

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the Senate Committee on Public Safety,
Intergovernmental, and Military Affairs**

February 16, 2021

S.B. No. 529: RELATING TO RECORDINGS OF LAW ENFORCEMENT
ACTIVITIES

Chair Nishihara, Vice Chair English, and Members of the Committee:

The Office of the Public Defender strongly supports S.B. No. 529.

This measure establishes the right of persons to record law enforcement activities. It also establishes a right of action for violations of said right.

On November 20, 2012, a journalist, while driving along Haleakala Highway, pulled over onto the shoulder to investigate an ongoing law enforcement operation. The journalist began filming two Maui Police Department officers who were conducting a traffic stop. After the officers and the journalist engaged in a brief discussion as to where the journalist can stand, the journalist was arrested for interfering with government operations. The journalist was subsequently charged with the offense of failure to comply with a lawful order or direction of a police officer, in violation of HRS § 291C-23, and the offense of disorderly conduct, in violation of HRS § 711-1101(1)(d). Prior to trial, the journalist moved to dismiss the charges because his conduct was protected by the first amendment. After the district dismissed the charges, the prosecuting attorney appealed the dismissal order.

On appeal, the Hawai‘i Supreme Court, in State v. Russo, 141 Hawai‘i 181, 407 P.3d 137 (2017), held that the journalist’s filming of government officials engaged in their duties in a public place is protected by the first amendment rights to free speech and press. The Court noted that numerous jurisdictions have held that the first amendment affords individuals the right to photograph and film police officers in public places. *See Glik v. Cunniffe*, 655 F.3d (1st Cir. 2011) (promotion of the free discussion of government operations is particularly desirable in the context of law enforcement officials because it may aid in the uncovering of abuses and have a salutary effect on the functioning of government more generally); Gentile v. State

Bar of Nevada, 501 U.S. 1030, 111 S.Ct 2720 (1991) (dissemination of information relating to alleged governmental misconduct” lies “at the core of the First Amendment); Turner v. Lieutenant Driver, 848 F.3d 678 (5th Cir. 2017) (“We agree with every circuit that has ruled on this question: Each has concluded that the First Amendment protects the right to record the police”); Fields v. City of Philadelphia, 862 F.3d 353 (3rd Cir. 2017) (bystanders have a right to record public police activity).

Even though the Hawai‘i and the United States Constitutions already afford an individual the right to record law enforcement officers, this measure is necessary to ensure that the individual has the right to maintain custody and control of any recording and of any property or instrument used to record the law enforcement activities. And more importantly, this measure is necessary to secure the individual’s right to bring a cause of action against the offending law enforcement officer and the law enforcement agency. Otherwise, there is nothing to prevent law enforcement from infringing upon the individual’s first amendment rights. Without consequences, law enforcement will continue to unconstitutionally prevent individuals from recording their activities.

Thank you for the opportunity to comment on this measure.



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

S.B. NO. 529, RELATING TO RECORDINGS OF LAW ENFORCEMENT
ACTIVITIES.

BEFORE THE:

SENATE COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL, AND
MILITARY AFFAIRS

DATE: Tuesday, February 16, 2021 **TIME:** 1:20 p.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Albert Cook,
Deputy Attorney General, at 586-0940)

Chair Nishihara and Members of the Committee:

The Department of the Attorney General (the Department) provides the following comments.

The purposes of this bill are to establish that a person not under arrest nor in the custody of a law enforcement officer has a right to record law enforcement activities and to create a civil cause of action if law enforcement interferes with that right.

The bill defines a "law enforcement officer" as "any police officer, peace officer, security officer, security guard, or similar person who is engaged in a law enforcement activity" and further defines "law enforcement activity" as "any activity by a law enforcement officer acting *under the color of law*" (emphasis added). Because peace officers, security officers, security guards, or similar persons are often not trained or authorized to exercise law enforcement powers over other persons, and do not operate "under the color of law," in that they have no legal authority or duty to maintain public order, to make arrests for offenses, or to enforce the criminal laws, the Department suggests defining "law enforcement officer" as defined in section 710-1000, Hawaii Revised Statutes, which states, "'Law enforcement officer' means any public servant, whether employed by the State or subdivisions thereof or by the United States, vested by law with a duty to maintain public order or, to make arrests for offenses or to enforce

the criminal laws, whether that duty extends to all offenses or is limited to a specific class of offenses."

The Department takes no position on the bill but requests that the above recommended amendment be made before this bill is passed.



LATE

Committee: Committee on Public Safety, Intergovernmental, and Military Affairs
Meeting Date/Time: Tuesday, February 16, 2021 1:20 p.m.
Place: Via Videoconference
Re: Testimony of the ACLU of Hawai'i in support of S.B. 529, Relating to Recordings of Law Enforcement Activities

Dear Chair Nishihara, Vice Chair English, and Committee Members:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes in support of S.B. 529, which establishes a statutory right to record law enforcement activities, and a private right of action when violations occur.

The First Amendment of the U.S. Constitution and Article I Section 4 of the Hawai'i State Constitution protect a person's right to film or photograph things that are plainly visible in public spaces, which includes the right to film police or other government officials carrying out their duties. Unfortunately, law enforcement officers in Hawai'i have been known to order people to stop taking photographs or video, often arresting (or threatening to arrest) those individuals for obstruction if they fail to comply – thus violating the photographer's First Amendment rights. This is especially common during protests and demonstrations. Codifying First Amendment protections in statute will help to remind law enforcement officers that, absent actual interference with an officer's duties, taking photographs or videos is not a crime. The private right of action is key to ensuring that if violations do occur, victims have legal recourse.

For the above reasons, the ACLU of Hawai'i urges the Committee to support this measure.

Sincerely,

A handwritten signature in black ink that reads "Mandy Fernandes".

Mandy Fernandes
Policy Director
ACLU of Hawai'i

The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for over 50 years.

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: (808) 522-5900
F: (808) 522-5909
E: office@acluhawaii.org
www.acluhawaii.org



Young Progressives Demanding Action
P.O. Box 11105
Honolulu, HI 96828

February 13, 2021

TO: SENATE COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL, AND MILITARY AFFAIRS
RE: Testimony in support of SB529

Dear Senators,

Young Progressives Demanding Action (YPDA) **strongly supports SB529**, which would establish the right to record law enforcement activities along with a private right of action for violations of this right.

The advent of camera phone technology has shown the world what antiracism and police reform advocates have known for decades: white supremacy and racism are pervasive within law enforcement agencies and departments across the United States, and the presence of this structural racism inflicts horrendous brutality against communities and persons of color.

Hawai'i is no exception. A recent *Honolulu Civil Beat* [article](#) reported on the disparity between the percentage of Native Hawaiian, Pacific Islander and Black residents on O'ahu and the much higher rates of both arrest and use-of-force. And advocates and researchers have known about the overrepresentation of communities of color—[particularly Native Hawaiians and Pacific Islanders](#)—in the overall criminal justice system in Hawai'i for almost a decade.

While the structure of racism within law enforcement in this country has thus far prevented genuine accountability for this brutality and justice for its victims, the circulation of video evidence of these abuses and crimes committed by law enforcement against persons of color has contributed to the growth of a nationwide movement to change that.

In Honolulu, thousands of residents—many of them young people—marched through the streets demanding racial justice and police accountability in the wake of multiple, publicized police murders involving Black and brown individuals.

Again, we must emphasize that these kinds of murders have been happening for decades. The camera phones, combined with the viral nature of social media, have simply revealed this awful truth to the public. As a result, more and more people are demanding that lawmakers take action on a host of smart justice policy proposals that seek to finally provide accountability to and justice for the communities that have suffered from this brutality—and the brutality of racism more generally—since before this country was founded.

We believe in the power of antiracist policy reforms to deliver on the promise of justice and true peace within and between our communities. However, we also recognize that the arc of the moral universe is long, and though it bends toward justice, it requires our constant vigilance and advocacy to do so.

SB529 protects our ability as citizens and community members to document the actions of law enforcement officials, keep watch against police violence, and continue to advocate for justice and peace. We ask that you support this bill and pass it out of committee.

Mahalo for the opportunity to testify,

Will Caron
Board President & Secretary, 2020–2021
action@ypdahawaii.org

SB-529

Submitted on: 2/12/2021 7:03:15 PM

Testimony for PSM on 2/16/2021 1:20:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Levana Lomma	Individual	Support	No

Comments:

I support this bill. The people need to be given the power to document any possible use of excessive force by police, or other unlawful activity.

SB-529

Submitted on: 2/13/2021 4:55:39 PM

Testimony for PSM on 2/16/2021 1:20:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Philip T. Rapoza	Individual	Support	No

Comments:

I support

TESTIMONY IN SUPPORT OF SB 529

TO: Chair Nishihara, Vice-Chair English, & Public Safety, Intergovernmental, and Military Affairs Committee Members

FROM: Nikos Leverenz
Grants, Development, & Policy Manager

DATE: February 16, 2021 (1:20 PM)

Hawai'i Health & Harm Reduction Center (HHRC) **supports** SB 529, which establishes the right of persons to record law enforcement activities and establishes a private right of action for violations of the right.

Residents with cellphone cameras can record incidents as they occur. Video records can be useful in determining what happened in an interaction. This bill will increase the public's trust and confidence in its police departments, which should operate with transparency in furtherance of their missions.

[As noted by the Electronic Frontier Foundation](#), "Recordings of police officers, whether by witnesses to an incident with officers, individuals who are themselves interacting with officers, or by members of the press, are an invaluable tool in the fight for police accountability. Often, it's the video alone that leads to disciplinary action, firing, or prosecution of an officer."

HHRC works with many individuals who are impacted by poverty, housing instability, and other social determinants of health. Many have behavioral health problems related to substance use and underlying mental health conditions. The continued criminalization of behavioral health concerns under existing law—and prevailing police and prosecutorial practices—is not conducive to individual or public health.

Thank you for the opportunity to testify on this important reform measure.