No. SCPW-24-484

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 REPLY IN SUPPORT OF 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

REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

Robert Brian Black 7659
Public First Law Center
700 Bishop Street, Suite 1701
Honolulu, Hawai`i 96813
(808) 531-4000
brian@publicfirstlaw.org
Attorney for Petitioner

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None of the arguments raised by Defendants S. Lawrence Schlesinger, MD, FACS; Phoenix Group, LLC dba the Breast Implant Center of Hawaii; and Mommy Makeover Institute of Hawaii (Schlesinger) justify hiding this entire case—including the docket—from the public, as ordered by the Honorable Gary W.B. Chang.[1] Schlesinger's answer raises several erroneous procedural issues. And as to the substantive standards, Schlesinger fails to overcome the strong presumption of public access required by the First Amendment of the U.S. Constitution and by article 1, section 4 of the Hawai`i Constitution.

The Law Center respectfully requests that the Court issue:

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. SCHLESINGER CONCEDED BELOW THAT THERE WAS NO BASIS TO SEAL THE ENTIRE CASE OR THE ENTIRE COMPLAINT.

In response to the petition, Schlesinger now claims that the entire case must remain sealed pursuant to Judge Chang's ruling. But Defendants conceded below that there was no basis for such complete sealing. Dkt. 1 at 9 (quoting Schlesinger's briefing and oral argument below).[2] At a minimum, in light of Schlesinger's concession, the docket and redacted complaint should be publicly accessible.[3]

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[1] Plaintiff M.K. and Respondent Judge James S. Kawashima did not file substantive responses to the petition.

[2] Pinpoint citations identify the corresponding PDF page. The Law Center has not accessed the sealed transcripts filed in this mandamus proceeding or Schlesinger's unredacted answer, Dkt. 13, 14, 38. As explained in the petition, the Law Center already had a transcript of the *public* May 1, 2024 hearing. Dkt. 1 at 9 n.8. Pinpoint citations to the transcript, however, may not align with the filed transcript.

[3] Schlesinger claims that Judge Chang's ruling meets the constitutional narrow tailoring requirement because the circuit court ordered redactions. Dkt. 36 at 21. Redaction does not satisfy the constitutional presumption of public access if—as here—the redacted filing remains entirely hidden from the public.

II. SEALING ISSUES ARE ADDRESSED THROUGH A PETITION FOR WRIT.

HCRR 10.15 provides: "A person or entity may seek review of a denial or grant of access to a record by petitioning the supreme court, in accordance with Rule 21 of the Hawai`i Rules of Appellate Procedure." Schlesinger argues, however, that the Law Center was required to appeal Judge Kawashima's order to the Intermediate Court of Appeals. Dkt. 36 at 8-10. HCRR 10.15 clearly forecloses Schlesinger's argument.

Moreover, this Court has held that non-parties—such as the Law Center—do not have standing to file appeals. To have standing to appeal, "the person must first have been a party to the action." *E.g.*, *Haw. Ventures, LLC v. Otaka*, 114 Hawai`i 438, 506, 164 P.3d 696, 764 (2007) (dismissing appeal filed by persons who failed to intervene as parties below); *accord* HRAP 3(c)(1) ("The notice of appeal shall identify the *party or parties* taking the appeal either in the caption or the body of the notice of appeal." (emphasis added)). The Law Center was not a party to the proceedings below and had no basis to intervene pursuant to HRCP 24.

And it is questionable whether the ICA would have jurisdiction. In *State v. Nilsawit*, this Court addressed a comparable context—a district court's decision limiting a media entity's request for extended coverage. 139 Hawai`i 86, 88-89, 384 P.3d 862, 864-65 (2016). The situation posed serious questions of appellate jurisdiction under HRS § 641-1 regarding whether (1) the decision concerned a "civil matter"; and (2) whether the order was "final". *Id.* at 91-92, 384 P.3d at 867-68. In the end, analogizing to sealing issues under *Ahn*, this Court held that the media entity could have filed a petition for writ of mandamus or prohibition. *Id.* at 94, 384 P.3d at 870.

The Law Center followed HCRR 10.15, *Ahn*, *Grube*, and *Nilsawit* among others.

III. TRIAL COURTS WOULD BENEFIT FROM CLARITY REGARDING PROCEDURAL ISSUES RAISED BY SCHLESINGER.

Judge Chang's conduct and Schlesinger's answer reflect fundamental procedural errors concerning motions on sealing court records. Trial courts would benefit from clarity on these issues. *See, e.g.*, *Oahu Public'ns, Inc. v. Takase*, 139 Hawai`i 236, 386 P.3d 873 (2016) (providing procedural directives for handling inadvertent public filings of HCRR 9 confidential information).

A. Members of the Public Are Not Required to Risk Gag Orders, Sanctions, or Liability to Request Access to Court Records.

Sealed information should not be disclosed to non-parties. *See* HCRR 10.4 (designating who should have access to confidential case records). Nevertheless, Schlesinger argues that the Law Center waived any right to access records in this case because the Law Center—on principle—refused to participate in a hearing closed to the public. Dkt. 36 at 8, 25-26. Courts cannot force members of the public into the catch-22 of either obtaining "confidential" information that cannot be publicly discussed or losing any right to claim that such information is not confidential in the first place.

First, factually, Schlesinger is incorrect that the Law Center waived any right to appear and challenge the evidence presented by Schlesinger. As stated in the petition and not disputed, on May 28, 2024, the Law Center alerted Judge Chang's staff that it was present in the hallway if the court decided to hold any portion of the hearing open to the public. Dkt. 2 at 1 ¶ 2. Although Judge Chang apparently heard further argument and made findings, he conducted the entire hearing outside public view. The Law Center did not refuse to appear and be heard; it refused access to purportedly "confidential" information as a condition to participate. 5/1/24 Hrg. Tr. at 25.

The Law Center never claimed that Judge Chang could not request *ex parte* submission of evidence. *E.g.*, *Grube v. Trader*, 142 Hawai`i 412, 423 n.13, 420 P.3d 343, 354 n.13 (2018) ("The moving party may request leave to file supporting evidence for its sealing motion ex parte and under seal pending the court's disposition of the motion."). But the Law Center did question whether such *ex parte* submission was necessary given the nature of the evidence proffered. 5/1/24 Hrg. Tr. at 25. In light of information referenced in Schlesinger's answer, however, the closure on May 28 exceeded any legitimate need, and Judge Chang should have opened the proceeding to the public so that the Law Center could participate.[4]

[4] Courts may "partially" seal findings when disclosing the facts would undermine the purpose of sealing. *Grube*, 142 Hawai`i at 425, 420 P.3d at 356. But Judge Chang sealed all further argument and all findings before exacerbating that error by requiring the Law Center—which was not present—to prepare the order.

Second, forcing "confidential" information on members of the public exposes those individuals to unwanted restrictions on speech and potential sanctions—simply for requesting access to a court record. In a prior case, Judge Chang expressly imposed a gag order on the Law Center after disclosing—unsolicited—purported "confidential" information from court records. *Civil Beat Law Ctr. for the Pub. Interest v. Chang*, No. SCPW-21-511, 2022 Haw. LEXIS 73, at *3 (Haw. May 11, 2022) (reciting that Judge Chang sought to prohibit the Law Center publishing the identity of parties to the case). Although the circuit court did not expressly order the Law Center not to disclose information here, the effect of the circuit court's actions in this case is no different because the court maintained the court records under seal.[5]

If the Law Center published sealed court records (*e.g.*, the redacted complaint), Schlesinger or the circuit court could claim that the Law Center violated the order denying its motion to unseal.[6] Alleged violation of a court order could lead to contempt charges, disciplinary charges against the Law Center's counsel, and civil tort claims.[7] If it were otherwise—*i.e.*, if Judge Chang did not intend to gag the Law Center—forced disclosure to the Law Center is the same as disclosure to the public, so there is no reason to keep the records under seal. In the end, the implied gag order, risk of such claims, and the need to defend itself is an unconstitutional chilling of the Law Center's speech when the Law Center's only conduct was to exercise its constitutional rights to request access to court records.

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[5] It is not uncommon for circuit courts to *sua sponte* disclose "confidential" information in the course of a motion to unseal or to ask the Law Center to review sealed records. When the Law Center is provided an opportunity to respond before disclosure occurs, it explains—as occurred here—that it is not seeking special access to court records, only what should be publicly disclosed. June 10 Proposed Order at 3 ("The Law Center never requested private access to the complaint."); *accord* 5/1/24 Hrg. Tr. at 25 (explaining that the Law Center did not want special access to information).

[6] Defendant Schlesinger has demonstrated a willingness to litigate the publication of any negative information. *E.g.*, *Schlesinger v. Doe*, No. 1CCV-24-997, Dkt. 1 (alleging defamation claims for negative Yelp reviews).

[7] The Law Center would have valid defenses to any such claims or penalties.

Third, this unconstitutional chilling effect extends not only to the information that the circuit court disclosed to the Law Center without its consent, but also information that the Law Center independently obtained from other sources. As stated in the petition, the Law Center obtained a copy of the unredacted complaint from CasePortal.[8] *E.g.*, Dkt. 1 at 7 n.4. If the Law Center publicly discussed this case based on the unredacted complaint that it legally obtained through CasePortal, Schlesinger or the circuit court could level the same allegations of violating the sealing order. But, simply because it questioned why this case is sealed, the Law Center would be the only entity subject to such unconstitutional chilling even though anyone could obtain the unredacted complaint from CasePortal (for a fee).

Courts should never *force* a member of the public to accept access to sealed records or "confidential" information—as occurred here when the redacted complaint was provided to the Law Center without its consent.

B. The Identity and Intent of the Member of the Public Who Requests Access to Court Records Is Irrelevant.

If court records must be publicly accessible pursuant to the constitutional presumption of public access, it is not based on any special interest of the person requesting access. As this Court observed decades ago, the public right of access does not distinguish between members of the public. *Gannett Pac. Corp. v. Richardson*, 59 Haw. 224, 229-30, 580 P.2d 49, 54-55 (1978).

> The news media in these situations does not occupy a special status distinct from that of the general public. The right of media representatives to be present is derived from their status as members of the general public. As such, they have a right to be present and may freely report whatever occurs in open court, but they occupy no privileged position vis-a-vis the general public.

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[8] Schlesinger claims that CasePortal "doesn't cover State circuit court cases." Dkt. 36 at 16. That is wrong, and Schlesinger made no such claim when this issue was raised below. *E.g.*, Apr. 25 Reply at 3. CasePortal's daily civil litigation reports for the Pacific region include certain newly filed Hawai`i circuit court cases with links to download the complaints. If necessary to verify the availability of the unredacted complaint through CasePortal, the Law Center can file the unredacted complaint obtained from the service, under seal, if so directed by the Court.

Id. Nevertheless, Schlesinger argues that the Law Center's identity and plans for the documents are relevant to whether the records should be sealed. Dkt. 36 at 15-16, 19. To the contrary, for purposes of sealing, disclosure to one is disclosure to all, and the Law Center's identity and plans are irrelevant because it could just as easily have been anyone else who requested access. *E.g.*, *Oahu Public'ns, Inc. v. Ahn*, 133 Hawai`i 482, 494, 331 P.3d 460, 472 (2014) ("[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known.") (quoting *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984)).

First, illustrating one danger of inquiring into identity and intent, Schlesinger misidentifies the Law Center by repeatedly referring to it as the media entity Honolulu Civil Beat that publishes news at civilbeat.org. *E.g.*, Dkt. 36 at 25, 27 n.vi. Even if it were not otherwise clear that the Law Center is not Honolulu Civil Beat, the Law Center explained below that it had changed its name to "Public First Law Center" while the motion to unseal was pending.[9] Jan. 16 Reply at 1 n.1.

Second, Schlesinger misstates the Law Center's intent regarding publication of information here, claiming that the complaint "would be posted for public purview [sic] without the benefit of [Schlesinger's] vigorous denial, since no answer was filed." Dkt. 36 at 16. As the Law Center explained, Schlesinger's denial of the allegations is accessible through the briefing on the motion to unseal, including now the briefing on this petition for writ. *See* 5/1/24 Hrg. Tr. at 13-16. Moreover, the Law Center expressed willingness to post additional context if offered by Schlesinger. *Id.* at 22. Illustrating

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[9] The Civil Beat *Law Center* for the Public Interest is not a media entity. The Law Center has its own website publicfirstlaw.org (previously civilbeatlawcenter.org)—not civilbeat.org. Readily available business registration records from the State Department of Commerce and Consumer Affairs confirm that the Law Center and Honolulu Civil Beat are separate entities. And when the Law Center represents others, unlike here, it litigates in the name of those persons. *E.g.*, *Grube*, 142 Hawai`i at 428-29, 420 P.3d at 359-60 (representing a reporter); *Roy v. GEICO*, 152 Hawai`i 225, 229 n.3, 524 P.3d 1249, 1253 n.3 (App. 2023) (appeal initially answered on behalf of a member of the public).

another danger of judicial inquiry into intent, however, the Law Center did object to Judge Chang's unconstitutional suggestion that the Law Center be *compelled* to post such information as a condition of unsealing.[10] *Id.*

Third, there is no reason for a judge to ask what a movant plans to do with court records. Anyone may move to unseal. That person may be, for example: a reporter, *Grube*, 142 Hawai`i 412, 420 P.3d 343; an unhappy customer, *Roy*, 152 Hawai`i at 230, 232, 524 P.3d at 1254, 1256 (describing individual as "vocal critic of GEICO" and reciting GEICO's allegations that the motion to unseal was part of a "campaign of disparaging and harassing GEICO"); or an academic, *e.g.*, *State ex rel. Cincinnati Enquirer v. Shanahan*, 185 N.E.3d 1089, 1091 (Ohio 2022) (resolving motions to unseal filed by Eugene Volokh and others). The intent of any given person seeking access will differ from others, but the scope of access cannot differ. And once court records are public pursuant to the constitutional right of access, anyone may obtain them—irrespective of intent and without restriction on subsequent use.[11] Inquiring into the plans of any specific person who moves to unseal is an empty gesture.

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[10] Whether a member of the public publishes information with context (as the Law Center was willing to do here)—or not—reflects on the integrity of that person, but it does not affect public access. *E.g.*, *In re McClatchy Newspapers Inc.*, 288 F.3d 369, 374 (9th Cir. 2001) (ordering disclosure of court records after observing: "A decent newspaper will not publish Nathanson's accusations without also publishing the skepticism of Nathanson's credibility shared by the district judge and the office of the United States Attorney. If less scrupulous papers omit these significant doubts, these papers themselves will be of a character carrying little credibility.").

[11] For example, if unsealed, the court records would be publicly accessible to the woman who accused Defendant Schlesinger of sexual harassment in the workplace, *Cosmetic Surgeon Hit With Employment Suit*, Honolulu Star-Bull. (Jan. 22, 2003) [*Cosmetic Surgeon*], https://archives.starbulletin.com/2003/01/22/news/briefs.html, and the woman who previously prevailed in a medical malpractice lawsuit against him, Deborah Barayuga, *Maui Woman Wins Lawsuit Over Bad Breast Surgery*, Honolulu Star-Bull. (Aug. 23, 2002), https://archives.starbulletin.com/2002/07/23/news/index3.html. Jan. 16 Reply at 6 n.3. It also would be available to various individuals who in recent years have alleged medical malpractice claims against Defendant Schlesinger in motions to compel arbitration. *See, e.g.*, *Mariano v. Schlesinger*, No. 1CSP-24-1174, Dkt. 1; *Takabayashi v. Schlesinger*, No. 1CSP-24-890, Dkt. 1; *Farr v. Schlesinger*, No. 1CSP-24-889, Dkt. 1; *Kanoh v. Schlesinger*, No. 1CSP-23-317, Dkt. 1.

Lastly, these inquiries lead down a dangerously unconstitutional path of judges making value determinations as to whether information is sufficiently newsworthy. Schlesinger expressly argues that disclosure is not required because the complaint is "not newsworthy." Dkt. 36 at 26. He wants to know why the Law Center has asked for the complaint. *Id.* at 23. Requiring that the public prove a specific interest in a lawsuit or that a reporter explain what story he or she is investigating would fundamentally contradict a "strong presumption" of public access in court records.[12] *Grube*, 142 Hawai`i at 424, 420 P.3d at 355.

Courts do not determine what is newsworthy.[13]

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974); *see also, e.g.*, *United States v. Schiavo*, 504 F.2d 1, 12 n.16 (3d Cir. 1974) (concurring opinion) ("Decisions that particular material is newsworthy, important, or 'hot news' seem precisely those that, under our constitutional scheme, are to be left to the press and are not to be made by public officials, judicial or otherwise."). Government officials deciding the value of

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[12] The Law Center does not dispute that members of the public may volunteer specific concerns as part of the constitutional analysis. *E.g.*, *Grube*, 142 Hawai`i at 425, 420 P.3d at 356 ("the 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." (emphasis added)). Members of the public often may be in a better position to explain why particular court records should not be sealed. But courts must always consider the general benefits that underlie the strong presumption of openness. Records cannot be sealed—as Schlesinger argues—simply because a member of the public has chosen not to identify a specific interest.

[13] The strong presumption of public access to court records recognizes that absent an overriding compelling interest, the litigants' invocation of publicly funded judicial authority to further their private interests is a matter of public concern that crosses any legitimate threshold of "newsworthiness." *See* Dkt. 1 at 14, 18 (citing cases).

information that may be heard and discussed by the public is major step away from our republican democracy. *See Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982) ("the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.").

The Law Center's plans for the court records are irrelevant, and it would be error if Judge Chang relied on such inquiries to deny public access.

C. A Court's Findings Must Be Written and, to the Extent Feasible, Public.

As this Court explained in *Ahn* concerning sealing: "entry of specific findings allows fair assessment of the trial judge's reasoning *by the public* and the appellate courts, enhancing trust in the judicial process and minimizing fear that justice is being administered clandestinely." 133 Hawai`i at 498, 331 P.3d at 476 (emphasis added) (quoting *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 951 (9th Cir. 1998)). Schlesinger, however, claims that the public does not deserve to know why this case is sealed. Dkt. 36 at 19-20. Secret findings in a secret case hew closer to the Star Chamber than a process "enhancing trust in the judicial process and minimizing fear that justice is being administered clandestinely."

This Court has endorsed the principle that a "court speaks only through its written orders." *State v. Milne*, 149 Hawai`i 329, 335, 489 P.3d 433, 439 (2021). Here, Judge Kawashima's written order provides no explanation for the sealing.[14] Schlesinger points to Judge Chang's sealed May 28 hearing, but Judge Kawashima did not incorporate or repeat any findings by Judge Chang in his written order and did not

[14] Judge Kawashima recites "having heard the arguments of counsel," so presumably, he reviewed a recording or transcript, was aware of any findings by Judge Chang during the May 28 sealed hearing, and could have incorporated findings in his written order to the extent that he agreed. Dkt. 3 at 3; *see also* HRCP 63 ("If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties."); *cf.* Fed. R. Civ. P. 63 advisory committee notes (1991) (explaining that a substitute judge's certification "will necessarily require that there be available a transcript or a videotape of the proceedings prior to substitution").

make his own findings.[15] Judge Kawashima does not even reference considering Schlesinger's oral testimony as part of the motion. The Law Center can infer from Schlesinger's arguments in response to the petition the general nature of Judge Chang's oral findings, but there are *no* public findings that justify sealing this case. The public should not be required to appeal a deficient written sealing order simply to get some explanation for why the circuit court believed sealing was necessary.

Entirely secret findings do not serve the purpose of the procedural requirement that protects the presumption of public access. The Law Center would have no concern with partially sealed findings if the necessary details would expose the very confidences that the parties seek to seal. But that is not what happened here.

D. Party Stipulations Do Not Waive the Public's Right of Access.

Party agreement is not relevant to sealing court records. As this Court has recognized, sealing affects *the public*'s rights of access, not rights of the parties. "All too often, parties to the litigation are either indifferent or antipathetic to disclosure requests. This is to be expected: it is not their charge to represent the rights of others." *Ahn*, 133 Hawai`i at 498, 331 P.3d at 476. Courts have an independent gatekeeping function—even in the absence of objections from the public—to preserve the strong presumption of public access to court records.[16] The constitutional rights of access are not so ephemeral as to disappear as soon as no one is looking.

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[15] Although this Court has held that "a successor trial judge cannot enter findings of fact and conclusions of law in a case which was tried before his predecessor," that principle derives from an earlier version of HRCP 63 that expressly required the original judge to have entered findings before the substitution. *See In re Death of Elwell*, 66 Haw. 598, 601-02, 670 P.2d 822, 824 (1983) (construing the historical version of HRCP 63). Judge Kawashima could and should have entered his own findings.

[16] Notwithstanding this Court's guidance in *Ahn* and *Grube*, some circuit courts continue to grant stipulated motions to seal if there is no objection, without entering specific findings or considering the general public benefits protected by the presumption of access. *E.g.*, *Navatek Capital Inc. v. Kao*, No. 1CCV-20-1511, Dkt. 764 (motion to unseal numerous court records sealed solely based on stipulations). Requiring the public to file a motion to unseal—rather than properly addressing the sealing standards in the first instance—does not comply with constitutional standards. *See Civil Beat Law Ctr. for the Pub. Interest, Inc. v. Maile*, 117 F.4th 1200, 1211-12 (9th Cir.

Schlesinger argues that this petition is "totally inappropriate," however, because the parties "stipulated that the record be sealed and dismissed the case with prejudice." *E.g.*, Dkt. 36 at 10. He cites no case law for that position and fails to address any of the case law to the contrary cited in the Law Center's petition.[17] Dkt. 1 at 16-17 & n.11.

Stipulations to seal have no bearing on the public's right of access.

IV. SCHLESINGER'S CONCERNS DO NOT JUSTIFY SEALING.

Schlesinger's reputation concerns do not justify sealing the complaint. *E.g.*, *Grube*, 142 Hawai`i at 425, 420 P.3d at 356 ("simply preserving the comfort or official reputations of the parties is not a sufficient justification"). Judge Chang apparently agreed. After the May 28 hearing, Schlesinger informed the Law Center that Judge Chang did not find that Schlesinger had a compelling interest in protecting his reputation. Dkt. 1 at 18 n.13. Judge Kawashima's Schlesinger-drafted order focused solely on "scandalous" allegations. Dkt. 3 at 3. And Schlesinger only cites Judge Chang's questioning of Schlesinger (not findings) as a basis for reputation arguments. *Compare* Dkt. 36 at 14 (referencing findings that allegations were scandalous), *with id.* at 17-18 (referencing questions concerning reputation).[18] But Schlesinger continues to raise the issue.

2024) (holding that the public's ability to move to unseal after-the-fact does not fix a court's failure to follow constitutional requirements when sealing).

[17] In general, Schlesinger relies heavily on cases that concern the common law right of access (*e.g.*, *Nixon*, *Foltz*, *Center for Auto Safety*). Where, as here, the constitutional right of access attaches, *Courthouse News Serv. v. Planet*, 947 F.3d 581, 592 (9th Cir. 2020) (First Amendment right to civil complaints), standards for sealing and for review of lower court decisions are more stringent. *E.g.*, *United States v. Bus. of the Custer Battlefield Museum*, 658 F.3d 1188, 1197 n.7 (9th Cir. 2011) ("The First Amendment is generally understood to provide a stronger right of access than the common law."); *accord United States v. Kaczynski*, 154 F.3d 930, 932-33 (9th Cir. 1998) (concurring opinion) (outlining some differences between common law and constitutional analyses).

[18] Any discrepancy regarding the sealed "findings" and the written order only underscores the problems when a circuit court does not provide specific findings in a written order.

Notably, Schlesinger now admits in the *public* answer to this petition that Plaintiff's complaint concerns sexual assault allegations.[19] Dkt. 36 at 15, 19 ("It is worthy of judicial notice that a sexual assault claim against a physician, who has a surgical practice primarily composed of women, will have a devastating effect on his reputation and livelihood – even if found innocent or not liable.").[20] Schlesinger's public admission eliminates any basis for sealing the entire docket, complaint, and case. *See* Dkt. 1 at 19 (citing cases regarding unsealing information that is already public).[21] Whatever purported reputational concern Schlesinger had concerning the fact that someone made a sexual assault claim against him, it disappeared as soon as he publicly acknowledged that someone had made such a claim.

Moreover, nowhere has Schlesinger addressed directly relevant cases that reject comparable reputation concerns as a compelling interest for sealing. *E.g.*, Dkt. 1 at 18 n.13; Jan. 16 Reply at 5-6.[22] Instead, Schlesinger cites a case concerning whether loss of goodwill that cannot be reduced to monetary damages is irreparable harm to justify a

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[19] Although the Law Center had a copy of the unredacted complaint, it avoided disclosing the nature of the allegations against Schlesinger in the complaint. *E.g.*, Jan. 16 Reply at 6 & n.3 (discussing medical malpractice and sexual misconduct cases "in light of prior allegations against Schlesinger"); *accord* Dkt. 1 at 9 n.8 (explaining that the May 1, 2024 hearing transcript was not attached because Judge Chang "discussed the specific nature of the allegations in the complaint").

[20] As to Schlesinger's request for judicial notice, the reputational impact of sexual assault allegations against a physician is a fact "subject to reasonable dispute" that cannot be taken on judicial notice. HRE 201(b). Moreover, Schlesinger previously was the subject of sexual harassment allegations, but claims to have a thriving medical practice, calling into question the purported harm of sexual allegations. *Cosmetic Surgeon*, https://archives.starbulletin.com/2003/01/22/news/briefs.html ("She claimed Schlesinger harassed her and made unwelcome sexual comments about her anatomy.").

[21] Schlesinger made no effort to address the cited case law that records and information once public cannot be made secret.

[22] As reflected in the cited cases, Schlesinger's purported reputational concerns over sexual assault allegations are not as "unique" as he claims. Dkt. 36 at 26; *see also Doe v. White*, 1CC-05-1-863, Dkt. 107 (Haw. Cir. Ct. Dec. 23, 2022), *as amended*, Dkt. 109 (Dec. 27, 2022) (unsealing docket and court records containing sexual assault allegations); *Doe v. Ibana*, 1CC-12-1-1422, Dkt. 68 (Haw. Cir. Ct. Apr. 21, 2021) (same).

preliminary injunction in a breach of contract action. Dkt. 36 at 24-25. At best, that case may be relevant to the second prong of the constitutional analysis (whether there is substantial probability that disclosure would irreparably harm a compelling interest). It does not show, under the threshold first prong of the analysis, that loss of goodwill in a business—purportedly as a result of allegations in a lawsuit—is a "compelling interest" that overcomes the strong presumption of public access to court records. And Schlesinger cites no authority for that proposition.

Schlesinger also continues to argue—without any legal authority or supporting findings by the circuit court—that settlement incentives are a compelling interest that overcomes the strong presumption of public access to court records. The answer, however, addresses none of the directly contrary case law. *See* Dkt. 1 at 17-19. Those cases expressly reject, for example, arguments that cases will not settle without secrecy.[23] *E.g.*, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994) (rejecting settlement concerns even under a "good cause" analysis) ("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."). Instead, Schlesinger cites a case regarding whether circuit courts have continuing jurisdiction to enforce a settlement agreement after a case is dismissed.[24] Dkt. 36 at 11. That case does not support the position Schlesinger

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[23] As to Schlesinger's assertions that the Maui County Police Department and prosecutor declined to bring criminal charges, Dkt. 36 at 13, any such fact does not mean that Plaintiff's civil case was patently frivolous or, under the lower common law standard, brought solely to "gratify private spite or promote public scandal." *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978).

[24] Schlesinger's citation contradicts his claims that the complaint was never "at issue" or that Schlesinger never responded to the complaint. *E.g.*, Dkt. 36 at 8. In *Amantiad*, this Court adopted the ICA's reasoning that dismissal with prejudice—even as part of a settlement—is "an adjudication on the merits of all issues that were raised or could have been raised in the pleadings." *Amantiad v. Odum*, 90 Hawai`i 152, 159-60, 977 P.2d 160, 167-68 (1999). Regardless, Schlesinger does not address any of the directly relevant case law that court records need not be "at issue" before the presumption of public access attaches. *See, e.g.*, Dkt. 1 at 17-18.

presents here. Cases do not suddenly disappear from the public domain because the parties settled.

Schlesinger cannot hide allegations of medical malpractice and sexual assault because he is a physician that works with women. His self-serving speculation about business impacts are not a compelling interest that overcomes the strong presumption of public access. Public access ensures, among other things, that our publicly funded administration of justice does not favor litigants with special treatment—as Schlesinger seeks here—because of their higher social status.

V. SCANDALOUS ALLEGATIONS, IF ANY, DO NOT JUSTIFY SEALING AN ENTIRE CASE.

HRCP 12(f) provides that a scandalous matter may be stricken from a pleading. It does not authorize sealing an entire case, and Schlesinger cites no authority for doing what the circuit court ordered here based solely on purported scandalous allegations. *Cf. In re Fin. Oversight & Mgmt. Bd.*, 406 F. Supp. 3d 180, 188 (D. Mass. May 2, 2005) (under bankruptcy equivalent of HRCP 12(f), rule "is not a basis for departing from the presumption of public access to the materials filed in the Adversary Proceeding.").

Moreover, Schlesinger does not explain how the circuit court followed an objective and judicially sound standard for what is "scandalous" under HRCP 12(f).[25] The Law Center outlined the standard for "scandalous" material—which Schlesinger did not contest or even address. Dkt. 1 at 20-24. Based on a comparison of the redacted complaint with the unredacted complaint from CasePortal, however, it is obvious that the language ordered stricken is relevant to the claims alleged in the case.

The circuit court may have been swayed by the fact that the case settled. But the standard for striking "scandalous" allegations must be assessed at the time of pleading; allegations do not become scandalous because a case settled. The purpose of a motion

[25] Because it has not accessed the May 28 transcript for the sealed hearing or Schlesinger's unredacted answer with excerpts from that hearing, the Law Center cannot independently comment on Judge Chang's findings—which Judge Kawashima did not repeat in his written order.

to strike is to streamline the case, not police the language used by a plaintiff.[26] *E.g.*, *Operating Eng'rs Local 324 Health Care Plan v. G&W Constr. Co.*, 783 F.3d 1045, 1050 (6th Cir. 2015) ("Motions to strike are viewed with disfavor and are not frequently granted. The function of the motion is to 'avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with' them early in the case." (citations omitted)); *accord Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). As cited in the petition, numerous cases hold that courts will not wordsmith—as Judge Chang did here—complaints alleging sexual assault. Dkt. 1 at 23-24 & n.17. Because the stricken allegations were *relevant* to the claims at the time the complaint was filed, the allegations were not scandalous.

Schlesinger does not argue that the stricken allegations were irrelevant to the Plaintiff's claims. Judge Chang did not apply the proper standard for assessing whether allegations in a pleading are scandalous.

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, March 14, 2025

Respectfully submitted,

/s/ Robert Brian Black
ROBERT BRIAN BLACK
Attorney for Petitioner Civil Beat Law Center for the Public Interest

[26] This focus of Rule 12(f) on case administration is reflected in the Rule's limitation to only striking matters from "pleadings"—not other court records. HRCP 12(f) ("stricken from any pleading").