

MATEO CABALLERO 10081  
JONGWOOK “WOOKIE” KIM 11020  
ACLU of Hawaii Foundation  
P.O. Box 3410  
Honolulu, Hawaii 96801  
Telephone: (808) 522-5905  
E-mail: [mcaballero@acluhawaii.org](mailto:mcaballero@acluhawaii.org)  
[wkim@acluhawaii.org](mailto:wkim@acluhawaii.org)

**Electronically Filed**  
**FIRST CIRCUIT**  
**1CSP-19-0000062**  
**06-MAR-2020**  
**03:20 PM**

Attorneys for *Amicus Curiae*

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

IN RE INVESTIGATION OF:  
KAHEA

(Department of the Attorney General, State of  
Hawai‘i;  
AG Subpoena No. 2019-158)

S.P. No. 19-0000062 (JHA)

**[PROPOSED] BRIEF OF *AMICUS***  
***CURIAE* ACLU OF HAWAI‘I**  
**FOUNDATION IN SUPPORT OF**  
**KAHEA’S MOTION FOR STAY**  
**PENDING APPEAL; CERTIFICATE OF**  
**SERVICE**

**[PROPOSED] BRIEF OF *AMICUS CURIAE* ACLU OF HAWAI‘I FOUNDATION IN**  
**SUPPORT OF KAHEA’S MOTION FOR STAY PENDING APPEAL**

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. BACKGROUND ..... 2

III. ARGUMENT ..... 6

    A. Stay Pending Appeal Is Necessary Because This Action Presents Significant Constitutional Questions Warranting Immediate Appellate Review ..... 6

        1. The Subpoena was improperly issued to investigate protected speech and association, not unlawful activity ..... 7

            i. The AG improperly bases the initiation of this investigation on constitutionally protected activity ..... 8

            ii. The AG has proffered no evidence that KAHEA is engaging in or supporting illegal activity on Mauna Kea ..... 10

        2. The State appears to have used its investigatory power to retaliate against KAHEA for exercising its constitutional rights to freedom of speech ..... 13

        3. The Subpoena, in encompassing the identities of KAHEA’s donors, threatens KAHEA’s constitutional rights to freedom of association and privacy ..... 15

            iii. The Subpoena infringes KAHEA’s First Amendment and article I, section 4 right to freedom of association ..... 15

            iv. The Subpoena infringes KAHEA’s article I, section 6 right to privacy ..... 17

            v. The Subpoena infringes KAHEA’s article I, section 7 right to privacy ..... 18

IV. CONCLUSION ..... 19

**TABLE OF AUTHORITIES**

**Cases**

*Anonymous Donors v. Clare Connors*,  
SCPW-20-0000102 (Feb. 28, 2020) ..... 6

*Arizona v. Evans*,  
514 U.S. 1 (1995)..... 18

*Bates v. City of Little Rock*,  
361 U.S. 516 (1960)..... 15

*Brandenburg v. Ohio*,  
395 U.S. 444 (1969)..... 12

*Brende v. Hara*,  
113 Haw. 424 (2007) ..... 17

*Buckley v. Valeo*,  
424 U.S. 1 (1976)..... 15, 16

*Capp v. Cty. of San Diego*,  
940 F.3d 1046 (9th Cir. 2019) ..... 13, 14

*Crosby v. State Dep’t of Budget & Fin.*,  
76 Haw. 332 (1994) ..... 9

*De Jonge v. State of Oregon*,  
299 U.S. 353 (1937)..... 9

*Gibson v. Florida Legislative Investigation Comm.*,  
372 U.S. 539 (1963)..... 16

*Janra Enterprises, Inc. v. City & Cty. of Honolulu*,  
107 Haw. 314 (2005) ..... 17

*Kusper v. Pontikes*,  
414 U.S. 51 (1973)..... 15

*Lacey v. Maricopa Cty.*,  
693 F.3d 896 (9th Cir. 2012) ..... 13, 14, 15

*Louisiana ex rel. Gremillion v. NAACP*,  
366 U.S. 293 (1961)..... 16

<i>Matter of Conservation Dist. Use Application HA-3568</i> , 143 Haw. 379 (2018) .....	5
<i>Mauna Kea Anaina Hou v. Bd. of Land &amp; Nat. Res.</i> , 136 Haw. 376 (2015) .....	5
<i>Mendocino Envtl. Ctr. v. Mendocino Cty.</i> , 192 F.3d 1283 (9th Cir. 1999) .....	14
<i>NAACP v. Alabama ex rel. Flowers</i> , 377 U.S. 288 (1964).....	7
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958).....	15, 16
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	9
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982).....	9, 10, 11, 12
<i>Nakano v. Matayoshi</i> , 68 Haw. 140 (1985) .....	17
<i>O'Brien v. Welty</i> , 818 F.3d 920 (9th Cir. 2016) .....	13
<i>Office of Hawaiian Affairs v. State of Hawai'i</i> , No. 1CC171001823 (Haw. Cir. Ct. Nov. 7, 2017) .....	4
<i>Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.</i> , 138 Haw. 14 (2016) .....	17
<i>Perry v. Schwarzenegger</i> , 591 F.3d 1147 (9th Cir. 2010) .....	16
<i>Santopietro v. Howell</i> , 857 F.3d 980 (9th Cir. 2017) .....	12
<i>State v. Biggar</i> , 68 Haw. 404 (1986) .....	18
<i>State v. Russo</i> , 141 Haw. 181 (2017) .....	9

<i>State v. Walton</i> , 133 Haw. 66 (2014) .....	18
<i>Scales v. United States</i> , 367 U.S. 203 (1961).....	12
<i>United States v. Miller</i> , 425 U.S. 435 (1976).....	18
<i>United Transp. Union v. State Bar of Mich.</i> , 401 U.S. 576 (1971).....	9
<i>White v. Lee</i> , 227 F.3d 1214 (9th Cir. 2000) .....	8, 13, 14
<b>U.S. Constitution</b>	
U.S. Const. amend. I.....	<i>passim</i>
<b>Hawai‘i Constitution</b>	
Haw. Const. art. I, sec. 4 .....	7, 9, 15
Haw. Const. art. I, sec. 6 .....	17
Haw. Const. art. I, sec. 7 .....	18, 19
<b>Statutes</b>	
Haw. Rev. Stat. § 28-2.5 .....	1
Haw. Rev. Stat. § 711-1105 .....	8, 10, 11
<b>Other Authority</b>	
Dep’t of the Attorney General, <i>Answers to Frequently Asked Questions About Hawaii’s Charity Registration Requirements</i> (Aug. 2017), <a href="https://ag.hawaii.gov/tax/files/2017/08/Charities-Registration-FAQs.pdf">https://ag.hawaii.gov/tax/files/2017/08/Charities-Registration-FAQs.pdf</a> .....	8
Leonard S. Rubinowitz et. al., <i>A “Notorious Litigant” and “Frequenter of Jails”</i> : <i>Martin Luther King, Jr., His Lawyers, and the Legal System</i> , 10 Nw. J. L. & Soc. Pol’y 494, 497 (2016)....	10
IRS General Counsel Memorandum, GCM 38415 (I.R.S. June 1980) .....	10

## I. INTRODUCTION

The American Civil Liberties Union of Hawai‘i Foundation (“ACLU of Hawai‘i”) respectfully submits this *amicus curiae* brief in support of the Motion for Stay Pending Appeal filed by KAHEA: The Hawaiian Environmental Alliance (“KAHEA”). A stay pending appeal of KAHEA’s motion to quash the State of Hawai‘i Attorney General’s (“State” or “AG”) subpoena *duces tecum* (“Subpoena”) is necessary because this action presents three significant constitutional questions that warrant immediate appellate review: (1) whether the AG improperly issued the Subpoena to investigate not unlawful activity, but protected speech and association; (2) whether the AG pursued the Subpoena in retaliation against KAHEA’s anti-Thirty Meter Telescope (“TMT”) viewpoint; and (3) whether the Subpoena—which seeks *all* of KAHEA’s financial records held with its bank—is overbroad in violation of the associational and privacy rights of KAHEA’s members and supporters. These constitutional issues are meritorious, and deserve appellate review *before* the Subpoena is executed—an event that would cause irreparable harm to the KAHEA, its members, and supporters.

There is no dispute that the AG is authorized under state law to “investigate alleged violations of the law” when doing so would be “in the public interest,” HRS § 28-2.5(a), and that such investigations may entail the use of subpoenas, *see* HRS § 28-2.5(b). But the AG’s present investigation of—and concurrent pursuit of a subpoena relating to—KAHEA exceeds the limits imposed by the federal and state constitutions. *First*, the Subpoena intrudes on KAHEA’s speech and associational rights by incorrectly conflating *without any evidence* KAHEA’s support for and encouragement of protected and peaceful demonstrations against the TMT with aiding and abetting isolated acts of alleged civil disobedience. *Second*, the AG appears to be using the Subpoena to retaliate against KAHEA for the organization’s anti-TMT viewpoint. *Third*, the

pursuit of the Subpoena, in exposing KAHEA’s members and donors, risks running roughshod over KAHEA’s rights to freedom of association and privacy.

In (largely) denying KAHEA’s motion to quash, the Court effectively held that the Subpoena did not violate KAHEA’s constitutional rights. Given the fundamental constitutional questions at stake, however—and the risk that KAHEA’s constitutional rights will be further and irreparably harmed if the AG executes the Subpoena—this Court should stay execution of the Subpoena pending appeal. A stay until the appellate process is completed would benefit not only KAHEA, but also other people and organizations who may otherwise be chilled from engaging in political advocacy relating to controversial public issues, or expressing viewpoints on public issues that the State dislikes, for fear of facing similarly retaliatory and overbroad investigations.

## **II. BACKGROUND**

The present dispute centers on the planned construction of the TMT, a superlatively large observatory, on top of Mauna Kea—a mountain that many consider as among the most sacred places in Hawai‘i, culturally, spiritually, historically, and ecologically. As with any significant issue of public concern, groups have been advocating on all sides of the issue, including by demonstrating on or near the road leading to the TMT’s construction site. Indeed, in recent months, *thousands* of people, including prominent political figures and celebrities, have traveled to Mauna Kea to participate in demonstrations.<sup>1</sup> Such advocacy has at times been vigorous. Last month, for instance, both “[s]upporters and opponents of the [TMT] [we]re clashing over debris

---

<sup>1</sup> Big Island Now, *Rep. Gabbard Visits Mauna Kea*, Big Island Now (Aug. 12, 2019), <https://bigislandnow.com/2019/08/12/gabbard-visits-mauna-kea> (noting that politicians Rep. Gabbard, Gov. Ige, Lt. Gov. Green, Hawai‘i County Mayor Kim, and celebrities Dwayne “The Rock” Johnson and Jason Momoa had visited Mauna Kea to speak about TMT).

at the encampment at Mauna Kea.”<sup>2</sup> While those demonstrating against the TMT have been more visible, pro-TMT protesters have routinely held large rallies in public spaces.<sup>3</sup> Other prominent non-profit organizations have also provided outside support to those engaged in demonstrations on Mauna Kea.<sup>4</sup>

The State has expressed strong support for the TMT, and has prioritized its construction, with Governor Ige stating that he “fully support[s]” the project,<sup>5</sup> and even issuing an emergency proclamation as part of his “commit[ment] to enforcing the law and seeing this project through.”<sup>6</sup>

Meanwhile, starting in fall 2019, the AG began serving subpoenas on several organizations that allegedly provided support to anti-TMT demonstrators. First, in September 2019, the AG served a subpoena on the Office of Hawaiian Affairs (“OHA”) seeking “detailed information about support that OHA has provided to the Thirty Meter Telescope opponents” demonstrating on or near Mauna Kea Access Road.<sup>7</sup> OHA has engaged in anti-TMT advocacy,

---

<sup>2</sup> Mahealani Richardson, *TMT Supporters, Opponents Clash Over Debris at Mauna Kea Camp*, Hawaii News Now (Feb. 17, 2020), <https://www.hawaiinewsnow.com/2020/02/18/tmt-supporters-opponents-debate-over-debris-mauna-kea>.

<sup>3</sup> Michael Brestovansky, *TMT Supporters Hold Rally*, Hawaii Tribune-Herald (Aug. 16, 2019), <https://www.hawaiitribune-herald.com/2019/08/16/hawaii-news/tmt-supporters-hold-rally>.

<sup>4</sup> Dayton, *Subpoena Issued To Learn How OHA is Helping Protesters*, Honolulu Star-Advertiser (Sept. 20, 2019), <https://www.staradvertiser.com/2019/09/20/hawaii-news/subpoena-issued-to-learn-how-oha-is-helping-protesters> (reporting that “Kamehameha Schools is also providing help to the demonstrators camped at the bottom of the access road, including providing a large tent and support for documentation of the protests through livestreams, photos and videos”).

<sup>5</sup> @GovHawaii, Twitter (Sept. 28, 2017), <https://twitter.com/GovHawaii/status/913517639690895360> (“To be very clear, I fully support @TMT Hawaii. #TMT”).

<sup>6</sup> Press Release, *Governor Ige Issues Emergency Proclamation For Mauna Kea*, Office of the Governor (July 17, 2019), <https://governor.hawaii.gov/newsroom/latest-news/office-of-the-governor-news-release-governor-ige-issues-emergency-proclamation-for-mauna-kea>.

<sup>7</sup> Dayton, *supra* note 4.

including by filing a 2017 lawsuit alleging mismanagement of Mauna Kea.<sup>8</sup> In response to the subpoena, OHA disclosed it had spent money to pay for things like toilet rentals, trash hauling and disposal fees, tent rental and lighting, and travel for staff to conduct site visits and legal observations relating to Mauna Kea.<sup>9</sup> Then, in October 2019, the AG served a separate subpoena on Hawaiian Airlines seeking “the names of people who donated their frequent-flyer miles to activists who wanted to travel to the Big Island to join the Mauna Kea protests.”<sup>10</sup> After Hawaiian Airlines resisted disclosure of its customers’ records, the AG withdrew that subpoena.<sup>11</sup> Publicly available information does not reflect any pro-TMT organizations or groups receiving investigative subpoenas from the AG.

The subpoena relating to KAHEA came on the heels of these earlier subpoenas, and falls in line with the AG’s trend of targeting organizations opposing the TMT. KAHEA is a non-profit organization incorporated in Hawai‘i whose charitable mission is to “improv[e] the quality of life for Hawaii’s people and future generations through the revitalization and protection of Hawaii’s unique natural and cultural resources.”<sup>12</sup> To carry out its mission, KAHEA has, among other things, advocated against the construction of the TMT on the summit of Mauna Kea on the basis

---

<sup>8</sup> See Complaint, *Office of Hawaiian Affairs v. State of Hawai‘i*, No. 1CC171001823 (Haw. Cir. Ct. Nov. 7, 2017), available at <https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/2017-11-07-Complaint.pdf>. The lawsuit is still pending.

<sup>9</sup> Timothy Hurley, *OHA Reveals Protest Support, Subpoena Response*, Honolulu Star-Advertiser (Sept. 27, 2019), <https://www.staradvertiser.com/2019/09/27/hawaii-news/oha-reveals-protest-support-subpoena-response>.

<sup>10</sup> Kevin Dayton, *Hawaii Attorney General Subpoenas Hawaiian Airlines For Names of People Who Donated Their Miles to TMT Protest*, Honolulu Star-Advertiser (Oct. 5, 2019), <https://www.staradvertiser.com/2019/10/05/hawaii-news/attorney-general-subpoenas-hawaiian-airlines-for-names-of-donors-to-protests>.

<sup>11</sup> *Id.*

<sup>12</sup> KAHEA, *Mission*, KAHEA (last visited Mar. 6, 2020), <http://www.kahea.org/about/mission>.

that the TMT would damage both the environment and related cultural sites.<sup>13</sup> This has included litigation around the issue,<sup>14</sup> as well as hosting benefit concerts, film screenings, and teach-ins.<sup>15</sup> KAHEA continues to advocate for the protection of Mauna Kea to this day.

On November 14, 2019, the AG issued the Subpoena to First Hawaiian Bank seeking “all financial records of KAHEA” in the bank’s possession. AG Opp’n Mot. Quash (“AG Opp’n”), Ex. 3. The AG proffered two justifications for the Subpoena. First was KAHEA’s failure to file a copy of its IRS Form 990 with the AG, which oversees charities operating in Hawai‘i. *See* AG Opp’n 4-6. Second was that KAHEA allegedly did not operate for a charitable purpose because it “facilitate[s]” and “support[s]” “illegal activity” relating to Mauna Kea. AG Opp’n 6, 7. The AG’s “evidence” for such assertion is that KAHEA supports individuals who want to go to Mauna Kea to demonstrate, encourages or supports such demonstrations, helps with travel to get to Mauna Kea, and offers bail money for those who are improperly arrested. *See* AG Opp’n 3. The AG also cited KAHEA’s Aloha ‘Aina Support Fund. *See* AG Opp’n 2-3, 7. According to KAHEA, the Aloha ‘Aina Support Fund is a fund “administered by KAHEA board and staff” that distributes money to “groups, other nonprofits, and individuals organizing non-violent direct actions” and, in doing so, “prioritize[s] funding for frontline logistics, including provision of bail where appropriate, supplies, transportation, technical services, and community meetings

---

<sup>13</sup> *See, e.g.*, KAHEA, *Fact Sheet: Massive 18-Story Telescope Complex Proposed for Mauna Kea*, KAHEA (last visited Mar. 6, 2020), <http://kahea.org/issues/sacred-summits/sacred-summits-documents/fact-sheet-thirty-meter-telescope-tmt>.

<sup>14</sup> *See, e.g.*, *Matter of Conservation Dist. Use Application HA-3568*, 143 Haw. 379 (2018) (KAHEA challenging State’s decision authorizing issuance of permit for the TMT); *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376 (2015) (KAHEA challenging permit TMT process on due process grounds).

<sup>15</sup> Past Events, KAHEA (last visited Mar. 6, 2020), <http://kahea.org/events/aggregator/previous>.

convened for such purposes.”<sup>16</sup> The AG argues without any evidence that the Aloha ‘Aina Support Fund takes KAHEA outside of a proper charitable purpose because “the ‘non-violent direct actions’ supported by donations to Kahea plainly refer to the five month long illegal blockade of Mauna Kea Access road.” AG Opp’n 3.

On December 24, 2019, KAHEA moved to quash the Subpoena. The Circuit Court held motion hearings on January 29, 2020 and February 7, 2020. On February 26, 2020, the Circuit Court issued an order partially denying KAHEA’s motion to quash. That same day, KAHEA filed a motion for stay pending appeal. The stay motion is set for hearing on March 31, 2020.

On February 28, 2020, the Circuit Court entered final judgment. That same day, KAHEA noticed its appeal. Also that day, anonymous donors to KAHEA filed in the Hawai‘i Supreme Court a petition for writ of mandamus against the Circuit Court judge and AG Clare Connors seeking vacatur, respectively, of the order on the motion to quash and the Subpoena.<sup>17</sup> The anonymous donors argue that the Subpoena infringes their constitutionally protected rights to privacy and freedom of association, and that it is a “pretext for harassment and chilling protected expression and associations.”<sup>18</sup> The anonymous donors’ petition is pending.

### **III. ARGUMENT**

#### **A. Stay Pending Appeal Is Necessary Because This Action Presents Significant Constitutional Questions Warranting Immediate Appellate Review**

The ACLU of Hawai‘i submits that a stay pending appeal is needed because KAHEA’s motion to quash raises three significant constitutional questions that deserve appellate review

---

<sup>16</sup> KAHEA, *Donate to the Aloha ‘Aina Support Fund*, KAHEA (last visited Mar. 6, 2020), [https://org.salsalabs.com/o/2699/donate\\_page/aloha-aina-support-fund](https://org.salsalabs.com/o/2699/donate_page/aloha-aina-support-fund).

<sup>17</sup> Petition for Writ of Mandamus, *Anonymous Donors v. Clare Connors*, SCPW-20-0000102 (Feb. 28, 2020).

<sup>18</sup> *Id.* at 1, 17.

*before* KAHEA’s rights are irreparably harmed by the Subpoena’s execution.

**1. The Subpoena was improperly issued to investigate protected speech and association, not unlawful activity**

The central problem with the AG’s investigation is that, by its own admission, it relies on KAHEA’s *constitutionally protected* political advocacy to justify issuance of the Subpoena—and also improperly attributes the conduct of others to KAHEA—in a manner that impermissibly intrudes on KAHEA’s First Amendment and article I, section 4 associational and speech rights.

The AG proffered two “public interest” justifications for the Subpoena centering on the laws governing charitable organizations: first, KAHEA failed to file an IRS form with the AG and, second, KAHEA is allegedly not operating for a charitable purpose. Framed this way, the AG would have this Court believe that the Subpoena concerns a routine matter of corporate law.

However, “[t]his case, in truth, involves not the privilege of a corporation to do business in a State, but rather the freedom of individuals to associate for the collective advocacy of ideas.” *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 309 (1964). As this Court correctly held, the first justification is clearly pretextual. Even accepting that KAHEA failed to file a copy of an IRS form that had already been filed with the IRS, such failure would in no way justify the pursuit of *all* of KAHEA’s bank records. *Cf. id.* at 305 (noting that the failure of a corporation to register with the state justifies monetary fines, but does not justify the “consequence of permanent ouster” from the state). That the AG escalated immediately to serving a subpoena—without pursuing less-intrusive alternatives—raises serious questions about the State’s motivations for investigating KAHEA, especially because this also was a departure from the

AG's standard practice.<sup>19</sup> See *White v. Lee*, 227 F.3d 1214, 1237-38 (9th Cir. 2000) (stating that “[i]t is axiomatic that when the actions of government officials so directly affect citizens’ First Amendment rights, the officials have a duty to take the least intrusive measures necessary to perform their assigned functions” and finding “no justification for the officials to take the extraordinarily intrusive and chilling measures they did during the . . . investigation.”).

The second justification—the AG’s theory that KAHEA aided and abetted demonstrators engaged in illegal acts of civil disobedience—is also invalid. The AG contends that KAHEA’s “Aloha ‘Aina Support Fund” supported and encouraged purportedly illegal activity—including the acts of “obstruction” allegedly committed by 39 people arrested under HRS § 711-1105. AG Opp’n 6-7. By providing such assistance, KAHEA has, in the AG’s view, been operating for an improper charitable purpose. The AG’s theory is problematic for two fundamental reasons: (1) the AG improperly relies on KAHEA’s *constitutionally protected* political advocacy as the predicate for its far-reaching investigation and (2) the AG has offered no evidence to show that KAHEA’s support of the protected and peaceful demonstrations violated the law, or otherwise aided and abetted the alleged acts of civil disobedience.

***i. The AG improperly bases the initiation of this investigation on constitutionally protected activity***

The AG admits that it relies on KAHEA’s expressed support for the Mauna Kea

---

<sup>19</sup> As local non-profit experts have recently explained, “a charity’s failure to file a financial report with the AG does not typically result in a subpoena of records.” Lisa Maruyama & En Young, *Hawaii AG Wrong to Subpoena Protest Group’s Records*, Honolulu Civil Beat (Jan. 28, 2020), <https://www.civilbeat.org/2020/01/hawaii-ag-wrong-to-subpoena-protest-groups-records>. Instead, the AG will normally send a letter or make a phone call, and then consider civil fines. See *id.* The AG itself has published guidance stating that “the penalt[y] for failing to timely file the annual report” is to “assess late fees of \$20 per day up to a maximum of \$1,000.” Dep’t of the Attorney General, *Answers to Frequently Asked Questions About Hawaii’s Charity Registration Requirements* (Aug. 2017), <https://ag.hawaii.gov/tax/files/2017/08/Charities-Registration-FAQs.pdf>.

demonstrators as the predicate for its far-reaching investigation. But the “frontline logistical support” that KAHEA provided through its Aloha ‘Aina Support Fund to those demonstrating on Mauna Kea is protected under the First Amendment to the U.S. Constitution and article I, section 4 of the Hawai‘i Constitution,<sup>20</sup> and thus cannot justify the AG’s present investigation.

The U.S. Supreme Court has long held that “associat[ing] for the purpose of *assisting persons* who seek legal redress for infringements of their constitutionally guaranteed and other rights” is among the “modes of expression and association protected by the First and Fourteenth Amendments.” *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (emphasis added); *see also United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 578-79 (1971) (stating that “the First Amendment guarantees of free speech, petition, and assembly” includes “the right to cooperate in helping and advising one another in asserting their [legal] rights”); *De Jonge v. State of Oregon*, 299 U.S. 353, 365 (1937) (“*Those who assist* in the conduct of [meetings for peaceable political action] cannot be branded as criminals on that score.” (emphasis added)). This type of “vigorous advocacy” is “a form of political expression” that “the First Amendment also protects . . . against governmental intrusion.” *Button*, 371 U.S. at 429.

Indeed, in *NAACP v. Claiborne Hardware Co.*—a case that, like this one, involved mass demonstrations—the U.S. Supreme Court specifically rejected the notion that an organization supporting its members with legal costs, such as “post[ing] bond” and “provid[ing] legal representation” for those arrested during the demonstration at issue, could expose the

---

<sup>20</sup> The Hawai‘i Supreme Court “has interpreted the free speech rights afforded by the Hawai‘i Constitution to be at least as expansive as those provided by the United States Constitution.” *State v. Russo*, 141 Haw. 181, 190 (2017). The Hawai‘i Supreme Court has also stated that, “in some circumstances,” it “may find that the Hawai‘i Constitution affords greater free speech protection than its federal counterpart.” *Id.* (quoting *Crosby v. State Dep’t of Budget & Fin.*, 76 Haw. 332, 339 n.9 (1994) (citation omitted)).

organization to civil liability. 458 U.S. 886, 931 n.78 (1982). Here, KAHEA’s provision of similar legal and other support services to demonstrators also falls squarely within the scope of the First Amendment’s protections, and cannot justify the Subpoena.

***ii. The AG has proffered no evidence that KAHEA is engaging in or supporting illegal activity on Mauna Kea***

Despite invoking “illegal activity” as the basis for its investigation, the AG also has no evidence that KAHEA’s constitutionally protected support for the peaceful demonstrations on Mauna Kea was instead intended to aid and abet isolated acts of alleged civil disobedience.

The AG is incorrect to assume that KAHEA’s provision of “frontline logistical support” to people engaged in “non-violent direct actions” means it is definitively supporting “illegal activity.” *See* AG Opp’n 3 (“The ‘non-violent direct actions’ supported by donations to Kahea *plainly refer* to the five month long illegal blockade of Mauna Kea Access road.” (emphasis added)). “Non-violent direct action” plainly includes expressive conduct protected by the First Amendment, including actions “such as boycotts, marches, and demonstrations.”<sup>21</sup> The IRS similarly recognizes that a non-profit may lawfully use direct action, such as “nonviolent confrontation activities,” to accomplish its charitable purposes. *See* IRS Gen. Counsel Memorandum, GCM 38415, at \*7 (I.R.S. June 1980).<sup>22</sup> In other words, “non-violent direct action” is not inherently synonymous with, or a form of, “illegal activity,” as the AG infers. And

---

<sup>21</sup> Leonard S. Rubinowitz et. al., *A “Notorious Litigant” and “Frequenter of Jails”*: Martin Luther King, Jr., His Lawyers, and the Legal System, 10 Nw. J. L. & Soc. Pol’y 494, 497 (2016).

<sup>22</sup> The AG cites an IRS revenue ruling for various propositions. *See* AG Opp’n 6-7 (citing Rev. Rul. 75-384, 1975-2 C.B. 204 (1975)). But as the IRS later clarified, that ruling related to an organization “whose primary activity” was to sponsor antiwar protests in which they “urged [protesters] to commit violations of local ordinances and breaches of public order.” IRS Gen. Counsel Memorandum, GCM 38415, at \*7 (I.R.S. June 1980). KAHEA’s primary activity is not so narrow and unambiguously improper, and the AG has not presented any evidence that KAHEA ever “urged” *anyone* to violate *any* laws, whether HRS § 711-1105 or otherwise.

here, the AG did not present any evidence that KAHEA intended to support anything other than the constitutionally protected expressive conduct of demonstrators at Mauna Kea.

The impropriety of the AG’s inference—that the Aloha ‘Aina Support Fund inevitably supports or assists an illegal “blockade”—is even plainer to see in light of the context behind the Mauna Kea demonstrations. Over the past half year, *thousands* of people, including prominent political figures and celebrities, have traveled to Mauna Kea to engage in varying kinds of lawful non-violent direct action.<sup>23</sup> While *some* of the people demonstrating on Mauna *may* have engaged in civil disobedience or participated in a “blockade,” the AG has offered zero evidence that KAHEA itself engaged in, directly supported, or intended any such acts.

Nevertheless, the AG attempts to connect the acts of the 39 demonstrators who were arrested under HRS § 711-1105 to KAHEA. *See, e.g.*, AG Opp’n 7 (noting KAHEA’s “*apparent* support of the blockade” (emphasis added)). But even assuming some of the 39 people presently being prosecuted had some kind of tie to KAHEA (something that the AG has not shown), the AG’s theory disregards a central tenet of First Amendment doctrine, reflected in U.S. Supreme Court case law: KAHEA cannot be liable for the illegal conduct of others on the basis of association alone; rather, the AG must establish that KAHEA (1) authorized, directed, ratified those illegal acts *and* (2) specifically intended such illegal acts. *See Claiborne Hardware Co.*, 458 U.S. at 930 (holding that the First Amendment guarantees that an organization can be liable only for “the acts of its agents . . . that are undertaken within the scope of their actual or apparent authority” or “other conduct of which it had knowledge and specifically ratified”); *id.* at 920 (holding that the First Amendment forbids imposing liability for advocacy or association that unintentionally leads others to commit unlawful acts; there must be proof that the person “held a

---

<sup>23</sup> Big Island Now, *supra* note 1.

specific intent to further th[e] illegal aims” of those engaged in the “unlawful acts.”); *see also Healy v. James*, 408 U.S. 169, 186 (1972); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969); *Scales v. United States*, 367 U.S. 203, 229 (1961). The AG has shown neither here.

The AG has no evidence that KAHEA itself authorized, directed, or ratified any illegal acts—it only offers speculation. To assert, as the AG does, that KAHEA may be liable on these facts, “without a finding that [it] authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden [its] rights of political association that are protected by the First Amendment.” *Claiborne Hardware Co.*, 458 U.S. at 931. Nor has the AG has presented any evidence that KAHEA or any of its agents or officers had the specific intent to support the allegedly illegal activity of the 39 arrested demonstrators (as opposed to supporting clearly protected speech activity). Absent such evidence, the AG cannot convert KAHEA’s protected expressive activity into unprotected activity simply because *some* people that KAHEA associated with may have independently violated the law. *See, e.g., Santopietro v. Howell*, 857 F.3d 980, 990-91 (9th Cir. 2017) (holding that street performer who solely engaged in constitutionally protected expressive activity alongside another street performer who engaged in some unprotected activity could not be liable, in part because “[t]here is no evidence at all . . . of a prior agreement” between the two performers to engage in unprotected activity).

No matter how KAHEA’s activities relating to Mauna Kea (including its use of the Aloha ‘Aina Support Fund) are framed, they constituted forms of advocacy and speech protected by the federal and state constitutions. Accordingly, the AG’s investigation and subpoena—which was predicated on such protected activity being “illegal,” or at least in aid of “illegal activity”—appear unconstitutional.

## **2. The State appears to have used its investigatory power to retaliate against KAHEA for exercising its constitutional rights to freedom of speech**

In stark contrast to the AG’s lack of evidence for issuing the Subpoena, there is significant evidence that the AG is investigating KAHEA to retaliate against the organization for its anti-TMT viewpoint. If the AG’s investigation (and related subpoena) were issued with such retaliatory intent, it would plainly violate the constitutional prohibition against retaliation for engaging in First Amendment-protected activity.

“To state a First Amendment retaliation claim, a plaintiff must plausibly allege ‘that (1) he was engaged in a constitutionally protected activity, (2) the defendant’s actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant’s conduct.’” *Capp v. Cty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019) (quoting *O’Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016)). The present record suggests the AG engaged in First Amendment retaliation against KAHEA precisely because KAHEA expressed views that the State dislikes.

Regarding the first element, as already explained, KAHEA was engaged in constitutionally protected advocacy. Indeed, “[i]n opposing their local government’s approval of the [TMT] project, [KAHEA] engaged in activity paradigmatically protected by the First Amendment.” *White*, 227 F.3d at 1226.

Regarding the second element, the State’s actions seem designed to chill KAHEA’s—and other similarly situated organizations’—protected speech. While KAHEA “need not show [that its] ‘speech was actually inhibited or suppressed[,]’” the fact that the AG issued a “broad, invalid subpoena[.]” against KAHEA seeking confidential, private, and protected information would be enough to make that showing. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 916-17 (9th Cir. 2012)

(quoting *Mendocino Env'tl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999)). Indeed, what is sought by the Subpoena “far exceeded what was reasonable for the purpose of ascertaining” KAHEA’s compliance with corporate law, “and thus intruded unnecessarily on their First Amendment rights.” *White*, 227 F.3d at 1237. That the AG may only be investigating—and has not (yet) penalized—KAHEA is immaterial because an “intrusive investigation that d[oes] not culminate in an arrest” or penalty can still be held to “chill the exercise of First Amendment rights.” *Lacey*, 693 F.3d at 917 (citing *White*, 227 F.3d at 1237-38).

Regarding the third element, a strong inference can be drawn that KAHEA’s protected speech was a substantial factor (or *the* motivating factor) in the AG’s initiation of its investigation of KAHEA—in other words, that there is “a ‘causal connection’ between the government defendant’s ‘retaliatory animus’ and the plaintiff’s ‘subsequent injury.’” *Capp*, 940 F.3d at 1053 (citation omitted). First, the AG’s pursuit of the subpoenas against OHA and Hawaiian Airlines miles donors for their support of the demonstrations on Mauna Kea strongly suggests that the AG issued the Subpoena as retaliation against KAHEA to discourage its constitutionally protected political advocacy. Second, the AG’s overbroad approach and reliance on non-standard investigative practices (*e.g.*, issuing a subpoena without considering less-intrusive, less-burdensome means) further demonstrates retaliatory animus. Finally, that this Court found one of the reasons proffered by the AG for the Subpoena (*i.e.*, KAHEA’s alleged initial failure to file certain required financial reports) to be essentially pretextual further underscores the likely retaliatory animus behind this investigation.

In sum, the present record raises a strong inference that the AG is investigating KAHEA because of the State’s hostility towards KAHEA’s anti-TMT viewpoint, and that it is doing so precisely “to punish [KAHEA and its members] for their First Amendment activities and deter

them from future activities.” *Lacey*, 693 F.3d at 917. A stay is warranted to consider this issue.

**3. The Subpoena, in encompassing the identities of KAHEA’s donors, threatens KAHEA’s constitutional rights to freedom of association and privacy**

The subpoena encompasses records that may disclose the identities of KAHEA’s donors in violation of their rights to freedom of association under the First Amendment and article I, section 4, and their rights to privacy under article I, sections 6 and 7.

***iii. The Subpoena infringes KAHEA’s First Amendment and article I, section 4 right to freedom of association***

The U.S. Supreme Court has stated that the “freedom to associate with others for the common advancement of political beliefs and ideas is a form of ‘orderly group activity’ protected by the First [Amendment].” *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). And that freedom encompasses the right to associate with and support causes *anonymously*.<sup>24</sup> See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (describing “[i]nviolability of privacy in group association” as being “indispensable to preservation of freedom of association”); *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960) (holding that “compulsory disclosure of the membership lists” of advocacy organization “would work a significant interference with the freedom of association of their members”). As early as 1958, the Court recognized that it was “hardly a novel perception that “compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective . . . restraint on freedom of association[.]” *Patterson*, 357 U.S. at 462. Since then, the Court has “repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” *Buckley*, 424 U.S. at 64. This is because “[c]ompelled disclosures concerning protected First

---

<sup>24</sup> This principle applies equally to donors and members of an advocacy organization. See *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (“Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably.”).

Amendment political associations have a profound chilling effect on the exercise of political rights.” *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010) (citing *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963)).

Because the Subpoena—by reaching the identities of KAHEA’s donors—plainly covers documents protected by the First Amendment, the government’s demand “must survive exacting scrutiny.” *Buckley*, 424 U.S. at 64; *see also Patterson*, 357 U.S. at 460-61 (“[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”); *Perry*, 591 F.3d at 1164-65 (granting organization’s petition for writ of mandamus seeking a protective order on First Amendment grounds because the trial court “did not apply . . . the First Amendment’s more demanding heightened relevance standard[,]” which the court “must apply”). KAHEA need only make a showing of a “reasonable probability” of harm, threats, harassment, or reprisal.<sup>25</sup> *Buckley*, 424 U.S. at 88. After such a showing is made, the burden shifts to the State to meet “exacting scrutiny” under *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). This means the State must “convincingly show”: (1) an “overriding and compelling state interest,” *Gibson*, 372 U.S. at 545-46; a (2) “substantial relation between the information sought” and that interest, *id.*; and (3) “narrowly drawn” means. *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961); *see also Perry*, 591 F.3d 1147 (requiring “carefully tailored” request).

Here, the AG has failed to meet every part of its burden. While the State arguably would have a compelling interest in policing charitable fraud, here, the fact that the State’s two proffered justifications appear pretextual, and also appear to have been used to justify retaliation against KAHEA, undercuts that possibility. The all-encompassing financial records the AG seeks

---

<sup>25</sup> Here, the series of investigations against anti-TMT organization seem sufficient to raise the specter of a reasonable probability of harm and reprisal against KAHEA’s donors and supporters.

also have only a minimal to nonexistent relation to the proffered interests. As KAHEA argued, the AG’s purported need to investigate KAHEA’s failure to file *one* IRS form for *one* year does not justify seeking *all* of KAHEA’s bank records for a more-than-three-year period. Relatedly, in seeking effectively all of KAHEA’s bank records—and in also broadly encompassing the identities of KAHEA’s donors and members—the Subpoena is not narrowly tailored.

***iv. The Subpoena infringes KAHEA’s article I, section 6 right to privacy***

The Hawai‘i Constitution provides additional protection against unwarranted privacy intrusions that are arguably infringed here. Article I, section 6 provides that “[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.” Haw. Const., art. I, sec. 6. As the Hawai‘i Supreme Court has recognized, article I, section 6 “provides Hawaii’s people with powerful protection against *any* infringement of their right to privacy, by state *and* private actors.” *Pac. Radiation Oncology, LLC v. Queen’s Med. Ctr.*, 138 Haw. 14, 19 (2016). Further, it “generally provides greater privacy to Hawaii’s people than its federal analogs.” *Id.*; *see also Janra Enterprises, Inc. v. City & Cty. of Honolulu*, 107 Haw. 314, 320 (2005) (observing that article I, section 6 “afford[s] much greater privacy rights than the federal right to privacy” (citation omitted)). Article I, section 6 specifically protects “highly personal and intimate” information, which includes “medical, financial, educational, or employment records[,]” *Brende v. Hara*, 113 Haw. 424, 430 (2007) (citations omitted), as well as the “personal financial affairs” of “the people of Hawaii.” *Nakano v. Matayoshi*, 68 Haw. 140, 148 (1985). Here, the bank records at issue—which disclose the identities and contribution amounts of KAHEA’s donors—squarely implicate the highly personal and intimate personal financial affairs. And, as already explained, the AG has not provided any compelling state interest justifying such infringement.

*v. The Subpoena infringes KAHEA’s article I, section 7 right to privacy*

Separately, the AG—in seeking confidential bank records, as part of a criminal investigation, without obtaining a warrant—may have infringed KAHEA’s right to privacy under article I, section 7 of the Hawai‘i Constitution. That provision provides that “[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause . . . .” Haw. Const. Art. I, Sec. 7. It specifically protects “all information in which individuals have a legitimate expectation of privacy.” *State v. Walton*, 133 Haw. 66, 91 (2014); *see also State v. Biggar*, 68 Haw. 404, 407 (1986). While the U.S. Supreme Court has held that people do not have a legitimate expectation of privacy in bank records (because such records are “revealed to a third party”), *United States v. Miller*, 425 U.S. 435, 442-43 (1976), the Hawai‘i Supreme Court has held that “a mechanical application” of the federal “third party” doctrine “cannot be justified in all situations” under the Hawai‘i Constitution. *Walton*, 133 Haw. at 96.<sup>26</sup> Instead, to determine whether information disclosed to a third party is protected, a court must decide whether a person “held a legitimate expectation that such information would not be shared with others” by considering the following five issues:

[W]hether the individual considered such information to be private, whether that information reveals ‘intimate details of a person’s life,’ whether the individual released the information to a third party to obtain a necessary service, whether there was not realistic alternative but to disclose the information, and the extent to which disclosing such information would jeopardize an individual’s sense of security.

*Id.* at 97 (citations omitted). If such information falls within the scope of article I, section 7, the

---

<sup>26</sup> Indeed, in departing from the federal “third party” doctrine, the Hawai‘i Supreme Court cited the U.S. Supreme Court’s acknowledgment that “state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.” *Walton*, 133 Haw. at 98 (quoting *Arizona v. Evans*, 514 U.S. 1, 8 (1995)).

government “must obtain a warrant before conducting such searches, thus subjecting the issue to the scrutiny of a neutral disinterested magistrate before a search is conducted.” *Id.* at 97-98.

Here, all five factors seem to weigh in favor of the conclusion that KAHEA and its donors had a legitimate expectation of privacy in the bank records at issue, particularly when they disclose private, constitutionally protected donor identities that, if disclosed, would jeopardize donors’ sense of security. Thus, the AG’s failure to obtain a warrant before seeking KAHEA’s bank records violates article I, section 7 of the Hawai‘i Constitution.

#### IV. CONCLUSION

*Amicus curiae* ACLU of Hawai‘i respectfully requests that the Court consider these facts and legal doctrines as part of its disposition of KAHEA’s motion. Further, because the constitutional issues raised in this proceeding have merit and are significant—and could lead to irreparable injury—this Court should grant KAHEA’s Motion For Stay Pending Appeal.

DATED: Honolulu, Hawai‘i, March 6, 2020.

Respectfully submitted,

/s/ Jongwook “Wookie” Kim  
JONGWOOK “WOOKIE” KIM  
MATEO CABALLERO

ACLU OF HAWAI‘I FOUNDATION  
Attorneys for *Amicus Curiae*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on March 6, 2020, a true and correct copy of the foregoing document was served via electronic delivery through JEFS/JIMS on the following:

Clare Connors  
Attorney General, State of Hawai‘i

W. Max Levins  
Lawrence L. Tong  
Deputy Attorneys General  
State of Hawai‘i  
425 Queen Street  
Honolulu, Hawai‘i 96813

Attorneys for STATE OF HAWAI‘I

Richard Naiwieha Wurdeman  
Attorney at Law, A Law Corporation  
Pauahi Tower Ste. 720  
1003 Bishop Street  
Honolulu, Hawai‘i 96813

Attorney for KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE

DATED: Honolulu, Hawai‘i, March 6, 2020.

Respectfully submitted,

/s/ Jongwook “Wookie” Kim  
JONGWOOK “WOOKIE” KIM

ACLU OF HAWAI‘I FOUNDATION  
Attorney for *Amicus Curiae*