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FAITH ACTION FOR COMMUNITY EQUITY,
MELVIN UESATO, AND
THE PACIFIC RESOURCE PARTNERSHIP

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

HONOLULUTRAFFIC.COM; CLIFF SLATER; BENJAMIN J. CAYETANO; WALTER HEEN; HAWAI'I'S THOUSAND FRIENDS; THE SMALL BUSINESS HAWAI'I ENTREPRENEURIAL EDUCATION FOUNDATION; RANDALL W. ROTH; and DR. MICHAEL UECHI, Plaintiffs, vs. FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS, in his official capacity as Federal Transit Administration Regional Administrator; PETER M. ROGOFF, in his official capacity as Federal Transit Administration Administrator; UNITED	CIVIL NO. 11-00307 AWT **MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE** (Presiding: The Honorable A. Wallace Tashima, United States Circuit Judge Sitting by Designation) Date Action Filed: May 12, 2011 Trial Date: None Set

STATES DEPARTMENT OF TRANSPORTATION; RAY LAHOOD, in his official capacity as Secretary of Transportation; THE CITY AND COUNTY OF HONOLULU; WAYNE YOSHIOKA, in his official capacity as Director of the City and County of Honolulu, Department of Transportation Services, Defendants.	

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

I. INTRODUCTION

This lawsuit centers on the Honolulu High-Capacity Transit Corridor Project ("Rail Project"), which is a 20-mile elevated fixed guideway rail transit project planned for construction in the highly congested transportation corridor between Kapolei and Ala Moana Center. After many years of environmental studies, the United States Department of Transportation, Federal Transit Administration ("FTA"), and the City and County of Honolulu ("City") (collectively "Defendants") approved the Rail Project. Plaintiffs filed this suit in May 2011 alleging that Defendants failed to comply with the National Environmental Policy Act ("NEPA"), Section 4(f) of the Department of Transportation Act ("Section 4(f)"), and the National Historic Preservation Act ("NHPA"). Plaintiffs request declaratory judgment, as well as, an injunction that would require Defendants to withdraw the FTA's Record of Decision ("ROD") approving the Rail Project and comply with the requirements of NEPA, Section 4(f) and the NHPA before approving or re-approving the Rail Project or any other proposed rail transit system. Plaintiffs' requested relief would effectively halt any construction on the Rail Project and delay future construction for many years.

The relief that Plaintiffs seek through this litigation would immediately curtail the construction of the Rail Project to the detriment of the health, aesthetic,

recreational, environmental justice, and economic interests of the Faith Action for Community Equity ("FACE") and its members, the Hawai'i Carpenters Market Recovery Program, dba The Pacific Resource Partnership ("PRP") and its members, and Mr. Melvin Uesato (collectively "Intervenors"). Plaintiffs do not merely seek to block construction of the Rail Project. Plaintiffs have also made it clear that, through this lawsuit, they seek to undo years of careful planning by local, state and federal agencies to establish a transportation system for Honolulu that provides convenient and affordable public transportation for low income and other environmental justice communities. By seeking to block the Rail Project, Plaintiffs also seek to undo land use plans approved by the City and County of Honolulu and by the State of Hawai'i that limit urban sprawl by accommodating smart, transit-oriented development and affordable housing in areas served by the Rail Project.

Instead of the Rail Project, Plaintiffs unabashedly seek to expand the current auto-oriented transportation system by expanding congested highways with so-called "managed lanes." Plaintiffs' preferred "managed lane" alternative will discriminate against Intervenors and other environmental justice communities by condemning Intervenors to the continuation of a second-class public transportation system that has disproportionate adverse social and environmental impacts on Intervenors and other environmental justice populations. If the Plaintiffs are

successful in this lawsuit, low income populations in Honolulu will continue to be impacted by an inequitable transportation system that is designed to benefit people of means who can afford private automobiles and any tolls charged by managed lanes. The Plaintiffs' preferred "managed lane" alternative will result in increased traffic congestion, air pollution and other adverse environmental impacts on Intervenors.

Intervenors have advocated for the Rail Project from its inception to protect Intervenors' interests. The interest of the Intervenors cannot be adequately represented by the Defendants in this action. Intervenors therefore respectfully request that this Court grant them leave to intervene as defendants in this action.

II. STATEMENT OF FACTS

A. The Intervenors and Their Interests in This Lawsuit.

PRP is a non-profit, joint labor management partnership with the State's largest construction union, the 6,500-member Hawai'i carpenters union – the United Brotherhood of Carpenters and Joiners of America, Local 745 ("Union"), and the over 200 contractors signatory to the Union. Declaration of John White in Support of Motion to Intervene ("White Decl."), submitted herewith ¶ 2. PRP's overriding mission is to improve the quality of life for Hawai'i's residents. White Decl. ¶ 3. To serve that purpose, PRP has used its position to strengthen Hawai'i's economy by working with public and private developers and contractors and the

unionized carpenters to bolster the building sector. White Decl. ¶ 3. PRP identifies development opportunities and assists with legislation and public policy development and support, guides projects through the federal, state, and county development process, and facilitates relationships with potential business and community organizations. White Decl. ¶ 3. PRP has been advocating for the Rail Project since its inception, and its members are depending on the Rail Project for jobs, for affordable transportation, and to curtail the increasing air pollution attributable to Honolulu's auto-centered transportation system. White Decl. ¶ 5, 6, 7, 8, 12; Declaration of Davin Auyong in Support of Motion to Intervene ("Auyong Decl."), submitted herewith ¶ 4, 5, 6, 9; Declaration of Ruben Amodo in Support of Motion to Intervene ("Amodo Decl."), submitted herewith ¶ 3, 5, 7.

FACE is a faith-based grassroots organization that was founded in 1996. FACE has a membership base of twenty-seven institutions on O'ahu, twenty-four institutions on Maui, and one statewide institution. Declaration of Andrew Astolfi in Support of Motion to Intervene ("Astolfi Decl."), submitted herewith ¶ 3. FACE's mission is to engage in actions that challenge the systems that perpetuate poverty and injustice, and to advocate for the interests of Hawai'i's low-income population. Astolfi Decl. ¶ 3, 4. FACE seeks to cultivate diversity and economic opportunity in its work with schools, community organizations and its members. FACE supports, funds, and works with community organizations that meet the

environmental, social, and economic needs of Hawai'i residents. Astolfi Decl. ¶ 4. FACE chooses the issues that it will act upon through a democratic process, soliciting the opinions of all the members of its congregations to learn what issues they are facing and what issues they see as important for the low-income community that FACE seeks to serve. Astolfi Decl. ¶ 5, 6. Because of FACE's commitment to finding solutions for the affordable housing crisis on O'ahu, its commitment to advocating for the needs of the poor, FACE has long-supported the Rail Project, and its members have publically spoken out for the Rail Project in numerous forums. Astolfi Decl. ¶ 6-13. FACE's members would benefit from the creation of affordable mass transportation, less air pollution, and the creation of more transit-oriented affordable housing. Astolfi Decl. ¶ 6-13.

Mr. Melvin Uesato is a lifelong resident of O'ahu who faces the commute between Kapolei and Honolulu each work day. Declaration of Melvin Uesato in Support of Motion to Dismiss ("Uesato Decl."), submitted herewith ¶ 2. Due to the high cost of owning a car, including gas prices and parking costs, Mr. Uesato commutes to work by taking the bus. Uesato Decl. ¶ 3, 4, 7. Because of the traffic on the H-1, Mr. Uesato must leave his house by 5:40 a.m. in order to ensure he is at work on time at 7:45 a.m., which means he usually arrives in Honolulu an hour before he is required to be at work, and he sacrifices both sleep and precious time to spend with his wife. Uesato Decl. ¶ 3, 4. The Rail Project would provide an

affordable, efficient means of transportation for Mr. Uesato, and he will benefit from the decrease in air pollution that will result from less cars on the road. Uesato Decl. ¶ 8.

B. The Rail Project and Plaintiffs' Challenge to the Rail Project.

The Rail Project will connect Kapolei and Ala Moana Center, which is currently only connected by the Interstate Highway H-1 highway and local streets. The Rail Project will consist of twenty-one stations and is expected to serve 116,300 weekday passenger trips by 2030. Exhibit A to Declaration of Sean Kim in Support of Motion to Intervene ("Kim Decl."), submitted herewith. Trains are expected to operate from 4 a.m. to midnight daily, with trains arriving every three minutes during peak travel times, every six minutes during the day, and every 10 minutes during the evenings. Ex. A to Kim Decl. The Rail Project has been subject to a comprehensive environmental review process, and FTA issued a final environmental impact statement ("EIS") and Section 4(f) evaluation in June 2010. On January 18, 2011, FTA issued its approval of the Rail Project in its ROD. 76 Fed. Reg. 4,160 (Jan. 24, 2011). Plaintiffs filed their Complaint for Injunctive and Declaratory Relief on May 12, 2011 ("Complaint") (ECF. No. 1). Plaintiffs seek an injunction that would require Defendants to (1) immediately withdraw the ROD approving the Rail Project, (2) comply with the requirements of the NHPA and Section 4(f) prior to approving or re-approving the Rail Project or any other

proposed rail transit system, and (3) before approving or re-approving the Rail Project or any other proposed rail transit system either prepare and circulate a new draft EIS followed by a new final EIS and a ROD or prepare a circulate a draft supplemental EIS followed by a final supplemental EIS and a revised ROD. Complaint at 54, 55.

III. ARGUMENT

A. Proposed Intervenors are Entitled to Intervene as a Matter of Right.

Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention as a matter of right when

> On timely motion, [an applicant] claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the [applicant's] ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). The Ninth Circuit employs a four-part test to determine whether an applicant satisfies the requirements of Rule 24(a): (1) a timely application; (2) a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest if intervention is not granted; and (4) the existing parties may not adequately represent the applicant's interest. *United States v. City of Los Angeles*, 288 F.3d

391, 397 (9th Cir. 2002). Courts generally "'construe [Rule 24] broadly in favor of proposed intervenors.'" *Id.*

1. This Motion to Intervene is Timely.

Courts consider three factors when determining whether an application to intervene is timely: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for the length of the delay." *U.S. v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002). "The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). Applying the factors above, it is clear that the motion to intervene is timely.

First, intervention is being sought in the early stage of the proceedings. Initial responsive pleadings were filed in August 2011, but no administrative record has been filed or certified, and the Court has not made any substantive rulings. Thus, the proceedings are still at a very early stage. This fact played a prominent role in the Court's recent denial of Defendants' Motion for Partial Judgment on the Pleadings, as the Court explained that any substantive determination prior to the preparation and certification of an administrative record was simply "premature." (Order on Motion for Partial Judgment on the Pleadings at 4-5, December 12, 2011, ECF No. 57.) Accordingly, the present stage of the

litigation supports a finding of timeliness. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (affirming that motion to intervene was timely because motion was filed "before any hearings or rulings on substantive matters").

Second, because the Court has not made any substantive rulings and an administrative record has not been filed or certified, no party would be prejudiced by granting the motion to intervene. *See Northwest Forest Resources Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) ("motion to intervene does not appear to have prejudiced either party in the lawsuit, since the motion was filed before the district court had made any substantive rulings"). Moreover, the lack of prejudice has essentially been conceded by the parties, as the parties agreed in the Joint Case Management Statement that "any proposed intervenors shall have until (1) January 2, 2012[1] or (2) 15 days after the Court rules on Defendants' Motion for Judgment on the Pleadings (ECF 37-40), whichever event occurs later, to move to intervene in the lawsuit." Joint Case Management Statement at 3-4, November 18, 2011, ECF No. 53. Accordingly, the lack of prejudice to other parties supports a finding of timeliness. *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (affirming finding of timeliness because it "is improbable that the defendants would be prejudiced by intervention").

[1] This date is extended to January 3, 2012 pursuant to Rule 6 of the Federal Rules of Civil Procedure because January 2, 2012 is a federal holiday.

Finally, there has been no unreasonable delay in filing this motion to intervene. As discussed above, the instant motion has been filed at a very early stage of the litigation, before the occurrence of any determinations on any matters raised by the Complaint, and has been filed in accordance with the schedule contemplated by the parties, and no party will be prevented from taking any action or is otherwise hindered from pursuing their claims or defenses. Accordingly, the motion is timely. *See Cummings v. United States*, 704 F.2d 437, 441 (9th Cir. 1983) (reversing denial of intervention because of the "absence of anything in the record to show reason to believe that the government was prejudiced, or that the intervention would cause undue delay").

2. Proposed Intervenors Have a Significant Protectable Interest Relating to the Transaction That is the Subject of Litigation. [2]

A proposed intervenor has a significant protectable interest in the action if it (1) asserts an interest that is protected under some law, and (2) there is a relationship between that legally protected interests and the plaintiff's claims. *City of Los Angeles*, 288 F.3d at 398. This test is not a "clear-cut" or "bright line" rule because "[n]o specific legal or equitable interest need be established." *Id.*;

[2] That Intervenors are private parties does not bar them from intervention. *See Wilderness Society v. United States Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (overturning the "federal defendant" rule which categorically precluded private parties from intervening of right as defendants on the merits of NEPA actions and holding courts should apply the significantly protectable interest test).

Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1189-90 (9th Cir. 1998) (union permitted to intervene in suit challenging state prevailing wage laws because union members had a significant interest in receiving those wages). Courts are required "to make a 'practical, threshold inquiry,' to discern whether allowing intervention would be 'compatible with efficiency and due process.'" *City of Los Angeles*, 288 F.3d at 398. "[A] prospective intervenor 'has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.'" *Wilderness Society*, 630 F.3d at 1179. The interest claimed by a proposed intervenor does not have to be a direct interest in the property or transaction at issue, provided that the interest is one that would be impaired by the outcome. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967).

Here, Intervenors have several significantly protectable interests: (1) Intervenors have an interest in an affordable and equitable transportation, reducing the public health impacts of air pollution from traffic from the City's auto-oriented transportation system, creating affordable housing with access to good public transportation, and preserving Hawai'i's natural resources from urban sprawl; (2) Intervenors PRP and FACE have actively supported the Rail Project from its inception and have an interest in upholding a project it has actively

supported; and (3) PRP and its members have an interest in the jobs that the Rail Project will create and in the existing contracts to build the Rail Project. A delay in construction of the Project will have direct economic consequences on PRP's members.

a. Intervenors Have a Significant Interest in Affordable Transportation, Reducing Air Pollution, Creating Affordable Housing, and Preventing Urban Sprawl.

Intervenors have a clear interest in this action. Both FACE and PRP seek to improve the quality of life of Hawai'i's residents. FACE advocates for the low-income population of Hawai'i and has fought for many years to address the housing crisis in O'ahu. Astolfi Decl. ¶ 11, 12, 15. Through ongoing discussion with its members, FACE has heard the high value that its members place on the Rail Project as a means of affordable transportation, as a means of creating affordable housing, as a means of alleviating the traffic on the H-1 and arterial roadways, and the accompanying air pollution, and as a means of limiting urban sprawl. Astolfi Decl. ¶ 6 – 13; Declaration of Bob Nakata in Support of Motion to Intervene ("Nakata Decl."), submitted herewith ¶ 9.

Individual members of PRP and FACE, and Mr. Uesato have been dealing with the negative effects of traffic congestion for many years and are burdened by the high cost of owning an automobile. White Decl. ¶ 12, 13, 14; Astolfi Decl. ¶ 7, 9, 10, 13; Auyong Decl. ¶ 6, 7, 8; Amodo Decl. ¶ 4, 5; Uesato Decl. ¶ 3-7; Nakata Decl. ¶ 5. Currently, travel between Kapolei and Honolulu requires driving on the

H-1, which is heavily congested, resulting in a travel time of one and a half hours during peak traffic hours. Uesato Decl. ¶ 6; White Decl. ¶ 14; Auyong Decl. ¶ 6. The only public transportation that serves to connect the two areas are buses, and riding the bus similarly takes an hour or more. White Decl. ¶ 12; Uesato Decl. ¶ 3, 4, 7; Auyong Decl. ¶ 6. However, the traffic is not the only issue facing Intervenors – the high cost of fuel and parking is a financial burden, taking up a large part of their discretionary income and limiting their ability to save money. Uesato Decl. ¶ 6, 7; Auyong Decl. ¶ 6, 7; Amodo Decl. ¶ 4. Although taking the bus is an existing alternative to driving a car, it is not an efficient alternative because traveling via the bus can be very time consuming, and is also subject to traffic conditions and the congestion that the Rail Project seeks to address. Uesato Decl. ¶ 3, 4, 7, 8; Auyong Decl. ¶ 6, 7, 8; Amodo Decl. ¶ 3, 4. In addition, spending time sitting in traffic or building in excess commute time to avoid traffic negatively affects Intervenors as they have less time to spend with their families. Uesato Decl. ¶ 8; Nakata Decl. ¶ 7; Astolfi Decl. ¶ 9. The Rail Project would provide an affordable, reliable, and fast mode of transportation to Intervenors, improving their quality of life. Uesato Decl. ¶ 8, 9; Auyong Decl. ¶ 4, 9; Nakata Decl. ¶ 5; Amodo Decl. ¶ 5, 7; White Decl. ¶ 12.

Individual members of FACE and PRP are also negatively impacted by the increasing air pollution resulting from the traffic on the H-1. Auyong Decl. ¶ 3, 4;

Amodo Decl. ¶ 3; Astolfi Decl. ¶ 13. There is a significant body of scientific evidence that links pollution from motor vehicles to a wide range of human health problems, including asthma and lung cancer. The health risks associated with highways is particularly acute for low and moderate income communities who live adjacent to highways. For residents who live next to the highway, including FACE and PRP individual members, this is an increasing concern. Astolfi Decl. ¶ 9, 13; Auyong Decl. ¶ 3, 4; White Decl. ¶ 13. Further, Intervenors enjoy the natural surroundings of O'ahu, and any automobile-centered alternative would continue to negatively impact their recreational interests and their health. Auyong Decl. ¶ 7, 8, 9; Amodo Decl. ¶ 3; Nakata Decl. ¶ 3, 4.

Plaintiffs, by this lawsuit, also seek to undo years of careful planning to reduce the severe adverse environmental impacts of urban sprawl. Plaintiffs seek to replace the Rail Project with new "managed lanes" – an expansion of City's current auto-oriented transportation system that will have adverse and disproportionate environmental impacts on Intervenors. Uesato Decl. ¶ 6; Amodo Decl. ¶ 5; Auyong Decl. ¶ 7, 8; Nakata Decl. ¶ 8. The Rail Project will help to limit urban sprawl by helping to keep development from spreading to the North Shore and Windward side of the island. Nakata Decl. ¶ 3, 4.

Finally, FACE has been a longtime advocate for affordable housing, and the Rail Project offers O'ahu's best solution for addressing the housing crisis on the

island. Astolfi Decl. ¶ 7, 11, 12; Nakata Decl. ¶ 6. The Housing Committee of the State Senate estimated that there was a need for 28,000 more units to house people already living in Honolulu. Astolfi Decl. ¶ 11. The transit oriented development that will stem from the Rail Project will provide an opportunity to provide much-needed housing – a study released by the O'ahu Metropolitan Planning Organization in 2004 found that there is a significant population of low-income residents that live along the proposed rail route. Astolfi Decl. ¶ 11.

Intervenors are not obligated to identify a "specific legal or equitable interest." *City of Los Angeles*, 288 F.3d at 398. Intervenors need only to establish that they have a "sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation. *Wilderness Society*, 630 F.3d at 1179. Intervenors have clearly satisfied this burden as described above.

In addition, Intervenors' interests are protected under federal statutes. In enacting NEPA, Congress declared that it is national policy

> to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the **social, economic,** and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a)(emphasis added). NEPA's procedural mechanism, the environmental impact statement, is focused on actions that impact the "human

environment." 42 U.S.C. § 4332(C). NEPA's definition of the "human environment" includes "economic and social" impacts that are interrelated with the natural environment. 40 C.F.R. § 1508.14. Four decades ago, the federal courts recognized that the quality of life for urban residents is included within NEPA's definition of the "human environment." *Hanly v. Mitchell,* 460 F.2d 640, 648 (2d Cir. 1972).

Under Title VI of the Civil Right Act of 1964, 42 U.S.C. §§ 2000d to 2000d.7 ("Title VI") and the environmental justice policies of the Federal Government, Intervenors, including members of FACE and PRP, also have a protectable interest because of the disproportionate impacts that many would experience if the Rail Project were not built. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994). The Department of Transportation ("DOT"), in turn, issued DOT Order 5610.2 ("Order 5610.2"). 62 Fed. Reg. 18,377 (April 15, 1997). Order 5610.2 instructs agencies of DOT, such as the FTA, to incorporate environmental justice considerations into their decisionmaking, including project actions being evaluated under NEPA. This directive was recently reaffirmed by the DOT Environmental Justice Strategy, which again asserted the link to NEPA analysis.[3] FTA has implemented Title VI through FTA Circular C 4702.1A,

[3] *See* http://www.dotcr.ost.dot.gov/documents/DOTPart/Final_Revised_Strategy_9_30[1].pdf

which spells out that issues related to disparate impacts and benefits of projects should be addressed in project planning and NEPA. *See* 72 Fed. Reg. 18,732 (April 13, 2007). FTA also implements broad environmental justice policies through similar means, as more fully explained in proposed FTA Circular C 4703.1.[4] As the above Orders and Circulars make clear, FTA uses the transportation planning and NEPA processes to provide information about project impacts on minority and low income communities and to solicit public input about such impacts. FTA expects that parties, such as Intervenors, that have a direct stake in such issues will look to and participate in the planning and NEPA processes to address them. That is what Intervenors have done, and they have every right to participate in litigation challenging the adequacy of these processes and the decisions that resulted from those processes.

b. Intervenors Are Entitled to Intervene as a Matter of Right in an Action Challenging the Legality of an Action They Supported.

PRP and FACE's consistent and heavy participation in the administrative process leading to FTA's approval of the ROD for the Rail Project, many times directly opposing the Plaintiffs, entitles them to intervene in support of the Rail Project. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) ("[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported."); *Sagebrush*

[4] http://www.fta.dot.gov/documents/Proposed_EJ_Circular_to_Docket_FINAL.pdf

Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) (holding Audubon Society had right to intervene in suit brought by plaintiff over establishment of conservation area when both Audubon Society and plaintiff had actively participated in administrative process, taking opposing positions); *see also Washington State Building & Construction Trades v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (public interest group entitled to intervene in action challenging legislative initiative it supported); *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (National Organization for Women had right to intervene in suit challenging a cause that the organization had championed).

Intervenors FACE and PRP have been advocating for the Rail Project since its inception and throughout the planning and approval process. White Decl. ¶ 5; Astolfi Decl. ¶ 14. Members of both organizations have helped organize community meetings, attended and submitted testimony supporting the Rail Project at City Council meetings, Honolulu Authority for Rapid Transit ("HART") meetings, and other agencies involved in the Rail Project. White Decl. ¶ 5, 6; Astolfi Decl. ¶ 14, 15. For example, John White, the Executive Director of PRP attended the May 17, 2011 public hearing of the Honolulu City Council Budget Committee to provide testimony in support of the Rail Project and Bill 40, which authorized the issuance of Government Obligation bonds to provide for continuing financing for the Rail Project. White Decl. ¶ 6.

As part of its advocacy for the Rail Project, in 2006, FACE organized turnout of its members to each of the nine council district hearings on the Rail Project. Astolfi Decl. ¶ 15. On June 26, 2010 FACE held a public meeting with over 500 people in attendance where our members rallied to support the Rail Project, as well as the bus system. Astolfi Decl. ¶ 16. In October 2010, FACE leadership met with Secretary Ray La Hood to reiterate FACE's position in support of the Rail Project and to support full funding for the project. Astolfi Decl. ¶ 16. On October 4, 2011, FACE held a rally at the Sun Yat Sen statue in Chinatown to demand job creation through infrastructure investments, such as the Rail Project. Astolfi Decl. ¶ 18.

FACE and PRP members have also attended and organized public rallies to support the Rail Project, have spoken out publically in support of the Rail Project, and have done community outreach to generate support for the Rail Project. White Decl. ¶ 5, 6; Astolfi Decl. ¶ 15, 16, 17, 18, 19; Nakata Decl. ¶ 9. For example, John White and former FACE president, Bob Nakata, co-authored an article that appeared in the *Honolulu Star Advertiser* on August 28, 2011 that advocates for the Rail Project. Ex. A to White Decl. ¶ 5; Nakata Decl. ¶ 9.

PRP has made significant expenditures of funds to support the Rail Project. White Decl. ¶ 7. For example, PRP supported the 2008 Rail Initiative ballot effort and the 2010 HART ballot measure and funded paid television, radio, and mail

advertisements in support of those transit ballot measures. White Decl. ¶ 6, 7. In addition, PRP has made major investments in ongoing studies to chart the development of growth scenarios and their impacts and has worked to understand the effect of rail transportation on the development of communities and how transit-oriented-development can help meet the needs of Honolulu's changing demographics. White Decl. ¶ 7. In October 2011, PRP partly funded a trip to Washington, D.C. by City officials and private sector leaders to attend Rail-Volution, the preeminent transportation-oriented development conference. White Decl. ¶ 7.

Finally, PRP has launched a social media campaign to raise awareness about the significant benefits of the Rail Project by establishing a Facebook page and Twitter feed. White Decl. ¶ 8. Through these outlets, PRP provides a steady stream of updates updated regarding the status of the Rail Project, community meetings regarding the Rail Project, provides link to stories about the Rail Project, and draws attention to the negative impact that traffic has on PRP's members and Honolulu's residents. White Decl. ¶ 8.

Plaintiffs allege that they have consistently participated in the administrative process for the Rail Project. Compl. ¶ 7, 8, 15. Plaintiff HonoluluTraffic.com alleges it has suggested alternatives to the Rail Project. Compl. ¶ 7. Because PRP and FACE have played key roles in supporting the Rail Project, often directly

opposing the Plaintiffs, they have an interest in the outcome of this litigation and a right to intervene.

c. PRP's Members Will Suffer Direct Economic Consequences From the Outcome of This Lawsuit.

A proposed intervenor has a significant protectable interest if the outcome of the lawsuit will impact its contractual rights or economic interests. *See Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995) (court granting motion to intervene because injunctive relief would impact intervenors' contracts); *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (holding timber purchasers had right to intervene because they had a legally protectable property interest in existing timber contracts that were threatened by the requested injunctive relief); *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995-996 (10th Cir. 2009) (holding proposed intervenor had a direct economic stake in the subject of the litigation, thereby establishing the requisite interest for intervention); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992) (holding interest of members of fishing industry in consent decree concerning fishery management plan sufficient); *Greenpeace Found. v. Daley*, 122 F. Supp. 2d 1110, 1114 (D. Haw. 2000) (association of lobster permit holders had a significantly protectable interest in lawsuit brought by environmental plaintiffs under the Endangered Species Act and NEPA challenging National Marine Fisheries Services' authorization of

commercial lobster fishing because "[t]he Association's interests are clearly protectable under the ESA and NEPA. If NMFS is found to have breached its obligations . . . the relief that follows is the suspension of lobster fishing . . . an outcome that will have serious economic consequences for the Association's members.").

The construction industry continues to face precarious economic conditions. As of December 1, 2011, 47 percent of active Union members on O'ahu are unemployed. Among O'ahu journeymen carpenters, the unemployment level is 42.2 percent, and among apprentice carpenters, the figure is even higher – 55 percent. White Decl. ¶ 9. The Union members have personally felt the pain of unemployment, some being unemployed for three years. Amodo Decl. ¶ 6; Auyong Decl. ¶ 5, 9. They have faced foreclosure and lost their savings. Auyong Decl. ¶ 5. The Rail Project will create over 10,000 jobs per year on average, with 350 construction jobs being created just for the first phase of construction of the guideway. White Decl. ¶ 9. PRP's members are counting on the Rail Project to get back to work, and any delay would have a direct, significant impact on them. White Decl. ¶ 11; Amodo Decl. ¶ 6, 7; Auyong Decl. ¶ 5, 9.

The Union, a PRP member, is a signatory to the Rapid Transit Stabilization Agreement for the Rail Project, which is a contract between the City and County of Honolulu and various construction unions to ensure that construction of the Rail

Project occurs without disruption due to labor disputes, among other things. White Decl. ¶ 10. In addition, PRP member, Kiewit Infrastructure West Co., was awarded the contract to design and build the guideway for the first two of the four construction phases of the Rail Project. Kiewit and fellow PRP member, Albert C. Kobayashi Inc. have teamed as a joint venture to build the maintenance and storage facility for the rail vehicles. White Decl. ¶ 11. Other PRP members have been retained as subcontractors to work on the Rail Project. White Decl. ¶ 10. If Plaintiffs prevail in this lawsuit, and Defendants are found to have violated NEPA, Section 4(f) and the NHPA, PRP's members will suffer direct and immediate economic consequences. Any delay in the construction of the Rail Project will have a major negative impact on Kiewit and the many Union workers employed on the Rail Project, and PRP members, who are already out of work, will continue to be unemployed, having a tremendous impact on their personal lives, including their ability to enjoy the environment. White Decl. ¶ 10-12; Amodo Decl. ¶ 3, 6, 9; Auyong Decl. ¶ 5, 6.

3. Disposition of This Matter May, As a Practical Matter, Impair or Impede Proposed Intervenors' Interests.

The third prong of determining whether an applicant satisfies Rule 24(a) concerns whether as a practical matter, denial of intervention *may* impede the applicant's ability to protect its interests in the subject of the action. *City of Los Angeles*, 288. F.3d at 401. Courts often follow the guidance of the advisory

committee notes for the 1966 amendment to Rule 24(a), which state "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24, Advisory Comm.'s Note to 1966 Amendments; *see Sw. Ctr. for Biological Diversity v. Berg*, 268. F.3d 810, 822 (9th Cir. 2001) (quoting and following the 1966 advisory committee notes). The United States Supreme Court has emphasized that the 1966 amendment to Rule 24(a) liberalized the prior rule to establish a right to intervene when the proposed intervenor claims "'an interest'" in the 'transaction which is the subject of the action.'" *Cascade Natural Gas*, 386 U.S. at 153.

A decision in Plaintiffs' favor would effectively shut down construction on the Rail Project, delaying it for several years and possibly eliminating it altogether. Such an outcome would severely impact Intervenors and their members' interests in having affordable, efficient public transportation, reducing air pollution, increasing affordable housing, and creating jobs. Astolfi Decl. ¶ 7-13; White Decl. ¶ 11, 12; Uesato Decl. ¶ 8; Amodo Decl. ¶ 6, 7; Auyong Decl. ¶ 5, 9; Nakata Decl. ¶ 5, 6, 7, 8. PRP's members will immediately be effected by such an outcome. White Decl. ¶ 11, 12; Amodo Decl. ¶ 6, 17; Auyong Decl. ¶ 5, 9. Among other impacts, if Plaintiffs prevail, Intervenors' members will continue to be adversely impacted by traffic congestion and air pollution caused by the extreme congestion

on H-1 and the auto-oriented transportation system advocated by Plaintiffs. White Decl. ¶ 12; Astolfi Decl. ¶ 8, 9, 10; Amodo Decl. ¶ 3, 5, 6, 7; Auyong Decl. ¶ 5, 7, 8, 9. Further, a decision in favor of the Plaintiffs would undermine PRP and FACE's years of advocacy that led to the approval of the Rail Project. Astolfi Decl. ¶ 14-18; White Decl. ¶ 5-8. Thus, Intervenors' interests may be impaired by the disposition of this case.

2. Existing Parties Do Not Adequately Represent Proposed Intervenors' Interests.

When determining whether a proposed intervenor's interests will be adequately represented, courts consider three factors:

> (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect.

City of Los Angeles, 288 F.3d at 398. The burden of showing that existing parties may not adequately represent a proposed intervenor's interests is a minimal one, and the applicant need only show that "representation of [its] interest '**may be**' inadequate." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (emphasis added); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995). If there is any doubt as to whether the existing parties will adequately represent the intervenor it should be resolved in favor of intervention. *Sagebrush Rebellion*, 713 F.2d at 528; *Fed. Sav. & Loan Ins. Corp.*

v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993). Typically, "a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." *Forest Conservation Council*, 66 F.3d at 1499. "However, this presumption arises when the government is acting on behalf of a constituency that it represents." *City of Los Angeles*, 288 F.3d at 399. The government must represent the broad pubic interest, and as such, representation will most likely be inadequate when the applicant asserts a personal interest that does not belong to the general public. *See Forest Conservation Council*, 66 F.3d at 1499.

In *Forest Conservation Council*, appellants were the State of Arizona and a county that sought to intervene in a case in which plaintiffs alleged that the U.S. Forest Service violated NEPA and the National Forest Management Act ("NFMA") by implementing guidelines for the management of a certain habitat on national forest lands. The Ninth Circuit found that although NEPA and NFMA required the Forest Service to consider public input and the appellants' interests in preparing an EIS, the appellants' interests were not adequately represented by the Forest Service. 66 F.3d at 1499. The Ninth Circuit explained that the appellants' interests "lie not in the procedural requirements of NEPA and NFMA with which the Forest Service must comply," but rather in the question of whether all forest

management activities should be enjoined pending compliance. *Id.* Furthermore, the Ninth Circuit reasoned that the Forest Service is not charged with a duty to represent those particular interests in defending against the issuance of an injunction and is required to represent a broader view than the more narrow interests of the state and county. Therefore, the court found that the appellants satisfied the minimal showing required to establish that the Forest Service may not adequately represent their interests in defending against the issuance of a broad injunction. *Id.; see also Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993) (overcoming presumption of adequate representation for landowners); *Conservation Law Found.,* 966 F.2d at 44 (finding that the "Secretary's judgments are necessarily constrained by his view of the public welfare.")

Here, PRP and FACE represent specific concerns of their members, many of whom are out-of-work contractors, low-income individuals who cannot afford a private automobile, and need an affordable, reliable and efficient public transportation system, individuals who suffer disproportionate impacts from a highway-oriented transportation system, and individuals who would rely on the affordable housing that would be built along the proposed route of the Rail Project. *See Sierra Club v. Espy*, 18 F.3d at 1208 (court granting intervention by timber industry in case brought against the government because "[t]he government must

represent the broad public interest, not just economic concerns of the timber industry."). Moreover, the Plaintiffs are comprised of interest groups with which many of the City and County of Honolulu's constituents may identify, and consequently, the City and County of Honolulu may not be necessarily willing to make the same arguments that will be advanced by Intervenors. Therefore, Intervenors' interests may not be adequately represented by the existing parties.

B. In the Alternative, the Court Should Grant Permissive Intervention.

At the minimum, Intervenors satisfy the requirements for permissive intervention. Rule 24(b)(2)) provides that a court may grant permissive intervention:

> On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."

Fed. R. Civ. P. 24(b). Permissive intervention under Rule 24(b)) is appropriate when: (1) the applicant for intervention shows independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, share a common question of law or fact. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997)

Here, even if the Court does not grant intervention as a matter of right, the circumstances warrant permissive intervention. First, assuming this Court has

jurisdiction over the claims raised in the Complaint, the Court has supplemental jurisdiction over Intervenors pursuant to 28 U.S.C. § 1367(a), which provides for such jurisdiction for "the intervention of additional parties."

Second, as shown above, this motion to intervene is timely. The administrative record has yet to be filed and certified, and the Court has not made any substantive determinations. Intervenors are seeking to intervene at an early stage in the litigation.

Third, Intervenors' defense, that the Rail Project is the preferred alternative as supported by the record, has an obvious and necessary overlap with Plaintiffs' affirmative claims to the contrary.

In addition allowing intervention in this case will not cause any undue delay or prejudice to existing parties and would conserve judicial economy. *See Venegas v. Skaggs*, 867 F.2d 527, 531 (9th Cir. 1989). Granting this application to intervene could obviate any independent subsequent challenge that Intervenors might otherwise bring challenging any judgment in this case in a separate action.

Therefore, even if this Court denies Intervenors intervention as a matter of right, it should grant their request for permissive intervention.

IV. CONCLUSION

For all the foregoing reasons, Intervenors respectfully request that this Court grant intervention as a matter of right in this case to defend their direct and substantial interests, or in the alternative, grant Intervenors permissive intervention.

Dated: Honolulu, Hawai'i, January 3, 2012

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