ALSTON HUNT FLOYD & ING LAWYERS
in affiliation with 大成 DENTONS

OAHU OFFICE:
1001 Bishop Street
Suite 1800
Honolulu, HI 96813

BIG ISLAND OFFICE:
26-238 Hawai`i Belt Road
Hilo, HI 96720

Phone: (808) 524-1800
Fax: (808) 524-4591
www.ahfi.com

PAUL ALSTON
Phone: (808) 524-1888
Fax: (808) 524-4591
E-mail:
PAlston@ahfi.com

September 13, 2017

Chief Clerk
Supreme Court of Hawai‘i
417 South King Street
Honolulu, Hawai`i 96813

Re: ***Tax Foundation of Hawai‘i v. State of Hawai‘i,***
No. SCAP-16-0000462

Dear Honorable Court:

Pursuant to Hawai‘i Rules of Appellate Procedure Rule 28(j), the Tax Foundation of Hawaii (the “Foundation”), through its counsel, hereby responds to the State of Hawai‘i’s (“State”) September 7, 2017 letter (“Letter”) regarding the newly signed Act 1 of the 2017 Special Session (the “Act”).

The Letter is disingenuous, at best in seeking to convince this Court that this Appeal is no longer appropriately before this Court.

The Foundation respectfully submits that the Act is pertinent to this Appeal for entirely different reasons than those submitted by the State:

- Section 5 of the Act, both expands the purposes for which the State can “skim” collections (now including administration of the amounts collected) and diminishes the percentage “skimmed” (from 10% to 1%) – highlighting the excessive mature of the amounts previously skimmed. Contrary to the Letter, Section 5 is irrelevant to skimming which occurred before the effective date of the Act. The State ignores Section 20 of the Act which says that the Act **does not affect** rights that matured or **proceedings that were begun** before the effective date of the Act.

- Moreover, Section 5 of the Act, amending HRS § 248-2.6(b), (c), and (d) left intact the key language that the Foundation relied upon on pages 20-21 of its Opening Brief – specifically that the State is not properly interpreting that whole of the statute.

And, perhaps most importantly:

- Section 9 of the Act adds a HRS § 237D-2(e)(2), which states:

> If a court of competent jurisdiction determines that the amount of county surcharge on state tax revenues deducted and withheld by the State, pursuant to Section 248-2.6, violates statutory or constitutional law and, as a result, awards moneys to a county with a population greater than five hundred thousand, then an amount equal to the monetary award shall be deducted and withheld from the tax revenues deposited under paragraph (1) into the mass transit special fund, and those funds shall be a general fund realization of the State.

By this language, the Legislative and Executive Branches:

- Explicitly recognize that this Court has a role, in an appropriate case within its jurisdiction, in assessing the size and validity of the skimming of surcharge revenues;

- Perniciously discriminate against the taxpayers of the City & County of Honolulu in violation of Hawai'i Const. Article VII § 1 (which requires the legislature to adopt "general laws") by exposing only those taxpayers to the obligation to pay back any court awarded refund of prior amounts skimmed at the 10% rate from amounts collected from them;[1] and

[1] This Court's decision in *Sierra Club v. DOT*, 202 P.3d 1226, 2009 LEXIS 118 (2009) teaches that "general laws" are ones that "probably" will apply to more than one county. There is nothing to suggest that the population of the Neighbor Island Counties will ever grow to more than 500,000, only Honolulu has suffered from skimming at 10%, and there is nothing in the purpose of the Act to justify singling out the City and County of Honolulu for the obligation to indemnify the State against having to repay excess amounts skimmed in the past. Indeed, by blocking reimbursement, the legislature has immediately and permanently condemned those who paid the Oahu surcharge to having to bear a disproportionate GET burden (in the form of excessive

- Create a new constitutional problem by disregarding Hawai‘i Const. Article VIII § 4 which forbids laws that require counties to pay any "previously accrued claims."[2]

For these reasons, the Act is pertinent to this appeal but it cannot be a reason for deeming this appeal to be moot. If the Court believes further briefing to expand on these issues would be helpful, Plaintiff-Appellant would be pleased to provide a supplemental brief whenever necessary.

Respectfully submitted,

PAUL ALSTON
Lori King Stibb

PA:LKST:rjkp

cc: All Counsel

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amount skimmed) and provides both the certainty and immediacy needed to provide standing—if, indeed, the existence of standing was otherwise in doubt.

[2] The record of the 1950 constitutional convention shows that the framers adopted this provision

> to curb some legislative practices found obnoxious by local units. One of these practices is compelling county government to pay accrued claims. This form of legislation it was urged, usurped the judgment of the courts and interfered unnecessarily with local affairs and finances. It was for the purpose of preventing such continued practice that the sentence, 'No laws shall be passed mandating any political subdivision to pay any previously accrued claim,' was incorporated into the provision on local government.

Proceedings of the Constitutional Convention of Hawaii, Vol. I, Committee of the Whole Report No. 21 (1950). *See Fasi v. City & County of Honolulu,* 50 Haw. 277, 282, 439 P.2d 206, 209-10 (1968).

Although the provision does not require the City & County to cut a check to the State, it has the same economic effect – namely, moneys otherwise due to the City & County are permanently redirected to the State's general fund.

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Case Type: Appeal
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Supporting Document(s):

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Douglas Shih-Ging Chin *(hawaiiag@hawaii.gov)*
Michael A. Lilly *(michael@nljlaw.com)*
Robert Tadao Nakatsuji *(robert.t.nakatsuji@hawaii.gov)*
Nathan Sau Chung Chee *(nathan.s.chee@hawaii.gov)*
Hugh R. Jones *(hugh.r.jones@hawaii.gov)*
Lori King Stibb *(lstibb@ahfi.com)*
Paul Alston *(palston@ahfi.com)*

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