DISSENTING OPINION BY ACOBA, J.,
WITH WHOM DUFFY, J., JOINS

With all due respect, our role is to protect the judicial process, not to subvert it. In sua sponte deleting Defendant-Appellee Kaua'i County Council (County Council) as a defendant in this case and adding it back as the putative plaintiff in order to create a supposed controversy between the County Council and Defendant-Appellee Mayor of Kaua'i (Mayor) and Defendant-Appellee Finance Director of Kaua'i (Finance Director), the majority does exactly that, manipulating the lawsuit so as to create a controversy that did not in fact exist when the suit was filed, when it was decided by the Circuit Court of the Fifth Circuit (the court), when it was appealed to this court, and when it was argued by the parties before us.

In accomplishing the alteration of this lawsuit, the majority misconstrues the amended complaint, in effect substituting the County Council in place of Plaintiff-Appellee County of Kaua'i (County) as the plaintiff, and misapplies the rules of court, in this case Hawai'i Rules of Civil Procedure (HRCP) Rule 21, in order to drop the County Council as a named defendant. HRCP Rule 21 was never intended to authorize a realignment of the parties in order to birth a controversy, but is applied in the cases when an underlying controversy exists in the first place. But most tellingly, there cannot be a controversy between two sides of a lawsuit where, as in this

case, "both [sides] desire precisely the same result." Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 48 (1971) (per curiam).

Under these circumstances, there are no manageable limits to the approach employed by the majority -- moving a party from one position to another position in the same lawsuit allows this court to decide what case will be deemed justiciable at its own behest. If it can do that in this case, then the majority can do the same in any case. The only way the merits in this case are reached by the majority is through the manipulation of the parties and the lawsuit -- a course that, in my view, fosters unwise and dangerous precedent.

I.

In this appeal, Intervenors-Appellants Gordon G. Smith, individually; Walter S. Lewis, in his capacity as trustee of the Walter S. Lewis Revocable Living Trust; Monroe F. Richman, Trustee, Richman Family Trust; and Ming Fang, Trustee, Ming Fang Trust (Appellants) appealed from the May 20, 2005 final judgment of the court denying the Appellants' motion to dismiss and granting the motion for summary judgment filed by the County. In granting summary judgment the court determined that Charter Amendment XXXI (Charter Amendment or Article XXXI) violated article VIII, section 3 of the Hawai'i State Constitution and the Kaua'i County Charter.

On appeal Appellants specifically ask that the "[court] . . . be reversed, and the [suit] be dismissed for lack of jurisdiction." As to the largely undisputed facts of the case, Appellants' Opening Brief states as follows:

> The authority to tax real property has been delegated to the counties by the Hawai'i Constitution . . . . Article XXXI [of the Kaua'i County Charter] restores property taxes to 1998 levels for owner-occupied homes of residents who have owned their properties from 1998 or before. For homeowners who purchased after 1998, taxes are based on the value at which their property was assessed when purchased. Future tax increases for all resident homeowners cannot exceed 2% per year. . . .
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> . . . Article XXXI was approved by an overwhelming margin [of the electorate]. . . .

(Emphases added.) The opening brief also states:

> During the run-up to Article XXXI's enactment, every Kaua'i official came out publicly against the measure, [including] the Mayor and the County Council . . . . Seven council members purchased a newspaper ad encouraging citizens to "Vote 'NO' on the Real Property Tax Charter Amendment." The County Attorney filed a "petition" seeking "the [c]ourt's clarification on legal issues surrounding the proposed Charter amendment," because "the people of Kaua'i need to know whether this amendment is legal and valid."

(Emphasis added.) As alleged in the amended complaint, subsequently,

> [t]he Kaua'i County[, represented by the County Attorney,] sued the Mayor, the County Finance Director, and the Kaua'i County Council. The County Attorney sought a declaration that Article XXXI was ultra vires as beyond the power of the people of the County, and an injunction preventing the Officials from implementing it. . . . The County Attorney claimed Article XXXI was ultra vires because the county council has a monopoly on exercise of property tax authority delegated by the Hawai'i Constitution, and the County itself has no such authority. The County Attorney also asserted it was a "disguised" initiative or referendum ordinance . . . .

(Emphasis added.) Thereafter,

> [f]our local homeowners intervened in the . . . lawsuit asking the court to dismiss the . . . case. When the [court] denied their motion to dismiss, the homeowners [remained] in the [lawsuit] . . . .
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> On the County Attorney's motion for summary judgment, the [court] invalidated Article XXXI, holding that the

> Hawai'i Constitution delegated real property tax authority exclusively to the county councils, and that Article XXXI . . . was, in fact, a disguised ordinance by initiative or referendum.

(Emphasis added.)

II.

The amended complaint was brought by the County by its County Attorney, as plaintiff, against the Mayor, the Finance Director, and the County Council, as defendants [collectively, Defendants-Appellees]. The County sets forth the following material allegations in its amended complaint:

> 1. This is an action to have this [c]ourt declare the Charter Amendment voted upon by the Kaua'i electorate in the general election on November 2, 2004 is invalid ("Charter Amendment") and to enjoin [D]efendants[-Appellees] from taking any action which would give effect to said Charter Amendment.
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> . . . .
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> 16. The Kaua'i County Charter Article XXII governs the Initiative and Referendum process. Section 22.02 of Article XXII sets forth the limits on the powers of initiative and referendum and expressly prohibits initiatives that affect "any ordinance authorizing or repealing the levy of taxes."
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> . . . .
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> 20. The intent of Article VII, section 3 of the Hawai'i State Constitution is specifically to delegate the real property tax function to the county councils because the county councils are in a better position to administer local affairs.
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> . . . .
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> 22. [Hawai'i Revised Statute (HRS)] § 50-15 provides that there is expressly reserved to the State Legislature the power to enact all laws of general application through the State on matters relating to the fiscal powers of the counties (except as delegated to the counties), and neither a charter or ordinance adopted under a charter shall be in conflict therewith.
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> . . . .
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> 25. An actual controversy has arisen and presently exists between the County and [D]efendants[-Appellees] Mayor, Finance Director and Council. The interest in controversy are direct and substantial. The County is entitled to a declaratory judgment that the Charter Amendment is invalid as well as an order enjoining [D]efendants[-Appellees] from giving effect to the invalid Charter Amendment, as well as such other relief which may be a result of the entry of such declaratory judgment.

> 26. An actual controversy exists between the Charter Amendment and the Kaua'i County Charter and the Kaua'i County Code because the Charter Amendment language is in direct conflict with the Kaua'i County Charter and the Kaua'i County Code.

(Emphases omitted and emphases added.)

Defendants-Appellees answered the County's first amended complaint by stating in pertinent part that "[t]he [D]efendants[-Appellees] admit the allegations contained in paragraphs 1 through 16, 20, 22, 25 and 26 of the Complaint." (Emphasis added.) Hence the supposed opposing parties agree that (1) "[t]he intent of Article VII, section 3 of the Hawai'i State Constitution is specifically to delegate the real property tax function to the county councils because the county councils are in a better position to administer local affairs"; (2) the court should "declare that the Charter Amendment voted upon by the the Kaua'i electorate in the general election on November 2, 2004 is invalid . . . [and] enjoin [D]efendants[-Appellees] from taking any action which would give effect to said Charter Amendment"; (3) "the Charter Amendment language is in direct conflict with the Kaua'i County Charter and the Kaua'i County Code"; and (4) "[t]he County is entitled to a declaratory judgment that the Charter Amendment is invalid as well as an order enjoining [D]efendants[-Appelles] from giving effect to the invalid Charter Amendment, as well as such other relief which may be a result of the entry of such declaratory judgment." See supra.

III.

Not surprisingly, then, Appellants contend, inter alia, that this case is not justiciable because (1) "there is no 'actual controversy' and the County Attorney, the Mayor, the Finance Director, and the County Council are not 'adversaries' or 'contending parties' with 'antagonistic claims'"; and (2) "intervention [by the Appellants] to contest justiciability [in the instant case] does not create justiciability." (Some capitalization omitted.)

In this regard, the County correctly points out that Hawai'i state courts are not subject to the "case or controversy" requirement as are the federal courts. See Trs. of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 170, 737 P.2d 446, 455-56 (1987) (stating that "[u]nlike the federal judiciary, 'the courts of Hawaii are not subject to a cases or controversies limitation like that imposed by Article III, [section] 2 of the United States Constitution'" (quoting Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171, 623 P.2d 431, 438 (1981)) (internal quotation marks, ellipses, and other citation omitted).

However, the County incorrectly assumes that Appellants' contention relies on the "case or controversy" requirement. While state courts are not subject to such a requirement, generally, it is the duty of this court to decide actual controversies. Tauese v. State, Dep't of Labor & Indus. Relations, 113 Hawai'i 1, 16 n.8, 147 P.3d 785, 800 n.8 (2006)

(stating that "[t]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions" (quoting Wong v. Bd. of Regents, Univ. of Hawaii, 62 Haw. 391, 394-95, 616 P.2d 201, 204 (1980) (emphasis added))).[1] Thus, this court has stated:

> Though the courts of Hawaii are not subject to a "cases or controversies" limitation like that imposed upon the federal judiciary by Article III, [section] 2 of the United States Constitution, we nevertheless believe judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context.

Life of the Land, 63 Haw. at 171-72, 623 P.2d at 438 (citing Reliable Collection Agency, Ltd. v. Cole, 59 Haw. 503, 510, 584 P.2d 107, 111 (1978)).

Relatedly, as to the County's request for declaratory judgment,[2] the declaratory judgment statute, HRS § 632-1 (1993) requires the presence of antagonistic interests and provides in pertinent part:

> Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or

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[1] The parties do not assert any exceptions to this rule in this case.

[2] The request for injunctive relief would only be in aid of a declaratory judgment decision favorable to the County.

> privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.

(Emphasis added.) Under the foregoing authority, the granting of declaratory relief in civil cases is proper only in instances where parties are adversarial, and further, in instances "where an actual controversy between contending parties" or "antagonistic claims are present between the parties involved." Id.; see Life of the Land, 63 Haw. at 178, 623 P.2d at 442. Hence, while state courts are not bound to the federal case and controversy requirement, an actual controversy must exist for declaratory relief to be granted in both state and federal court.[3]

Analogously, in Moore, the United States Supreme Court dismissed the case for lack of an actual controversy. 402 U.S. at 47. In that case, the appellants sought review of the

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[3] The Federal Declaratory Judgment Act provides that declaratory relief may be granted "in a case of actual controversy . . . ."

> The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that in a case of actual controversy a federal court may declare the rights and other legal relations of any interested party * * * whether or not further relief is or could be sought. A controversy, as contemplated by Article III of the Constitution and the Declaratory Judgment Act, is one that is appropriate for judicial determination, i.e., one which is not of a hypothetical or abstract character, and which admits of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Teamsters Local 513 v. Wojcik, 325 F. Supp. 989, 991 (E.D. Pa. 1971) (citing 28 U.S.C.A. § 2201) (internal quotation marks and other citation omitted).

district court's ruling declaring a portion of the North Carolina anti-busing statute unconstitutional, and to enjoin its enforcement. Id. "At the hearing both parties argued to the three-judge court that the anti-busing law was constitutional[.]" Id. The Court stated, "We are . . . confronted with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art[icle] III of the Constitution." Id. at 47-48 (emphasis added) (citation omitted); see Teamsters Local 513, 325 F. Supp. at 991 (denying declaratory relief for lack of controversy where "it [was] apparent that the interests of both parties to [the] alleged controversy [would] be served by a determination that the state conviction is not for violation of 'narcotics laws', and it is equally apparent that the interests of neither will be served by a determination that it is" (emphasis added)).

IV.

In light of the agreement among all the parties to the amended complaint that the Charter Amendment is invalid, there is a lack of controversy or of antagonistic claims among the parties to the case brought. It is manifest that there is no actual controversy among the parties to the amended complaint because they all agree that the subject Charter Amendment is "invalid," i.e., both the County and Defendants-Appelles "desire precisely the same result." Moore, 402 U.S. at 47-48. When opposing

parties share identical interests, there is no actual controversy and the court is left with nothing to decide. Auberry Union Sch. Dist. v. Rafferty, 226 Cal. App. 2d 599, 603 (Cal. Ct. App. 1964) ("Where it is apparent that the defendant does not actually oppose the position taken by the plaintiff, there obviously can be no controversy and there is nothing to be determined by the court." (Citation omitted.)); Maxwell v. Brougher, 99 Cal. App. 2d 824, 828 (Cal. Ct. App. 1950) ("Obviously there cannot be a controversy unless one party actually opposes the position taken by the other. If there be no controversy there is nothing to be determined by the court." (Emphasis added.)).

Based on the foregoing, Appellants correctly assert that the instant case lacks an actual controversy and should be dismissed. For "it is apparent that the interests of both [the County and the Defendants-Appellees in this case] . . . [would] be served by a determination that . . . [the Charter Amendment is invalid], and it is equally apparent that the interests of neither will be served by a determination that it is [valid]." Teamsters Local 513, 325 F. Supp. at 991. In that regard, "[i]t is the prevailing doctrine in our judicial system that an action not founded upon an actual controversy between the parties to it, and brought for the purpose of securing a determination of a point of law, is collusive and will not be entertained." State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000) (citing Reynolds v. Van Culin, 36 Haw. 556 (1943)) (internal quotation

marks, ellipses, and brackets omitted); see Kilpatrick v. Kilpatrick, 205 S.W.3d 690, 700 (Tex. App. 2006) ("It is axiomatic that a court must have subject matter jurisdiction in order to adjudicate a dispute, and without it, the merits of a case may not be reached." (Citations omitted.)).

V.

As to Appellants' assertion that the instant case lacks an actual controversy, the County further maintains that participation by Appellants cured concerns regarding the lack of adversity. Appellants however contend that to treat their participation as curative of jurisdictional defects would "encourage filing collusive lawsuits in order to 'smoke out' defendants, with no assurance that those who might come forward would have sufficient motivation or resources to provide a genuine adversary for the collusive parties." In fairness, because the intervention in this lawsuit by Appellants was only for the purpose of contesting jurisdictional defects, their presence as Intervenors should not supply the necessary adverse requirement. In Santa Monica v. Stewart, 24 Cal. Rptr. 3d 72 (Cal. 2005), the California Supreme Court explained that intervention does not "obviate[] concerns about the justiciability" where the intervenor seeks "to intervene solely to dismiss the action as a nonjusticiable controversy." Id. at 87, 87 n.8 (stating that here the intervenor "sought to intervene for the sole purpose of dismissing the action on the ground the court lacked subject matter jurisdiction").

VI.

The majority acknowledges that "a plaintiff must be adversarial to a defendant to create an actual case or controversy sufficient for a court to invoke jurisdiction." Majority opinion at 29 (citing State v. Fields, 67 Haw. 268, 274, 686 P.2d 1379, 1385 (1984)). Thus, in order to create the missing controversy, the majority first asserts that although "the instant declaratory action was not brought in the name of the County Council . . . [but] was brought by 'the County' . . . [,] it is clear from a plain reading of the allegation in the first amended complaint that the [County] has brought the instant case on behalf of the County Council." Majority opinion at 23-25 (footnote and citation omitted). In essence, the majority unilaterally "substitutes" the County Council in place of the County.[4]

Further, in doing this, the majority recognizes that it is "[p]roblematic . . . that the County Council is specifically named as a defendant in this case[, and] consequently, . . . the County is, in essence, suing itself." Majority opinion at 25-26 (emphasis and footnote omitted) (emphasis added). In order to cure this problem, the majority "dismiss[es] the County Council as a dispensable defendant in this case[,]" relying on HRCP Rule 21 relating to misjoinder of parties in a lawsuit. Majority

[4] Although the majority claims this is a mischaracterization, majority opinion at 42, in holding that the County, which had sued the County Council, represents the County Council, the majority has effectively replaced the County with the County Council. See discussion infra.

opinion at 42 (footnote omitted). Repositioning the parties thusly, the majority concludes that "by dropping the County Council as a defendant an actual controversy exists[,]" majority opinion at 40, and reaches the merits of the case. With all due respect, the majority's approach is wrong.

VII.

First, the majority, in assuming that the parties "brought the instant case on behalf of the County Council[,]" seemingly finds that the fact that the case was brought in the name of the County and not under the County Council is of no consequence and can be completely disregarded. Majority opinion at 25 (citing State ex rel. Bronster v. Yoshina, 84 Hawai'i 179, 185, 932 P.2d 316, 322 (1997) (stating that "for the purposes of this appeal, the fact that the attorney general brought this action in the name of the state rather than in the name of the governor represents a distinction without difference")).[5] This is contrary in principle to the express language in the pleadings.

[5] Bronster is clearly inapposite. In that case the Governor was not a named defendant and there was a true underlying controversy. The parties were adversaries in that the plaintiff (State of Hawai'i) sought declaratory judgment against the defendants (the chief election officer and the clerks of the Senate and the House) who had processed Hawai'i Constitutional amendments for the voters without proper notice to the Governor. Bronster, 84 Hawai'i at 180, 932 P.2d at 317. On the other hand, the defendants contended that the notice requirements had been met. Id. Here, the majority not only incorrectly assumes that the County intended to bring the instant case on behalf of the County Council, but proposes that despite the fact that the County Council was expressly named as a defendant in the instant case, it can simply be "dropped" as a defendant.

A.

The amended complaint, as set forth by the County Council itself and as acknowledged by Defendants-Appellees, treats the County and the County Council as separate entities between whom there is a dispute. The amended complaint alleges that "[a]n actual controversy has arisen and presently exists between the County and defendant[] . . . [County] Council." (Emphasis added.) Hence, under the amended complaint, the County alleges that the County Council, which it is suing, is an entity separate from the County, not an entity for which it is acting.

Nevertheless, the majority in effect substitutes the County Council for the County, although the County Council is but a constituent part of the County government. See majority opinion at 40 (stating that the "[County], by asserting that the Charter Amendment usurps the taxing authority of the County Council, has asserted an injury on behalf of the Council" (emphasis added)). Based on the allegations made in paragraphs 19, 20, and 28 of the amended complaint, the majority contends that the County Council is the real party in interest. See majority opinion at 22 (stating that "[w]e believe the first amended complaint alleges a sufficient injury . . . to confer standing . . . upon the County Council" (citing paragraphs 19, 20, and 28 of the first amended complaint)) (emphasis omitted).

With all due respect, it is incorrect to argue, as the majority does, that "it is clear . . . that the [County] has

brought the instant case on behalf of the County Council[,]" majority opinion at 25 (emphasis added), inasmuch as the County sued the County Council as a defendant, and the County and Defendants-Appellees distinguish between the County as an entity in and of itself, as opposed to the Mayor, Finance Director and the County Council. Plainly, then, the County was not acting on behalf of the County Council it was suing, as the majority contends. Moreover, if as the majority contends, the injury is suffered by the County Council and not the rest of the County government or the political subdivision designated as the County of Kaua'i, the appropriate plaintiff is the County Council itself as the real party in interest, not the County. But there is no legal basis for substituting the County Council for the County.

B.

HRCP Rule 21,[6] referred to by the majority, does not provide a vehicle for impliedly substituting the County Council for the County. In circumstances similar to this case, it has been held that "Rule 21 cannot be employed as a means to create a case or controversy through substitution where one no longer exists. Fox v. Bd. of Trs. of the State Univ. of New York, 148 F.R.D. 474, 486 (N.D.N.Y. 1993) [hereinafter Fox II] (emphasis added). In Fox II, the district court observed "the present action had been rendered moot because in the intervening years the plaintiff students had graduated." Id. at 476 (citing Fox v.

[6] See infra for text of HRCP Rule 21.

Bd. of Trs. of the State Univ. of New York, 764 F. Supp 747, 757 (N.D.N.Y. 1991) [hereinafter Fox I]. The district court explained that when a case becomes moot "the Constitution's case or controversy requirement . . . is not satisfied and a federal court lacks subject matter jurisdiction over the action." Id.

Fox II noted that "although not relied on by the court in [Fox I], the plaintiffs submit[ted] that Rule 21 could provide a basis for allowing amendment of the complaint" to substitute new parties. Id. at 484. According to Fox II, "[s]everal courts have recognized the impropriety of relying upon Rule 21 to substitute parties, as opposed to adding or dropping parties." Id. (emphasis added) (citing Sable Commc'ns of California v. Pacific Tel. & Tel. Co., 890 F.2d 184, 191 n.13 (9th Cir. 1989) (denying a motion by the plaintiff to substitute members of the California Public Utilities Commission, which might have allowed the action to survive, because "[n]othing on the face of Rule 21 allows substitution of parties" and "[t]he rule by its terms creates means to cure 'misjoinder of parties'")).

Similar to the majority's action here with respect to the County, the plaintiffs in Fox II attempted "to substitute" a claimant. Id. The district court concluded that such a substitution is "simply not within the scope of Rule 21, which is not a rule providing for the substitution of parties," but which "was enacted to minimize the harsh effects of common-law adherence to technical rules of joinder" and not "in order to

deal with problems of defective federal jurisdiction." Id. (internal quotation marks and citations omitted)); see also Schwartz v. Metro. Life Ins. Co., 2 F.R.D. 167, 168 (D. Mass. 1941) (Rule 21 "contemplates the retention of a party or parties after the other party or parties are dropped or before they are added" and as such the guardian suing a representative of an insane ward could not institute a personal action against a defendant by substitution).

Fox II reasoned that "[i]f that were a proper application of Rule 21, then parties could routinely invoke Rule 21 as a means of circumventing a finding of mootness, thus rendering the mootness doctrine a legal fiction." Fox II, 148 F.R.D. at 486. By the same token, the same problem arises here for the majority, which in effect circumvents the lack of a controversy by seemingly "invok[ing] Rule 21" to allow substitution of a party.

Fox II noted that it did not "ignore the fact that case support does exist . . . for permitting substitution of parties under Rule 21." Id. In this regard, the majority seemingly relies on Mullaney v. Anderson, 342 U.S. 415 (1952). In that case, the Court allowed the real party in interest to be substituted for his agent. The Alaska legislature had imposed a $5 fee on resident fisherman and a $50 fee on non-resident fishermen. Id. at 416. The Alaska Fisherman's Union and its Treasury-Secretary brought suit on behalf of 3,200 nonresident union members. Id.

Mullaney explained that "[t]he original plaintiffs alleged without contradiction that they were authorized by the nonresident union members to bring this action in their behalf. This claim of authority is now confirmed in the petition supporting the motion to add the member-fishermen as plaintiffs." Id. at 417 (emphasis added). As such, Mullaney said that "[t]o grant the motion merely puts the principal, the real party in interest, in the position of his avowed agent" and "[t]he addition of these two parties [as] plaintiff[s] can in no wise embarrass the defendant. Nor would their earlier joinder have in any way affected the course of the litigation." Id. (emphasis added).

The instant case is manifestly distinguishable. Here the County did not "allege[] . . . [that it was] authorized by the [City Council] to bring this action on their behalf" as was the case in Mullaney. Id. Rather, despite the majority's allegations, the County expressly brought suit against and not "on behalf of the County Council." Majority opinion at 42. Additionally, in this case, as contrasted with Mullaney, an "earlier joinder" would have definitely "affected the course of the litigation[,]" 342 U.S. at 417, inasmuch as the subsequent substitution and dismissal of the County Council performed by the majority would have been unnecessary. Thus, substitution of the County Council for the County is not authorized under HRCP Rule 21.

C.

Substitution of a party is allowed, but under HRCP Rule 25[7] entitled "Substitution of Parties." Under the express provisions of that rule, substitution is only appropriate in particularized situations. As noted in Fox II, Rule 25 "[b]asically . . . designates four specific categories where substitution is appropriate: (1) death; (2) incompetency; (3) transfer of interest; and (4) public officers-death or separation

[7] HRCP Rule 25 allows for substitution of parties and states in pertinent part:

> **(a) Death.** (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. . . .
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> (2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.
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> **(b) Incompetency.** If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against the party's representative.
>
> **(c) Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. . . .
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> **(d) Public Officers; Death or Separation from Office.**
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> (1) When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. . . .
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> (2) When a public officer sues or is sued in an official capacity, the officer may be described as a party by official title rather than by name; but the court may require the officer's name to be added.

(Boldfaced font in original.)

from office." 148 F.R.D. at 486 n.29 (citing FRCP Rule 25).[8] Obviously, none of the categories pertain here. Thus, substitution of the County Council for the County is not authorized under HRCP Rule 25.

VIII.

Second, as noted before, the majority recognized that following its implied substitution of the County Council for the County as plaintiffs, "the presence of the County Council as a defendant in this case destroys the existence of an actual controversy" because the County Council would be suing itself. Majority opinion at 34-35. Notwithstanding the majority's acknowledgment of the resulting lack of controversy, it decides again sua sponte "at this stage of the proceeding, . . . to 'drop,' i.e., dismiss, the County Council [as a defendant in the instant case,] to cure the 'spoiler' problem," majority opinion at 35, and thus, to fashion a controversy. To achieve this, the majority relies on HRCP Rule 21 (2004).[9] HRCP Rule 21 provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or added by order of the court

[8] It may be noted that "HRCP Rule 25 is nearly identical to its federal counterpart." Roxas v. Maros, 89 Hawai'i 91, 119, 969 P.2d 1209, 1237 (1998).

[9] HRCP Rule 21 is virtually identical to the Federal Rules of Civil Procedure Rule 21 which provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

> on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately by order of the court.

In utilizing HRCP Rule 21 to drop the County as a defendant, the majority predominantly relies on two federal cases: Stark v. Indep. Sch. Dist. #640, 163 F.R.D. 557 (D. Minn. 1995), and Newman-Greene v. Alfonzo-Larrain, 490 U.S. 826 (1989).[10] Both cases are irrelevant to this appeal, for in none of the cases is HRCP Rule 21 applied to establish a controversy where one did not already exist.

A.

In Stark the plaintiffs sought a declaratory judgment regarding whether the use of taxpayer funds to support an allegedly religious school was in violation of the Establishment Clause. 163 F.R.D. at 559. The plaintiffs brought suit against the school district, the school board, the Brethern, which they identified as a religious association, and Lloyd Paskewitz (Paskewitz), owner of the school building and surrounding property. Id. Paskewitz filed a motion to dismiss. Id. at 561. That court, citing Rule 21, dismissed Paskewitz.

[10] As the majority itself notes, the Hawai'i case law which states that "'[a] circuit court has the discretion to realign the parties at any stage of the action and on such terms as are just,'" majority opinion at 35-36 (quoting Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 244, 948 P.2d 1055, 1085 (1997), is in relation to "the appropriate number of peremptory challenges to be allocated to the parties at trial and, thus, provides little guidance with respect to the circumstances [at issue] here," id. at 36, where there is no underlying case or controversy between the parties.

It was said that the real Establishment Clause challenge was "directed at the actions of the [s]chool [d]istrict and the Brethern, not at [Paskewitz]." Id. According to that court, "[u]nder the circumstances of this case, the [c]ourt has the option to sever and stay the action against [Paskewitz], or to drop him as a party." Id. at 564. The district court determined that because "resolution of the dispute among the remaining parties will resolve all claims involving [Paskewitz,]" dismissal was appropriate. Id. However, the district court noted that the dismissal was "permissive in character" and "without prejudice." Id.

Thus, Stark is plainly distinguishable. Because an underlying controversy existed, it was not necessary for the district court, on its own initiative, to drop Paskewitz to create adversaries among the remaining parties as the majority purports to do in this case. Significantly, also, the dismissal in Stark was based on a motion by a party, namely the party that was eventually dismissed, and was done "permissive[ly,]" id., not at the behest of the appellate court as is done by the majority here.

B.

In Newman-Greene, Newman-Green, Inc., an Illinois corporation, brought a "state-law contract action in a [d]istrict [c]ourt against a Venezuelan corporation, four Venezuelan

citizens, and William L. Bettison [(Bettison)], a United States citizen domiciled in Caracas, Venezuela." 490 U.S. at 828. Newman-Green alleged that the corporation had breached a licensing agreement and that the individual defendants, who were "joint and several guarantors of royalty payments due under the agreement, owed money to Newman-Green." Id.

The action was brought under the diversity of citizenship jurisdiction of the district court. But inclusion of Bettison destroyed diversity because, for purposes of diversity jurisdiction, he was "stateless." Id. (internal quotation marks and citation omitted). However, neither counsel nor the district court raised this issue and the district court granted partial summary judgment for Newman-Greene and partial summary judgment in favor of the individual plaintiffs. Id. On appeal, the Seventh Circuit Court of Appeals "inquired as to the statutory basis for diversity jurisdiction" but concluded that Rule 21 did not "empower[] appellate courts to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction." Id. at 829.

The narrow issue before the U.S. Supreme Court on certiorari in Newman-Greene was "'whether a court of appeals [such as the Seventh Circuit] may do what a district court can do and dismiss a dispensable nondiverse party itself, or whether a court of appeal must remand the case to the district court,

leaving it to the district court's discretion to dismiss the party.'" Majority opinion at 37 (quoting Newman-Greene, 490 U.S. at 832-33) (emphasis added) (brackets omitted). The Court answered this question in the affirmative, determining that "[a]lmost every modern Court of Appeals faced with this issue has concluded that it has the authority to dismiss a dispensable nondiverse party by virtue of Rule 21" and it was "reluctant to disturb this well-settled judicial Construction[.]" Newman-Greene, 490 U.S. at 833. As such, the Court concluded that it was appropriate for the Seventh Circuit to dismiss Bettison, who was not "indispensible to the suit" in order to preserve diversity. Id. at 838.

Obviously Newman-Greene is distinguishable from the instant case, as this court does not have federal diversity jurisdiction and the issue of dismissing a nondiverse dispensible party would never arise in our court. Despite the fact that this issue could never come before us, the majority relies on the Court's discussion of judicial efficiency and flexibility made in the specific diversity context for the naked proposition that it may "dismiss the County Council as a dispensable defendant in this case." Majority opinion at 42. However, the Court in Newman-Greene decided that "hypertechnical jurisdictional purity" was not necessary because it was allowing an appellate court to do what the trial court could already do in the particular context of diversity actions: dismiss dispensable, non-diverse

parties "at any time, even after judgment has been rendered." 490 U.S. at 837.

Clearly, then, Newman-Greene does not stand for the proposition that Rule 21 allows a party to be dropped in order to create a controversy where no underlying controversy previously existed or for the majority's assertion that purported "judicial efficacy" justifies such action. In Newman-Greene, the underlying contract dispute that existed among the parties when Bettison was a party remained extant when Bettison was dropped as a party. The dismissal of Bettison as a party had no effect on the pre-existing vitality of the underlying contract controversy. Because there was no question that a controversy existed in Newman-Greene, as there is in the instant case, the majority's reliance on Newman-Greene is not correct.

IX.

The majority contends that "despite the subjective desires of the original parties to this action, it is their legal interests and duties that are to be considered when determining whether a suit is adversarial and, thus, not collusive for purposes of justiciability, i.e., standing."[11] Majority opinion at 34 (emphasis added). The majority rests this proposition on Reynolds, Golden Gate Bridge & Highway Dist. v. Felt, 5 P.2d 585

[11] This assertion relies on the assumption that a usurpation of the County Council's taxing authority has taken place -- a determination of the merits of the case that should take place after, not before the presence of a controversy is established.

(Cal. 1931), and United Pub. Workers, AFSCME, Local 646 v. Yogi, 101 Hawai'i 46, 62 P.3d 189 (2002). First, the cases upon which the majority relies are inapposite.

A.

In Reynolds, the plaintiffs, husband and wife, were passengers in a vehicle operated by the defendant. 36 Haw. at 556. The plaintiffs each sued the defendant for personal injuries suffered by them arising out of a collision involving the vehicle operated by the defendant and another vehicle. Id. The defendant filed a motion to dismiss the husband's case arguing, inter alia, that the husband committed "an abuse of process . . . in filing the suit under the circumstances as set forth in his letter[.]" Id. at 557. The husband, who was associated with the defendant in business prior to the accident, sent the defendant a letter which stated:

> I want to remind you again that we do not propose to look to you for the satisfaction of any judgment. The only way that we can proceed against the insurance company under the Kaufman policy is to sue you, obtain judgment and then sue the insurance company under the policy, alleging and proving that you were driving the car for the Kaufman's [sic] at the time Avis and I got hurt.

Id.

On appeal, the Reynolds court observed that "[a] collusive action is defined as one brought under a secret agreement for the decision of a legal question not involved in a controversy, or one so brought with intent to defraud the other person" and that the bringing of a collusive action "would

constitute abuse of the process of the court." Id. at 558 (internal quotation marks and citations omitted) (emphasis added). However, this court did not decide whether the case was a fictitious or collusive one because "[t]he record before [it did] not disclose the terms of the Kaufman policy nor [did] it disclose whether or not the company issuing the policy was given notice of the suit and called upon to defend it." Id. at 560. Accordingly, this court said that "we are unable to say and refrain from deciding whether or not the judgment against the defendant will be of any force or effect[.]" Id.

B.

In Felt, the respondent, who was the district secretary, refused to sign proposed bonds to be issued by the district. 5 P.2d at 589. The petitioner district demanded that the respondent sign the bonds which were intended to raise money for the construction of the bridge. Id. Amici curiae, representing certain taxpayers not parties to the case, filed and argued a motion to dismiss contending that "the proceeding [was] fundamentally collusive in its nature by reason of the fact that there [was] in reality no controversy between petitioner and respondent." Id.

The Felt court inter alia rejected the amici curiae's argument that "the proceeding [was] fictitious and collusive, being a mere attempt to secure an advisory opinion without an actual contest" because "[t]he real controversy . . . [was]

adverse legal interests, of sufficient immediacy and reality to warrant a declaratory judgment." Majority opinion at 34 (quoting Yogi, 101 Hawai'i at 57, 62 P.3d at 198) (Acoba, J., concurring) (internal quotation marks, citations, brackets, and ellipses omitted). But in this case, there were no "adverse legal interests" among the parties. Plainly on "the facts alleged" in the amended complaint and as answered by Defendants-Appellees, and in the briefs submitted by them on appeal, there are no "adverse legal interests" because the parties all agree the Charter Amendment is invalid.

D.

Second, contrary to the majority position, considering the "legal interests and duties" under the facts of this case does not lead to a proper determination that this suit is adversarial. As a preliminary matter, the posited conflict between "the legal interests and duties" only arises because of the improper realignment of the parties by the majority. That realignment is contrary to the pleadings and HRCP Rules 21 and 25. Further, assuming arguendo that the "legal interests and duties of the parties conflict," the legal position of the parties as expressed in the amended complaint, the answers before the court, the County's brief, and Defendants-Appellees' answering briefs on appeal is that they all agree that the Charter Amendment is invalid. Consequently, as to the contending legal interests and duties of the County Council, the Mayor, and

the Finance Director, their official legal positions are not antagonistic, but the same.

The majority's formulation of a controversy does not comport with any rule, statute or legal doctrine. It is not unanticipated then, that the County has not argued that it is acting "on behalf" of the County Council, or that the County Council has not maintained that it should be dropped as a defendant from the suit under HRCP Rule 21, or that the parties have not contended realignment in the manner imposed by the majority is an appropriate remedy. Nor is it unexpected that the majority does not cite to any case in which an appellate court has engaged in the methodology the majority employs in this case in order to engender a controversy.

X.

In the absence of a controversy, the case should be dismissed. Assuming arguendo any alleged "practicality" or judicial efficiency applies (even in contradiction to the cases relied on by the majority itself), neither can be a proper justification for deciding cases outside the expressed prescription in the declaratory judgment statute that an actual controversy or real antagonistic interests must exist in the case as presented to us. With all due respect, the torturous route taken by the majority to reach the merits suggests an intrusiveness beyond the appropriate and reasoned exercise of judicial power.

Moreover, not all wisdom resides in the judiciary. In our democracy, governance is a tripartite function. We may decide the legal limits within which the parties may act, but what choices they should make within those limits and what would be in their best interest to effectuate once the law is applied, is prudently and lawfully committed to them. Accordingly, I would dismiss the appeal.[12]

Kamaa E. Duffy, Jr.

[12] Because I would hold that the case should be dismissed, I do not reach the merits of the case.