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 DAVID ANDERSON, SARAH ANDERSON
 WINTER ANDERSON, HEATHER NAHAKU KALEI,
 ARIEL TERGEOGLOU, DEAN EDWARDS,
 SALLY LUNDBURG, KEITH TALLETT,
 ROLAND SHACKELFORD, JERRY BESS,
 JOEL GOLLAHER, STEVEN ROBERSON,
 and STEPHEN SOROS

Electronically Filed
THIRD CIRCUIT
3CCV-22-0000106
22-APR-2022
02:22 PM
Dkt. 1 CMP

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THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

MĀLAMA I KE KAI 'O WAIPI'O, a volunteer)	CIVIL NO.
community association organized under)	[Declaratory Judgment]
Chapter 429, HRS, DAVID ANDERSON,)	(Hilo)
SARAH ANDERSON, WINTER ANDERSON,)	
HEATHER NAHAKU KALEI,)	COMPLAINT; SUMMONS
ARIEL TERGEOGLOU, SALLY LUNDBURG,)	
KEITH TALLETT, ROLAND SHACKELFORD,)	
DEAN EDWARDS, JERRY BESS,)	
JOEL GOLLAHER, STEVEN ROBERSON,)	
STEPHEN SOROS, and STEVEN STRAUSS,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
MITCHELL D. ROTH, in his capacity as Mayor of)	
the County of Hawai'i, IKAIKA RODENHURST,)	

in his capacity as Director, County of Hawai‘i,)
Department of Public Works, COUNTY OF)
HAWAI‘I, and DOES 1-10,)
)
Defendants.)
_____)

COMPLAINT

PARTIES, JURISDICTION AND VENUE

1. Plaintiff MĀLAMA I KE KAI ‘O WAIFI‘O is a nonprofit volunteer association organized under chapter 429, Hawai‘i Revised Statutes ("HRS"). Its members include adults, their children and their grandchildren of native Hawai‘ian ancestry who have enjoyed access to the ocean and beach and a clean and healthful environment at Waipi‘o, County and State of Hawai‘i and engaged in spiritual, traditional and customary practices there. Adult members of Plaintiff MĀLAMA I KE KAI ‘O WAIFI‘O, including some of its members of native Hawai‘ian ancestry, have enjoyed ocean and beach access and a clean and healthful environment at Waipi‘o, County and State of Hawai‘i and access to Waimanu and its State camping areas via Waipi‘o and the Mulawai trail pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai‘i Constitution, the administrative rules and regulations of the State of Hawai‘i, Department of Land & Natural Resources, and the common law. MĀLAMA I KE KAI ‘O WAIFI‘O has the capacity to assert claims on behalf of its members and has standing in this action pursuant to HRS §429-7.

2. All Plaintiffs below are adult residents of the County and State of Hawai‘i.

3. Plaintiff DAVID ANDERSON is a resident of Hamakua District, County and State of Hawai‘i and claims rights to ocean and beach access and a clean and healthful environment at Waipi‘o, County and State of Hawai‘i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai‘i Constitution and the common law.

4. Plaintiff SARAH ANDERSON is a resident of Hamakua District, County and State of Hawai'i and claims rights to ocean and beach access and a clean and healthful environment at Waipi'o, County and State of Hawai'i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai'i Constitution and the common law.

5. Plaintiff WINTER ANDERSON is a resident of North Kona District, County and State of Hawai'i and claims rights to ocean and beach access and a clean and healthful environment at Waipi'o, County and State of Hawai'i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai'i Constitution and the common law.

6. Plaintiff HEATHER NAHAKU KALEI is a resident of South Kohala District, County and State of Hawai'i and claims rights to ocean and beach access and a clean and healthful environment at Waipi'o, County and State of Hawai'i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai'i Constitution and the common law.

7. Plaintiff ARIEL TERGEOGLOU is a resident of South Kohala District, County and State of Hawai'i and claims rights to ocean and beach access and a clean and healthful environment at Waipi'o, County and State of Hawai'i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai'i Constitution and the common law.

8. Plaintiff ROLAND SHACKELFORD is a resident of South Kohala District, County and State of Hawai'i and claims rights to ocean and beach access and a clean and healthful environment at Waipi'o, County and State of Hawai'i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai'i Constitution and the common law.

9. Plaintiff DEAN EDWARDS is a resident of Hamakua District, County and State of Hawai'i and claims rights to ocean and beach access and a clean and healthful environment at

Waipi'o, County and State of Hawai'i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai'i Constitution and the common law.

10. Plaintiff SALLY LUNDBURG is a resident of Hamakua District, County and State of Hawai'i and claims rights to ocean and beach access and a clean and healthful environment at Waipi'o, County and State of Hawai'i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai'i Constitution and the common law.

11. KEITH TALLETT is a resident of Hamakua District, County and State of Hawai'i and claims rights to ocean and beach access and a clean and healthful environment at Waipi'o, County and State of Hawai'i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai'i Constitution and the common law.

12. Plaintiff JERRY BESS is a resident of South Kohala District, County and State of Hawai'i and claims rights to ocean and beach access and a clean and healthful environment at Waipi'o, County and State of Hawai'i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai'i Constitution and the common law.

13. Plaintiff JOEL GOLLAHER is a resident of Hamakua District, County and State of Hawai'i and claims rights to ocean and beach access and a clean and healthful environment at Waipi'o, County and State of Hawai'i, and access to Waimanu and its State camping areas via Waipi'o and the Mulawai trail pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai'i Constitution, the administrative rules and regulations of the State of Hawai'i, Department of Land & Natural Resources and the common law.

14. Plaintiff STEVEN ROBERSON is a resident of Hamakua District, County and State of Hawai'i and claims rights to ocean and beach access and a clean and healthful

environment at Waipi‘o, County and State of Hawai‘i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai‘i Constitution and the common law.

15. Plaintiff STEPHEN SOROS is a resident of South Kohala District, County and State of Hawai‘i and claims rights to ocean and beach access and a clean and healthful environment at Waipi‘o, County and State of Hawai‘i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai‘i Constitution and the common law.

16. Plaintiff STEVEN STRAUSS is a resident of North Hilo District, County and State of Hawai‘i and claims rights to ocean and beach access and a clean and healthful environment at Waipi‘o, County and State of Hawai‘i pursuant to Article 1, sections 2, 5, and 8 and Article 11, sections 1, 6 and 9 of the Hawai‘i Constitution and the common law.

17. Defendant MITCHELL D. ROTH is the duly elected Mayor of the COUNTY OF HAWAI‘I and sued herein in such capacity.

18. Defendant IKAIKA RODENHURST is the appointed Director, County of Hawai‘i, Department of Public Works, and sued herein in such capacity.

19. Defendant COUNTY OF HAWAI‘I is a municipal corporation and political subdivision of the State of Hawai‘i whose powers and limitations are set forth in chapter 46, HRS including its capacity to be sued.

20. At times in this Complaint, some or all of Defendant MITCHELL D. ROTH, Defendant IKAIKA RODENHURST and Defendant COUNTY OF HAWAI‘I are collectively referred to herein as "County Defendants".

21. Jurisdiction is proper in this Circuit Court under the common law and the applicable provisions of HRS including §§603-21.5, 603-21.7, 603-21.9, and 632-1 conferring

jurisdiction over the Plaintiffs' respective claims because the matters at issue occurred within this Circuit and the claims arose here.

22. Venue is proper under HRS §603-36 because the claims herein arose in this judicial district and all Defendants have their respective principal places of business here.

23. Each named Defendant has participated in the wrongful acts or omissions alleged herein and each named Defendant has acted as the agent and servant of the other named Defendants.

24. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendant DOES 1-10 (“DOE Defendants”) are unknown to Plaintiffs, who therefore sue said DOE Defendants by such fictitious names and will ask leave of Court to amend this complaint to substitute the true names and capacities when same are ascertained.

25. Plaintiffs performed due and diligent search to ascertain the names and identities of DOE Defendants, including interview of known witnesses and examination of all pertinent reports, documents and records retrievable by Plaintiffs.

26. Each named Defendant and DOE Defendants, inclusive, have participated in the unlawful acts alleged herein. Accordingly, each named Defendant and DOE Defendants, inclusive, is responsible for violation of Plaintiffs' respective rights asserted herein through their own acts and omissions or through the acts and omissions of their agents.

FACTS COMMON TO ALL COUNTS

27. Historically, the Hawai‘i Supreme Court has committed to preserve public access to the ocean by vesting rights in waterways and beaches in the State when reasonably possible. Longstanding public use of Hawai‘i's beaches has ripened into a customary right and public policy favors extending to public use and ownership as much of Hawai‘i's shoreline as is

reasonably possible. These rights enjoyed by Plaintiffs and the rights guaranteed by Article 1, sections 2, 5 and 8 and 11 of the Hawai‘i Constitution are fundamental. Moreover, Article 11, section 1 requires County Defendants to promote use of Hawai‘i’s natural resources for the people. Article 11, section 6 guarantees that all natural fisheries in the sea waters of the State remain free to the public. Article 11, section 9 guarantees all persons the right to a clean and healthful environment.

28. Waipi‘o Valley Road is owned by the County of Hawai‘i and a necessary and integral component of public access to Waipi‘o beach and the adjacent ocean. The sacred Waipi‘o Valley was the boyhood home of King Kamehameha I, and an important center for political and religious life in Hawai‘i. The beach at Waipi‘o features some of Hawai‘i’s best surfing waves, unrestricted flow of freshwater via the Waipi‘o river, and incomparable dramatic landscapes favored by centuries of Hawai‘ian royalty.

29. Before Western contact, native Hawai‘ians used Waipi‘o beach and the adjacent ocean for fishing, surfing, gathering, swimming, spiritual practices, recreation, and enjoyment of life.

30. Since Western contact, residents of what is now the County of Hawai‘i have used Waipi‘o beach and the adjacent ocean for fishing, surfing, gathering, swimming, spiritual practices, recreation, and enjoyment of life up until the present time.

31. Article 1, section 2 of the Hawai‘i Constitution guarantees all persons certain inherent and inalienable rights, including enjoyment of life, liberty and the pursuit of happiness.

32. For Plaintiffs and their ohana, access to the beach and ocean at Waipi‘o is necessary to fulfill their enjoyment of life and pursuit of happiness.

33. The mission of Plaintiff MĀLAMA I KE KAI ‘O WAIPI‘O is to ensure ocean access for Hawai‘i Island residents to perpetuate traditional forms of wave riding, fishing, gathering, and other shoreline activities that sustain a thriving Waipi‘o Valley. Its mission and testimonials from some of its members may be viewed at <http://www.oceanaccesswaipio.org>.

34. Up until February 25, 2022, the members of Plaintiff MĀLAMA I KE KAI ‘O WAIPI‘O, the individual Plaintiffs and their respective ohana all enjoyed free, unrestricted access¹ over the County-owned road from the Waipi‘o valley lookout to the valley floor and then to the ocean and beach at Waipi‘o.

35. Plaintiffs also enjoy the right to travel along Waipi‘o Valley Road under HRS §7-1 rights of way, which guarantees that the people shall have the right of way and roads shall be free to all. Under the common law, Plaintiffs also have the right to use County of Hawai‘i roads.

36. On February 25, 2022, Defendant MITCHELL D. ROTH interrupted and violated Plaintiffs' access to the ocean and beach and a clean and healthful environment at Waipi‘o and Plaintiffs' enjoyment of life and pursuit of happiness.

37. In claimed reliance on a flawed Preliminary Geotechnical Engineering Evaluation prepared by the engineering firm Hart Crowser for Defendant County of Hawai‘i, Department of Public Works and similarly flawed recommendations from the same Defendant County of Hawai‘i, Department of Public Works, Defendant MITCHELL D. ROTH exaggerated and misstated the conclusions of such Evaluation and declared an emergency when none existed.

¹ County Defendant Department of Public Works closed public access to Waipi'o during the approach of Hurricane Douglas in July 2020 and twice for holidays during coronavirus restrictions.

38. Specifically, Defendant MITCHELL D. ROTH issued a Traffic Emergency Zone Declaration dated February 25, 2022 ("Declaration") and Waipi'o Valley Road Emergency Rule No. 1 ("Emergency Rule").

39. County Defendants' closure of Waipi'o Valley Road to beach and ocean users but no other groups were and remain arbitrary and capricious.

40. There appear to be no records of incidents of injury or death to persons from rock fall, landslide or roadway failure along Waipi'o Valley Road at any time during the last 50 years.

41. Nevertheless Defendant MITCHELL D. ROTH's Declaration claims that "upon scientific information and expertise available, Waipi'o Valley Road is in **imminent** threat of slope and roadway failure threatening the health, safety, and welfare of the people" and "due to the possibility of **imminent** emergency or disaster", closure to some groups but not all groups is necessary. Emphasis added.

42. Email communications with Defendant County of Hawai'i, Department of Public Works clearly show that the perceived threat to persons on which the Declaration is based rests on the flawed Preliminary Geotechnical Engineering Evaluation's erroneous conclusions that pedestrians on Waipi'o Valley Road have a greater than 1/18,000 chance of dying from rock fall events per single trip over the Road and vehicle occupants have a risk of 1/170,000 chance of dying from rock fall events per single trip over the Road.

43. In its Preliminary Geotechnical Engineering Evaluation, Hart Crowser made clear mathematical errors in its use of wrong equations to calculate risk to pedestrians and vehicle occupants from potential rock fall.

44. Weeks before this Complaint was filed, the mathematical errors and erroneous risk conclusions made by Hart Crowser were made known to Hart Crowser and Defendant

County of Hawai'i, Department of Public Works.

45. To date, Defendant County of Hawai'i, Department of Public Works has failed and refused to require Hart Crowser to correct its mathematical errors and erroneous risk conclusions.

46. Written correspondence from Defendant County of Hawai'i, Department of Public Works and Hart Crowser show that the degree of threat to persons on which Defendant MITCHELL D. ROTH's Declaration and Emergency Rule is based rests on Hart Crowser's miscalculated risk of harm to pedestrians and vehicle occupants from potential rock fall.

47. When properly employed by Civil Engineer Panos Prevedouros, Ph. D.², the methodology misapplied by engineers Hart Crowser in their Preliminary Geotechnical Engineering Evaluation yields a far less actual risk to pedestrians, approximately 1/5,000,000. Similarly, the properly calculated risk to vehicle occupants is approximately 1/17,000,000.³ Both of these actual risks nearly 100 times less than calculated by Hart Crowser. Noth of these actual risks are well within the acceptable risk for existing slopes using the Australian Geomechanics Society ("AGS") risk evaluation methodology applied in the Hart Crowser Preliminary Geotechnical Engineering Evaluation at pp. 10-11.

48. Even with its mathematical errors and exaggerated risk conclusions, the Hart Crowser Evaluation did not recommend closure of Waipi'o Valley Road, except for times associated with heavy rain events. Moreover, nowhere in the Hart Crowser report does the word "imminent" appear. The Hart Crowser Preliminary Geotechnical Engineering Evaluation provides no support for closing Waipi'o Valley Road to Plaintiffs.

² Dr. Prevedouros is the retired chair of the Department of Engineering, University of Hawai'i.

³ Hart Crowser assumes one in three vehicles struck by rocks will result in death.

49. No credible scientific information and available expertise nor other rational basis exists to support Defendant MITCHELL D. ROTH's Declaration and Emergency Rule that Waipi'o Valley Road is "in **imminent** threat of slope and roadway failure threatening the health, safety, and welfare of the people" and "due to the possibility of **imminent** emergency or disaster", closure to some groups but not all groups is necessary. Emphasis added.

50. The effects of the Declaration and Emergency Rule interrupt and violate Plaintiffs' rights of access to the ocean and beach at Waipi'o, including Plaintiffs' enjoyment of life and pursuit of happiness in favor of other groups whose rights of access to Waipi'o Valley and the ocean and beach at Waipi'o remains unaffected.

51. In issuing the Declaration and Emergency Rule, Defendant MITCHELL D. ROTH acted beyond the scope of to his lawful authority. Specifically, Defendant MITCHELL D. ROTH claimed to rely on HRS §264-1.5, but HRS §264-1.5 provides no authority for his actions and does not allow for closure of Waipi'o Valley road. Even if HRS §264-1.5 had provided him authority, Defendant MITCHELL D. ROTH failed to follow the requirements of the statute.

52. The purpose of HRS §264-1.5 is to provide access to an area that is threatened by a temporary closure or lack of adequate access to a road, not to close the only road to an area with no alternate access.

53. By issuing his Declaration and Emergency Rule, Defendant MITCHELL D. ROTH sought to designate the Waipi'o Valley to be a traffic emergency zone and close the road. The Declaration and Emergency Rule, however, did not comply with the statutory requirement of HRS §264-1.5 to fix a place and time, not later than twenty-four hours after the designation, for a hearing to be held before the county director of transportation.

54. The terms of the Declaration and Emergency Rule allow use of Waipi‘o Valley Road by some groups with no safeguards at all, while arbitrarily denying other groups use of the Road.

55. The terms of the Declaration and Emergency Rule fail to make reasonable accommodations to provide for continued use of Waipi‘o Valley Road by Plaintiffs and others to access the ocean and beach at Waipi‘o in exercise of their rights guaranteed by the Hawai‘i State constitution and the public trust doctrine.

56. The Declaration and Emergency Rule are unlawful, unnecessary and continue to cause division among long time users of Waipi‘o Valley Road and the Hamakua community.

COUNT 1
DECLARATORY RELIEF

57. Plaintiffs reallege Paragraphs 1 through 56, inclusive.

58. An actual substantial controversy exists between Plaintiffs and Defendants in which Plaintiffs assert that Defendant MITCHELL D. ROTH's Declaration and Emergency Rule were made upon unlawful procedure and are therefore void and of no legal effect and County Defendants assert to the contrary.

59. A second actual substantial controversy exists between Plaintiffs and Defendants in which Plaintiffs assert that Defendant MITCHELL D. ROTH's Declaration and Emergency Rule violate and misapply the letter and purpose of Chapter 264, HRS including HRS §264-1.5, and are *ultra vires*, and therefore void and of no legal effect and County Defendants assert to the contrary.

60. A third actual substantial controversy exists between Plaintiffs and Defendants in which Plaintiffs assert that Defendant MITCHELL D. ROTH's Declaration and Emergency Rule are arbitrary and capricious because they are not based upon credible scientific information and

expertise nor any other rational basis and are therefore void and of no legal effect and County Defendants assert to the contrary.

61. A fourth actual substantial controversy exists between Plaintiffs and Defendants in which Plaintiffs assert that Defendant MITCHELL D. ROTH's Declaration and Emergency Rule fail to make reasonable, available accommodations to mitigate violation of Plaintiffs' rights, and are therefore void and of no legal effect and County Defendants assert to the contrary.

62. Absent grant of declaratory relief, Plaintiffs have no adequate remedy at law and cannot be fully compensated for violation of their rights by award of money damages.

63. Accordingly, Plaintiffs are entitled to declaratory judgment that:

a. Defendant MITCHELL D. ROTH's Declaration and Emergency Rule were made upon unlawful procedure and are therefore void and of no legal effect.

b. Defendant MITCHELL D. ROTH's Declaration and Emergency Rule violate and misapply the letter and purpose of Chapter 264, HRS, including HRS §264-1.5, and are *ultra vires*, and therefore void and of no legal effect.

c. Defendant MITCHELL D. ROTH's Declaration and Emergency Rule are arbitrary and capricious because they are not based upon credible scientific information and expertise nor any other rational basis and are therefore void and of no legal effect.

d. Defendant MITCHELL D. ROTH's Declaration and Emergency Rule fail to make reasonable, available accommodations to mitigate violation of Plaintiffs' rights, and are therefore void and of no legal effect.

COUNT 2
VIOLATION OF PUBLIC TRUST DOCTRINE

64. Plaintiffs reallege Paragraphs 1 through 56, and Paragraphs 58 through 63, inclusive.

65. The Hawai'i constitution adopts the public trust doctrine as a fundamental principle of constitutional law. Article 11, section 1 provides in pertinent part that "the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land ... All public natural resources are held in trust by the State for the benefit of the people." The shoreline below the high-water mark of the ocean is a natural resource, owned by the State, and held in trust for the enjoyment of certain public rights, including Plaintiffs' rights of access to the ocean and beach at Waipi'o, enjoyment of life and pursuit of happiness.

66. The public trust encompasses all the water resources and other public natural resources in the State, including the shoreline, and it requires that state agencies and political subdivisions, including Defendant County of Hawai'i, must take the initiative in considering, protecting and advancing public rights in the resources at every stage of the decision-making process.

67. County Defendants' arbitrary, irrational and capricious closure of Waipi'o Valley Road failed to consider, protect and advance Plaintiffs' fundamental public rights of access to and use of the ocean and beach at Waipi'o and therefore violates the public trust doctrine. Accordingly, Defendant MITCHELL D. ROTH's Declaration and Emergency Rule are void and of no legal effect.

COUNT 3
VIOLATION OF PLAINTIFFS' CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION

68. Plaintiffs reallege Paragraphs 1 through 56, and Paragraphs 58 through 63, and Paragraphs 65 through 67, inclusive.

69. The Hawai'i Constitution Article 1, section 5 guarantees every person "equal protection of the laws." Every person within the State's jurisdiction is protected against intentional and arbitrary discrimination.

70. Exclusion of Plaintiffs from use of Waipi'o Valley Road in favor of other groups intentionally and arbitrarily discriminates against Plaintiffs and impairs their fundamental rights in violation of their constitutional respective rights to equal protection.

71. No rational relationship exists between the disparity of treatment of various groups seeking to continue to use Waipi'o Valley Road and some legitimate governmental purpose. There is no reasonably conceivable state of facts that could provide a rational basis for the exclusion of Plaintiffs from use of Waipi'o Valley Road in the exercise of their fundamental rights. If Waipi'o Valley Road is safe enough for valley residents, tenants, landowners and others to use under the Declaration and Emergency Rule, it is safe enough for Plaintiffs to use as well.

72. The only basis offered by County Defendants to close Waipi'o Valley Road to Plaintiffs is that "upon scientific information and expertise available, Waipi'o Valley Road is in **imminent** threat of slope and roadway failure threatening the health, safety, and welfare of the people" and "due to the possibility of **imminent** emergency or disaster". Emphasis added.

73. The basis stated by County Defendants, however, is demonstrably false. No scientific information and expertise states that Waipi'o Valley Road is in **imminent** threat of slope and roadway failure. Moreover, common sense and historical evidence shows that the County Defendants' claim is untrue. In addition, the probable risk of harm or death to users of Waipi'o Valley Road from rock fall events is vastly exaggerated by County Defendants, based on defectively applied mathematics, and belied by common sense and historical evidence.

74. Even the defective Hart Crowser Preliminary Geotechnical Engineering Evaluation relied upon by County Defendants does not support closure of Waipi‘o Valley Road except during and immediately after heavy rain events.

75. Accordingly, the Court should hold that Defendant MITCHELL D. ROTH's Declaration and Emergency Rule are void because they violate Plaintiffs' respective rights to equal protection.

COUNT 4
PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

76. Plaintiffs reallege Paragraphs 1 through 56, Paragraphs 58 through 63, Paragraphs 65 through 67, and Paragraphs 69 through 75, inclusive.

77. Plaintiffs have a strong likelihood of prevailing on their claims in this Complaint. Absent grant of an order for preliminary injunction, Plaintiffs have no adequate remedy at law to prevent County Defendants and their agents from continuing to violate State law, Plaintiffs' respective Hawai‘i constitutional rights, and the State public trust by keeping Waipi‘o Valley Road closed to Plaintiffs and the public.

78. Unless enjoined by this Court, County Defendants' continuing unlawful acts subject Plaintiffs to irreparable harm, including continuing impairment and/or loss of their rights to enjoy the ocean and beach at Waipi‘o and their respective constitutional rights to enjoy life, happiness, and a clean and healthful environment for at least the next three years, for which they have no adequate remedy at law.

79. Impairment of Plaintiffs' rights cannot be remedied by money damages alone.

80. Grant to Plaintiffs of preliminary and permanent injunctive relief promotes and serves the public interest, including vindication of Hawai‘i constitutional rights enjoyed by all

citizens, access to the ocean and beach at Waipi‘o, a clean and healthful environment, and respect for the rule of law and the public trust.

81. Plaintiffs are entitled to preliminary and permanent injunctive relief enjoining County Defendants, their agents, and DOE Defendants from enforcing the Declaration and Emergency Rule.

COUNT 5
VIOLATION OF PROCEDURAL DUE PROCESS

82. Plaintiffs reallege Paragraphs 1 through 56, Paragraphs 58 through 63, Paragraphs 65 through 67, Paragraphs 69 through 75, and Paragraphs 77 through 81, inclusive.

83. The United States and Hawai‘i Constitutions protect individuals from deprivation of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Haw. Const. art. 1, § 5. This protection includes both a procedural and substantive component. The right to procedural due process protects individuals from deprivation of a constitutionally protected interest without adequate procedural protections. In this case, County Defendants never provided a meaningful hearing to persons affected by Defendant MITCHELL D. ROTH’s Declaration and Emergency Rule.

84. The Declaration and Emergency Rule violated Plaintiffs' procedural due process rights because they suspended Plaintiffs' fundamental State constitutional, statutory and common law rights to access, enjoyment of life and happiness and a clean and healthful environment without notice and a meaningful opportunity to be heard. The sole statute relied on by Defendant MITCHELL D. ROTH, HRS 264-1.5 requires a hearing, which was not provided.

85. The Declaration and Emergency Rule exceptionally and adversely affect Plaintiffs on an individual basis because Plaintiffs are all frequent regular surfers and other users of the beach and ocean at Waipi‘o.

86. Because the Declaration and Emergency Rule violated Plaintiffs' procedural due process rights, Plaintiffs are entitled to judgment that the Declaration and Emergency Rule are void and unenforceable.

COUNT 6
VIOLATION OF SUBSTANTIVE DUE PROCESS

87. Plaintiffs reallege Paragraphs 1 through 56, Paragraphs 58 through 63, Paragraphs 65 through 67, Paragraphs 69 through 75, Paragraphs 77 through 81, and Paragraphs 83 through 86, inclusive.

88. Plaintiffs' rights to substantive due process protects them from the arbitrary and irrational interference with Plaintiffs' constitutionally protected interests by County Defendants that flows from Declaration and Emergency Rule.

89. County Defendants have violated substantive due process because the issuance and enforcement of the Declaration and Emergency Rule are clearly arbitrary and unreasonable and have no substantial legitimate relation to the public health, safety, morals, or general welfare.

90. Defendant MITCHELL D. ROTH's misrepresentation and exaggeration of the condition of Waipi'o Valley Road is not rationally related to a legitimate safety interest, because the basis for the decision is itself not rational. MITCHELL D. ROTH claims that Waipi'o Valley Road is imminent threat of slope and roadway failure is wrong, exaggerated, unsupported by science, mathematics and expertise.

91. Plaintiffs are informed and believe and thereon allege that, contrary to the need for immediate mobilization of private and government services to remediate the claimed hazardous conditions along Waipi'o Valley Road stated in the Declaration, no private or government services have been mobilized to remediate the claimed hazardous conditions in the three months since issuance of the Declaration.

92. Defendant MITCHELL D. ROTH's executive action is egregious official conduct that is arbitrary in the constitutional sense and amounts to an abuse of power lacking any reasonable justification in the service of a legitimate governmental objective. Because the Declaration and Emergency Rule interfere with Plaintiffs' fundamental rights, the Declaration and Emergency Rule must actually advance their stated purposes to avoid violation of Plaintiffs' substantive due process rights. The Declaration and Emergency Rule do not advance their stated purposes.

93. Because the Declaration and Emergency Rule violate Plaintiffs' substantive due process rights, Plaintiffs are entitled to judgment that the Declaration and Emergency Rule are void and unenforceable.

COUNT 7
PRIVATE ATTORNEY GENERAL

94. Plaintiffs reallege Paragraphs 1 through 56, Paragraphs 58 through 63, Paragraphs 65 through 67, Paragraphs 69 through 75, Paragraphs 77 through 81, Paragraphs 83 through 86, and Paragraphs 88 through 93, inclusive.

95. Plaintiffs' claims vindicate strong and socially important public policies because they involve "constitutional rights of profound significance" Articles 2, 5 and 8 of the Hawai'i State Constitution.

96. Private enforcement is necessary because to date, the State Attorney General has not pursued claims on behalf of the public to remedy public harms caused by County Defendants' unlawful actions. The burden falls on Plaintiffs to devote not only their time but their hard-earned money to fund the lawsuit starting with this Complaint.

97. All the State's citizens benefit when violations of the laws and constitution of this State are corrected. Restoration of ocean and beach access rights at Waipi'o promotes the

judicially-recognized public policy favoring public use of as much of Hawai'i 's shoreline as is reasonably possible. Restoration also promotes the judicially-recognized customary right of public use of Hawai'i's beaches. Again, these are rights enjoyed by all the State's citizens.

98. Vindications of the people's constitutional rights also benefits all State citizens. When Plaintiffs prevail, no one will be excluded from travel on Waipi'o Valley Road because they do not belong to a small, exclusive class favored by County Defendants.

99. Plaintiff MĀLAMA I KE KAI 'O WAIFI'O seeks to vindicate public policy through this litigation on discrete issues, the favorable resolution of which vindicates multiple public policy goals, and that policy satisfies the first prong of the test.

100. In exercise of its sound discretion, the Court should award Plaintiffs their attorneys' fees against County Defendants because this litigation vindicates important public rights.

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, including:

1. As to Count 1, declaratory judgment in favor of Plaintiffs that:
 - a. Defendant MITCHELL D. ROTH's Declaration and Emergency Rule were made upon unlawful procedure and are therefore void and of no legal effect.
 - b. Defendant MITCHELL D. ROTH's Declaration and Emergency Rule violate and misapply the letter and purpose of Chapter 264, HRS, including HRS §264-1.5, and are *ultra vires*, and therefore void and of no legal effect.
 - c. Defendant MITCHELL D. ROTH's Declaration and Emergency Rule are arbitrary and capricious because they are not based upon credible scientific information

and expertise nor any other rational basis, and are therefore void and of no legal effect; and,

d. Defendant MITCHELL D. ROTH's Declaration and Emergency Rule fail to make reasonable, available accommodations to mitigate violation of Plaintiffs' rights, and are therefore void and of no legal effect.

2. As to Count 2, judgment in favor of Plaintiffs that Defendant MITCHELL D. ROTH's Declaration and Emergency Rule are void and of no legal effect because they violate the public trust.

3. As to Count 3, judgment in favor of Plaintiffs that that Defendant MITCHELL D. ROTH's Declaration and Emergency Rule are void because they violate Plaintiffs' respective rights to equal protection.

4. As to Count 4, for preliminary and permanent injunctive relief preventing County Defendants, their agents, DOE Defendants and all persons acting in active concert with any of them from enforcing Defendant MITCHELL D. ROTH's Declaration and Emergency Rule.

5. As to Count 5, for judgment in favor of Plaintiffs that the Declaration and Emergency Rule violate Plaintiffs' procedural due process rights and are therefore void and unenforceable.

6. As to Count 6, for judgment in favor of Plaintiffs that the Declaration and Emergency Rule violate Plaintiffs' substantive due process rights and are therefore void and unenforceable.

7. As to Count 7, for Plaintiffs' attorney's fees under the private attorney general doctrine.

8. As to all Counts, for costs of suit.
9. As to all Counts, for such other relief as the Court deems just.
10. As to all Counts, for leave to amend the Complaint following discovery and further investigation.

Dated: Hilo, Hawai'i, April 22, 2022.

/Steven D. Strauss/

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Dated: Hilo, Hawai'i, April 22, 2022.

/Christopher R. Bridges/

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