the family court. What  
15 was said, was that only for the return of his firearms that he  
16 surrendered again, or was it also to grant him a new permit to  
17 purchase the new weapon?

18 MS. ICKES: I'm sorry, Judge. I don't have that  
19 motion before me. I can't answer yes or no.

20 THE COURT: The language is a little vague. It  
21 covers the -- on the one hand it requests that he get his  
22 firearms back, but it also discusses whether or not his  
23 conviction of harassment was a conviction of violence and a  
24 crime of violence. I will have to go through that more  
25 thoroughly.

1 MS. ICKES: Chronologically, Your Honor, the motion  
2 to enforce the prior order to returned firearms came subsequent  
3 to Paul Putzulu's -- Acting Chief Paul Putzulu's denial of the  
4 application -- of Mr. Fisher's application to get a new  
5 firearm. That was October 1st, 2009. That motion to enforce  
6 was June 10th, 2010.

7 Mr. Fisher, through counsel, wrote to the new Chief  
8 Kealoha requesting that he reevaluate that application. So,  
9 the reapplication, if you will, came after the family court's  
10 order denying the motion to enforce the prior order. So I  
11 don't believe that motion would have addressed what came after  
12 on August 31st when Mr. Fisher essentially reapplied for a  
13 permit. And then defendant --

14 THE COURT: What you have pointed out, a motion came  
15 after J. Putzulu denied application and required the return of  
16 or surrender of all his firearms.

17 MS. ICKES: That's correct. And then there was a  
18 subsequent attempt to reapply or ask Chief Kealoha to  
19 reconsider an application by Mr. Fisher to obtain new firearms  
20 or to obtain a new firearm. And that was denied by Kealoha in  
21 September of 2010.

22 So chronologically, there were reapplications and  
23 denials following that motion to enforce. There was also an  
24 application prior to that motion to enforce. It's all set  
25 forth in the complaint as well as in the statement of facts to

1 this instant motion.

2 THE COURT: The same issue was involved.

3 MS. ICKES: Well, Judge, I believe that the initial  
4 order back in 1998 had to do with those firearms in  
5 Mr. Fisher's possession at that time. There was an order that  
6 he surrender the firearms, which he did. He pled guilty to and  
7 was convicted of harassment.

8 Later, after serving his term of probation, the  
9 family court ordered that HPD return those firearms so long as  
10 he is statutorily qualified. They returned the firearms.  
11 They, meaning HPD, returned the firearms. And then all of this  
12 happens 10 years later when he applies to -- pursuant to the  
13 Hawaii revised statutes to obtain a new firearm.

14 They reconsider their position and deny the new  
15 application and order him to surrender or lawfully dispose of  
16 firearms in his possession. So what's at issue here is whether  
17 Mr. Fisher is statutorily qualified. And our argument,  
18 obviously, is that he is statutorily qualified and that HPD or  
19 Chief Kealoha and HPD should grant his application to obtain a  
20 new firearm or firearms.

21 So while that motion to enforce had -- that motion to  
22 enforce essentially had to do with returning firearms that he  
23 was ordered to surrender. And we are seeking here, for  
24 purposes of this -- this case and this motion, an order  
25 requiring HPD to issue a permit pursuant to his application,

1 because he has -- he being Mr. Fisher is statutorily qualified  
2 under law to -- to possess a firearm.

3 With respect to the instant motion, the motion for  
4 preliminary injunction is before the Court this morning, and I  
5 know the Court is well aware of the four part Winter test: The  
6 likelihood of success on the merits, which we have kind of  
7 discussed up to now, irreparable harm to plaintiff, the balance  
8 of equities, and the interests of the public.

9 Plaintiff would submit that despite this Court's  
10 prior order with respect to City and Kealoha's motions to  
11 dismiss, which Your Honor granted in part with respect to  
12 Kealoha and denied in part, and granted in -- granted with  
13 respect to the City, that plaintiff is -- can and has still  
14 made a strong showing that he's likely to succeed on the  
15 merits.

16 As I mentioned earlier, the -- or we have filed an  
17 amended complaint. The Court obviously is well aware that in  
18 the order of -- back in April of 2012, that the Court left the  
19 door open for the plaintiff to file an amended complaint if we  
20 so chose to. And we did, albeit it was filed this morning.

21 We filed the amended complaint this morning, and we  
22 believe we've addressed and cured those deficiencies that the  
23 Court pointed out in their April 2012 order with respect to  
24 municipal liability and qualified immunity to --

25 THE COURT: Well, we are not on a motion to dismiss

1 again. We are just on a motion for preliminary injunction.

2 MS. ICKES: Yes, Judge. I guess the only reason I  
3 bring that --

4 THE COURT: And of course we have not read your  
5 amended complaint which was very dilatorily filed this morning.

6 MS. ICKES: Yes, Judge. I apologize for that. There  
7 was --

8 THE COURT: I don't want to discuss those points --

9 MS. ICKES: Yes, Judge.

10 THE COURT: -- that we dismissed.

11 MS. ICKES: I am not going to get into it.

12 THE COURT: This is a preliminary injunction.

13 MS. ICKES: I am not going to get in to those  
14 deficiencies that the Court pointed out.

15 THE COURT: Let's proceed.

16 MS. ICKES: Thank you. I may be repeating myself  
17 here, Judge, but what we are trying to do here -- what we are  
18 seeking here is not -- we are not trying to invalidate any  
19 statute. We are not trying to get a particular statute  
20 declared unconstitutional.

21 We are just -- rather we are arguing here that in  
22 Mr. Fisher's case, Chief Kealoha and, by extension, HPD and, by  
23 extension, the City and County have misapplied the statute as  
24 it -- as -- in Mr. Fisher's -- with regards to Mr. Fisher's  
25 application, because Mr. Fisher is not statutorily

1 disqualified.

2 And those issues are discussed at length in our  
3 motion. We discuss the applicable Hawaii law with respect to  
4 the gun laws. We discuss crimes of violence under Hawaii and  
5 federal law. We -- which was discussed at length at the -- the  
6 previous hearing on City's motion to dismiss.

7 What's very relevant here, Judge, is the case law  
8 states, and it's argued at length in our motion, is that with  
9 regards to whether or not someone is statutorily disqualified  
10 because of a prior crime -- because of a prior crime of  
11 violence, the statute contemplates what applicant has been  
12 convicted of, not what one was arrested for or even charged  
13 with.

14 Many Ninth Court Circuit -- Ninth Circuit courts  
15 discuss the fact that harassment is not a crime of violence. I  
16 am sorry, Judge. I may have misspoke. It might be Tenth  
17 Circuit. But in any case, the case law is set forth at length  
18 in our motion.

19 Not what one was arrested for, not what one was  
20 charged with, and not on the facts underlying the conviction.  
21 So, plaintiff submits that in this case, it does not matter  
22 what the police reports say. It does not matter what  
23 Mr. Fisher was arrested for. It does not matter what  
24 Mr. Fisher was charged with.

25 What matters is what the conviction is. And in this



1 case, the conviction was for harassment. And we submit that  
2 harassment here does not satisfy the crime of violence, because  
3 it does not have elements of injury, threats of injury, use of  
4 force or attempted use of physical force as elements. So for  
5 those reasons, Mr. Fisher is not statutorily disqualified from  
6 firearms ownership.

7 The Court addressed that issue in its lengthy order  
8 and with just regards to the allegations that plaintiff  
9 sufficiently has alleged second -- that his second amendment  
10 right to bear arms was infringed when defendants denied his  
11 permit to acquire.

12 With respect to irreparable harm, Judge, we submit  
13 that Mr. Fisher has suffered irreparable harm. I started off  
14 with the fact that back in 2009, October 2009 when Mr. Putzulu  
15 initially denied his application through today, and if this  
16 injunction is not granted he will continue to suffer  
17 constitutional violation.

18 Now district courts in other jurisdictions, and I  
19 have discussed them in my memo -- or my memo in support and in  
20 my reply, that district courts in other jurisdictions have  
21 ruled that irreparable harm is established or can be presumed  
22 when the claim for preliminary injunction is based on a  
23 constitutional violation.

24 And in this case, that's exactly what we are  
25 alleging. That Mr. Fisher's permit or application rather was

1 wrongfully denied, because he is statutorily qualified. And as  
2 a result, he's been deprived of his second amendment right to  
3 bear arms.

4 THE COURT: And his wife won't let him have the arms.  
5 She keeps the arms in her own bureau?

6 MS. ICKES: Judge, I -- I don't know. But with -- in  
7 any case, what's going on now is that he's being denied the  
8 opportunity to own firearms himself. And that's a right  
9 covered by the second amendment and that statutorily qualified  
10 United States citizens to meet objective criteria are entitled  
11 to.

12 And plaintiff submits in this case Mr. Fisher is  
13 entitled to own and possess firearms pursuant to the second  
14 amendment and Hawaii Revised Statutes Chapter 134 and is not  
15 disqualified by any statutory law -- Hawaii statutory law or  
16 the Lautenberg Amendment or any other federal law that  
17 prohibits firearm ownership for citizens who have previously  
18 been convicted for crimes of violence or misdemeanor crimes of  
19 domestic violence.

20 That's all inapplicable here, because Mr. Fisher --  
21 as argued before, Mr. Fisher has not been convicted of a crime  
22 of violence.

23 THE COURT: Thank you.

24 MS. ICKES: One thing, another point that --

25 THE COURT: How much more do you have?

1 MS. ICKES: Well, I was just going to go through the  
2 four prongs, Judge. I am on irreparable harm. I have -- I can  
3 speed through it if the Court has specific questions. Not very  
4 much longer.

5 THE COURT: Okay. We are running kind of short on  
6 time.

7 MS. ICKES: Okay. The largest point I believe we  
8 covered was the likelihood of success. But just briefly,  
9 Judge, with respect to irreparable harm not only has Mr. Fisher  
10 suffered liberty interest because he's been deprived of his  
11 constitutional right to bear arms, but also a property interest  
12 which the City does not address in its memorandum in  
13 opposition.

14 I believe I cite a Nevada case -- a District Court of  
15 Nevada case that states that property is unique. And under  
16 general principles of law of equity, its possible loss or  
17 destruction usually constitutes irreparable harm. And we are  
18 arguing here that not only has Mr. Fisher been deprived of the  
19 liberty interest but also the property interest. So, plaintiff  
20 submits that Mr. Fisher has undoubtedly suffered irreparable  
21 harm.

22 I can cover balance of equities and public interest  
23 fairly quickly. I would just like to point out that the  
24 reasons set forth by the City with regard to protecting the  
25 public are entirely speculative. Harm to the public, their

1 argument is -- they are based on pure speculation, and many of  
2 their arguments are completely inapplicable here because they  
3 discuss cases that are to do with carrying a firearm in public.

4 THE COURT: Carrying a firearm in public.

5 MS. ICKES: So that's inapplicable here. Here  
6 Mr. Fisher -- with regards to Mr. Fisher, he just wants to be  
7 able to have a -- to -- excuse me, Judge. That's not what  
8 Mr. Fisher is seeking here. He is not trying to obtain a  
9 permit to carry weapons in public.

10 So I would submit that the City's arguments regarding  
11 harm to the public are inapplicable here. Also, issuing the  
12 injunction would further serve the public interest because --

13 THE COURT: I wasn't really persuaded by the City's  
14 argument on that, so go ahead to your next item.

15 MS. ICKES: Okay. Just one last note on public  
16 interest, because, you know, there are these --

17 THE COURT: If you want to get into it, I will give  
18 you some reasons that the City can assert.

19 MS. ICKES: I will move on, Judge.

20 THE COURT: Okay.

21 MS. ICKES: And although I did not raise this in my  
22 motion, the City raises levels of scrutiny. If Your Honor  
23 wants me to get into it, I can try and address that. But if  
24 you don't have any questions, I don't have to. I know we are  
25 running short on time, so --

1 THE COURT: Please move ahead.

2 MS. ICKES: Yes, Judge. For all of those reasons, we  
3 believe we are likely to succeed on the merits or Mr. Fisher's  
4 claims are likely to succeed on the merits. That because  
5 constitutional issues and liberty -- he has been deprived of  
6 liberty interest, property interest, he has suffered  
7 irreparable harm.

8 The balance of equities weigh in his favor. The City  
9 has not even addressed the balance of equities. And the public  
10 interest would serve -- it would serve the public interest to  
11 grant this -- or issue this injunction, because other similarly  
12 situated citizens are subject to these same arbitrary  
13 evaluations of permits to acquire.

14 By issuing this injunction, it would put the HPD, the  
15 Chief, the City on notice that at least when it comes to  
16 harassment, there are certain things you can and cannot look  
17 at. In this case, Mr. Fisher was not convicted of a crime of  
18 violence as set forth in our moving papers.

19 If Your Honor has any additional questions, we are  
20 just requesting that based on all of these, the reasons set  
21 forth in our moving papers, our reply, the argument here today,  
22 that the injunction be issued and HPD be ordered to grant  
23 Mr. Fisher's application for a permit to acquire.

24 THE COURT: Thank you.

25 MS. ICKES: Thank you.

1 THE COURT: Mr. Dodd.

2 MR. DODD: Thank you, Your Honor. Your Honor, excuse  
3 me one second. It is our position that this motion has not  
4 been properly supported by evidence. Plaintiff argues facts --

5 THE COURT: What's your point on the res judicata  
6 matter?

7 MR. DODD: The res judicata matter. Your Honor, I  
8 didn't brief that in my papers, because I believe that is a  
9 more appropriate subject for a motion for summary judgment,  
10 because I was not including evidence with my opposition papers.  
11 I don't disagree with the Court's position, and I do think that  
12 is a legitimate argument that the City would raise.

13 THE COURT: I haven't --

14 MR. DODD: But I don't have the evidence.

15 THE COURT: I haven't really pronounced any position  
16 on that. I am just raising some issues on it.

17 MR. DODD: Your Honor, when -- which gets back to my  
18 point that the plaintiff has not sufficiently shown evidence  
19 that the Court needs to evaluate. I mean plaintiff is seeking  
20 an injunction here. Plaintiff's got to show more than just a  
21 possibility of success.

22 THE COURT: Did you even raise res judicata in your  
23 answer?

24 MR. DODD: I didn't. Your Honor, I will not make a  
25 statement on the record that I don't know the answer to. But

1 as to the motion -- as to plaintiff's motion, what the -- what  
2 we would like to see, I think everyone would like to see are  
3 these filings in the family court that plaintiff has been  
4 arguing about. Those are not part --

5 THE COURT: I mean your opposition did not even  
6 address this issue of whether this is a crime of violence.

7 MR. DODD: Your Honor, we did address that in the --  
8 in our motion to dismiss. We addressed whether it was a crime  
9 of violence.

10 The City defendant's position, Your Honor, is that  
11 plaintiff is statutorily disqualified. Plaintiff argues that  
12 he is statutorily qualified but there is not evidence to  
13 support that. We believe that eventually we will prevail on  
14 that issue. But for a --

15 THE COURT: You haven't presented any evidence to me  
16 about that.

17 MR. DODD: Nor has the plaintiff. So, it is  
18 plaintiff's burden on a motion for preliminary injunction to  
19 establish that he is likely to succeed. We believe he has not  
20 done that.

21 Your Honor is correct that we did not establish  
22 evidence. We did not adduce evidence in opposition, but it's  
23 plaintiff's burden to carry on a motion for preliminary  
24 injunction, and the argument is that plaintiff has not done  
25 that.

1 THE COURT: Well, they have analyzed the charge and  
2 the nature of the charge and conviction.

3 MR. DODD: Your Honor, in our --

4 THE COURT: And provided case law.

5 MR. DODD: Your Honor, in our motion to dismiss, we  
6 brought up that -- and we argued cases from the Supreme Court  
7 that it is not -- excuse me -- it is not what plaintiffs argue  
8 that the statute is; that the police department is solely  
9 limited to the elements of what plaintiff was convicted to.  
10 The opinion by Ginsberg shows --

11 THE COURT: There is no element of crime or force in  
12 the statute.

13 MR. DODD: Yes, Your Honor.

14 THE COURT: Crimes or --

15 MR. DODD: I do not believe that the -- I do not  
16 believe that that is required as it is the Supreme Court  
17 decision that it does not have to be an element in order for  
18 a -- for the -- a permittee's application to be denied.

19 I understand plaintiff's position that unless he's  
20 convicted of a, quote, "crime of violence", that he's  
21 statutorily qualified. I don't believe it's that simple, Your  
22 Honor. I believe that the -- the reviewing entity is entitled  
23 to do more than just simply look at the elements of the crime  
24 of which he was convicted of.

25 THE COURT: I have no evidence before me that there



1 was a crime of violence at this point.

2 Can you turn your cellphone down? (Speaking the  
3 courtroom manager.)

4 Please proceed, Mr. Dodd.

5 MR. DODD: Your Honor, I believe it was unfair to ask  
6 the defendants to respond to -- plaintiffs have argued about an  
7 amended complaint. We received the -- I received the emailed  
8 that an amended complaint had been filed at 9:09 this morning.  
9 I do not believe it is fair to ask the defendants to have to  
10 respond to that, because I have not had --

11 THE COURT: I don't think there's anything in there  
12 you have to respond to. I assume what you are responding to is  
13 what's left over from the Court's prior order regarding a  
14 motion for preliminary injunction.

15 MR. DODD: Yes, Your Honor. And what we get to on  
16 that, what my argument is is that plaintiff has not established  
17 what he needs to established to prevail on a motion for  
18 preliminary injunction.

19 Our arguments in the motion to dismiss directly  
20 address his claim that the -- he's only allowed to look at what  
21 he pled guilty to and that harassment is not a crime of -- that  
22 the crime of harassment does not necessarily include violence.  
23 That's the difference. It doesn't necessarily.

24 It doesn't mean that he didn't use violence. It  
25 just -- what he pled to is not an element, but it doesn't --

1 that doesn't mean that he -- that he didn't use violence when  
2 he, you know, committed the act, just what he pled to does not  
3 have that as an element.

4 THE COURT: You are asking the Court to go back and  
5 look at your motion in opposition to the motion to dis -- I  
6 mean, in favor of your motion to dismiss rather than your  
7 motion -- your opposition to the motion for preliminary  
8 injunction?

9 MR. DODD: We did not -- I did not argue that in the  
10 opposition to the motion for preliminary injunction. Yes, Your  
11 Honor.

12 THE COURT: Why not?

13 MR. DODD: Your Honor, I -- I did not argue it. I  
14 thought it had been sufficiently argued previously that I  
15 didn't need to reassert the same arguments in the opposition.  
16 If I was in error, Your Honor --

17 THE COURT: It was more pertinent than what you  
18 included in your opposition to the motion for preliminary  
19 injunction.

20 MR. DODD: Fair enough, Your Honor. And I apologize  
21 if I made that mistake. But I do believe that plaintiff has  
22 failed to establish what he needs to establish to have asked --  
23 to have the Court issue the requested injunction.

24 THE COURT: Anything else?

25 MR. DODD: Your Honor, plaintiff argues in the motion

1 and also the reply about the level of scrutiny to be applied to  
2 laws infringing the second amendment. But here plaintiff  
3 appears not to be challenging the statute at issue, only that  
4 he was denied the requested permit.

5 The reason that the defendants had raised the issue  
6 about the state of the law is for the qualified immunity issue.  
7 That since the state of the law may not -- I am talking about  
8 the Supreme Court.

9 THE COURT: I have already granted Mr. Kealoha, in  
10 his individual capacity, qualified immunity.

11 MR. DODD: I understand, Your Honor, but that's why  
12 the issue was raised there.

13 For irreparable harm, while defendants note that this  
14 Court did hold that plaintiff had sufficiently alleged the  
15 second amendment right was infringed, the Court did not make  
16 any finding that his second amendment rights were in fact  
17 infringed.

18 Plaintiff does not adduce proof of irreparable harm.  
19 He only submits argument that he is -- that he has suffered or  
20 is suffering the harm.

21 Now plaintiff -- as to plaintiff's argument as to due  
22 process, he argues that his liberty and property interests are  
23 being unduly instricted -- unduly restricted. Excuse me. But  
24 at this stage of the litigation, again there is not sufficient  
25 proof of that. It is mere argument.

1           Plaintiff is not entitled to an injunction based upon  
2 argument. He needs to prove sufficiently that these interests  
3 are being unduly restricted. Based upon the record before the  
4 Court, it is our position that plaintiff has not established  
5 sufficient injury to warrant the granting of an injunction.

6           And again, Your Honor, the defendants believe that  
7 plaintiff is statutorily disqualified from owning a firearm.  
8 But we do not believe that at this juncture we have to  
9 established that. It is plaintiff who has to establish that he  
10 is disqualified by clear evidence. We submit that he has not  
11 done so.

12           Your Honor, just to conclude, we posit that under the  
13 four elements of the Winter test, and that's 555 U.S. 7,  
14 plaintiff does not meet the standards for issuance of a  
15 preliminary injunction, and we would ask that the Court deny  
16 plaintiff's motion.

17           THE COURT: Thank you.

18           MR. DODD: Thank you.

19           THE COURT: I don't think there's much there for you  
20 to respond to, Miss Ickes. I do want to know how long you need  
21 to determine whether you can get a transcript.

22           MS. ICKES: We will put in the request today, Judge.  
23 Two weeks if that's okay with the Court.

24           THE COURT: No.

25           MS. ICKES: Lesser, I mean a shorter amount of time.

1 One week or --

2 THE COURT: One week.

3 MS. ICKES: Would the Court require a -- because I  
4 believe family court is audio. Would the court require a  
5 transcript, a written transcript or is the audio or video  
6 version okay?

7 THE COURT: Video version?

8 MS. ICKES: Yeah. We will get the transcript, Judge.

9 THE COURT: Okay.

10 MS. ICKES: Sorry, Judge. I think now it's DVD. I  
11 don't think they are video cassettes anymore.

12 COURTROOM MANAGER: That's correct.

13 THE COURT: Okay. So by next Thursday, file either a  
14 transcript and/or a memorandum regarding the res judicata  
15 issue.

16 MS. ICKES: Yes, Judge.

17 THE COURT: And Mr. Dodd, you will have four days  
18 after that to make any response. And I will review the amended  
19 complaint to see if it has any impact on the motion for  
20 preliminary injunction that would necessitate giving Mr. Dodd  
21 any further opportunity to respond to that, but I doubt that  
22 there is.

23 MS. ICKES: Yes, Judge. Just for clarification,  
24 would the Court also want me to send a copy of that same  
25 transcript to the City or to Mr. Dodd's office?

1 THE COURT: Yes, please.

2 MS. ICKES: Yes, Judge, I will.

3 THE COURT: So we will take the matter under  
4 advisement until we have a chance to make a ruling. Thank you.

5 MS. ICKES: Thank you.

6 MR. DODD: Thank you, Your Honor.

7 (Recess 11:41 a.m.)

8 --oOo--

9 COURT REPORTER'S CERTIFICATE

10

11 I, KATHERINE EISMANN, Official Court Reporter, United  
12 States District Court, District of Hawaii, Honolulu, Hawaii, do  
13 hereby certify that the foregoing is a true, complete, and  
14 correct transcript of the proceedings had in connection with  
15 the above-entitled matter.

16

17 Date: October 10, 2012.

18

/s/ Katherine Eismann

19

Katherine Eismann, CSR CRR RDR

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