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1ST CIRCUIT COURT
STATE OF HAWAII
FILED

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F. OTAKE
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEAGUE OF WOMEN VOTERS OF
HONOLULU and COMMON CAUSE,

Plaintiffs,

vs.

STATE OF HAWAII,

Defendant.

CIVIL NO. 18-1-1376-09 GWBC

**REPLY IN SUPPORT OF MOTION FOR
LEAVE TO FILE A MEMORANDUM OF
BEHALF OF THE HAWAII STATE
LEGISLATURE AS *AMICUS CURIAE* IN
SUPPORT OF DEFENDANT STATE OF
HAWAII'S MOTION FOR SUMMARY
JUDGMENT FILED ON OCTOBER 9,
2018 AND IN OPPOSITION TO
PLAINTIFFS' CROSS-MOTION FOR
SUMMARY JUDGMENT FILED ON
OCTOBER 25, 2018; DECLARATION OF
COLLEEN HANABUSA; EXHIBIT "1";
CERTIFICATE OF SERVICE**

HEARING:

Date: December 19, 2018

Time: 3:00 PM

Judge: The Honorable Gary W. B. Chang

Trial Date: None

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE A MEMORANDUM ON
BEHALF OF THE HAWAII STATE LEGISLATURE AS *AMICUS CURIAE* IN
SUPPORT OF DEFENDANT STATE OF HAWAII'S MOTION FOR SUMMARY
JUDGMENT FILED ON OCTOBER 9, 2018 AND IN OPPOSITION TO PLAINTIFFS'
CROSS-MOTION FOR SUMMARY JUDGMENT FILED ON OCTOBER 25, 2018**

Plaintiffs' Memorandum in Opposition to the HAWAII STATE

LEGISLATURES' motion for leave to file a memorandum as *Amicus Curiae* (hereinafter "Plaintiffs' Opp"), begins with the perplexing statement that their Complaint does not allege that the Executive Branch of the State "engaged in unconstitutional conduct." (Plaintiffs' Opp at 1). Plaintiffs so state to argue that only the Legislature is implicated as a party to this action. Plaintiffs fail or refuse to recognize that their Complaint challenges Act 84 which became law on July 5, 2018 because of the Executive Branch. For any bill to become law, it requires the concurrence of the Governor. Section 16, article III of the *Constitution*. A challenge to Act 84 (2018) is not only against the Legislature but also implicates the Governor and his departments.¹

It is apparent that the Plaintiffs do not want the Legislature to be before this Court or any court. They refuse to recognize that the Legislature is a co-equal branch of the State and has a Constitutional mandate and responsibility to protect its functions. The Legislature in moving for leave to file a memorandum as a friend of the court does so because it believes it can best assist the Court understanding the process which is being challenged.²

¹ At the very minimum the Office of the Attorney General has permitted SB 2858 to become law by finding it constitutional. Once law, the potentially affected departments, such as public safety, education, accounting and general services and budget and finance could be "parties" as well.

² The Legislature takes issue with the allegations by the Plaintiffs that "the proposed amicus is nothing more than a futile attempt at political intimidation of this Court." (Plaintiffs' Opp at 2). In their footnote 1, Plaintiffs cite to Senate Majority Leader J. Kalani English's statements made at Civil Beat's Civil Café to convince this Court to deny the Legislature's motion for leave. The intimidation appears to be by the Plaintiffs against the Legislature for exercising its co-equal status in the State. The Hawai'i Supreme Court in *Taomae v. Lingle*, 108 Hawai'i 245, 254, 118 P.3d 1188, 1197 (2005) was very clear in its decision that the holding was limited to Article XVII and was not to be construed as interfering with the Legislature's Article III authorities. In any event, I do not believe that this Court would be politically intimidated.

Plaintiffs raise four major arguments in opposition to the Legislature's Amicus Motion. Each will be addressed herein.

Plaintiffs' First Argument alleges that the Legislature fails to meet the "recognized standards" for participation as an amicus. It is undisputed that the granting of leave to file an amicus brief in this jurisdiction is solely within the discretion of this Court. The Legislature identified instances where the Circuit Court and the Hawai'i Supreme Court has granted it leave. To the best of its knowledge, the Legislature has not been denied leave. Moreover, contrary to what Plaintiffs would like to argue, the Legislature has not abused requesting the filing of Amicus briefs. There are no recognized standards in our court rules or case law except that leave must be sought. Plaintiffs in their opposition to the Legislature cites to the case of *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000) and other case authorities which will be referred to Judge Posner's progeny of cases.³ (Plaintiffs Opp at 2-3). Plaintiffs propose that this Court adopt the standards of the Seventh Circuit Court of Appeals to determine whether leave should be granted. Though Judge Posner freely granted leave prior to his decision in *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997), he implemented the criteria because of the time he and his colleagues spent reading these briefs; the quality of the briefs and the additional cost to the litigants to respond to the briefs. Judge Posner did note that in the Federal Appellate rules, an argument must be made as to why the filing is desirable. *Id.* It is important to note that there is no such requirement in Hawai'i's Court Rules. Notwithstanding, Judge Posner set forth three criteria, the Legislature contends that

³ Judge Posner may have first used the phrase "judicial grace" to describe the discretion of the Court in granting leave to file an amicus brief.

though not applicable, it could meet Judge Posner's third criteria which is that it has "unique information" that can assist this Court way beyond what the parties can provide.⁴

Judge Posner was not the first to establish criteria which Plaintiffs now seek this Court to adopt. Judge Prather in *Taylor v. Roberts*, 475 So.2d 150, 152-153 (Miss. 1985) set forth four criteria. Judge Prather as a state court judge, gave deference to the State of Mississippi and its Attorney General as an exemption to his criteria. As with *Ryan*, there is a criteria which can be met by the Legislature; that is, there exists substantial legitimate interest which will likely be affected by the outcome of the case and the interest is not adequately protected by the parties.

None of the cases cited by Plaintiffs were of state courts denying their legislatures' motion for leave to file an amicus. The cases cited were individuals or entities advocating for one party or the other. Plaintiffs do rely heavily on yet another Judge Posner case, *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 543-544 (7th Cir. 2003) as an example of state legislators being denied filing an amicus brief and by analogy why the Hawai'i Legislature should also be denied. In *Voices*, the Illinois Legislators' motion for leave to file an amicus brief was denied based on Judge Posner's belief that providing the vote count on the legislation did not meet any of the Seventh Circuit's criteria. It is important to note that the Illinois Legislators are filing in the federal court and not as a co-equal branch of a state government. The Seventh Circuit need not concede any special position to the Illinois Legislators or Legislature.

⁴ The review of the string citation by Plaintiffs in support of Judge Posner are for most part either written by him or cases which have cited *Ryan* as an authority. The case which appears to be incorrectly listed is *AmeriCare MedServies, Inc. v. City of Anaheim*, 2017 WL 1836354 (C.D. Cal. 2017).

The Plaintiffs had three subparts to their first argument. Plaintiffs' Subpart A argues that the Legislature is already represented by the Attorney General and should not be permitted a dual role. Plaintiffs allege that the Legislature's participation would violate Judge Posner's first criteria which is that leave should not be granted to someone who is a party.

The Legislature points to the fact that both parties, the State of Hawai'i and Plaintiffs have filed motion for and cross-motion for summary judgment. Both parties have defined this Complaint as pertaining to Act 84 and only Act 84. The Legislature believes that what is being challenged is its process as to how a bill is introduced and ultimately becomes law. Act 84 is just an innocuous convenient vehicle for their challenge. If, in fact, the Legislature is correct, that the challenge is more than Act 84, then why did Plaintiffs choose Act 84; and what is the injury which Plaintiffs have suffered as a result of Act 84. The Legislature is concerned about *res judicata* and/or collateral estoppel arguments that may be raised as to other bills which have become Acts. The Legislature raised in footnote 5 of its proposed Amicus Brief the number of Acts which might be challenged under Section 14, article III. As well in footnote 14, the Legislature questions whether the provisions of Section 15, article III will be raised to challenge the much needed flood relief for East Oahu and Kauai. The Legislature contends that this challenge to Act 84 has potentially major implications for its self-governance and its legislative process.

It is in this Subpart A to Plaintiffs' first argument that they take issue with the examples of the cases in which the Legislature were permitted to file their amicus briefs. Plaintiffs attempt to distinguish the cases based upon who was sued and argue it was not simply the State of Hawai'i as they have conveniently named as the defendant. Plaintiffs are incorrect to believe drafting the pleading so there is only one defendant, to then argue Legislature is the

true party will justify the denial of the Legislature's request to file amicus brief. Their arguments do not outweigh the examples of when the Legislature was permitted leave to file amicus briefs.

Contrary to what Plaintiffs allege at 4-5 of their Opposition, the cases of *Nelson v. Hawaiian Homes Commission*, (Civil No. 07-1-1663-08 JHC) where the Legislature was granted leave to file two amicus briefs, *Taomae v. Lingle*, 108 Hawai'i 245, 118 P.3d 1188 (2005) and *Sierra Club v. Dep't of Transportation*, No. 29035, 2009 WL 1567327 (May 13, 2007) ("*Superferry*"), were challenges to the acts of the Legislature and alleged violations of the *Constitution*. Ironically, Plaintiffs opening argument that the Legislature is the only branch implicated is probably true in *Taomae* in that the Governor cannot veto a Constitutional Amendment. The Hawai'i Supreme Court granted leave to file an Amicus brief to the Legislature in *Taomae*.

Plaintiffs are candid in their statement that the State of Hawai'i, in this case the Executive and the Legislative Branches should speak with one voice. (Plaintiffs Opp at 5). The Legislature will speak with its own voice on its constitutionally authorized process.

Plaintiffs' Subpart B of their first argument alleges that the Legislature does not have a special legal interest. Interestingly, Plaintiffs do state at 6 that "[i]f the Legislature's current procedures writ large or as applied to other bills are unconstitutional-issues that are not presented to this court-this does not confer on the Legislature an special legal interest justifying amicus participation." This is criteria four in *Taylor* which is a substantial legal interest that will be affected by the outcome.⁵ As stated above, the quoted statement by Plaintiffs makes more

⁵ The Legislature does not adopt the criteria as proposed by Plaintiffs. The Legislature contends that whether it is permitted leave to file an Amicus brief is within the Court's discretion. However, it raises Plaintiffs' own authorities to show how critical the Legislature's participation is in this matter.

curious as to why Plaintiffs' challenged Act 84 and again, more importantly, what is the injury they suffer. If it is their attempt to challenge the "current procedure . . . as applied to other bills are unconstitutional," this should definitely confer a special legal interest "justifying amicus participation."

Plaintiffs rely upon *Voices* which is not analogous to what we have here, a State Legislature and a State Court. Plaintiffs end with the citation, highlighted for emphasis, "[a]n appeal should therefore not resemble a congressional hearing." There is nothing in the Legislature's proposed amicus brief which should give this Court any concern that this brief resembles a congressional hearing.⁶ (Plaintiffs Opp at 7).

Plaintiffs' Subpart C of their first argument claims that the Legislature's arguments rehashes the State of Hawai'i's in its Memorandum in Support and Reply Memorandum in support of its Motion for Summary Judgment. Plaintiffs again rely on Judge Posner in *Voices* for the position that all the Illinois Legislators added was a vote count. This is Plaintiffs attempt to say that the Legislature's proposed amicus brief is also useless to this Court. The Legislature believes that when this Court reviews the arguments that it raised in its proposed amicus brief and compare to that which the Attorney General's office filed, the Court will find the Legislatures proposed amicus brief contains extensive discussions of the Constitutional

However, it raises Plaintiffs' own authorities to show how critical the Legislature's participation is in this matter.

⁶ The Federal District Court of New Jersey was faced with a request by a Leadership Group of the United States House of Representative for leave to file an amicus brief in the summary judgment motion of the Defendant in *Yip v. Pagano*, 606 F. Supp. 1566, 1567-1569 (D.N.J. 1985). The Congressional group was permitted to do so because it was viewed as "useful." The issue was Defendant Pagano's opening statement to the House Subcommittee on Crime where he made statements about Hon Yip and crime in the casinos. The issue was immunity in testifying before Congress.

Convention Debates which focus on Section 15, article III and how the Framers viewed three readings of a bill; the significance of the major amendment in the 1968 Constitutional Convention on the 24 (now 48) hour layover of final bills; the significance of the broad titles of Acts; how a ruling in favor of the Plaintiffs in this action may implicate other pieces of legislation; the internal rules of the two Houses and their adoption of *Mason's Manual of Legislative Procedure*. The Legislature contends that the information it is providing which, in all due respect, differs from that provided by the Attorney General, must be troubling to the Plaintiffs and possibly dispositive of their case for them to object so strenuously.

Plaintiffs' Second Argument is the allegation that the Legislature's desire to preserve the separation of powers is a veiled attack on judicial integrity. This is a troubling allegation against the Legislature for performing its Constitutional responsibilities. Moreover, it is unclear as to how a motion for leave to file an amicus brief is a threat on judicial integrity. The Legislature contends that if there is a veiled threat in this matter, it is Plaintiffs implying that the decision on Act 84, an otherwise innocuous bill, can serve to challenge the constitutionality of other Acts passed. The Legislature needs an independent judiciary. The Legislature wants a judiciary that will not be manipulated to interfere with the independence of its co-equal branch of the State, the Legislature.

Plaintiffs' Third Argument goes to the authority of the Hawai'i State Legislature to file this action. Plaintiffs argument is similar to that raised by plaintiffs in the *Nelson* case. It is important to note that Judge Castagnetti did grant leave, twice, to the Hawai'i State Legislature.

Rule 2.3 of the House of Representatives was met with the appropriate notice of Scott K. Saiki, Speaker of the House of Representative. (A copy of the Notice is attached hereto

as Exhibit "1." Declaration of Colleen Hanabusa). Speaker Saiki notified all members of the House of Representatives of his intent to authorize legal action in this matter. The Memorandum is dated November 5, 2018. The Legislature's Motion was filed on November 27, 2018; 22 days after notification. There is no comparable requirement in the Rules of the Senate.

In addition, HR 229, "AUTHORIZING AND EMPOWERING THE SPEAKER TO PERFORM AND CARRY OUT ANY OFFICIAL LEGISLATIVE BUSINESS DURING THE INTERIM BETWEEN THE 2018 AND 2019 REGULAR SESSIONS" was enacted and passed on May 3, 2018. Likewise, SR 144, "REGARDING COMPLETION OF THE WORK OF THE TWENTY-NINTH LEGISLATURE, REGULAR SESSION OF 2018, SUBSEQUENT TO THE ADJOURNMENT THEREOF," was enacted and passed on May 3, 2018. These Resolutions empower the Speaker and the Senate President to proceed with this action.

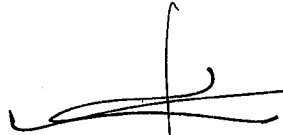
Plaintiffs' Fourth Argument is again an attempt to adopt Judge Posner "to speak with one voice;" meaning the Legislature has no voice. The scheduling conference held on December 5, 2018 is dispositive of this argument. The Court ruled that **IF** the Legislature is permitted to file an amicus brief, Plaintiffs and Defendant will have the opportunity in 20 pages to respond. The Legislature would then have a 10 page reply memo. Although I do not recall an objection to the request to file a Reply, Plaintiffs now object. It was understood that the right to participate at argument was reserved by this Court for ruling at the December 19, 2018 hearing, along with the ruling on the Legislatures' motion to file a memorandum as *Amicus Curiae*.

The Legislature is well aware that leave to file and its participation is discretionary on the part of this Court.

For the reasons stated above, the HAWAII STATE LEGISLATURE respectfully request that this Court grants its Motion for Leave to file a Memorandum as *Amicus Curiae* in

support of the Defendant State of Hawai'i's Motion for Summary Judgment filed on October 9, 2018 and in opposition to Plaintiffs' Cross-Motion for Summary Judgment filed on October 25, 2018. In addition, the HAWAII STATE LEGISLATURE, respectfully request that this Court grant its oral motion to participate and present arguments at the hearing on said motions presently scheduled for January 24, 2019 at 10 AM.

DATED: Honolulu, Hawai'i, December 14, 2018.

A handwritten signature in dark ink, appearing to read 'Colleen Hanabusa', is written over a horizontal line.

COLLEEN HANABUSA

Attorney for HAWAII STATE LEGISLATURE

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEAGUE OF WOMEN VOTERS OF
HONOLULU and COMMON CAUSE,

Plaintiffs,

vs.

STATE OF HAWAII,

Defendant.

CIVIL NO. 18-1-1376-09 GWBC

**DECLARATION OF COLLEEN
HANABUSA; EXHIBIT "1"**

Judge: The Honorable Gary W. B. Chang

Trial Date: None

DECLARATION OF COLLEEN HANABUSA

I, COLLEEN HANABUSA, hereby declare pursuant to Rule 7(g), Rules of the Circuit Court of the State of Hawai'i that:

1. I am an attorney duly licensed in the State of Hawai'i; and I am counsel for Movant, the Hawai'i State Legislature.
2. I make this declaration based on my personal knowledge and am competent to testify as to matters set forth herein.
3. Attached hereto as Exhibit "1" is a true and correct copy of a Memorandum sent to all Members of the House of Representatives from Scott K. Saiki, Speaker of the House notifying members of his intent to authorize legal action in order to file an amicus curiae brief in *League of Women Voters of Honolulu and Common Cause v. State of Hawai'i*, Civil NO. 18-1-1376-09 GWBC.

I, COLLEEN HANBUSA, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, December 14, 2018.



COLLEEN HANABUSA

EXHIBIT “1”




HOUSE OF REPRESENTATIVES

STATE OF HAWAII
STATE CAPITOL, ROOM 431
415 SOUTH BERETANIA STREET
HONOLULU, HAWAII 96813

November 5, 2018

MEMORANDUM

TO: All House Members

FROM: Speaker Scott K. Saiki 

RE: Intent to Authorize Legal Action

This memo is to inform you that the House intends to authorize legal action in order to file an amicus curiae brief in *League of Women Voters of Honolulu and Common Cause v. State of Hawaii*, Civ. No. 18-1-1376-09. As time is of the essence to protect the Legislature's interest, I will authorize legal action as soon as practicable.

Please contact my office if you have any questions. Thank you very much.

cc: Brian L. Takeshita, Chief Clerk
Mark K. Morita, Acting Chief Attorney

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CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify the on this date a true and correct copy of the foregoing document
was duly served by hand delivery on the following parties listed below:

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DATED: Honolulu, Hawai'i, December 14, 2018.


COLLEEN HANABUSA

Attorney for the HAWAII STATE LEGISLATURE