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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

LEAGUE OF WOMEN VOTERS OF HONOLULU and COMMON CAUSE,

Plaintiffs,

vs.

STATE OF HAWAI`I,

Defendant.

CIVIL NO. 18-1-1376-09 GWBC
(Other Civil Action)

PLAINTIFFS' OPPOSITION TO MOTION FOR LEAVE TO FILE A MEMORANDUM ON BEHALF OF THE HAWAI`I STATE LEGISLATURE AS *AMICUS CURIAE*; and CERTIFICATE OF SERVICE

HEARING MOTION
JUDGE: Honorable Gary W. B. Chang
TRIAL DATE:
HEARING DATE: December 19, 2018
HEARING TIME: 3:00 p.m.

PLAINTIFFS' OPPOSITION TO MOTION FOR LEAVE TO FILE A MEMORANDUM ON BEHALF OF THE HAWAI`I STATE LEGISLATURE AS *AMICUS CURIAE*

The Legislature—as the only branch of the State implicated in this lawsuit—is the sole client represented by the Attorney General (AG). There are no allegations in the Complaint that the Executive or Judicial Branches of the State engaged in unconstitutional conduct. The Legislature *is* the State for purposes of this case. But the Legislature ignores its existing ability as client to direct its legal representation and instead asks this Court to grant its motion for leave to file an *amicus curiae* brief. The same entity cannot concurrently be both a "friend of the court" and also a party. And,

as could be expected, the Legislature's proposed memorandum simply rehashes the arguments made by the AG, adding no new relevant legal analysis. In effect, the proposed amicus is nothing more than a futile attempt at political intimidation of this Court by the Legislature on a constitutional issue.[1] For these reasons, Plaintiffs League of Women Voters of Honolulu and Common Cause respectfully request that this Court deny the motion for leave.

I. THE LEGISLATURE'S MOTION FOR LEAVE FAILS RECOGNIZED STANDARDS FOR *AMICUS CURIAE* PARTICIPATION.

This Court has broad discretion to reject amicus briefs for any reason. *Cf.* HRAP Rule 28(g) ("An *amicus curiae* brief may be filed only by leave of the appellate court."); *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000) ("Whether to permit a nonparty to submit a brief, as amicus curiae, is, with immaterial exceptions, a matter of judicial grace."). To avoid unnecessarily increasing the cost of litigation for the parties and for the courts, recognized standards ensure that motions for leave are not "rote

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[1] In recent years, the Legislature has threatened the independence of the Judiciary with efforts to politicize the judicial reappointment and retention process and reduce judges' pension benefits. *E.g.*, S.B. 249 (2017); S.B. 328 (2017); S.B. 673 (2017); Brennan Center for Justice, *Legislative Assaults on State Courts – 2018* (Feb. 6, 2018), at https://www.brennancenter.org/analysis/legislative-assaults-state-courts-2018; Civil Beat, *House Legislators Clash Over Bill to Trim Judges' Pensions* (Apr. 11, 2017); Honolulu Star-Advertiser, *Protect Integrity of Judicial Selection* (Feb. 4, 2017); Civil Beat, *Ian Lind: Hawaii Lawmakers Needlessly Renew Assault on the Judiciary* (Jan. 26, 2017). The Legislature also has undermined the integrity of the courts by denying the Judiciary's budget requests based on the Legislature's criticism of court rulings.

> We also had some tension with the Judiciary. That was very healthy as well. They did some rulings that we thought was stepping into the legislative arena. They were trying to legislate from the bench. We control the purse strings. We said "no" to a lot of their money. They reversed some of their decisions. We gave them some money. So the tension worked.

Civil Beat, *Civil Café: Legislative Wrap-Up 2018 Panel Discussion*, at https://www.youtube.com/watch?v=uNP9r-Hc08I (May 2, 2018) (starting at 23:09) (remarks by Senate Majority Leader J. Kalani English). The Legislature should not be permitted to play political games with the constitutional rights of the people of Hawai`i. The Legislature as *amicus curiae* adds nothing of legal substance to this case.

permission" to file an *amicus curiae* memorandum. *Nat'l Org. for Women*, 223 F.3d at 617; *accord Taylor v. Roberts*, 475 So. 2d 150, 152 (Miss. 1985); *see* HRCP 1 ("[The Hawai`i Rules of Civil Procedure] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

In general, leave to file an *amicus curiae* submission should be granted only where: (1) a party is inadequately represented; (2) the amicus party has a direct legal interest in another case that may be affected by the holding in the present case; or (3) the amicus party has unique information that can help the court in a way beyond what the parties are able to provide. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *accord N. Sec. Co. v. United States*, 191 U.S. 555, 556 (1903); *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012); *Nat'l Org. for Women*, 223 F.3d at 617; *Taylor*, 475 So. 2d at 152; *see also, e.g., Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1177 (D. Nev. 1999) (rejecting proposed amicus filing by the United States); *Gabriel Techs. Corp. v. Qualcomm Inc.*, No. 08-cv-1992 AJB (MDD), 2012 WL 849167, at *4-5 (S.D. Cal. Mar. 13, 2012); *Merritt v. McKenney*, No. C 13-01391 JSW, 2013 WL 4552672, at *4 (N.D. Cal. Aug. 27, 2013); *AmeriCare MedServices, Inc. v. City of Anaheim*, No. 8:16-cv-1703-JLS-AFMx, 2017 WL 1836354, at *1 n.3 (C.D. Cal. Mar. 28, 2017).

The Legislature does not meet any of the recognized criteria for allowing its participation as *amicus curiae*.

A. The Legislature Is Already Represented by the Attorney General and Should Not Be Permitted a Dual Role as *Amicus Curiae*.

Amicus curiae means "friend of the court", not friend of a party. *Ryan*, 125 F.3d at 1063. While the role of *amicus curiae* has evolved to become more partisan, there are limits. *Id.* By definition, *amicus curiae* is "[s]omeone who is *not a party* to a lawsuit." Black's Law Dictionary (10th ed. 2014) (emphasis added). Participation by *amicus curiae* "is generally afforded to a person who has *no right to appear in a suit*, but is allowed to introduce argument, authority or evidence to protect his interests." *Giammalvo v. Sunshine Min. Co.*, 644 A.2d 407, 410 (Del. 1994) (emphasis added) (rejecting amicus brief by a preferred shareholder in the appeal of a class action in which he was a class member because his interests were already represented by class counsel).

Here, the Legislature is the party defending this lawsuit, represented by the AG. The Legislature, as client of the AG in this lawsuit, has full authority to direct the nature of its legal representation. *See* HRPC 1.2 (counsel must abide by its client's decisions concerning the objectives of representation); *Chun v. Bd. of Trustees of Employees' Ret. Sys.*, 87 Hawai`i 152, 174–75, 952 P.2d 1215, 1237–38 (1998) ("Once the state officer [or instrumentality] whom the Attorney General represents has determined the course he [or she] desires the litigation to take, it is the duty of the Attorney General to zealously advocate the public policy positions of h[er] client in pleadings, in negotiations, and in the courtroom and to avoid even the appearance of impropriety by appearing to be in conflict with the desires of h[er] client."); *accord In re Water Use Permit Applications*, 94 Hawai`i 97, 126, 9 P.3d 409, 438 (2000). And this case does not present circumstances where the Legislature's interests are at odds with another state agency or where the Legislature otherwise lacks full control of its legal representation.

To explain its request for *amicus curiae* status, the Legislature offers only an ambiguous statement: "The Attorney General is speaking for the State of Hawai`i. However, the Legislature believes only it can present to this Court, its position as the Constitution mandated co-equal branch of government." Mot. For Leave to File a Mem. on Behalf of the Hawai`i State Legislature as *Amicus Curiae* [Amicus Mot.] at 2. But the Legislature does not clarify what instrumentality or officer of the State it believes the AG purports to represent if not the Legislature itself or how its interests diverge from the AG's representation.

The Legislature's request for dual roles—as the client defending this lawsuit and also *amicus curiae*—is unprecedented. The Legislature cites three cases that granted the Legislature leave to file memoranda as *amicus curiae*, but none of those cases already directly involved the Legislature as a party. Mem. in Supp. of Mot. at 1-2. In *Nelson*, the plaintiffs sued the Hawaiian Homes Commission, the chair and members of the commission individually, the Department of Hawaiian Homelands, the State Director of Finance, and the State of Hawai`i. *Nelson v. Hawaiian Homes Comm'n*, 141 Hawai`i 411, 412 P.3d 917 (2018). In *Sierra Club*, the defendants were the Department of Transportation, its Director, and the Director of Harbors. *Sierra Club v. Dep't of Transp.*,

No. 29035, 2009 WL 1567327 (Haw. May 13, 2009). *Taomae* was an original proceeding in the Hawai`i Supreme Court with only the Governor and Chief Elections Officers as defendants.[2] *Taomae v. Lingle*, 108 Hawai`i 245, 118 P.3d 1188 (2005).

Furthermore, *Nelson v. Hawaiian Homes Commission*—the only cited case in which a *circuit court* permitted amicus participation by the Legislature—involved an issue of ongoing legislative appropriations. *Nelson v. Hawaiian Homes Comm'n*, Civ. No. 07-1-1663-08, 2016 WL 11201231 (Haw. Cir. Ct. Apr. 18, 2016). The circuit court emphasized that the proposed amicus brought to the court's attention "a matter of public importance." *Id.* Unlike here, that issue—the Legislature's appropriations power—directly impacted the Legislature's constitutional authority. Also, different State parties in the *Nelson* case were at odds with each other, creating conflicting State interests that do not exist here.[3] *Id.* at 416-17, 412 P.3d at 922-23. In fact, the Legislature did not seek to submit an amicus filing in *Nelson* until those conflicts among State parties became an issue on remand from the Hawai`i Supreme Court; when the case was first presented to the Hawai`i Supreme Court, the Legislature had not filed an amicus, and all the State defendants were represented collectively by the AG. *See Nelson v. Hawaiian Homes Comm'n*, 127 Hawai`i 185, 277 P.3d 279 (2012).

These cases do not support the Legislature's purported special need for amicus participation here in addition to its existing representation by the AG. "There is something to be said for asking the state to speak in litigation with one voice." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 546 (7th Cir. 2003). Accordingly, the Court should deny amicus participation on this basis alone.

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[2] The Legislature also cites *Hanabusa v. Lingle*. Mem. in Supp. of Mot. at 2. But that case concerned legislator standing as a party for a writ of mandamus, not submission of an amicus filing. 119 Hawai`i 341, 347-48, 198 P.3d 604, 610-11 (2008).

[3] Reflecting those conflicts of interest, counsel for the Legislature in the *Nelson* case was appointed as special deputy attorney general. *See, e.g.*, Brief of the Hawai`i State Legislature as *Amicus Curiae* (Haw. App. Feb. 27, 2017). Appointment as special deputy attorney general is permitted when the Attorney General declines representation based on conflicts of interest. HRS § 28-8.3(a)(2).

B. The Legislature Does Not Have a Special Legal Interest—Distinct from its Current Role as the Defendant State of Hawai`i—in the Outcome.

Political interests do not justify amicus participation. *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004).

> The [Illinois Chamber of Commerce] does not have "an interest relating to the property or transaction which is the subject of the action"; its concern is not a *legal* "interest" . . . but a political or programmatic one: the Chamber favors more business and less environmental regulation. That does not justify intervention. Indeed, it does not necessarily justify even a filing as amicus curiae. Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed.

Id.; *accord Voices for Choices*, 339 F.3d at 546 (the "viewpoint of state officials" on a constitutional challenge to legislation did not justify amicus participation where their position was no different from the represented party).

In its proposed amicus, the Legislature asserts an interest in "protect[ing] its constitutional prerogative of determining its own rules of proceeding to enact laws of the State" and that the "constitution protects the Legislature's rules, authorities, along with its custom and practices." Amicus Mot., Ex. A at 3. But, as already briefed among the parties on the merits, the Legislature does not have any constitutional prerogative to adopt rules inconsistent with the constitution. Pls. Mem. at 12-13. If the Legislature's current procedures writ large or as applied to other bills are unconstitutional—issues that are not presented to this Court—that does not confer on the Legislature any special legal interest justifying amicus participation.

The Legislature's purported interest here is indistinguishable from the claims in *Voices for Choices*. In that case, legislators sought to file an amicus—in a case where the state attorney general already represented a party—because the case concerned the constitutionality of a state statute. 339 F.3d 542.

> Insofar as the district court in the decision that has been appealed placed limitations on what a state legislature may do, not only in this case but presumably in any like case that should arise in the future, it might seem that the leaders of the legislature have a direct interest in other cases, one of the situations in which amicus participation is appropriate. But that argument would imply that any state legislator should have a right to file

> an amicus curiae brief when the constitutionality of state legislation is challenged—an extreme position that could invite a blizzard of briefs.

Id. at 546. The court explained that judicial processes differ from the interest politics of the legislative process:

> All this said, comity might seem to be a compelling reason to allow the filing of an amicus curiae brief by the leaders of a state legislature in an appeal concerning the validity of a statute of their state . . . . But in my view the argument from comity bespeaks a misunderstanding of the difference between the legislative and the judicial processes. The legislative process is democratic, and so legislators have an entirely legitimate interest in determining how interest groups and influential constituents view a proposed statute. Statutes pass because there is more political muscle behind than in front of them, not because they are "wise" or "just," though they may be. The judicial process, in contrast, though "political" in a sense when judges are asked to decide cases that conventional legal materials, such as statutory and constitutional texts and binding precedent, leave undetermined, so that some mixture of judges' values, temperament, ideology, experiences, and even emotions is likely to determine the outcome, is not democratic in the sense of basing decision on the voting or campaign-financing power of constituents and interest groups. ***An appeal should therefore not resemble a congressional hearing.***

Id. at 544-45 (emphasis added).

The Legislature does not have a distinct legal interest that should be recognized by this Court as separate from its role as the Defendant in this case.

C. The Legislature's Proposed Amicus Brief Rehashes the AG's Arguments.

The Legislature's brief—mostly duplicative of legal arguments already made by the AG—offers no special legal analysis in its brief. Courts repeatedly caution against accepting such amicus briefs:

> The judges of this court . . . will deny permission to file an amicus brief that essentially duplicates a party's brief. The reasons for the policy are several: judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation;

> and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.

Id. at 544; *accord Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003); *United States v. Ackerman*, 831 F.3d 1292, 1299 (10th Cir. 2016); *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381, 385, 813 N.E.2d 476, 480 (2004).

Again, the factually similar discussion from *Voices for Choices* provides relevant guidance:

> While the amicus briefs sought to be filed in this case contain a few additional citations not found in the parties' briefs and slightly more analysis on some points, essentially they cover the same ground the appellants, in whose support they wish to file, do. (The state legislators' brief is a mere seven and a half pages long.) This is not a case in which a party is inadequately represented, or the would-be amici have a direct interest in another case that may be materially affected by a decision in this one, or they are articulating a distinctive perspective or presenting specific information, ideas, arguments, etc. that go beyond what the parties whom the amici are supporting have been able to provide. ***Essentially, the proposed amicus briefs merely announce the "vote" of the amici on the decision of the appeal.*** But, as I have been at pains to emphasize in contrasting the legislative and judicial processes, ***they have no vote.***

339 F.3d at 545 (emphasis added).

Moreover, the proposed amicus filing conflates issues, serving only to confuse the record and the law. In its motion for leave, the Legislature argues that it seeks a determination that the constitutional challenges to Act 84 are non-justiciable as a violation of the separation of powers doctrine.[4] Amicus Mot. at 2 ("That is to say, for this Court to even address the issue raised, it must first find it to be justiciable."). But the proposed amicus—under its purported analysis for separation of powers—presents arguments focused primarily on the *merits* of Plaintiffs' claims. *See, e.g., Hussey v. Say*, 139 Hawai`i 181, 188, 384 P.3d 1282, 1289 (2016) (non-justiciable claims are dismissed

[4] Representing the Legislature's interests, the State, of course, also focuses the most attention on the justiciability argument in its motion for summary judgment. Def. Mem. at 9-14. But as Plaintiffs pointed out in opposing summary judgment, the justiciability argument is frivolous in light of more than a century of precedent from the Hawai`i Supreme Court adjudicating similar constitutional claims. Pls. Mem. at 12-13.

without addressing the merits). If the Legislature does not understand its own arguments, it certainly cannot aid this Court in resolving the pending dispute.

The AG—already representing the Legislature—adequately and extensively addressed the separation of powers issue that the Legislature seeks to brief again. And briefing is not complete, so the AG will have a further opportunity to present arguments on this issue in opposing Plaintiffs' cross-motion for summary judgment. The Legislature's proffered amicus brief repeats the AG's arguments without offering any novel information helpful to the court. The amicus brief is merely an attempt to exert political influence on this Court.

II. THE LEGISLATURE'S FRIVOLOUS SEPARATION OF POWERS ARGUMENT IS A THINLY VEILED ATTACK ON JUDICIAL INTEGRITY.

Reflected in the Legislature's posturing about the separation of power doctrine, the Legislature's plainly stated motivation is to demand that the Judiciary not "interfere" with the status quo—regardless whether that status quo is constitutional. Amicus Mot. at 2. The Legislature seeks to pressure this Court to *ignore* the constitution rather than interpret it.

In blatant disregard for the Judiciary's constitutional role in the separation of powers, the Legislature describes judicial review of a constitutional question as *interference* that the Legislature must oppose: "The Legislature's interest as *Amicus Curiae* is that it cannot stand by silently as the Plaintiffs call upon a co-equal branch of government, the Judiciary, to interfere with the Legislature's constitutionally empowered self-governance." Amicus Mot., Ex. A at 2. But as held in numerous cases, the Judiciary, not the Legislature, is the "ultimate interpreter" of the constitution. Pls. Mem. at 12-13 (discussing over a century of similar challenges being held justiciable).

Yet, the Legislature argues that it has unilateral discretion over the process for adopting legislation, irrespective of the numerous limitations imposed by the Hawai`i Constitution, only two of which are at issue in this case. For example, the proposed amicus states:

> [The constitution] empowers each house with rights of self-governance and the determination of its process to adopt legislation. Each house enacts its own rules and procedures and *need only agree on deadlines* where

> the constitution requires them to do so. Thus the Legislature has a strong interest in protecting its governance and rules and procedures as they adopted in compliance with the constitution.

Amicus Mot., Ex. A at 2 (emphasis added).

The Legislature does not need "protection" from the procedural guarantees in the Hawai`i Constitution that ensure the people of Hawai`i understand and have the opportunity to comment on proposed legislation before it becomes law. While it is surprising that the Legislative Branch has chosen to defend a practice that keeps its citizens in the dark, these procedural guarantees have been enshrined in Hawai`i constitutions for over a century specifically to provide a check-and-balance against legislatures overstepping their authority. That is why it is all the more important that the Judiciary require the Legislature to respect courts' independence and integrity to resolve these critical constitutional questions without undue political pressure.

As Alexander Hamilton observed:

> [I]t proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches . . . .
>
> . . .
>
> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.
>
> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were

> designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Federalist No. 78.

> And as more succinctly explained by Chief Justice Richardson:
>
> [I]n resolving disputes, courts interpret and develop law and act as a check on the other branches of government. In order to effectively perform these functions, the judiciary must be free from external pressures and influences. Only an independent judiciary can resolve disputes impartially and render decisions that will be accepted by rival parties, particularly if one of those parties is another branch of government.

William S. Richardson, *Judicial Independence: The Hawaii Experience*, 2 Univ. of Haw. L. Rev. 1, 4 (1979).

There is no substance to the Legislature's arguments. Its motion, at essence, functions as a barely veiled threat to the Court not to interfere.

III. NOTHING SUGGESTS THE LEGISLATURE AS A BODY AUTHORIZED THE AMICUS SUBMISSION.

Counsel has provided no evidence that the Legislature authorized this amicus filing. The Legislature convenes every third Wednesday in January for a period of sixty days; it has not been in session to vote on a resolution in support of this amicus filing. According to Rule 2.3 of the Rules of the House of Representatives, the Speaker of the House may file legal action if 15 days notice is given to all House members.[5] The motion for leave is silent about who authorized this legal action, whether any notice has been provided to the members of the Legislature, or whether a majority is in favor of it.

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[5] The Senate Rules do not address the filing of legal action.

While perspectives of members of the Legislature are irrelevant to this Court's consideration regardless, the Court should note that the authority for filing this amicus motion is dubious.

IV. PLAINTIFFS MUST BE PERMITTED AN OPPORTUNITY TO RESPOND TO ANY PERMITTED *AMICUS CURIAE* FILING.

As noted, the proposed *amicus curiae* filing confuses several issues. If, contrary to the judicial guidance outlined above, this Court is inclined to grant the Legislature's motion for leave, Plaintiffs must be permitted a separate opportunity to address the Legislature's analysis. *See* HRAP 28(g) ("The order granting leave shall fix the time for filing the *amicus curiae* brief and any response thereto.").

Moreover, the Legislature's role as amicus must be limited in scope. The Legislature has not moved to intervene, so it should not be granted equal status as a party.[6] *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) ("Courts have rarely given party prerogatives to those not formal parties. A petition to intervene and its express or tacit grant are prerequisites to this treatment."); *United States v. State of Mich.*, 940 F.2d 143, 164 (6th Cir. 1991) (district court's "creation of this legal mutant characterized as 'litigating amicus curiae' . . . if accorded precedential viability, will implicate and erode the future core stability of American adversary jurisprudence as we know it today"). The Legislature has moved solely for authority to file its proposed memorandum of law. Amicus Mot. at 2 ("Thus, the Legislature respectfully requests leave of this Court to file the Amicus Brief as attached as Exhibit 'A,' hereto."). Thus, there is no basis for this Court to authorize any further participation from the Legislature without a further motion for leave. *E.g.*, Docket, *Nelson v. Hawaiian Homes Comm'n*, Civ. No. 07-1-1663-08 JHC (reflecting different motions for leave filed by the Legislature every time it sought to submit a filing).

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[6] Plaintiffs' counsel has had another matter in which an initially unopposed government amicus continually sought to be involved in every aspect of a case and go beyond the initial authority conferred in a motion for leave, causing practical issues and procedural delays. The lesson being that it is critical to define the role of amicus at the outset.

Specifically, the Legislature should not be permitted to file a "reply" to any response filed by the parties to the amicus filing. The Legislature has no burden of proof in this case, and it would be fundamentally unfair to Plaintiffs to permit an amicus the "last word"—to which the parties have no effective opportunity to respond. And the appellate model that should guide this Court does not provide for an amicus reply. HRAP 28(g).

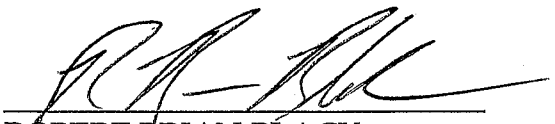
And the Legislature should not be permitted to prolong and muddle the parties' oral argument on the merits of the motions for summary judgment by rearguing the State's position. The Legislature is not presenting any unique perspective on this case that is not covered in the State's arguments. Permitting the Legislature to appear and argue at the hearing only provides an opportunity for grandstanding by an amicus who seeks to exert improper political pressure on the Court. Here, this case is distinguishable from *Nelson*—one of the few cases that permitted oral argument by an amicus—because *Nelson* on remand involved conflicting interests among State instrumentalities. The docket in the second appeal shows that the State expressly moved to permit the Legislature share its oral argument time, resulting in the unusual situation where the State defendants and the Legislature shared time while the plaintiffs and the State Department of Hawaiian Home Lands shared time. There are no comparable internal State conflicts here, nor any motion for leave to argue at the hearing.

If the Court permits an amicus filing, the Legislature's involvement ends with the filing. The parties must be permitted the opportunity to file a response to the amicus filing, but the Legislature is not entitled to a "reply" or the opportunity to argue at the merits hearing.

CONCLUSION

Plaintiffs respectfully requests that this Court deny the Hawai`i State Legislature leave to file a memorandum as *amicus curiae*.

DATED: Honolulu, Hawai`i, December 11, 2018



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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

LEAGUE OF WOMEN VOTERS OF HONOLULU and COMMON CAUSE Plaintiffs, vs. STATE OF HAWAI`I, Defendant.	CIVIL NO. 18-1-1376-09 GWBC (Other Civil Action) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, R. Brian Black, certify that on December 11, 2018, I will serve a copy of the foregoing Plaintiffs' Opposition to Motion for Leave to File a Memorandum on Behalf of the Hawai`i State Legislature as *Amicus Curiae* on the following parties by U.S. mail, postage prepaid:

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DATED: Honolulu, Hawai`i, December 11, 2018

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