

APPEAL NO. 12-17808

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE K. YOUNG, JR.,

Plaintiff-Appellant,

v.

STATE OF HAWAII and NEIL
ABERCROMBIE in his capacity as
Governor of the State of Hawaii;
DAVID M. LOUIE in his capacity as
State Attorney General; COUNTY OF

(caption continued)

D.C. No. 1:12-cv-00336-HG-BMK

APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
HAWAII

THE HONORABLE HELEN
GILLMOR, DISTRICT JUDGE

STATE OF HAWAI‘I’S REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE ATTACHED 2,384 WORD
SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE STATE OF HAWAI‘I

CERTIFICATE OF SERVICE

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HAWAII, as a sub-agency of the State of Hawaii and WILLIAM P. KENOI in his capacity as Mayor of the County of Hawaii; and the Hilo County Police Department, as a sub-agency of the County of Hawaii and HARRY S. KUBOJIRI in his capacity as Chief of Police; JOHN DOES 1-25; JANE DOES 1-25; CORPORATIONS 1-5, AND DOE ENTITIES 1-5,

Defendants-Appellees.

STATE OF HAWAI‘I’S REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE ATTACHED 2,384 WORD
SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE STATE OF HAWAI‘I

Plaintiff filed on July 14, 2016 an opposition to the State of Hawai‘i’s July 12, 2016, motion for leave to file attached 2,384 word supplemental amicus curiae brief of the State of Hawai‘i. We address plaintiff’s arguments herein.

First, plaintiff claims the State of Hawai‘i is not an amicus curiae, but a party defendant. As already explained in its motion for leave, the State of Hawaii (along with its Governor and Attorney General) was dismissed below as a **party** defendant on immunity grounds. Clerk’s Record 42 at 9-14. **And**, Plaintiff Young **on appeal** did **not** challenge that immunity dismissal of the State of Hawaii (or of its Governor and Attorney General). Thus, the State of Hawaii, after its dismissal below on immunity grounds, and plaintiff’s failure to appeal that dismissal, was and is **no longer** a **party** to this appeal. Hawai‘i thus seeks instead to file an **amicus curiae** brief to defend the constitutionality of its laws.

Plaintiff then argues that this Court’s June 15, 2016 Order only allowed the Defendant parties to file a single brief. There are two problems with that argument. First, as just explained above, the State of Hawai‘i is no longer a party to this case (having been dismissed below, and plaintiff not challenging that dismissal on appeal), and thus the State of Hawai‘i, as an **amicus**, is not directly governed by any order directed at the **parties** to this case.

Second, even if the State of Hawai‘i were a party to this case (which it is not), because the State of Hawai‘i is an entirely separate entity from the County of Hawai‘i defendants (which include the County of Hawai‘i, the County police department, the County mayor, and the County police chief), and is represented by entirely separate counsel (the Attorney General's office, versus the Hawai‘i County Corporation Counsel), the State of Hawai‘i should be able to file its own supplemental brief, regardless of whether or not the County Defendants file their own supplemental brief. This is especially so in this case because the State and the County do not necessarily have the exact same interests; the State is defending the constitutionality of its **state** laws, while the County Defendants are defending the constitutionality of the County officials' particular **county** actions in denying the license to carry. Cf. FRAP 28(i) ("In a case involving more than one ... appellee, ... any number of ... appellees **may** join in a brief;" the "may" language makes clear that joining in a single brief is completely **optional**).

Plaintiff also seems to argue that the State of Hawai‘i cannot file a supplemental amicus brief after having previously filed a regular amicus brief. But just as the parties themselves are being allowed to file, in addition to their principal briefs on appeal, **supplemental** briefs to address the impact of the recent Peruta en banc decision on this case, it makes perfect sense for the State of Hawai‘i, as amicus, to also be able to address the impact of the Peruta en banc decision, too.

Certainly nothing in the rules precludes the State's filing of a supplemental amicus brief, when the parties have been ordered to file supplemental party briefs.¹ And the State is, in any event, asking for permission to file its 2,384 word supplemental amicus brief, even if no permission is technically required (except perhaps for the amicus brief to have a 2,384 word count roughly matching the 2,400 maximum word count limit ordered for the party briefs; but see footnote 2 below).²

Ultimately, because it is important that the State of Hawai‘i be allowed to be heard on the constitutionality of its own laws, see Yniguez v. State of Arizona. 939 F.2d 727, 739 (9th Cir. 1991) ("the simple fact is that **unless we allow the**

¹ Plaintiff is clearly wrong to suggest that the State's supplemental amicus brief would violate FRAP 29(e), which requires "[a]n amicus curiae [to] file its brief ... no later than 7 days after the **principal** brief of the party being supported is filed." That rule has no application here, as we are dealing with **supplemental** briefs at this time, not principal briefs. For the same reason, plaintiff is wrong to suggest the State's supplemental amicus brief would violate FRAP 28(c), which says "[t]he appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed." Rule 28(c) has no application to **supplemental** briefs, which this Court subsequently orders to be filed.

² The State did not seek to obtain the consent of all parties for the filing of its amicus brief because the State did not feel that consent was needed, given that FRAP 29(a) states that: "a **state** may file an amicus-curiae brief **without the consent of the parties** or leave of court." Out of an abundance of caution, however, the State filed a motion for leave because it sought to file a **2,384 word** amicus brief, and it was unclear whether or not FRAP 29(d)'s statement -- "Except by the court's permission, an amicus brief may be no more than **one-half** the maximum length authorized **by these rules** for a party's **principal** brief" -- applied to this situation. The **supplemental** briefs filed by the parties, after all, are not "principal" briefs, and the 2,400 word limit for the supplemental briefs was not set "by these rules," but rather by court order. Thus, FRAP 29(d)'s one-half-maximum-length rule probably does not actually apply here.

Attorney General to make his argument we will have to pass judgment on the constitutionality of a provision of Arizona law without hearing the views of the state of Arizona."), the State asks, respectfully, that its motion for leave to file its 2,384 supplemental amicus brief be granted.

DATED: Honolulu, Hawai'i, July 19, 2016.

/s/ Girard D. Lau _____
GIRARD D. LAU
Solicitor General of Hawaii
KIMBERLY TSUMOTO GUIDRY
First Deputy Solicitor General
ROBERT T. NAKATSUJI
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CERTIFICATE OF SERVICE

I certify that on July 19, 2016, I electronically filed the State of Hawai‘i's Reply Memorandum in Support of Motion for Leave to File attached 2,384 word Supplemental Amicus Curiae Brief of the State of Hawai‘i, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

DATED: Honolulu, Hawaii, July 19, 2016.

/s/ Girard D. Lau

GIRARD D. LAU

Solicitor General of Hawaii

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