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**FIRST CIRCUIT**  
**1CC191000057**  
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ATTORNEYS FOR AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION  
OF HAWAI'I FOUNDATION

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SAVE SHARKS COVE ALLIANCE,  
MĀLAMA PŪPŪKEA-WAIMEA,  
HAWAI'I'S THOUSAND FRIENDS,  
LARRY McELHENY, JOHN THIELST,  
CORA SANCHEZ, and SURFRIDER  
FOUNDATION

Plaintiffs,

v.

CITY AND COUNTY OF HONOLULU;  
CITY COUNCIL OF THE CITY AND  
COUNTY OF HONOLULU;  
DEPARTMENT OF PLANNING AND  
PERMITTING OF THE CITY AND  
COUNTY OF HONOLULU;  
HANAPOHAKU LLC; DOES 1-10,

Defendants.

Civil No. 19-1-0057-01 JHA  
(Declaratory and Injunctive Relief)

**AMICUS CURIAE THE AMERICAN  
CIVIL LIBERTIES UNION OF HAWAI'I  
FOUNDATION'S REPLY IN SUPPORT  
OF MOTION FOR LEAVE TO FILE  
AMICUS BRIEF IN SUPPORT OF  
COUNTERCLAIM DEFENDANTS'  
JOINT RENEWED MOTION FOR  
JUDGMENT ON THE PLEADINGS; and  
CERTIFICATE OF SERVICE**

**NON-HEARING MOTION**

Hearing on Counterclaim Defendants' Motion:

Date: October 28, 2020

Time: 10:15 a.m.

Judge: Hon. James H. Ashford

Trial Date: February 22, 2021

HANAPOHAKU LLC

Counterclaim Plaintiff,

v.

SAVE SHARKS COVE ALLIANCE,  
MĀLAMA PŪPŪKEA-WAIMEA,  
HAWAI‘I’S THOUSAND FRIENDS,  
LARRY McELHENY, JOHN THIELST,  
and CORA SANCHEZ,

Counterclaim Defendants.

**AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF HAWAI‘I  
FOUNDATION’S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS  
BRIEF IN SUPPORT OF COUNTERCLAIM DEFENDANTS’ JOINT RENEWED  
MOTION FOR JUDGMENT ON THE PLEADINGS**

Non-party and proposed Amicus Curiae the American Civil Liberties Union of Hawai‘i Foundation (“ACLU of Hawai‘i”) respectfully submits this Reply in support of its Motion for Leave to File an Amicus Brief (the “Motion”) in support of Counterclaim Defendants Save Sharks Cove Alliance (“SSCA”), Mālama Pūpūkea-Waimea (“MPW”), Hawai‘i’s Thousand Friends (“HTF”), Larry McElheny, John Thielst, and Cora Sanchez’s (collectively, “Save Sharks Cove”) Joint Renewed Motion for Judgment on the Pleadings (the “Joint Motion”) on Defendant/Counterclaimant Hanapohaku LLC’s (“Developer”) Counterclaims.

In the oppositions to the ACLU of Hawai‘i’s Motion submitted by the Developer and Defendants the City and County of Honolulu, the City Council, and the Department of Planning and Permitting (collectively, the “City”),<sup>1</sup> both the Developer and the City claim that the ACLU

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<sup>1</sup> The City’s opposition to the ACLU of Hawai‘i’s proposed involvement as amicus curiae, as well as that of the Conservation Council for Hawai‘i, Friends of Lana‘i, KAHEA: The Hawaiian-Environmental Alliance, Keep North Shore Country, Life of the Land, Mālama Kakanilua, Maui Tomorrow Foundation, Sierra Club of Hawai‘i, West Maui Preservation Association, Hermina Morita, and Carol Wilcox (collectively, “Citizen Amici”) is puzzling, given that Save Sharks

of Hawai‘i’s Motion is improper at the Circuit Court level. *See* City’s Opp. at 3; Developer’s Opp. at 1. The Developer and the City fail to realize that *this very Court* has exercised its discretion to permit proposed amicus curiae—such as the ACLU of Hawai‘i—to submit amicus briefs on issues of substantial public importance. *See* Ex. A (Order Granting Motion for Leave to File Amicus Brief) (Ashford, J.).

That this Court is empowered with discretion to permit public interest groups to participate as amicus curiae, even in the absence of a specific rule governing amicus briefs in the Hawai‘i Rules of Civil Procedure, is unsurprising. “State and federal trial courts have received an increasing number of amicus briefs in recent years, but they do not generally have separate rules on the acceptance of amicus briefs, and instead follow the rules of the appeals courts.” Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 323 (2008); *see also* Hawai‘i R. App. P. 28(g) (amicus briefs permitted upon leave of court).

In general, trial courts “frequently welcome amicus briefs from nonparties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Safari Club Int’l v. Harris*, No. 2:14-CV-01856-GEB-AC, 2015 WL 1255491, at \*1 (E.D. Cal. Jan. 14, 2015). Notwithstanding the Developer’s claims that the amicus brief should be rejected because Save Sharks Cove is represented by “no fewer than eight highly skilled attorneys,” *see* Developer’s Opp. at 2, “[*e*]ven when a party is very well represented, an amicus may provide important assistance to the court.” *Safari Club Int’l*, 2015 WL 1255491, at \*1 (emphasis added).

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Cove’s Joint Motion on the Developer’s Counterclaims is not brought against the City and has no bearing on the City’s defenses in this matter.

The ACLU of Hawai‘i’s proposed amicus brief provides such assistance, even though (or, in fact, especially because) it does not recycle the arguments set forth in Save Sharks Cove’s Joint Motion. *See* Developer’s Opp. at 1-2 (objecting that proposed amicus brief does not address issues raised in Joint Motion); City’s Opp. at 3-4 (same). Indeed, the “classic role of amicus curiae” is not to argue identical facts and issues under consideration by the Court, but to “supplement[] the efforts of counsel, and draw[] the court’s attention to law that escaped consideration” in a “case of general public interest.” *Miller-Wohl Co., Inc. v. Comm’r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). Thus “[a]n amicus brief should normally be allowed when ... the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Cnty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999). That is precisely what the ACLU of Hawai‘i’s amicus brief does: it provides the Court with a discussion of the broader ramifications of the Developer’s Counterclaims on the free exercise of the right to petition. Although this Court’s decision on Save Sharks Cove’s Joint Motion will likely involve an interpretation of the *Noerr-Pennington* Doctrine (a doctrine that is fundamentally about the right to petition), it cannot be disputed that a discussion of the consequences of frivolous claims brought to chill petitioning activity may assist the Court in its understanding of the First Amendment rights that undergird *Noerr-Pennington*, and in so doing, assist in the Court’s resolution of the Joint Motion.

Verbatim arguments were lodged by the City and the Developer against the Citizen Amici’s Motion for Leave to File an Amicus Brief. *See* Dkts. 150, 154, 158. Rather than imposing on the Court’s time by filing a separate reply, Council for the Citizen Amici therefore indicated that they

join this Reply. The ACLU of Hawai'i thus respectfully requests that the Court grant its Motion for Leave to File an Amicus Brief, as well as that of the Citizen Amici.

DATED: Honolulu, Hawai'i, October 19, 2020.

*/s/ Thomas M. Otake*  
\_\_\_\_\_  
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# **EXHIBIT A**

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**Electronically Filed  
FIRST CIRCUIT  
1CSP-19-0000062  
06-APR-2020  
03:03 PM**

Attorneys for *Amicus Curiae*

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

IN RE INVESTIGATION OF:  
KAHEA

(Department of the Attorney General, State of  
Hawai‘i;  
AG Subpoena No. 2019-158)

S.P. No. 19-0000062 (JHA)

**ORDER GRANTING MOTION FOR  
LEAVE TO FILE BRIEF OF *AMICUS  
CURIAE* ACLU OF HAWAI‘I  
FOUNDATION IN SUPPORT OF  
KAHEA’S MOTION FOR STAY  
PENDING APPEAL**

NON-HEARING MOTION

Judge: Hon. James H. Ashford  
Stay Hearing: cancelled  
Trial Date: none

**ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*  
ACLU OF HAWAI‘I FOUNDATION IN SUPPORT OF KAHEA’S MOTION FOR STAY  
PENDING APPEAL**

The American Civil Liberties Union of Hawai‘i Foundation (“ACLU of Hawai‘i”) filed a Motion For Leave To File Brief of *Amicus Curiae* ACLU of Hawai‘i Foundation in Support of KAHEA’s Motion For Stay Pending Appeal (“Motion”) on March 6, 2020. The Motion was filed as a non-hearing motion, and was not opposed by the parties in the above-captioned matter.

The Court having reviewed the Motion, memoranda, declarations, exhibits and all other

documents and pleadings filed in support of the Motion in the above-referenced matter, the records and files in the instant case, and being fully advised in the premises and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the ACLU of Hawaii's Motion For Leave To File Brief of *Amicus Curiae* ACLU of Hawai'i Foundation in Support of KAHEA's Motion For Stay Pending Appeal is GRANTED. The ACLU of Hawaii shall file its *amicus curiae* brief, previously attached as Exhibit A to the Motion, immediately.<sup>1</sup>

DATED: Honolulu, Hawai'i, April 6, 2020.

/s/ James H. Ashford



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JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ W. Max Levins  
W. MAX LEVINS  
Deputy Attorney General  
Attorney for the State of Hawaii Department of the Attorney General

/s/ Richard Naiwieha Wurdeman  
RICHARD NAIWIEHA WURDEMAN  
Attorney for KAHEA: The Hawaiian Environmental Alliance

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<sup>1</sup> In light of the ongoing COVID-19 pandemic, and Emergency Order #8 Regarding Delivery of Courtesy Copies of Documents For Circuit Court Judges Assigned to the Civil Division (Mar. 27, 2020), the ACLU of Hawai'i need not deliver file-stamped courtesy copies to the Circuit Court under Rule 7.2(g) of the Rules of the Circuit Courts of the State of Hawai'i.



IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SAVE SHARKS COVE ALLIANCE,  
MĀLAMA PŪPŪKEA-WAIMEA,  
HAWAI'I'S THOUSAND FRIENDS,  
LARRY McELHENY, JOHN THIELST,  
CORA SANCHEZ, and SURFRIDER  
FOUNDATION

Plaintiffs,

v.

CITY AND COUNTY OF HONOLULU;  
CITY COUNCIL OF THE CITY AND  
COUNTY OF HONOLULU;  
DEPARTMENT OF PLANNING AND  
PERMITTING OF THE CITY AND  
COUNTY OF HONOLULU;  
HANAPOHAKU LLC; DOES 1-10,

Defendants.

---

HANAPOHAKU LLC

Counterclaim Plaintiff,

v.

SAVE SHARKS COVE ALLIANCE,  
MĀLAMA PŪPŪKEA-WAIMEA,  
HAWAI'I'S THOUSAND FRIENDS,  
LARRY McELHENY, JOHN THIELST,  
and CORA SANCHEZ,

Counterclaim Defendants.

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Civil No. 19-1-0057-01 JHA  
(Declaratory and Injunctive Relief)

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was served on the following parties listed below by electronic service through the JEFS E-Filing System:

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DATED: Honolulu, Hawai‘i, October 19, 2020.

*/s/ Thomas M. Otake*

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# NOTICE OF ELECTRONIC FILING

**Electronically Filed  
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An electronic filing was submitted in Case Number 1CC191000057. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

**Case ID:** 1CC191000057

**Title:** SAVE SHARKS COVE ALLIANCE VS C & C OF HONOLULU

**Filing Date / Time:** MONDAY, OCTOBER 19, 2020 03:26:57 PM

**Filing Parties:** AMERICAN CIVIL LIBERTIES UNION OF HAWAII FOUNDATION

**Case Type:** Circuit Court Civil

**Lead Document(s):**

**Supporting Document(s):** 160-Memo in Reply/Response to\_\_\_\_\_

**Document Name:** 160-AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF HAWAI'I FOUNDATION'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai'i Electronic Filing and Service Rules.

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