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Supreme Court
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S.C. NO. SCPW-20-0000085

IN THE SUPREME COURT OF THE STATE OF HAWAII

JUDGES FOR JUSTICE,

Petitioner,

vs.

THE HONORABLE HENRY T.
NAKAMOTO, Circuit Judge of the Circuit
Court of the Third Circuit,

Respondent.

ORIGINAL PROCEEDING
S.P. NO. 7-1-0007

**PETITION FOR WRIT OF
PROHIBITION AND WRIT OF
MANDAMUS**

The Honorable Henry T. Nakamoto, Circuit
Court of the Third Circuit, State of Hawaii

**MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF
BY THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
REGARDING PETITIONER JUDGES FOR JUSTICE'S PETITION FOR WRIT OF
PROHIBITION AND WRIT OF MANDAMUS**

EXHIBIT "1"

CERTIFICATE OF SERVICE

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Pursuant to Hawai'i Rules of Appellate Procedure 27 and 28 (g), The Reporters Committee for Freedom of the Press ("the Reporters Committee") moves this Court for leave to appear as amicus curiae and to file a brief stating its position with respect to the Petition for Writ of Prohibition and Writ of Mandamus filed February 21, 2020.

The Reporters Committee is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee has a strong interest in preserving access to court proceedings and records, and upholding the public's right to observe and evaluate the conduct of those proceedings.

The Reporters Committee seeks leave to file a brief discussing this Court's prior decisions upholding the state and federal constitutional rights of the media and the public to observe court proceedings and access court records, and setting forth standards by which the courts should evaluate whether and when to allow documents to be sealed and court proceedings to be closed. The Reporters Committee plans to argue that the trial court here erred in failing to apply the proper standards and failing to make the required factual findings in determining whether the documents should remain sealed. The Reporters Committee also plans to argue that the trial court's order imposing sanctions was improper, and has the potential to chill journalistic inquiries, to the extent the sanctions were imposed only because a non-party to the underlying

case attempted to present the trial court with a request to unseal documents. The Reporters Committee takes no position on the merits of Petitioner's request to unseal the documents at issue here.

Because of the importance of these constitutional issues, and the Reporters Committee's ability to provide a journalistic perspective and historical context regarding the issues before the Court, the Reporters Committee respectfully requests that the Court grant its motion for leave to file an amicus curiae brief in this matter.

DATED: Honolulu, Hawai'i, June 10, 2020.

CADES SCHUTTE
A Limited Liability Law Partnership

/s/ Jeffrey S. Portnoy

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JOHN DUCHEMIN

Counsel of record for amicus curiae

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FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER'S WRIT
OF PROHIBITION AND WRIT OF MANDAMUS**

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EXHIBIT 1

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amicus curiae is the Reporters Committee for Freedom of the Press (the “Reporters Committee”), an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Petitioner Judges for Justice (“JFJ”) seeks review of the circuit court’s order denying its motion to unseal two judicial records in a criminal case and imposing sanctions on JFJ. *See* Pet. for Writ of Prohibition and Writ of Mandamus at 1 (hereinafter “Pet.”). Members of the news media frequently rely on the public’s First Amendment right of access to judicial records in order to report about individual cases and, more generally, how the judicial branch carries out its duties. In particular, members of the news media file motions to unseal judicial records in cases where they are not a party nor counsel for a party, in order to seek access to records they assert should not be sealed from public view. Accordingly, as an organization that advocates on behalf of journalists and news organizations, the Reporters Committee has a strong interest in ensuring that courts in Hawai‘i interpret and apply the qualified First Amendment right of access to judicial records in a manner that facilitates public oversight of the judicial branch.

To that end, amici write to highlight the important societal interests promoted by the constitutional and common law rights of access to court records, to emphasize the procedural and substantive requirements that must be met to justify the sealing or continued sealing of court proceedings or records, and to highlight the chilling effect that the sanctions imposed on JFJ in

this case could have on future movants who seek access to court records, including journalists and news organizations.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns a motion by Petitioner JFJ to unseal two stipulations from a 2007 criminal case, *In re Schweitzer*, S.P. No. 07-1-0007. The circuit court not only denied that motion, but also issued sanctions against JFJ. In denying the motion, the circuit court made no findings of fact justifying the continued sealing of the records; the only explanation it provided was that a similar request by JFJ was denied in the past and that that JFJ is “not a party or counsel for a party.”¹ *See* Pet. Br. 3, Ex. 5.

The public’s right of access to judicial proceedings and records under the First Amendment and Hawai‘i State Constitution serves important societal interests, particularly in criminal cases. News outlets in Hawai‘i frequently rely on access to court proceedings and records to inform the public about the workings of the judicial branch and matters of public concern.

Under the First Amendment and the Hawai‘i State Constitution, court records may remain sealed only if the court makes specific findings that “(1) [the] closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.” *Oahu Publ’ns Inc. v. Ahn*, 331 Hawai‘i 482, 498 (2014) (quoting *Oregonian Publ’g Co. v. U.S. District Court for District of Oregon*, 920 F.2d 1462, 1466 (9th Cir. 1990)). The Reporters Committee takes no position on whether the stipulations at

¹ JFJ, acting *pro se*, initially sent a letter to the circuit court requesting an opportunity to submit a motion to unseal the two stipulations. Pet. Ex. 2. The circuit court responded that it could not “schedule a hearing or entertain a motion submitted based on the information provided as the person requesting relief is not a party or counsel for a party in the above-entitled matter.” *Id.* JFJ then filed a motion to unseal the stipulations, and the circuit court issued an order denying the motion. *Id.* Exs. 3 & 5.

issue in this case should be unsealed or on JFJ's involvement in the underlying case. However, the circuit court's denial of JFJ's unsealing motion falls short of the steep requirements that this Court and the United States Supreme Court have required to be met before a court can deny the public's presumptive right to access judicial records.

Moreover, the Reporters Committee urges the Court to hold that courts cannot sanction a non-party movant simply for moving to unseal sealed judicial records. The potential for such sanctions would chill members of the public, including members of the news media, from asserting their constitutional and common law rights of access.

ARGUMENT

I. The First Amendment and the Hawai'i State Constitution guarantee the public a right of access to judicial records for reasons fundamental to our democracy and the integrity of our judicial system.

The Supreme Court of the United States has recognized that the First Amendment provides the public a presumptive right of access to a wide range of judicial proceedings. *See, e.g., Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8–10 (1986) (“*Press-Enterprise II*”) (holding that the First Amendment right of access applies to transcripts of preliminary hearings); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505–10 (1984) (“*Press Enterprise I*”) (holding that the First Amendment right of access applies to a transcript of voir dire); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (holding that the First Amendment creates a preemption of public access to criminal trials).

Following and expanding upon the U.S. Supreme Court's guidance, this Court has held that both the First Amendment and Hawai'i State Constitution provide the public with a right of access to judicial proceedings and records in criminal and other matters. *Ahn*, 331 Hawai'i at 496 (recognizing the public's right of access to criminal trials under the First Amendment and article 1, section 4 of the Hawai'i State Constitution, including transcript of an investigation of

possible juror misconduct); *Freitas v. Admin. Dir. of Courts*, 104 Hawai‘i 483, 489 (2004) (recognizing a right of access to quasi-judicial administrative hearings under the First Amendment).²

This Court has recognized five societal interests served by public access to criminal proceedings and records. *First*, public access “promotes informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system, serving an ‘educative’ interest.” *Ahn*, 133 Hawai‘i at 502. *Second*, open proceedings give “‘assurance that the proceedings were conducted fairly to all concerned’ thereby promoting a ‘perception of fairness.’” *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 569). *Third*, “public access to criminal proceedings also has a ‘significant community therapeutic value’ because it provides an ‘outlet for community concern, hostility, and emotion.’” *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 570–71).³ *Fourth*, public access to criminal proceedings “serv[es] as a

² Though JFJ has not asserted the common law right of access in this case, the common law also guarantees the public a right of access to judicial records. In *Nixon v. Warner Communications, Inc.*, the Supreme Court recognized a common law right “to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–98 (1978) (citations omitted). This Court has similarly noted its “long-established policy of openness in judicial proceedings.” *In re Estate of Campbell*, 106 Hawai‘i 453, 462 (2005) (quotation and citation omitted).

³ Moreover, with respect to the community therapeutic societal interest, this Court has stated:

Societal interest in open proceedings is especially high in a newsworthy case where the public has already been following the progress of a proceeding through news reports and other media, or the case otherwise resonates as significant in the community. Where the public has made a significant investment of interest and attention in a case or proceeding, closing a portion of the proceeding will undoubtedly breed concern and result in unbridled speculation, whereas open proceedings will resolve such concerns.

check on ‘the misconduct of participants’ by exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality.” *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 569). *Fifth*, “public access to criminal proceedings discourages perjury . . . because members of the public who might be able to contradict false testimony will not learn of that testimony unless the proceedings are open to the public.” *Id.*

In short, public access to criminal proceedings and records as guaranteed by the First Amendment and Hawai‘i State Constitution benefits “both the defendant and to society as a whole.” *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

II. The news media relies on public access to court records to keep Hawaiians informed.

Because members of the public cannot attend every court proceeding or read every judicial record, journalists function “as surrogates for the public” by requesting access to and reporting on court proceedings and records. *Richmond Newspapers*, 448 U.S. at 573. In Hawai‘i and elsewhere, access to judicial records has led to important reporting in the public interest, and unsealed records, in particular, have helped the public understand the judicial process and the rights of the accused. Recent local news stories underscore how reporters and news outlets in Hawai‘i use unsealed records to keep the public informed.

In one prominent example, news organizations relied on unsealed judicial records to report about the criminal prosecution of Katherine and Louis Kealoha, two former public officials. In October 2017, Katherine Kealoha, former Honolulu prosecutor, and Louis Kealoha, former Honolulu police chief, were charged with various crimes, including fraud, obstruction of justice, and identity theft. *See* Nick Grube, *Former Honolulu Police Chief and Prosecutor Wife Arrested*, Honolulu Civil Beat (Oct. 20, 2017), <https://perma.cc/HJ7P-9R7D>. Despite the

Id.

immense public interest in a criminal trial involving two public officials and their abuse of their public positions, many filings in the case were submitted under seal. Only after a third party intervened and moved to unseal were many of the records in the Kealohas' case unsealed to provide the public the full picture of what their former public officials had done.

For instance, an unsealed letter from Ms. Kealoha's doctor filed in the case revealed that, at the same time that she was prosecuting cases, Ms. Kealoha was taking medications that could "significantly affect some cognitive ability and her ability to focus, making it difficult at times for her to work, be involved in legal proceedings or to perform her activities of daily living." Lynn Kawano, *Unsealed Records: Kealoha was Prosecuting Cases Despite 'Serious' Medical Condition*, Hawaii News Now (June 24, 2019, 5:20 PM), <https://perma.cc/VZ7D-NQ4T>; *see also In re Civil Beat Law Center for the Public Interest*, The Civil Beat Law Center for Public Justice, <https://bit.ly/3cdOr16> (last visited June 8, 2020).

The records at issue in this Court's landmark decision in *Ahn* also resulted in significant news reporting. In that case, the *Honolulu Star-Advertiser* and *Hawaii News Now* sought to unseal a transcript of portions of the highly publicized trial of Christopher Deedy, a federal agent criminally charged for the 2011 shooting death of Kollin Elderts. *See Ahn*, 133 Hawai'i at 490–92. The trial resulted in a mistrial because of a hung jury. *Id.* at 499. The unsealed but still partially-redacted transcript revealed—six months after the fact—that the jury foreman had raised concerns to the court that another juror knew one of the family members of the defendant or victim. *See* Ken Kobayashi, *Judge Releases Documents in Deedy Murder Case*, *Honolulu Star-Advertiser* (Feb. 25, 2014), <https://perma.cc/TV6W-7VTS>; Mileka Lincoln, *Judge Unseals Transcripts in Deedy Murder Case*, *Hawaii News Now* (Feb. 27, 2014, 7:10 PM), <https://perma.cc/ALG4-W77J>. According to the transcript, the juror in question explained to the

court that he had worked with the family member about seven years ago but was capable of being an impartial juror. *See* Lincoln, *supra*. Over the objection of the defense, the judge allowed the trial to continue without replacing the juror with an alternate. *See* Lincoln, *supra*.

As these stories demonstrate, access to sealed records in cases in Hawai‘i have allowed the news media to shed light on the workings of the judicial branch and important matters of public concern.

III. The circuit court made no findings of fact to support the continued sealing of the stipulations, as required by the First Amendment.

The public’s right of access under the First Amendment and Hawai‘i State Constitution can be overcome only if two requirements are met. The court must both (1) provide the public with opportunity to object to the sealing and, if sealing is appropriate, (2) articulate its reasons supporting closure in findings. *See Grube v. Trader*, 142 Hawai‘i 412, 423 (quoting *Ahn*, 133 Hawai‘i at 497–98).⁴ Closure can be supported only by findings that “(1) [the] closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.” *Ahn*, 133 Hawai‘i at 498; *Press-Enterprise I*, 464 U.S. at 510 (explaining that the First Amendment right of access may be overcome “only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest” and that “[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered”).

⁴ The Reporters Committee agrees with JFJ that it is irrelevant that the stipulations were sealed before this Court’s decisions in *Ahn* and *Grube* and that the standards set forth in *Ahn* and *Grube* govern the circuit court’s continued sealing of the stipulations. *See* Pet. at 11.

The circuit court erred in failing to make the findings required to support the continued sealing of the stipulations in this case. Indeed, the circuit court failed to make any findings regarding the existence of a compelling interest that would justify closure, the probability, if any, of harm to that interest, and the availability of alternatives to sealing that would protect that interest.

The circuit court offered only one justification for the continued sealing of the stipulations: That a similar request by JFJ was previously denied on the grounds that JFJ is not a party to the case. *See* Pet. Br. 3, Ex. 5. But the right of access to judicial proceedings and documents is the *public's* right, not the parties'. Indeed, this Court's requirement that "*the public*" be afforded the opportunity to challenge closures, *Grube*, 142 Hawai'i at 423 (emphasis added), reflects, in part, the fact that the public's interest in access to court records and proceedings may be entirely distinct from that of the parties. At times, "[p]arties to the litigation are either indifferent or antipathetic to disclosure requests," *Grube*, 142 Hawai'i at 423, and may want to shield proceedings from public scrutiny entirely. *See also* Order Affirming in Part and Reversing in Part Magistrate Judge's Order Den. Pet'r's Mot. to Unseal Court Records at 2 n.2, *In re Motion to Unseal Court Records*, No. 1:18-mc-00477 (D. Haw. Feb. 20, 2019), ECF No. 12⁵ (explaining that "[u]ntil [a third party] requested unsealing (several months after this court's initial order on the matter), no party advanced, or attempted to advance, the public's interest in access to these court proceedings," and that the adversarial process "can prove to be unreliable" when courts rely on parties to represent the public interest in access).

While the Reporters Committee takes no position on whether a compelling reason may support sealing of the stipulations at issue, the circuit court's order was plainly insufficient to

⁵ Available at <https://bit.ly/2XdfvcL>.

justify sealing. For that reason, the Court should issue a writ of mandamus directing the circuit court to adhere to the standards set forth in *Grube* and *Ahn*, including by articulating specific reasons to justify sealing if the circuit court determines that the stipulations may remain under seal.

IV. The circuit court’s sanctions against JFJ could have a chilling effect on the exercise of the public’s right of access to judicial records.

In addition to denying JFJ’s motion to unseal, the circuit court also imposed sanctions against JFJ. *See* Pet. Br. 3, Ex. 5. The circuit court’s order, if permitted to stand, could chill members of the public, including the press, from seeking access to judicial records and proceedings in the future.

This Court made clear in *Oahu Publications v. Takase* that “*any individual* may file a motion objecting to the sealing” of a judicial record. *Oahu Publ’ns, Inc. v. Takase*, 139 Hawai‘i 236, 247 (2016) (emphasis added). The Court’s holding in that case, which addressed the sealing of a judicial document because it contained personal information in violation of the Hawai‘i Court Records Rules, should apply to any sealing of judicial documents or motion to unseal judicial documents, and forecloses sanctioning a movant requesting unsealing simply because he or she is not a party to the case.

That the circuit court previously rejected JFJ’s informal, *pro se* request to unseal the stipulations does not justify the imposition of sanctions.⁶ The circuit court’s sanctions order is especially chilling on the right of access to court records precisely because it is not uncommon for requests to unseal to be made *pro se*. Indeed, in *Grube*, this court held that the circuit court

⁶ The circuit court did not explain why it found that sanctions against JFJ were appropriate. The Reporters Committee writes only to urge the Court to make clear that courts should not impose sanctions for moving to intervene to unseal court records and takes no position on whether sanctions may be imposed for other reasons unrelated to the motion to unseal.

erred by refusing to allow the movant, who was a reporter, to appear *pro se* and requiring him to obtain counsel to seek access to sealed judicial records. 142 Haw. at 417, 420 P.3d at 348.

Reporters—especially freelance journalists—may make requests to open judicial proceedings or records without the assistance of an attorney. *See, e.g., FTC v. OSF Healthcare Sys.*, No. 11 C 50344, 2012 WL 1144620, at *1 (N.D. Ill. April 5, 2012); *In re Sealed Search Warrants Issued June 4 and 5, 2008*, No. 08–M–208 (DRH), 2008 WL 5667021 (N.D.N.Y. 2008). Sanctioning a *pro se* movant who submitted an informal request seeking access to court records and later submitted a formal request when represented by counsel will undoubtedly chill members of the public from attempting to exercise their First Amendment right of access to judicial proceedings and records.

This Court has recognized that “First Amendment interests are fragile interests” and must be jealously protected so that those who are considering exercising their First Amendment rights are not discouraged from doing so. *State v. Bumanglag*, 63 Hawai‘i 596, 620 (1981). The circuit court’s order, which provides no explanation as to why a motion to unseal warranted sanctions, leaves the public with the impression that the judiciary may penalize those who seek simply to learn more about the judicial system. To ensure that First Amendment rights are not chilled, this Court should make clear that a movant should not be sanctioned simply for seeking for access to sealed judicial records, even if his or her previous *pro se* motion has been denied.

CONCLUSION

For the foregoing reasons, the Reporters Committee respectfully urge the Court to issue a writ of mandamus ordering the circuit court to comply with this Court’s constitutional standards governing the sealing of judicial records as set forth in *Ahn* and *Grube*, and a writ of prohibition

prohibiting the circuit court from enforcing any sanctions against JFJ for filing a motion to unseal.

DATED: Honolulu, Hawai‘i, June 10, 2020.

CADES SCHUTTE
A Limited Liability Law Partnership

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CERTIFICATE OF SERVICE

The undersigned certifies that on this date, a copy of the foregoing document was served electronically upon the following parties at their last known email via JEFS:

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Title: Judges for Justice, Petitioner, vs. The Honorable Henry T. Nakamoto, Judge of the Circuit Court of the Third Circuit, Respondent.

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Filing Parties: Jeffrey Portnoy
John Duchemin
The Reporters Committee for Freedom of the Press

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Supporting Document(s): 26-Exhibit
27-Certificate of Service

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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