No. SCPW-24-_____

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, Petitioner, vs. THE HONORABLE JAMES S. KAWASHIMA, Circuit Court Judge of the Circuit Court of the First Circuit, Respondent.	ORIGINAL PROCEEDING CIV. NO. 1CCV-19-2164 PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI`I  The Honorable James S. Kawashima, Circuit Court of the First Circuit, State of Hawai`i

PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

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EXHIBIT 1

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. STATEMENT OF FACTS 2

II. STATEMENT OF ISSUES PRESENTED AND RELIEF REQUESTED 5

III. STATEMENT OF REASONS FOR ISSUING THE WRIT OF MANDAMUS 7

A. Standard for Writs of Prohibition 7

B. Standard for Writs of Mandamus 7

C. Issue 1: The Circuit Court Failed to Provide Specific Findings to Justify Hiding an Entire Case from the Public 7

D. Issue 2: Settlement Is Not a Compelling Interest for Sealing. 9

E. Issue 3: The Scope of the Circuit Court's Sealing Was Excessive. 14

F. Issue 4: Allegations that Go to the Heart of Claims in a Complaint May Not Be Stricken as Scandalous Under HRCP 12(f) 14

G. The Public Has No Remedy Other than a Writ of Prohibition and/or Mandamus. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

A.W. v. Neb. Med. Ctr., No. 8:19-CV-342, 2020 U.S. Dist. LEXIS 79220 (D. Neb. May 5, 2020) 17

Bank of Am. Nat. Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339 (3d Cir. 1986) 11

Barcher v. N.Y.U. Sch. of Law, 993 F. Supp. 177 (S.D.N.Y. 1998) 17

Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132 (2d Cir. 2016) 8, 11, 13

Breiner v. Takao, 73 Haw. 499, 835 P.2d 637 (1992) 19

Carvalho v. AIG Haw. Ins. Co., 150 Hawai`i 381, 502 P.3d 482 (2022) 15

Chalmers v. Martin, No. 21-CV-02468, 2021 U.S. Dist. LEXIS 247178 (D. Colo. Dec. 28, 2021) 12

Chappuis v. Ortho Sport & Spine Physicians Savannah, LLC, 825 S.E.2d 206 (Ga. 2019) 16

Citizens First Nat. Bank v. Cincinnati Ins. Co., 178 F.3d 943 (7th Cir. 1999) 10

Cobell v. Norton, 224 F.R.D. 266 (D.D.C. 2004) 16

Company Doe v. Pub. Citizen, 749 F.3d 246 (4th Cir. 2014) 8

Constand v. Cosby, 833 F.3d 405 (3d Cir. 2016) 13

Courthouse News Serv. v. Planet, 947 F.3d 581 (9th Cir. 2020) 8, 12

DeGroot v. Muccio, 277 A.2d 899 (N.J. Super. 1971) 16

Doe v. Methacon School Dist., 878 F. Supp. 40 (E.D. Pa. 1995) 12

Eaton v. Am. Media Operations, Inc., No. 96 Civ. 6158, 1997 U.S. Dist. LEXIS 46 (S.D.N.Y. Jan. 8, 1997) 18

Foltz v. State Farm Mut. Auto Ins. Co., 331 F.3d 1122 (9th Cir. 2003) 10

Gambale v. Deutsche Bank AG, 377 F.3d 133 (2d Cir. 2004) 13

Gannett Pac. Corp. v. Richardson, 59 Haw. 224, 580 P.2d 49 (1978) 7, 19

Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) 8

Globe Newspaper Co. v. Super. Ct., 457 U.S. 596 (1982) 10

Goesel v. Boley Int'l (H.K.) Ltd., 738 F.3d 831 (7th Cir. 2013) 11

Grimes v. Howard, No. 1:20-CV-2045, 2021 U.S. Dist. LEXIS 103065 (N.D. Ga. Mar. 8, 2021) 18

Grube v. Trader, 142 Hawai`i 412, 420 P.3d 343 (2018) ..... passim

Harper v. Brinke, No. 3:06-CV-412, 2007 U.S. Dist. LEXIS 5591 (E.D. Tenn. Jan. 23, 2007) 17
Hartford Courant Co. v. Pellegrino, 380 F.3d 83 (2d Cir. 2004) 8
Honolulu Advertiser, Inc. v. Takao, 59 Haw. 237, 580 P.2d 58 (1978) 7
Honolulu Police Dep't v. Town, 122 Hawai`i 204, 225 P.3d 646 (2010) 19
In re Roman Catholic Archbishop, 661 F.3d 417 (9th Cir. 2011) 12
In re Search Warrant, 855 F.2d 569 (8th Cir. 1988) 8
Jacobsen-Wayne v. Kam, No. 96-15704, 1999 U.S. App. LEXIS 26557 (9th Cir. Oct. 18, 1999) 18
Kamakana v. City & County of Honolulu, 447 F.3d 1172 (9th Cir. 2006) 13
Kema v. Gaddis, 91 Hawai`i 200, 982 P.2d 334 (1999) 7, 19
LC v. MG, 143 Hawai`i 302, 430 P.3d 400 (2018) 10
Lugosch v. Pyramid Co., 435 F.3d 110 (2d Cir. 2006) 4
Lynch v. Southampton Animal Shelter Found., 278 F.R.D. 55 (E.D.N.Y. 2011) 16
McKenzie v. U.S. Tennis Ass'n, No. 6:22-CV-615, 2023 U.S. Dist. LEXIS 71181 (M.D. Fla. Apr. 24, 2023) 17
MD Spa Shop LLC v. Med-Aesthetic Sols, Inc., No. 21-CV-1050, 2021 U.S. Dist. LEXIS 210552 (S.D. Cal. Oct. 29, 2021) 13
Mishra v. Tandon, No. 12-C-50390, 2013 U.S. Dist. LEXIS 32552 (N.D. Ill. Mar. 8, 2013) 16, 18
O'Brien v. Anderson, No. 12-C-1201, 2012 U.S. Dist. LEXIS 208790 (N.D. Ill. Sept. 29, 2012) 17
Oahu Publc'ns Inc. v. Ahn, 133 Hawai`i 482, 331 P.3d 460 (2014) ..... passim
Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994) 11, 13
Phoenix Newspapers, Inc. v. U.S. Dist. Court, 156 F.3d 940 (9th Cir. 1998) 14
Poague v. Huntsville Wholesale Furniture, 369 F. Supp. 3d 1180 (N.D. Ala. 2019) 18
Procter & Gamble Co. v. Bankers Tr. Co., 78 F.3d 219 (6th Cir. 1996) 12
Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653 (3d Cir. 1991) 12
Rosendall v. Voight, No. 4:17-CV-821, 2017 U.S. Dist. LEXIS 220699 (D.S.C. Sept. 11, 2017) 17
Roy v. GEICO, 152 Hawai`i 225, 524 P.3d 1249 (App. 2023) 10
Rudd Equip. Co.. v. John Deere Constr. & Forestry Co., 834 F.3d 589 (6th Cir. 2016) 12
San Jose Mercury News v. U.S. Dist. Ct., 187 F.3d 1096 (9th Cir. 1999) 11
Sapienza v. Hayashi, 57 Haw. 289, 554 P.2d 1131 (1976) 19

Schaumleffel v. Muskingum Univ., No. 2:17-CV-463, 2018 U.S. Dist. LEXIS 36350 (S.D. Ohio Mar. 6, 2018) 17

Schur v. Berntsen, No. 2:22-CV-00013, 2024 U.S. Dist. LEXIS 2740 (D. Utah Jan. 4, 2024) 12

Shellhorn v. Brad Ragan, Inc., 248 S.E.2d 103 (N.C. App. 1978) 16

Sirois v. East West Partners, Inc., 285 F. Supp. 3d 1152 (D. Haw. 2018) 16, 18

Slivka v. YMCA, 390 F. Supp. 3d 1283 (D. Colo. 2019) 12

State v. Nilsawit, 139 Hawai`i 86, 384 P.3d 862 (2016) 19

State v. Tangalin, 66 Haw. 100, 657 P.2d 1025 (1983) 10

Tri-S Corp. v. W. World Ins. Co., 110 Hawai`i 473, 135 P.3d 82 (2006) 13

Ulearey v. PA Servs., Inc., No. 16-CV-4871, 2017 U.S. Dist. LEXIS 52798 (E.D. Pa. Apr. 6, 2017) 16, 17

Union Oil Co. v. Leavell, 220 F.3d 562 (7th Cir. 2000) 9, 10

United States v. Doe, 870 F.3d 991 (9th Cir. 2017) 13

United States v. Valenti, 987 F.2d 708 (11th Cir. 1993) 8

Vassiliades v. Israely, 714 F. Supp. 604 (D. Conn. 1989) 11

Wells Fargo Bank, N.A. v. Omiya, 142 Hawai`i 439, 420 P.3d 370 (2018) 15

Whitney Nat'l Bank v. Boylston, No. 09-CV-59, 2009 U.S. Dist. LEXIS 53446 (W.D. La. June 24, 2009) 18

Williamson v. Va. First Sav. Bank, 26 F. Supp. 2d 798 (E.D. Va. 1998) 18

Constitutional Provisions

U.S. Const. amend. I 2, 5, 6, 8

Hawai`i Const. art. 1, § 4 ..... 2, 5, 6, 8

Statutes

HRS § 602-5 2

Rules

HCRR 10.10 2

HRAP 21 2

HRCP 12 ..... passim

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This petition concerns public access to the docket and complaint in a civil case, *M.K. v. S. Lawrence Schlesinger*.[1] Contrary to this Court's clear precedent, the circuit court denied the motion to unseal filed by Petitioner Civil Beat Law Center for the Public Interest (Law Center) without any findings of fact to meet the standard for denying public access.[2] To the extent Judge Chang apparently stated rationales for hiding this entire case from the public—orally in a closed hearing—those secret rationales fail to overcome the presumption of public access under the U.S. and Hawai`i Constitutions.[3]

Moreover, Judge Chang's order completely disregarded the position of the parties and the nature of the relief requested in the motion to unseal. Neither Plaintiff M.K. (M.K.) nor Defendants S. Lawrence Schlesinger, MD, FACS; Phoenix Group, LLC dba the Breast Implant Center of Hawaii; and Mommy Makeover Institute of Hawaii (Schlesinger) objected to unsealing the docket and at least some portions of the complaint. But the circuit court insisted that nothing may be released publicly. Instead, Judge Chang released a redacted version of the complaint solely to the Law Center—not the public. The circuit court had no authority to release sealed records only to one member of the public, and the Law Center never requested such relief.[4]

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[1] Pursuant to Hawai`i Court Records Rules 10.15, denial of access to court records—as here—is reviewed by this Court on a petition for writ.

[2] The Honorable Gary W.B. Chang presided over the case, but retired before entry of a written order. The Honorable James S. Kawashima executed a written order to conform with Judge Chang's oral ruling.

[3] As a non-party to the proceeding, the Law Center took steps throughout to ensure that it only obtained publicly available information. *E.g.*, Dkt. 32 at 2; Dkt. 59. Because the circuit court provided its oral ruling in a closed hearing—while the Law Center waited in the hallway—the Petitioner can comment only on the explanations for the ruling as conveyed to the Law Center by the parties to the proceeding.

[4] The Law Center already had a copy of the unredacted complaint obtained through the commercial CasePortal service because—as discussed below—the complaint was publicly available for weeks after it was initially filed. It is unclear why Judge Chang forced the Law Center to receive a sealed court filing. *Cf. Civil Beat Law Ctr. for the Pub. Interest v. Chang*, No. SCPW-21-511 (challenging a gag order imposed after the circuit court disclosed—without request—sealed information to non-party movant).

Pursuant to Hawai`i Revised Statutes (HRS) § 602-5(a); Hawai`i Rules of Appellate Procedure 21(a); article 1, section 4 of the Hawai`i Constitution; and the First Amendment of the U.S. Constitution, the Law Center petitions for:

1. A writ of prohibition prohibiting the circuit court from enforcing any order to seal the docket and complaint in *M.K. v. Schlesinger*; and

2. A writ of mandamus ordering the circuit court to comply with the constitutional standards set forth in *Oahu Publications Inc. v. Ahn* and *Grube v. Trader* and the standards for scandalous allegations under HRCP 12(f).

I. STATEMENT OF FACTS

On November 18, 2019, M.K. publicly filed a three-count complaint against Schlesinger. Dkt. 51 at 3. Three weeks later, on December 10, the parties settled the case and stipulated to sealing the proceeding. *Id.* at 3-4; Dkt. 41 at 7-9. The same day, the circuit court flagged the case as "confidential" and removed its existence from the public record.[5] Dkt. 41 at 7-9; Dkt. 51 at 4. Nevertheless, because the case was publicly filed for several weeks, the full complaint is and remains available through the CasePortal service to subscribers for a fee. Reply Mem., dated Apr. 25, 2024 [Apr. 25 Reply], at 3.[6]

On December 6, 2023, the Law Center requested access to the case file in Civil No. 1CCV-19-2164, and the clerk of the court filed a Notice of Denied Access. On December 7, the Law Center filed its motion for access pursuant to HCRR 10.10. Dkt.

[5] Judge Chang's same-day sealing of the complaint violated this Court's admonition a year earlier that courts must give the public reasonable notice of a motion to seal. *Grube v. Trader*, 142 Hawai`i 412, 423-24, 420 P.3d 343, 354-55 (2018) ("motions requesting closure must be docketed a reasonable time before they are acted upon.") (holding that same day notice and sealing did not provide adequate public notice).

[6] Because the Law Center does not have access to the docket, it is not possible to consistently provide citations to the record. "Dkt." will be used to reference specific docket entries when known.

32.[7] M.K. did not file a response to the motion to unseal. Schlesinger objected to unsealing portions of the Complaint—specifically the allegations concerning the third count (paragraphs 43-58 and 74-77). Dkt. 51 at 2, 4-5. "Defendants do not seek the continued sealing of the ***entire*** record and file herein. Instead, Defendants agree with [the Law Center] that redactions to specific and limited portions of the record and file serve as an appropriate alternative." *Id.* at 2. Schlesinger justified the need for redaction by reference to the stipulation in the settlement and harm to Schlesinger's reputation. *Id.* at 3-4; *accord* Dkt. 41 at 2. The Law Center addressed those arguments. Reply Mem. in Support of Mot. For Reconsideration, dated Jan. 16, 2024 [Jan. 16 Reply], at 4-7; Apr. 25 Reply at 2-3. The only dispute left open after briefing was the scope of redaction for the complaint. Apr. 25 Reply at 3 ("Defendants' proposal to redact full paragraphs in the complaint—erasing an entire claim—is not a 'narrowly tailored' solution.").

On May 1, Judge Chang held a hearing—open to the public—concerning the pending motions.[8] Schlesinger reiterated that the entire case did not need to be sealed. May 1, 2024 Tr. at 4-5 ("[W]e are not asking, now that this motion has been brought, that the entire complaint be sealed. I think the allegations of medical negligence clearly under the law as exists now really has no basis for sealing. And I wouldn't argue to the Court that it should seal that."). Schlesinger justified continued sealing for portions of the complaint because of the unproven allegations and settlement of the case.

> As you can well imagine, there's no way now for a court proceeding to disprove them.

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[7] For reasons not relevant to this petition, Judge Chang mistakenly believed that the motion to unseal was an *ex parte* communication, but retracted that assessment on reconsideration. Dkt. 69.

[8] The Law Center has a transcript of the May 1 hearing. However, during that open hearing, Judge Chang discussed the specific nature of the allegations in the complaint that Schlesinger seeks to keep sealed. As a consequence, the Law Center has not attached the transcript to this petition, but is prepared to file it if ordered by the Court. Portions of the transcript that do not reveal information of concern to Schlesinger are quoted verbatim here.

> The settlement would not have occurred had this case not been sealed. We would have gone through the court process of discovery. Maybe a trial, maybe a settlement. And so it -- it kind of turns this thing on its head. And I guess we have to balance that, which is your job, the harm to Dr. Schlesinger for a four-year-old unproven, unverified allegations which have no way now of being proved or disproved versus the public's interest in something that was between a patient and a physician multiple years ago.

Id. at 7-8. Judge Chang asked the Law Center a series of questions about what it would do with the complaint if it were unsealed.[9] *Id.* at 12-16. At the request of Schlesinger, the circuit court scheduled an evidentiary hearing to permit Dr. Schlesinger to testify as to his "interest in maintaining the complaint under seal and how, if at all, he may be affected or harmed by unsealing that complaint." *Id.* at 24. After Judge Chang clarified that the hearing would be closed to the public, the Law Center reiterated that it did not want "special access to information." *Id.* at 24-25. The circuit court stated it would "take no offense if your client chooses not to participate because I understand the delicate situation that would put you in." *Id.* at 26.

On May 28, Judge Chang held the closed evidentiary hearing. The Law Center waited outside the courtroom in case the court conducted any portion of the hearing in public. Dkt. 59. During the closed proceeding, Judge Chang issued an oral ruling.[10] Decl. of R. Brian Black, dated July 22, 2024 [Black Decl.], ¶¶ 2-4. According to the

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[9] Although the Law Center answered the circuit court's questions, it made clear that the public's constitutional right of access should not depend on what the Law Center may do with the court filings. May 1, 2024 Tr. at 12-13 ("I would just say that our use of it should not affect the Court's decision."). Anyone could have made the motion to unseal; thus, the Law Center's potential motives or actions are irrelevant. *Grube*, 142 Hawai`i at 428, 420 P.3d at 359 ("Any member of the public may assert a personal right to access judicial proceedings and records."); *Lugosch v. Pyramid Co.*, 435 F.3d 110, 125 (2d Cir. 2006) ("[W]e believe motive generally to be irrelevant to defining the weight accorded to the presumption of access. . . . [A]ssessing the motives of [the party moving to unseal] risks self-serving judicial decisions tipping in favor of secrecy.").

[10] Despite HRAP 21(a), the Law Center cannot attach the May 28 transcript because (1) the Law Center is not entitled to access sealed records in the case, and (2) Judge Chang not only sealed the hearing, but also ordered that it could not be "transcribed without the prior written order of a court of competent jurisdiction." Dkt. 57.

parties, the circuit court denied the motion to unseal, holding that the case would remain sealed in light of settlement concerns, ordering certain portions of the complaint stricken as scandalous, and requiring that the parties provide the Law Center a copy of the redacted complaint. *Id.* The following day, May 29, Judge Chang entered a minute order inconsistent with his oral denial of the motion, stating that the motion to unseal was granted in part and denied in part. Dkt. 59.

On June 10, the Law Center submitted a proposed order based on Judge Chang's May 29 minute order granting in part and denying in part the motion to unseal. Proposed Order Granting in Part and Denying in Part Motion to Unseal, dated June 10, 2024 [June 10 Proposed Order]. On June 14, Schlesinger objected to the Law Center's proposed order as inconsistent with Judge Chang's oral ruling and submitted a separate proposed order that denied the motion to unseal. Dkt. 66-67. On June 21, Judge Kawashima entered Schlesinger's order denying the motion to unseal. Dkt. 73 (Ex. 1). On the same day, M.K. filed a redacted version of the complaint, and both M.K. and the circuit court sent a copy of the redacted complaint to the Law Center, even though the Law Center never asked for such special access. Black Decl. ¶ 5; June 10 Proposed Order at 3 ("The Law Center never requested private access to the complaint").

II. STATEMENT OF ISSUES PRESENTED AND RELIEF REQUESTED

Issue 1: Whether the public's constitutional right of access to judicial records under the First Amendment of the U.S. Constitution and article 1, section 4 of the Hawai`i Constitution requires the circuit court to enter a written order with specific findings of fact regarding the basis for denying access.

Relief Requested: A writ of mandamus ordering the circuit court to comply with constitutional standards set forth in *Oahu Publications Inc. v. Ahn* and *Grube v. Trader*, for example, by entering a sealing order that notifies the public as to the specific findings of fact that explain the compelling interest to be protected, the necessary connection between unsealing the entire case file and the infliction of irreparable damage to that compelling interest, and the feasibility of protecting the compelling interest through alternative means.

Issue 2: Whether settling the claims in a case is a compelling interest that overrides the public's constitutional presumption of access to court records under the First Amendment of the U.S. Constitution and article 1, section 4 of the Hawai`i Constitution.

Relief Requested: A writ of prohibition prohibiting the circuit court from enforcing any order to seal the entire case file for *M.K. v. Schlesinger*, and a writ of mandamus ordering the circuit court to comply with the constitutional standards set forth in *Oahu Publications v. Ahn* and *Grube v. Trader*, for example, by ordering public disclosure of the case docket and complaint.

Issue 3: Whether the public's constitutional right of access to court records under the First Amendment of the U.S. Constitution and article 1, section 4 of the Hawai`i Constitution requires redaction of records or other alternatives narrowly tailored to the specific concerns that necessitate the sealing of documents, instead of concealing an entire case from the public.

Relief Requested: A writ of prohibition prohibiting the circuit court from enforcing any order to seal the entire case file for *M.K. v. Schlesinger*, and a writ of mandamus ordering the circuit court to comply with the constitutional standards set forth in *Oahu Publications v. Ahn* and *Grube v. Trader*, for example, by ordering redacted filings or other alternatives narrowly tailored to the specific compelling interest found by the court.

Issue 4: Whether allegations in a complaint are "scandalous" within the meaning of HRCP 12(f) when the allegations are directly relevant to the assertion of a plaintiff's claims.

Relief Requested: A writ of mandamus ordering the circuit court to limit "scandalous" redactions to the complaint, if any, to details irrelevant to the alleged claims—consistent with the purpose of HRCP 12(f).

III. STATEMENT OF REASONS FOR ISSUING THE WRIT OF MANDAMUS

A. Standard for Writs of Prohibition

A writ of prohibition concerns the supervisory power of the Hawai`i Supreme Court "to restrain a judge of an inferior court from acting beyond or in excess of his [or her] jurisdiction." *Honolulu Advertiser, Inc. v. Takao*, 59 Haw. 237, 241-42, 580 P.2d 58, 62 (1978). It is not "to cure a mere legal error or to serve as a substitute for appeal." *Id.* Prohibition is an appropriate procedure to address questions of grave import, such as "the right of the public to attend and to be present at judicial proceedings." *Gannett Pac. Corp. v. Richardson*, 59 Haw. 224, 227, 580 P.2d 49, 53 (1978).

B. Standard for Writs of Mandamus

A writ of mandamus requires that the petitioner show "a clear and indisputable right to the relief requested and a lack of other means to redress adequately the alleged wrong or to obtain the requested action." *Kema v. Gaddis*, 91 Hawai`i 200, 204, 982 P.2d 334, 338 (1999). A writ of mandamus cannot supersede a court's discretionary authority nor serve as a legal remedy in lieu of normal appellate procedures. *See id.* Mandamus is the appropriate procedure when a non-party seeks to enforce rights or interests that do not directly concern a criminal proceeding. *Gannett*, 59 Haw. at 235-36, 580 P.2d at 57; *see also Kema*, 91 Hawai`i at 205, 982 P.2d at 339 (mandamus for party challenging disclosure of confidential information appropriate when "the order is not immediately appealable or related to the merits of the child protective proceedings").

C. Issue 1: The Circuit Court Failed to Provide Specific Findings to Justify Hiding an Entire Case from the Public.

The circuit court has hidden an entire case file from the public based on a secret rationale. The June 21, 2024 Order denying the Law Center's motion to unseal provides no findings or explanation for the continued sealing. Dkt. 73 (Ex. 1) at 2. And the original December 10, 2019 order sealing the case provides no findings or explanation. Dkt. 41 at 8-9 ("the Clerk of the Court shall be directed to close the case and file following the sealing of the pleadings herein"). As this Court has previously held, if a court overrides the presumptive right of public access to court records under the First

Amendment of the U.S. Constitution and article 1, section 4 of the Hawai`i Constitution, the public deserves an explanation.

Pursuant to the First Amendment of the U.S. Constitution and article 1, section 4 of the Hawai`i Constitution, the public has a qualified right of access to the court docket and initial pleadings filed in a civil case. *E.g.*, *Oahu Publc'ns Inc. v. Ahn*, 133 Hawai`i 482, 496 n.18, 331 P.3d 460, 474 n.18 (2014); *Courthouse News Serv. v. Planet*, 947 F.3d 581, 592 (9th Cir. 2020) ("[P]ublic access to civil complaints before judicial action upon them 'plays a particularly significant role' in the public's ability to ably scrutinize 'the judicial process and the government as a whole.'"); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 140 (2d Cir. 2016) ("[T]he fact of filing a complaint, whatever its veracity, is a significant matter of record. . . . [P]leadings—even in settled cases—are judicial records subject to a presumption of public access."); *Company Doe v. Pub. Citizen*, 749 F.3d 246, 268-71 (4th Cir. 2014) ("The ability of the public and press to inspect docket sheets is a critical component to providing meaningful access to civil proceedings."); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93-96 (2d Cir. 2004) ("the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible."); *accord United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993); *In re Search Warrant*, 855 F.2d 569, 575 (8th Cir. 1988); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 508-09 (1st Cir. 1989) (holding statute unconstitutional that sealed entire criminal proceedings, including the docket, without individualized findings).

In *Ahn*, this Court stated that when the public has a constitutional right of access, it is a prerequisite to sealing that "the reasons supporting closure must be articulated in findings." 133 Hawai`i at 498, 331 P.3d at 476. "Requiring specific findings on the record enables the trial court to address each element necessary for closure and allows an appellate court to review the reasoning of the trial judge to ensure that protection of the public right was adequately considered." *Id.* Thus, the circuit court is required to make specific "findings that 'the closure is essential to preserve higher values' and that the closure is 'narrowly tailored' to serve that interest." *Grube v. Trader*, 142 Hawai`i 412, 424, 420 P.3d 343, 355 (2018); *Ahn*, 133 Hawai`i at 507, 331 P.3d at 485 ("the trial

court is required to make specific findings demonstrating a compelling interest, a substantial probability that the compelling interest would be harmed, and there is no alternative to continued sealing of the transcript that would adequately protect the compelling interest.").

> The trial court may not rely on "generalized concerns" but *must indicate facts* demonstrating "a compelling interest justifying the continued sealing of the hearing transcript." Additionally, the court must "specifically explain the necessary connection between unsealing the transcript" and the infliction of irreparable damage resulting to the compelling interest.

Ahn, 133 Hawai`i at 507, 331 P.3d at 485 (emphasis added) (citations omitted); *accord Grube*, 142 Hawai`i at 425-28, 420 P.3d at 356-59 (findings "must contain sufficient detail for a reviewing court to evaluate each of the criteria, including the strength of the interest weighing toward closure or sealing, the potential that disclosure will cause irreparable harm to that interest, and the feasibility of protecting the interest through alternate methods").

The circuit court's continued sealing of the entire case and complaint in *M.K. v. Schlesinger* without any findings of fact is unconstitutional under the U.S. and Hawai`i Constitutions.

D. Issue 2: Settlement Is Not a Compelling Interest for Sealing.

When individuals invoke the power and authority of the taxpayer-funded Judiciary by filing a lawsuit to resolve civil disputes, that process is public. *E.g.*, *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("Judicial proceedings are public rather than private property, and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible."). As a consequence, once a lawsuit is filed, the parties cannot simply stipulate to seal the case because they have settled.

The first step in the analysis to override the constitutional presumption of public access requires proof that sealing serves a compelling interest. *Ahn*, 133 Hawai`i at 496-98, 331 P.3d at 474-76 ("Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness."); *Grube*, 142 Hawai`i at 425, 420 P.3d at 356 ("the asserted government interest served by

nondisclosure must be 'compelling.'"); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606-07 (1982) ("Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest . . . ."). "To qualify as compelling, the interest must be of such gravity as to overcome the strong presumption in favor of openness. . . . [T]he asserted interest must be of such consequence as to outweigh both the right of access of individual members of the public and the general benefits to public administration afforded by open trials." *Grube*, 142 Hawai`i 425-26, 420 P.3d at 356-57. "Although privacy rights may in some instances rise to the level of compelling, simply preserving the comfort or official reputations of the parties is not a sufficient justification." *Id.* at 425, 420 P.3d at 356.

It is well-established that parties cannot, by mere stipulation, seal the existence of a case from public view.[11] *Roy v. GEICO*, 152 Hawai`i 225, 232-35, 524 P.3d 1249, 1256-59 (App. 2023) (analyzing public access to "confidential" case independent of parties' stipulation to seal); *Union Oil*, 220 F.3d at 567 ("the parties' confidentiality agreement can not require a court to hide a whole case from view"); *see also Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003) (common law presumption of public access is not rebutted by a stipulated protective order); *Citizens First Nat. Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999) ("[G]rant[ing] a virtual carte blanche to either party to seal whatever portions of the record the party wanted to seal . . . [is] improper."). If a party stipulation were sufficient basis to withhold court records, the public regularly would be denied access because parties often prefer to keep the public in the dark about the details of litigation. *Grube*, 142 Hawai`i at 423, 420 P.3d at 354

[11] Moreover, this Court has held that party stipulations are never binding on the court in matters—as here—that concern the public interest and that require independent findings by the court. *E.g.*, *State v. Tangalin*, 66 Haw. 100, 100-01, 657 P.2d 1025, 1026 (1983) ("It is well established that matters affecting the public interest cannot be made the subject of stipulation so as to control the court's action with respect thereto."); *accord LC v. MG*, 143 Hawai`i 302, 320, 430 P.3d 400, 418 (2018) ("[P]arty agreement as to a question of law is not binding on this court, and does not relieve us from the obligation to review questions of law de novo.").

("often parties to the litigation are either indifferent or antipathetic to disclosure requests."). Ultimately, "[t]he right of access to court documents belongs to the public, and the Plaintiffs were in no position to bargain that right away." *San Jose Mercury News v. U.S. Dist. Ct.*, 187 F.3d 1096, 1101 (9th Cir. 1999).

Any purported interest in encouraging settlements does not change the nature of the parties' stipulation as it concerns sealing court records. *E.g.*, *Bernstein*, 814 F.3d at 143 (describing as "insubstantial" arguments against unsealing the complaint in a lawsuit settled shortly after filing)[12]; *Bank of Am. Nat. Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 346 (3d Cir. 1986) ("[T]he generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public's common law right of access."); *accord Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994) ("[C]ourts should not rely on the general interest in encouraging settlement, and should require a particularized showing of the need for confidentiality in reaching a settlement."); *Vassiliades v. Israely*, 714 F. Supp. 604, 606 (D. Conn. 1989) (refusing request to file complaint under seal) ("The mere prospect of settlement does not overcome the public's right of access to a document that has been filed with the Court."); *see also Goesel v. Boley Int'l (H.K.) Ltd.*, 738 F.3d 831, 835 (7th Cir. 2013) (requiring disclosure of settlement agreement) ("[P]arties *have* to give the judge a reason for not disclosing them—and the fact that they don't want to disclose is not a reason.").

Irrespective of settlement, "the fact of filing a complaint, whatever its veracity, is a significant matter of record." *Bernstein*, 814 F.3d at 140.

> Some civil complaints may *never* come up for judicial evaluation because they may prompt the parties to settle. The public still has a right to know that the filing of the complaint in our courts influenced the settlement of the dispute: "When a complaint is filed, and the authority of the people of the United States is thereby invoked, even if only as a threat to induce

[12] This case is virtually indistinguishable from *Bernstein*. The one distinction only further favors disclosure in this case. In *Bernstein*, the complaint was filed under seal, not publicly, from the outset of the lawsuit. 814 F.3d at 138. Here, the complaint was publicly accessible for weeks before sealed and remains available through a commercial service.

> settlement, the American people have a right to know that the plaintiff has invoked their power to achieve his personal ends."

Courthouse News Serv. v. Planet, 947 F.3d 581, 592-93 (9th Cir. 2020).

Respondents may argue that the existence of unproven allegations justifies sealing or that Schlesinger would have litigated, rather than settle, if the complaint was not going to be sealed.[13] It is well understood that allegations in a complaint are not evidence or findings of fact. *E.g.*, *Tri-S Corp. v. W. World Ins. Co.*, 110 Hawai`i 473, 494

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[13] As relayed by the parties to the Law Center, in his oral ruling during the sealed proceeding, Judge Chang did not adopt Schlesinger's argument that disclosure would cause reputational harm. Refusal to recognize reputational harm as a compelling interest is consistent with this Court's observation in *Grube* and all case law cited below to the circuit court. *Grube*, 142 Hawai`i at 425, 420 P.3d at 356 ("Although privacy rights may in some instances rise to the level of compelling, simply preserving the comfort or official reputations of the parties is not a sufficient justification."); *accord In re Roman Catholic Archbishop*, 661 F.3d 417, 433 (9th Cir. 2011) (affirming decision to disclose discovery documents publicly identifying a Catholic priest accused of sexual abuse because "the public's serious safety concerns" outweighed his right to privacy); *see also Rudd Equip. Co.. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 591 (6th Cir. 2016) ("Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records"); *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 225 (6th Cir. 1996) ("The private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint. It is not even grounds for keeping the information under seal . . ."); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991) (harm to a "company's public image" alone cannot rebut the common-law presumption of access); *Slivka v. YMCA*, 390 F. Supp. 3d 1283, 1288-89 (D. Colo. 2019) (denying defendant's motion to seal complaint and other documents containing allegations of workplace sexual harassment and sexual assault); *Doe v. Methacon School Dist.*, 878 F. Supp. 40, 43 (E.D. Pa. 1995) (ordering the unsealing of the entire record of a case involving allegations of sexual assault of a minor student by a teacher); *Schur v. Berntsen*, No. 2:22-CV-00013, 2024 U.S. Dist. LEXIS 2740 at *4-6 (D. Utah Jan. 4, 2024) (denying defendants' motion to seal complaint involving allegations of sexual assault after the case was dismissed with prejudice); *Chalmers v. Martin,* No. 21-CV-02468, 2021 U.S. Dist. LEXIS 247178 at *5-6 (D. Colo. Dec. 28, 2021) ("The supposed harm from being the target of a lawsuit alleging sexual abuse is not enough to justify shrouding this case with a veil of secrecy."). Schlesinger never addressed these cases or cited cases to the contrary. If the Court orders an answer to the petition and Schlesinger would seek to bolster its unsupported position below with legal argument, the Law Center would respectfully request the opportunity to brief it further.

n.9, 135 P.3d 82, 103 n.9 (2006). And courts routinely reject such arguments as a basis for sealing.[14] *E.g.*, *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 143 (2d Cir. 2016) ("They argue that unsealing the complaint 'assumes the truth' of the allegations within it. But unsealing does no such thing. . . . [N]ot everything alleged by one party can or should be taken as ground truth."); *Pansy*, 23 F.3d at 788 ("[S]ettlements will be entered into in most cases whether or not confidentiality can be maintained. The parties might prefer to have confidentiality, but this does not mean that they would not settle otherwise. For one thing, if the case goes to trial, even more is likely to be disclosed than if the public has access to pretrial matters.").

Moreover, settlement cannot negate the fact that plaintiff filed the complaint publicly. Jan. 16 Reply at 4 & n.2. The public had access to the complaint for weeks before the parties settled. "Secrecy is a one-way street: Once information is published, it cannot be made secret again." *United States v. Doe*, 870 F.3d 991, 1002 (9th Cir. 2017); *accord Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) ("We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again."); *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1184 (9th Cir. 2006) (affirming an unsealing order because the information at issue was "already publicly available"); *see also Constand v. Cosby*, 833 F.3d 405, 410 (3d Cir. 2016) ("appeals seeking to restrain 'further dissemination of publicly disclosed information' are moot"); *MD Spa Shop LLC v. Med-Aesthetic Sols, Inc.*, No. 21-CV-1050, 2021 U.S. Dist. LEXIS 210552 at *18-19 (S.D. Cal. Oct. 29, 2021) ("A request to seal information that was publicly disclosed involves 'an inherent logical dilemma' in that 'information that has already entered the public domain cannot in any meaningful way be later removed from the public domain.'"). The bell cannot be unrung here because any member of the

[14] Schlesinger's concession that there is no basis to keep the entire complaint sealed implicitly acknowledges that allegations are not taken as fact. It is equally unproven whether Schlesinger committed some form of medical negligence as alleged in the complaint, but Defendants express no concern about unsealing those allegations.

public with sufficient funds may obtain the unredacted complaint from the commercial CasePortal service.[15] Apr. 25 Reply at 3.

Cases do not disappear entirely from the public record—as if they never existed—simply because the parties settled.

E. Issue 3: The Scope of the Circuit Court's Sealing Was Excessive.

The Judiciary's "confidential" case designation hides everything. No docket. No complaint. No explanation. The case disappears without any public accountability. Such expansive secrecy must be justified by harm to a compelling interest that cannot be protected through less restrictive means. Redaction is an obviously less restrictive solution for any legitimate compelling interest. *Grube*, 142 Hawai`i at 427, 420 P.3d at 358; *Ahn*, 133 Hawai`i at 507, 331 P.3d at 485; *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 951 (9th Cir. 1998).

Moreover, none of the parties objected to unsealing the case docket and certain portions of the complaint. Dkt. 51 at 2 ("Defendants do not seek the continued sealing of the ***entire*** record and file herein. Instead, Defendants agree with [the Law Center] that redactions to specific and limited portions of the record and file serve as an appropriate alternative."); May 1, 2024 Tr. at 4-5. The only dispute to resolve was the scope of redaction for the complaint. Apr. 25 Reply at 3 ("Defendants' proposal to redact full paragraphs in the complaint—erasing an entire claim—is not a 'narrowly tailored' solution.").

The circuit court's decision to override the constitutional presumption of public access and maintain *the entire case* under seal is unconstitutional.

F. Issue 4: Allegations that Go to the Heart of Claims in a Complaint May Not Be Stricken as Scandalous Under HRCP 12(f).

A court may not *sua sponte* strike matters from a pleading simply because the phrasing offends the judge's sensibilities. HRCP 12(f) provides in relevant part: "[U]pon the court's own initiative at any time, the court may order stricken from any

[15] Public access to court records should not be a right available only to monied elite. When cases are not sealed, any member of the public may visit a courthouse and review court records at no cost.

pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."[16] "The function of the motion is to avoid the expenditure of time and money that would arise from litigating spurious issues, by dispensing with those issues prior to trial." 2 James Wm. Moore, Moore's Federal Practice § 12.37[3] at 12-129 (3d ed. 2021); *see generally* 5C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure: Civil § 1382 at 433-41 (3d ed. 2004) ("Rule 12(f) motions to strike on any of these grounds are not favored, often being considered purely cosmetic or 'time wasters'").

Hawai`i appellate courts have not previously elaborated on the scope of what is "scandalous" under HRCP 12. "In conducting a plain meaning analysis, this court may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined." *E.g.*, *Wells Fargo Bank, N.A. v. Omiya*, 142 Hawai`i 439, 449-50, 420 P.3d 370, 380-81 (2018) (citing Black's Law Dictionary). As defined by Black's Law Dictionary, a matter is not "scandalous" if it is relevant to the underlying legal action. *Scandalous Matter*, Black's Law Dictionary (12th ed. 2024) ("An assertion or allegation that is improper in a court paper because it is both disgraceful (or defamatory) *and irrelevant to an action or defense*." (emphasis added)); *Scandalous Matter in a Pleading*, Bouvier Law Dictionary (desk ed. 2012) ("matter which is relevant can never be scandalous, and the degree of relevancy is of no account in determining the question").

Federal courts have provided similar guidance. *Carvalho v. AIG Haw. Ins. Co.*, 150 Hawai`i 381, 386, 502 P.3d 482, 487 (2022) (federal interpretation of "functionally identical" rule of civil procedure is "highly persuasive"). "A scandalous allegation is one that reflects *unnecessarily* on the defendant's moral character, or uses repulsive

[16] The circuit court equated "stricken" with "redacted." Dkt. 73 (Ex. 1) at 2. It is not clear that a motion to strike necessarily results in the redaction and sealing of portions of a pleading. For purposes of this petition, however, the Law Center challenges only whether Judge Chang correctly held that stricken portions were scandalous within the meaning of HRCP 12, not the circuit court's authority to redact and seal portions that are in fact scandalous.

language that detracts from the dignity of the court." *Lynch v. Southampton Animal Shelter Found.*, 278 F.R.D. 55, 63 (E.D.N.Y. 2011) (emphasis added). "It is not enough that the matter offends the sensibilities of the objecting party if the challenged allegations describe acts or events that are relevant to the action." *Lynch*, 278 F.R.D. at 65; *Sirois v. East West Partners, Inc.*, 285 F. Supp. 3d 1152, 1161 (D. Haw. 2018) ("While these allegations are, in some ways, sensational and salacious, and it is understandable that Defendants wish to keep the details hidden, the challenged paragraphs are directly related to Sirois' claims for hostile work environment and retaliation."); *Cobell v. Norton*, 224 F.R.D. 266, 283 (D.D.C. 2004) ("While such statements may be inflammatory, and perhaps ill-advised, they simply do not rise to the level of 'scandalous' sufficient to warrant relief under Rule 12(f)."); *Ulearey v. PA Servs., Inc.*, No. 16-CV-4871, 2017 U.S. Dist. LEXIS 52798 at *12 (E.D. Pa. Apr. 6, 2017) (allegations not stricken simply because defendant "feels embarrassed, annoyed, or harassed by the inclusion of this material in the Complaint"); *Mishra v. Tandon*, No. 12-C-50390, 2013 U.S. Dist. LEXIS 32552 at *10 (N.D. Ill. Mar. 8, 2013) ("where the allegations are relevant to the plaintiff's claims or request for relief, then the material is not subject to being stricken even if it is potentially embarrassing."); *see generally* 5C Wright & Miller § 1382 at 466-67; 2 Moore's § 12.37[3] at 12-131 ("[C]ourts will usually strike so-called scandalous material only if it is irrelevant and immaterial to the issues in controversy.").

Other state courts follow a similar interpretation of scandalous matters that denies a motion to strike if the allegations are relevant to the case. *E.g.*, *Chappuis v. Ortho Sport & Spine Physicians Savannah, LLC*, 825 S.E.2d 206, 212-13 (Ga. 2019) ("An important part of guarding against the improper use of motions to strike is ensuring that matter that is relevant to the litigation is not readily struck."); *DeGroot v. Muccio*, 277 A.2d 899, 901 (N.J. Super. 1971) ("No matter how the language may vilify defendants, it will not be 'scandalous' within the meaning of the cited rule unless it is irrelevant."); *Shellhorn v. Brad Ragan, Inc.*, 248 S.E.2d 103, 108 (N.C. App. 1978) ("Matter should not be stricken unless it has no possible bearing upon the litigation."). Courts have recognized, however, that as the relevance of particular allegations becomes more attenuated, unnecessarily offensive language may justify striking weakly relevant

allegations. *Chappuis*, 825 S.E.2d at 214 ("an allegation that has only a remote connection to a claim or defense but is highly prejudicial to the opposing party may be improperly and unnecessarily derogatory and therefore a good candidate for striking as scandalous.").

Even as to allegations of sexually explicit conduct that might be considered offensive or defamatory in everyday conversation, courts routinely hold that the language may not be stricken as scandalous when relevant to the claims in a complaint. *E.g.*, *Barcher v. N.Y.U. Sch. of Law*, 993 F. Supp. 177, 181 (S.D.N.Y. 1998) (unproven allegations of sexual harassment 20 years earlier will not be stricken as scandalous or sealed even though case dismissed); *McKenzie v. U.S. Tennis Ass'n*, No. 6:22-CV-615, 2023 U.S. Dist. LEXIS 71181 at *22-23 (M.D. Fla. Apr. 24, 2023) (denying motion to strike the words "sexual assault" and "sexual battery" from complaint that alleged torts from sexual abuse, not scandalous); *A.W. v. Neb. Med. Ctr.*, No. 8:19-CV-342, 2020 U.S. Dist. LEXIS 79220 at *2-3, *7-9 (D. Neb. May 5, 2020) (words characterizing sexual conduct relevant to allegation that defendant engaged in "inappropriate sexual contact . . . during a surgical procedure," not scandalous) ("It is not the Court's role to police the terminology and language a plaintiff uses in her complaint simply because the defendant disagrees with how his alleged conduct is described."); *Schaumleffel v. Muskingum Univ.*, No. 2:17-CV-463, 2018 U.S. Dist. LEXIS 36350 at *4-5 & *28-29 (S.D. Ohio Mar. 6, 2018) (sexually explicit text messages repeated verbatim in complaint relevant to claims, not scandalous); *Ulearey*, 2017 U.S. Dist. LEXIS 52798 at *11-12 (sexually explicit text messages relevant to sexual harassment claims); *Rosendall v. Voight*, No. 4:17-CV-821, 2017 U.S. Dist. LEXIS 220699 at *7-11 (D.S.C. Sept. 11, 2017) (descriptions relevant to sexual assault claim against prison guard, not scandalous); *O'Brien v. Anderson*, No. 12-C-1201, 2012 U.S. Dist. LEXIS 208790 at *2-3, *10-13 (N.D. Ill. Sept. 29, 2012) (sexually explicit exhibits and allegations relevant to sexual assault and intentional infliction of emotion distress claims, not scandalous); *Harper v. Brinke*, No. 3:06-CV-412, 2007 U.S. Dist. LEXIS 5591 at *2 (E.D. Tenn. Jan. 23, 2007) (details

regarding alleged "acts of sexual abuse" relevant to sexual molestation claim, not scandalous).[17]

In the end, striking *relevant* scandalous allegations would lead to the absurd result that certain claims could not be brought.

> Clearly, allegations of sexual assault are inherently scandalous. That does not render them improper under the Federal Rules. If this Court adopted Defendant's argument, it would be difficult for any plaintiff to plead a complaint for sexual assault, or for a number of other claims which allege unseemly behavior. The allegations cited by Defendant relate to Plaintiff's claims of sexual harassment and assault. Thus, striking them would be improper.

Grimes v. Howard, No. 1:20-CV-2045, 2021 U.S. Dist. LEXIS 103065 at *17-18 (N.D. Ga. Mar. 8, 2021).

The statements that Judge Chang held scandalous are obviously relevant to the claims asserted by M.K. and should not have been stricken.

G. The Public Has No Remedy Other than a Writ of Prohibition and/or Mandamus.

This Court has recognized that a petition for writ of prohibition or mandamus is the appropriate procedure for members of the public excluded from judicial

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[17] *Accord Poague v. Huntsville Wholesale Furniture*, 369 F. Supp. 3d 1180, 1192-93 (N.D. Ala. 2019) (alleged rumor about defendant's sexual conduct with a minor relevant to claims, not scandalous); *Sirois*, 285 F. Supp. 3d at 1161-64 (allegations of sexually charged workplace and extramarital affair relevant to hostile work environment and retaliation claims, not scandalous); *Williamson v. Va. First Sav. Bank*, 26 F. Supp. 2d 798, 806 (E.D. Va. 1998) (allegations of sexually explicit comments relevant to gender discrimination claim, not scandalous); *Mishra*, 2013 U.S. Dist. LEXIS 32552 at *10-11 (allegation of extramarital affair relevant to interference with contract claim and request for punitive damages, not scandalous); *Whitney Nat'l Bank v. Boylston*, No. 09-CV-59, 2009 U.S. Dist. LEXIS 53446 at *14 & n.8 (W.D. La. June 24, 2009) (although "potentially embarrassing," discussion in complaint of sexual relationship among individuals was relevant to allegations of fraud and not basis to strike as scandalous or to seal complaint); *Eaton v. Am. Media Operations, Inc.*, No. 96 Civ. 6158, 1997 U.S. Dist. LEXIS 46 at *5-6, *12-16 (S.D.N.Y. Jan. 8, 1997) (descriptions of sexually harassing conduct—dismissed as untimely—relevant to timely sex discrimination claim, not scandalous); *see Jacobsen-Wayne v. Kam*, No. 96-15704, 1999 U.S. App. LEXIS 26557 at *6-7 (9th Cir. Oct. 18, 1999) (striking as scandalous references to "date rape" and "rape" in filing where "[t]here is no allegation of any sort of sexual contact in this case").

proceedings in violation of the constitutional right of access. *Gannett Pac. Corp. v. Richardson*, 59 Haw. 224, 235-36, 580 P.2d 49, 58 (1978).

> To permit a third party to intervene would unnecessarily encumber pending litigation and invite the entry of 'nonparty-parties' when the right or interest sought to be enforced is not directly involved in the subject matter of the pending proceeding. *His remedy must ordinarily lie in an original action in prohibition or in mandamus*.

Id. (citations omitted) (emphasis added).

The *Gannett* court's observation is consistent with this Court's holdings in more recent cases. *E.g.*, *State v. Nilsawit*, 139 Hawai`i 86, 94, 384 P.3d 862, 870 (2016); *Honolulu Police Dep't v. Town*, 122 Hawai`i 204, 216-17, 225 P.3d 646, 658-59 (2010); *Breiner v. Takao*, 73 Haw. 499, 502, 835 P.2d 637, 640 (1992). When a nonparty raises legal concerns unrelated to the merits of an underlying proceeding and that cannot be appealed, then relief in the nature of prohibition or mandamus is appropriate. *Nilsawit*, 139 Hawai`i at 94, 384 P.3d at 870 (media entities may seek writ of prohibition or mandamus when denied application for extended coverage because order is not immediately appealable or related to the merits of the underlying proceeding); *Honolulu Police Dep't*, 122 Hawai`i at 216-17, 225 P.3d at 658-59 ("HPD is not a party to the case. . . . Having no remedy by way of appeal, HPD properly sought redress from the [order denying HPD's motion to quash subpoena duces tecum] by mandamus."); *Breiner*, 73 Haw. at 502, 835 P.2d at 640 ("[M]andamus is the appropriate remedy where the order of the court imposed a restraint on free speech rights unrelated to the merits of the criminal trial and thus could not be raised on appeal."). This Court also has recognized exceptional circumstances in which requiring a *party* to go through the appeals process "would not be in the public interest and would work upon the public irreparable harm." *Sapienza v. Hayashi*, 57 Haw. 289, 294, 554 P.2d 1131, 1135 (1976); *accord Kema v. Gaddis*, 91 Hawai`i 200, 205, 982 P.2d 334, 339 (1999) (mandamus proper when party cannot immediately appeal court order that is unrelated to merits and that would result in disclosure of confidential information).

The Law Center is not a party to the underlying case. And these concerns have nothing to do with the merits of the case. But the circuit court's sealing order violates

the public's—and the Law Center's—constitutional rights, causing irreparable harm. The public is entitled to access the sealed judicial records.

CONCLUSION

The Law Center respectfully requests that the Hawai`i Supreme Court issue a writ of prohibition prohibiting the circuit court from enforcing any order to seal *M.K. v. Schlesinger* and a writ of mandamus ordering the circuit court to comply with the constitutional standards set forth in *Oahu Publications Inc. v. Ahn* and *Grube v. Trader* and the standards for scandalous allegations under HRCP 12(f).

Dated: Honolulu, Hawai`i, July 22, 2024

Respectfully submitted,

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