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**Case No. 13-16554**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PRESIDIO HISTORICAL ASSOCIATION  
and SIERRA CLUB,

Plaintiffs-Appellants,

v.

PRESIDIO TRUST,

Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 3:12-cv-00522-LB  
(Hon. Laura M. Beeler, Magistrate Judge)

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**AMICUS CURIAE BRIEF  
OF  
CITIZENS FOR A FORT MONROE NATIONAL PARK, INC.  
IN SUPPORT OF APPELLANTS, SEEKING REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Citizens for a Fort Monroe National Park, Inc., states that it is a not-for-profit organization and has no parent companies, subsidiaries, or affiliates that have issued stock to the public in the United States or abroad.



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Mark D. Perreault

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## **PRELIMINARY STATEMENT**

Citizens for a Fort Monroe National Park, Inc., (“CFMNP”) is a Virginia non-profit corporation organized in 2006 following the 2005 decision of the Army to close Fort Monroe (located in Hampton, Virginia) as a military installation in 2011. CFMNP is dedicated to promoting awareness of the value of Fort Monroe to the nation and its inclusion in a new national park, and, overall, to maximizing the potential of Fort Monroe as a grand public place for the American people.

All parties to this appeal have consented to CFMNP filing this *amicus curiae* brief. No party’s counsel has authored this brief, in whole or in part, nor has any party or its counsel contributed any money that was intended to fund preparation or submission of this brief, nor has any person, other than the *amicus curiae*, its members or its counsel, contributed any money that was intended to fund preparation or submission of this brief.

CFMNP is filing this brief in support of the appellants, Presidio Historical Association and Sierra Club, seeking reversal of the judgment below. CFMNP specifically urges reversal of the judgment on the second cause of action below, the alleged violation of the National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470 *et seq.*, and its implementing regulations, standards and guidelines. CFMNP will point out the significance of Section 110(f) of the NHPA, 16 U.S.C. § 470h-2(f), to the preservation and protection of National Historic Landmarks

beyond the Presidio, including specifically Fort Monroe and Fort Monroe National Monument, and the impact, for better or worse, of the court's decision on Fort Monroe and, potentially, other Landmarks around the nation.

## ARGUMENT

### **The District Court's Interpretation of NHPA §110(f), If Upheld, May Mean Less Protection for the Fort Monroe National Historic Landmark District and Other National Historic Landmark Districts**

#### **A. Historical Background and Setting of Fort Monroe**

The current Fort Monroe National Historic Landmark District (including most of Fort Monroe National Monument) occupies land first visited by European settlers in 1607 when the English expedition led by Captain John Smith landed a party on the site (later denominated "Old Point Comfort") in their search for a suitable settlement (which ultimately ended more than 30 miles up the James River at Jamestown). A wooden fort was established on the site in 1609 (known as Fort Algernonne) because of its strategic location at the mouth of Hampton Roads where it meets the Chesapeake Bay in view of the Atlantic Ocean. That fort was destroyed and rebuilt a number of times in subsequent years, but a masonry fort, Fort George, was completed in 1728, only to be destroyed by a hurricane in 1749. During the Yorktown Campaign of the American Revolution in 1781, French troops occupied Old Point Comfort. Again, in the War of 1812, Old Point Comfort

was occupied by foreign troops, this time by British forces.

The Royal Navy's domination of the Chesapeake Bay during the War of 1812, and the occupation of Washington and the burning of the White House and other public buildings by British troops in 1814, convinced U.S. leaders after the war to build a series of major defensive fortifications along the Atlantic and Gulf coasts. The largest of these was Fort Monroe, a moat-encircled granite fort built between 1819 and 1834 on Old Point Comfort at the southern end of the Virginia Peninsula. More than a mile in circumference and designed by French General Simon Bernard (former military engineer for Napoleon), Fort Monroe came to be known as "the Gibraltar of the Chesapeake" and remains the largest moated fort ever built in North America. Robert E. Lee and his family lived at the Fort in the 1830's while the young officer supervised construction. Edgar Allen Poe also was stationed here as a young soldier, and Chief Black Hawk was imprisoned here.

Upon the outbreak of the Civil War, Fort Monroe became a Union stronghold in the heart of a Confederate state. In May 1861, three enslaved African-Americans, Shepard Mallory, Frank Baker and James Townsend, sought sanctuary with the Union forces at Fort Monroe after escaping from a work gang engaged in constructing Confederate fortifications across the harbor at Sewell's Point in Norfolk. The Union commander at Fort Monroe, General Benjamin Butler, divined a justification for declining to return them to their Confederate

masters, declaring them “contraband of war,” as they were being forced to aid the Confederate war effort. This precedent led to 10,000 or more slaves fleeing to Fort Monroe and hundreds of thousands fleeing to other Union forces throughout the South over the next several years, putting the lie to the claim that they preferred bondage to freedom and seriously damaging the Confederate war economy. Many historians believe this incident played a major role in the evolution of the Union war effort, from a war for union to a war for freedom. Fort Monroe itself came to be called “Freedom’s Fortress”.

A year later, President Abraham Lincoln himself visited Fort Monroe and played a major personal role in the successful Union attack on Norfolk in May, 1862, leading to the destruction of the Confederate ironclad *CSS Virginia* (also known as the *Merrimack*). The house he stayed in, Quarters #1, still stands inside the moated fortress. Confederate President Jefferson Davis was famously imprisoned at Fort Monroe from 1865-1867, and the casemate in which he was held for several months is still intact, now a part of the Casemate Museum, within the walls of the historic fortress.

Following the Civil War, Fort Monroe’s military tradition melded even more with the grandeur of on-site hotels. The first Hygeia Hotel was built in 1822, the Sherwood Inn in 1843, and the first Chamberlin Hotel in 1896. Only the Chamberlin, which was reconstructed in 1928 after a 1920 fire, still stands on Old



Point Comfort today (it is currently used for rental apartments and has recently been handsomely restored).

Fort Monroe continued to operate as an Army installation until 2011. Most of its land was designated a National Historic Landmark District (“NHLD”) on December 19, 1960. The NHLD consists of 157 contributing elements: 147 contributing buildings, six landscape features, three structures, and one stone fort (with eleven named or numbered elements).

Beyond its history and architecture, Fort Monroe is a 565-acre peninsula of exceptional beauty in the heart of the Hampton Roads metropolitan area of 1.7 million people. With over three miles of Chesapeake Bay shoreline, beaches, groves of live oaks, wetlands, and the potential for hundreds of acres of open space and parks, it provides the opportunity for valuable public waterfront green space and breathing room in a region comparatively deficient in public green space of any kind, and especially devoid of public green space along the shoreline, when compared to the San Francisco, New York or Boston metropolitan areas. *Bracing for Change – Fort Monroe and the Need for Parkland in Hampton Roads*, Trust for Public Land, Center for City Park Excellence, October 2008.

## **B. Closure of Fort Monroe as an Army Installation and Its Redevelopment**

Upon the announcement of its planned closure as an Army installation in 2005, a redevelopment planning process was initiated under the Defense Base

Realignment and Closure Act, 10 U.S.C. Section 2687. Initially, a massive residential development proposal was advanced, which contributed to the formation of CFMNP in 2006 in order to seek a plan that would preserve and protect Fort Monroe for the nation, to include a significant national park unit. A reuse plan was created in 2008 that reduced the amount of new development proposed, including designating a critical 72-acre area just north of the moated fortress between the Chesapeake Bay and the estuary of Mill Creek, known as the “Wherry Quarter,” as “undetermined” in use. *Fort Monroe Reuse Plan* of August 20, 2008.

In the spring of 2009, a Programmatic Agreement (“PA”) among the Army, the Virginia State Historic Preservation Officer, the Advisory Council on Historic Preservation, the Commonwealth of Virginia, the Fort Monroe Federal Area Development Authority, and the National Park Service, was completed for the undertaking of the “Closure and Disposal of Fort Monroe, VA.” The PA allowed for some new construction in the Wherry Quarter, subject to certain conditions. PA, Section IV.C.ii. e), f). While the PA was clearly intended to satisfy the requirements of NHPA Section 106, it also makes some reference to NHPA Section 110 and to protecting the NHLD, but still leaves significant doubt whether the PA satisfies the requirements of Section 110(f).

Following a massive public campaign initiated by CFMNP and ultimately joined in by the City of Hampton, many political leaders and national, regional and local historical, conservation and preservation organizations, 324 acres (more than 244 of which are to be in fee simple with the rest in easement) of the 565-acre Fort Monroe property were designated a national monument by a November 1, 2011 proclamation by President Obama, under the Antiquities Act of 1906, 16 U.S.C. §§ 431-433. The remaining acreage at Fort Monroe was designated for management by a state authority, the Fort Monroe Authority. More recently, on December 11, 2013, the Governor of Virginia approved a master plan for these remaining state-managed lands at Fort Monroe which, among other things, allows a new 21-acre residential subdivision and a nearly nine-acre new commercial development to be placed in the core Wherry Quarter, between two divided sections of the National Monument and within the National Historic Landmark District. In addition, it would permit further development just to the east, along the Chesapeake Bay, again inside the NHLD. CFMNP and other groups vigorously opposed this plan on the grounds it failed to maximize the potential of Fort Monroe as a National Monument and NHLD, and proposed development in the core Wherry Quarter that was, based upon data in the state authority's own economic studies, unnecessary to financial sustainability of the state-managed lands at Fort Monroe.

**C. Interpreting Section 110(f) Consistent with Appellants' Arguments May Act to Protect the Fort Monroe National Historic Landmark District and Enhance The Fort Monroe National Monument**

Like the Presidio, Fort Monroe (now sometimes referred to as “the Presidio of the East”) is a very significant national historic landmark, with a national park unit, that faces significant threats from new development, where Section 110(f) of the NHPA may play a significant role in its protection for future Americans, or not, depending upon how it is interpreted in this and future cases. If the reasoning of the district court is affirmed, the Section 110(f)-heightened affirmative obligation can be satisfied without considering all alternatives to the proposed action, thus weakening substantially the force of the statute as a protection for the nation’s national landmarks. Over time, the forces seeking economic exploitation of our nation’s great landmarks may gradually reduce their uniqueness and character to the point where the NHLD’s lose their high degree of integrity of location, design, setting, materials, workmanship, feeling and association that led to their designation in the first place.

Conversely, a ruling that mandates further efforts by the appellee to minimize harm to the Presidio National Historic Landmark will not only protect the integrity of the Presidio’s historic and natural resources, but could well contribute to protection of the Fort Monroe National Historic Landmark’s historic and natural resources, including the critical, character-defining Wherry Quarter

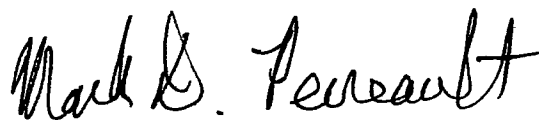
lands now threatened with residential and commercial development. Since there is data in the governing Commonwealth of Virginia authority's own studies that indicate financial sustainability of the state-managed lands at Fort Monroe can be achieved without new development in the core Wherry Quarter lands, it may well be that a rigorous Section 110(f) analysis would conclude that additional planning and actions could avoid the harm to the Fort Monroe NHLD that the Wherry Quarter development inflicts. *See Coalition Against a Raised Expressway (CARE) v. Dole*, No. 84-1219-C, 1986 U.S. Dist. LEXIS 30976, at \*49 (S.D. Ala., Oct. 20, 1986), *aff'd on other grounds*, 835 F.2d 803 (11<sup>th</sup> Cir. 1988) (where district court emphasized that Section 110(f) established a higher standard of care than Section 106).

### **CONCLUSION**

For the foregoing reasons, Citizens for a Fort Monroe National Park, Inc., respectfully requests that the Court reverse the district court's Order Granting Defendant's Motion for Summary Judgment and direct the district court to enter judgment in Appellants' favor on their National Historic Preservation Act claim.

Date: December 27, 2013

Respectfully submitted,



Mark D. Perreault  
Attorney for *Amicus Curiae*  
CITIZENS FOR A FORT MONROE  
NATIONAL PARK, INC.

**PROOF OF SERVICE**

I hereby certify that two (2) copies of this foregoing brief were mailed, via first-class mail, prepaid, this 27<sup>th</sup> day of December, 2013, to both of the following:

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January 2, 2014

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**To:** Mark D. Perreault

**From:** Molly C. Dwyer, Clerk of Court  
By: Liora Anis, Deputy Clerk

**Re:** Receipt of a Deficient Brief of Amicus Curiae on 12/30/2013

USCA No. 13-16554      Presidio Historical Association, et al v.  
Presidio Trust

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The amicus brief submitted by Citizens for a Fort Monroe National Park, Inc. was filed with the following minor deficiencies:

- *Brief was not submitted via ECF: All attorneys are required to submit all filings electronically using the Court's Appellate Electronic Case Files ("ECF") system. See 9th Cir. R. 25-5. A review of Court records indicates that counsel has not registered for Appellate ECF. Counsel for the amicus is directed to register for Appellate ECF within 14 days from the date of this notice.*

The following action has been taken with respect to the brief received in this office:

- *The deficiency is judged to be minor. The brief has been filed as of the date received.*