IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

LEVANA LOMMA,

Plaintiff,

v.

CLARE E. CONNORS, in her individual and official capacity as Attorney General of the State of Hawai'i; DAVID Y. IGE, in his official capacity as Governor of the State of Hawai'i; and DEREK S.K. KAWAKAMI, in his individual and official capacity as Mayor of the County of Kaua'i,

Defendants.

Civil No.: 1:20-cv-00456-JAO-RT

MEMORANDUM IN SUPPORT OF MOTION

District Judge: Hon. Jill A. Otake

Magistrate Judge: Rom A. Trader

No Trial Date Set

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MEMORANDUM IN SUPPORT OF MOTION

Defendants DAVID Y. IGE, Governor of the State of Hawai‘i, and CLARE E. CONNORS, Attorney General of the State of Hawai‘i (collectively, the "**State Defendants**"), respectfully submit the following Memorandum in support of the accompanying Motion to Dismiss under FRCP Rules 12(b)(1) and 12(b)(6).

Plaintiff LEVANA LOMMA ("**Plaintiff**") seeks to challenge the mandate—as set forth in State and County emergency proclamations—that Hawai‘i residents wear a mask in public to protect themselves and the community from spreading COVID-19. Plaintiff's Complaint should be dismissed. Even when accorded the liberal construction due pro se complaints, the Complaint clearly fails as a matter of law. Whether analyzed under the First Amendment claim, the Ninth Amendment, or Hawaii State law, the result is the same: The claims purportedly set forth against the State Defendants are meritless and must be dismissed.

BACKGROUND

I. The COVID-19 pandemic

"Like many states across the nation and countries around the world, Hawai'i has issued a series of Emergency Proclamations 'to limit the spread of COVID-19, a novel severe acute respiratory illness[.]'" *Carmichael v. Ige*, 470 F.Supp.3d 1133, 1137 (D. Haw. 2020) (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring)). COVID-19, which is virulently infectious, has already infected more than 27

million Americans, and killed more than 480,000. *See* https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited February 16, 2021).[1] In Hawai‘i, COVID-19 has to date infected over 26,000 people and killed over 400. *See* https://health.hawaii.gov/coronavirusdisease2019/ (last visited February 16, 2021).

"[E]fforts to contain COVID-19" are complicated by a host of complex factors, including "the fact that individuals who are 'infected but asymptomatic may unwittingly infect others." *Carmichael*, 470 F.Supp.3d at 1130 (quotation and alteration omitted). While many individuals who suffer from COVID-19 symptoms fully recover, some suffer from long-term complications. *See* https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html (last visited

[1] "[C]ourts may 'consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *Walter v. Drayson*, 496 F. Supp. 2d 1162, 1165 (D. Haw. 2007) (quotation omitted). Likewise, Courts have routinely taken judicial notice of information on the CDC's website in challenges relating to the COVID-19 pandemic. *See, e.g.*, *United States v. Bryant*, No. 2:03-CR-00245-RHW-1, 2020 WL 6686414, at *1 (E.D. Wash. Nov. 12, 2020) ("The Court takes judicial notice of the Center of Disease Control and Prevention's (CDC) website regarding Covid-19."); *McGhee v. City of Flagstaff*, No. CV-20-08081-PCT-GMS, 2020 WL 2309881, at *2 (D. Ariz. May 8, 2020) (taking judicial notice of CDC guidance "[b]ecause government publications are matters of public record and can be easily verified.").

February 16, 2021). In addition, since December 2020, new variations of the COVID-19 virus first identified in other countries began to be detected in the United States. https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html (last visited February 16, 2021). Some of these variants "spread[] more easily and quickly than other variants," and "may be associated with an increased risk of death compared to other variant viruses." *Id.*

There is broad scientific consensus that "cloth face coverings are a critical tool in the fight against COVID-19 that could reduce the spread of the disease, particularly when used universally within communities." https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html (last visited February 16, 2021). This is because as early as Summer 2020, there was "increasing evidence that cloth face coverings help prevent people who have COVID-19 from spreading the virus to others." *Id.* The CDC therefore recommends that "[e]veryone 2 and older should wear masks in public," https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited February 16, 2021), and has ordered that individuals must wear masks while on public conveyances or at transportation hubs. https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html (last visited February 16, 2021).

Pursuant to such guidance, the Governor's COVID-19 Emergency Proclamations have included rules that require individuals within the State to wear a face covering subject to several exceptions. In relevant part, the Governor's current Eighteenth Proclamation Related to the COVID-19 Emergency provides:

> All persons in the State shall wear a face covering over their nose and mouth when in public. The requirements of this statewide mask mandate are set forth in Exhibit J, which shall be enforced in each county.

Eighteenth Proclamation at 5, https://governor.hawaii.gov/wp-content/uploads/2021/02/2102078-ATG_Eighteenth-Proclamation-Related-to-the-COVID-19-Emergency-distribution-signed.pdf (last visited February 16, 2021).[2]

Exhibit J to the Eighteenth Proclamation provides the following exceptions to the Mask Mandate:

> A. Individuals with medical conditions or disabilities where the wearing of a face covering may pose a health or safety risk to the individual;
> B. Children under the age of 5;
> C. While working at a desk or work station and not actively engaged with other employees, customers, or visitors, provided that the individual's desk or workstation is not located in a common or shared area and physical distancing of at least six (6) feet is maintained;
> D. While eating, drinking, smoking, as permitted by applicable law;

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[2] The relevant language of the mask mandate and the exceptions in Exhibit J have remained unchanged from the first state-wide mask mandate in the Governor's Fifteenth Proclamation Related to the COVID-19 Emergency, *see* https://governor.hawaii.gov/wp-content/uploads/2020/11/2011051-ATG_Fifteenth-Proclamation-Related-to-the-COVID-19-Emergency-distribution-signed.pdf (last visited February 16, 2021), to the current Eighteenth Proclamation.

E. Inside private automobiles, provided the only occupants are members of the same household/living unit/residence;
F. While receiving services allowed under a State or county order, rule, or proclamation that require access to that individual's nose or mouth;
G. Where federal or state safety or health regulations, or a financial institution's policy (based on security concerns), prohibit the wearing of facial coverings;
H. Individuals who are communicating with the hearing impaired while actively communicating (e.g., signing or lip reading);
I. First responders (police, fire fighters, lifeguards, etc.) to the extent that wearing face coverings may impair or impede the safety of the first responder in the performance of his/her duty;
J. While outdoors when physical distance of six (6) feet from other individuals (who are not members of the same household/living unit/residence) can be maintained at all times; and
K. As specifically allowed by a provision of a State or county COVID-19 related order, rule, or proclamation.

Exhibit J also provides that "[t]he wearing of face coverings is intended to complement, not serve as a substitute, for physical distancing and cleanliness."

II. Plaintiff's Complaint

Plaintiff characterizes her Complaint, filed on October 23 and amended on October 28, as a constitutional challenge to the Governor's Mask Mandate. The Complaint appears to advance two legal claims. First, Plaintiff suggests that the Mask Mandate "violates the plaintiff's First Amendment right of free speech under the United States Constitution by literally abridging the plaintiff's ability to speak audibly and clearly while wearing a face mask, thereby resulting in a form of censorship by infringing upon the ability for plaintiff to effectively communicate with others[.]" Complaint ¶ 2. Second, Plaintiff asserts that the Mask Mandate

"acts to obstruct plaintiff's God-given right to freely breathe LIFE-giving oxygen, which is a fundamental right, not enumerated, and so protected under the Ninth Amendment of the United States Constitution." Complaint ¶ 2.

In addition to federal constitutional claims under the First and Ninth Amendments, it appears that Plaintiff's Complaint – read liberally – may also intend to challenge the legal validity of the Mask Mandate under State law. In particular, the Complaint appears to allege that the "government has not shown the Covid-19 disease qualifies as a public health emergency under HRS 127A-2[.]" Complaint, Conclusion; *see also* Complaint ¶¶ 31-34, 52, Conclusion.

The Complaint requests that the Court, *inter alia*, "[e]nter a declaration that the Fourteenth Supplemental Proclamation is unconstitutional and void," "[e]nter a preliminary and permanent injunction barring defendants Clare E. Connors, David Y. Ige and Derek S.K. Kawakami from enforcing the Fourteenth Supplemental Proclamation against [P]laintiff," and "[a]ward fees and costs associated with filing this complaint to [P]laintiff[.]" Complaint, Prayer for Relief.

LEGAL STANDARD

"Federal Rule of Civil Procedure 12(b)(6) permits a motion to dismiss for 'failure to state a claim upon which relief can be granted.'" *Morelli v. Hyman*, No. CV 19-00088 JMS-WRP, 2020 WL 3847703, at *3 (D. Haw. July 8, 2020). "To survive a motion to dismiss, a complaint must contain sufficient factual matter,

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "This tenet – that the court must accept as true all of the allegations contained in the complaint – 'is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (quoting *Iqbal*, 556 U.S. at 678). "[A] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quotation omitted). "Factual allegations that only permit the court to infer 'the mere possibility of misconduct' or 'unadorned, the defendant-unlawfully-harmed me accusations' fall short of meeting this plausibility standard." *Id.* (quotation omitted; cleaned up).

"[C]onclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss." *Thinh Tran v. Dep't of Planning for Cty. of Maui*, No. CV 19-00654 JAO-RT, 2020 WL 3146584, at *3 (D. Haw. June 12, 2020) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000)).

Although courts "liberally construe[] a pro se complaint," the courts "cannot act as counsel for a pro se litigant or supply the essential elements of a claim."

Griffin v. Hawai'i, No. 20-CV-00298-DKW-KJM, 2020 WL 5790380, at *2 (D. Haw. Sept. 28, 2020) (citing *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987); *Pliler v. Ford*, 542 U.S. 225, 231 (2004); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)).

As a general matter, emergency restrictions protecting public health during the COVID-19 pandemic "are not susceptible to . . . constitutional challenges unless they have 'no real or substantial relation to' the crisis or are 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Carmichael*, 470 F.Supp.3d at 1143 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31(1905)). "*Jacobson* instructs that all constitutional rights may be reasonably restricted to combat a public health emergency." *Id.* at 1142-43 ("Courts presented with emergency challenges to governor-issued orders temporarily restricting activities to curb the spread of COVID-19 have consistently applied *Jacobson v. Massachusetts* to evaluate those challenges.").

As this Court recognized in *Carmichael*, because the "'Constitution principally entrusts [t]he safety and the health of the people to the politically accountable officials of the States to guard and protect,' . . . [i]f officials do not exceed these broad limits, 'they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.'"

Carmichael, 470 F. Supp. 3d at 1142 (quoting *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613-14 (Roberts, C.J., concurring).

When a defendant puts the question of federal jurisdiction at issue by filing a Rule 12(b)(1) motion, it is the plaintiff's burden to show that the Court has jurisdiction over each claim. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015). Rule 12(b)(1) is "a proper vehicle for invoking sovereign immunity from suit" under the Eleventh Amendment because the State's immunity is "quasi-jurisdictional." *Id*. "In the context of a Rule 12(b)(1) motion to dismiss," the plaintiff must establish "that immunity does not bar the suit." *Id*.

ARGUMENT

I. Plaintiff's First Amendment Claim Fails

The core of Plaintiff's First Amendment claim is that the Mask Mandate allegedly violates her "right of free speech under the United States Constitution by literally abridging [her] ability to speak audibly and clearly while wearing a face mask, thereby resulting in a form of censorship by infringing upon the ability for plaintiff to effectively communicate with others[.]" Complaint at ¶ 2.

This claim is wholly meritless. Since the COVID-19 pandemic began, the federal courts have repeatedly rejected free-speech challenges to state face-covering requirements. For example, in one well-reasoned district court decision considering a First Amendment challenge to a face-covering requirement –

Antietam Battlefield KOA v. Hogan, 461 F. Supp. 3d 214 (2020) – the court squarely rejected the idea that being required to wear a mask burdened a plaintiff's free-speech rights:

> The plaintiffs argue that the face covering requirement violates their freedom of speech. "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the Supreme Court has] asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (citation omitted). Therefore, the Supreme Court has found that allowing military recruiters on campus was not expressive conduct protected by the First Amendment, *see Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* ("FAIR"), 547 U.S. 47, 66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006), and the Fourth Circuit has found that recreational dancing was not either*, Willis v. Town Of Marshall, N.C.*, 426 F.3d 251, 257 (4th Cir. 2005). As to the military recruiting, the Court found that schools' refusal to allow recruiting on campus was expressive only because the schools' conduct was accompanied by speech. *FAIR*, 547 U.S. at 66, 126 S.Ct. 1297. But "[t]he fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection" as symbolic speech. *Id*.
>
> Similarly, while wearing a face covering might be to several of the plaintiffs a "sign of capture on the battlefield, and subservience to the captor," (Compl. ¶ 73), that meaning is not "overwhelmingly apparent." *FAIR*, 547 U.S. at 66, 126 S.Ct. 1297 (quoting *Johnson*, 491 U.S. at 406, 109 S.Ct. 2533). Instead, especially in the context of COVID-19, wearing a face covering would be viewed as a means of preventing the spread of COVID-19, not as expressing any message. As the Supreme Court explained in *City of Dallas v. Stanglin*, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a

> shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989).

Antietam Battlefield KOA, 461 F. Supp. 3d at 236-37.

This same reasoning requires the dismissal of Plaintiff's free-speech claim. Here, as in *Antietam*, Plaintiff's supposed constitutional claim categorically falls outside the Free Speech Clause's domain – because there is *no* free-speech right to speak without a mask during a pandemic. Thus, there is no basis for the Court to apply Free Speech Clause scrutiny to the Mask Mandate at all. Requiring people to wear masks does not offend the Free Speech Clause. It is – at most – a wholly incidental burden on speech. And "the First Amendment does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

Even if the Mask Mandate were assumed to implicate the Free Speech Clause at all – which, as explained above, it does not – the Mask Mandate would still clearly pass constitutional muster because it would be (at most) a content-neutral restriction on the time, place, and manner of speech. Such restrictions are subject to intermediate scrutiny, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) – a form of scrutiny that the Mask Mandate clearly passes (with or without the deferential *Jacobson* framework being applied). Courts across the country have applied this standard and unanimously rejected Free Speech challenges to

mask mandates. *See Oakes v. Collier Cty.*, No. 220CV568FTM38NPM, 2021 WL 268387, at *10 (M.D. Fla. Jan. 27, 2021) (dismissing claim that mask mandate violates the First Amendment); *Young v. James*, No. 20 CIV. 8252 (PAE), 2020 WL 6572798, at *3 (S.D.N.Y. Oct. 26, 2020) (rejecting First Amendment challenge to mask mandate); *Stewart v. Justice*, No. CV 3:20-0611, 2020 WL 6937725, at *6 (S.D.W. Va. Nov. 24, 2020) (same); *Minnesota Voters All. v. Walz*, No. 20-CV-1688 (PJS/ECW), 2020 WL 5869425, at *12 (D. Minn. Oct. 2, 2020) (same).

A content-neutral, time-place-or-manner restriction survives intermediate scrutiny if it is narrowly tailored to serve a significant governmental interest unrelated to the content of the speech, and leaves open adequate channels for communication. *Ward*, 491 U.S. 781; *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1068 (9th Cir. 2020). To be narrowly tailored, the restriction must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.[3]

First, the Mask Mandate is plainly content neutral. It was put in place to mitigate the spread of COVID-19, not to limit any particular forms of speech.

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[3] Under intermediate scrutiny, the restriction "need not be the least restrictive or least intrusive means of serving the governments interests. But the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not advance its goals." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (cleaned up).

Ward, 491 U.S. at 791 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *Young*, 2020 WL 6572798, at *4 (finding that, "at most, [the mask mandate] imposes a content-neutral limitation on where and how a person can speak or express themselves.").

Second, it is clear that preventing "the spread of COVID-19 and [avoiding] overwhelming the health care system . . . are compelling state interests." *Carmichael*, 470 F. Supp. 3d at 1147; *Stewart*, 2020 WL 6937725, at *6 ("Slowing the spread of a novel virus that has already killed over 250,000 Americans is a compelling, and at least significant, government interest.").

Third, in light of the CDC guidance on mask wearing, which includes urging that mask usage is most effective when masks are worn "universally within communities,"[4] and the extensive list of exceptions to the Mask Mandate, it is clear that the Mask Mandate is narrowly tailored to serve that compelling interest. As one district court explained:

> Although the state-wide order is undeniably broad, it is no less narrowly tailored to its purpose. The order is geographically broad and indefinite, but so too is the virus. The order applies to all individuals regardless of their apparent health, but the evidence shows that asymptomatic individuals are nonetheless contagious. Moreover, the order is narrowly tailored through its various exceptions. Indeed, the order even provides an exception that

[4] https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html (last visited February 16, 2021).

> allows businesses—like Bridge Café & Bistro—to continue operating: "face covering shall not be required . . . when one is actively engaged in the consumption of food and/or beverage.

Stewart, 2020 WL 6937725, at *6.

Finally, the Mask Mandate leaves open ample alternative channels of communication. (Such alternative channels include, among other things, speaking through a mask). *See Oakes*, 2021 WL 268387, at *10 ("[I]ndividuals assembling must exercise a minor degree of caution by social distancing or wearing masks. Yet that is a reasonable restriction on the manner of assemblies within the County. During this pandemic, far greater restrictions have left open alternate channels to assemble."); *Young*, 2020 WL 6572798, at *4 ("The EO does not prevent Young from speaking or expressing herself. It simply requires that, under certain circumstances, she speaks through a face covering.").

Accordingly, Plaintiff's First Amendment claim fails because the Mask Mandate is not subject to scrutiny under the First Amendment. And even if it were, it clearly passes constitutional scrutiny.

II. Plaintiff's Ninth Amendment Claim Fails

The Complaint also purports to assert a claim under the Ninth Amendment. *See* Complaint at ¶ 2, 3, 27, & Conclusion. The gravamen of this claim is that "requiring all citizens to wear a face mask while in public violates [P]laintiff's . . .

right to breathe LIFE-giving oxygen," *id.*, which she asserts is protected under the Ninth Amendment.

This claim fails. "The ninth amendment states, 'the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986) (quoting U.S. Const. amend. IX). "The Ninth Amendment is a rule of interpretation rather than a source of rights." *Froehlich v. State Dep't. of Corrs.*, 196 F.3d 800, 801 (7th Cir. 1999). As such, the Amendment helps "to assure that greater rights guaranteed by a State are not undermined by lesser rights under the Constitution." *Oliver v. Asuncion*, No. CV 18-00355 JAO-KSC, 2018 WL 6332834, at *3 (D. Haw. Dec. 4, 2018). But "[f]ederal courts appear to have unanimously rejected § 1983 claims premised on the Ninth Amendment." *Solomon Mathis v. Lozier*, No. C19-3035-LTS, 2020 WL 3621181, at *7 (N.D. Iowa July 2, 2020). Although "it has been argued that the ninth amendment protects rights not enunciated in the first eight amendments," the Ninth Circuit has held that "the ninth amendment has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim." *Strandberg*, 791 F.2d at 748 (citations omitted); *see Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991) (Ninth Amendment is "not interpreted as independently securing any constitutional rights for purposes of making out a

constitutional claim”). “Other circuits agree that the Ninth Amendment cannot serve as an independent source of rights for a § 1983 claim.” *Griego v. Cty. of Maui*, No. CV 15-00122 SOM-KJM, 2017 WL 1173912, at *11 (D. Haw. Mar. 29, 2017).

Thus, “[b]ecause the Ninth Amendment does not guarantee any specific constitutional right, as required for pursuing a constitutional claim under § 1983,” Plaintiff “may not proceed against” Defendants “under § 1983 based on the Ninth Amendment.” *Griego*, 2017 WL 1173912, at *11.

III. Insofar as Plaintiff’s “Ninth Amendment” Challenge Is Liberally Construed as a Substantive Due Process Claim, that Claim also Fails

To the extent Plaintiff’s Complaint can be liberally construed as asserting a substantive due process claim, any such claim also fails as a matter of law. Because Plaintiff is challenging efforts to control the spread of a deadly pandemic, the highly deferential framework set forth in *Jacobson*, controls.[5] The only

[5] Because “our Constitution broadly commits the difficult and delicate exercise of emergency powers in a global pandemic to the elected officials of the executive branch,” “[i]t is not a far reach to say that within the broad limits of the *Jacobson* test, the executive branch may . . . order businesses to curtail activities to protect the public health and welfare.” *SH3 Health Consulting, LLC v. Page*, 459 F. Supp. 3d 1212 (E.D. Mo. 2020). Although the U.S. Supreme Court has recently granted emergency applications partially enjoining state orders restricting indoor worship, *see S. Bay United Pentecostal Church v. Newsom*, No. 20A136, 2021 WL 406258 (U.S. Feb. 5, 2021); *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257, at *1 (U.S. Feb. 5, 2021), those orders are plainly limited to free exercise of religion claims, and are not applicable to free speech challenges to state mask mandates. *See, e.g.*, *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603,

restriction at issue here – namely, the Mask Mandate – plainly survives review under *Jacobson*. The restrictions unquestionably have a "real and substantial relation" to protecting the public during the ongoing public health emergency, and are not "beyond question, in palpable conflict with the Constitution." *Jacobson*, 197 U.S. at 31.

Even if analyzed under "ordinary" (*i.e.*, non-*Jacobson*) standards of judicial review, the temporary restrictions at issue here clearly pass muster. Because the restrictions do not impermissibly burden a fundamental right within the meaning of substantive due process, rational basis review applies. "[O]nly those aspects of liberty that we as a society traditionally have protected as fundamental are included within the substantive protection of the Due Process Clause." *Franceschi v. Yee*, 887 F.3d 927, 937 (9th Cir. 2018). Searching review under substantive due process is "largely confined to protecting fundamental liberty interests, such as

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2614 (2020) (Kavanaugh, J., dissenting) ("Under the Constitution, state and local governments, not the federal courts, have the primary responsibility for addressing COVID–19 matters such as quarantine requirements, testing plans, ***mask mandates***, phased reopenings, school closures, sports rules, adjustment of voting and election procedures, state court and correctional institution practices, and the like. . . . But COVID–19 is not a blank check for a State to discriminate against religious people, religious organizations, and religious services." (emphasis added)).

marriage, procreation, contraception, family relationships, child rearing, education and a person's bodily integrity, which are 'deeply rooted in this Nation's history and tradition.'" *Id.* Crucially, courts "must be reluctant to expand the concept of substantive due process and must exercise the utmost care whenever . . . asked to break new ground in this field." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1087 (9th Cir. 2015) (quotation omitted). Any such right, moreover, must be "carefully stated and narrowly identified. *Id*. at 1086.

Here, Plaintiff has not plausibly alleged that there is a fundamental right to not wear a face mask during a deadly pandemic. And because the Complaint fails to plead facts that would implicate a fundamental right or interest within the meaning of the substantive due process doctrine, rational basis review applies. Because – given the nature of the pandemic and the abundance of scientific guidance regarding the efficacy of face masks – there are plainly legitimate reasons for the relevant emergency orders, Plaintiff's claim therefore fails on its face. "Where, as here, rational basis review applies and there are plausible reasons for [the] action, [the Court's] inquiry is at an end."[6] *Novak v. United States*, 795 F.3d 1012, 1023 (2015).

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[6] "In applying the rational basis test at the motion to dismiss stage, a court may go beyond the pleadings to hypothesize a legitimate governmental purpose." *HSH, Inc. v. City of El Cajon*, 44 F. Supp. 3d 996, 1008 (S.D. Cal. 2014).

Finally, although Plaintiff has not expressly asserted any such theory in her Complaint, where, as here, "the state has a strong interest in stopping the spread of COVID-19, . . . it cannot be said that the Governor's conduct amounts to conscience-shocking action." *World Gym, Inc. v. Baker*, No. 20-CV-11162-DJC, 2020 WL 4274557, at *4 (D. Mass. July 24, 2020).[7]

Thus, even if Plaintiff's complaint could be construed as asserting a substantive due process claim, the claim would fail as a matter of law.

IV. Insofar as Plaintiff Intends to Raise a Claim Under State Law, the Eleventh Amendment Bars Any Such Claim

Although the scope of Plaintiff's claims are not clear from the Complaint, if Plaintiff intends to challenge the Mask Mandate based on state-law grounds – for example, a failure to comply with HRS chapter 127A – that challenge is barred by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) ("a claim that state officials violated state law . . . is a claim against the State that is protected by the Eleventh Amendment," as are "state-law

[7] Under the executive abuse of power substantive due process theory, "[e]xecutive branch action that sinks to the depths of shocking the contemporary conscience is much more likely to find its roots in 'conduct intended to injure in some way unjustifiable by any government interest.'" *DePoutot v. Raffaelly*, 424 F.3d 112, 119 (1st Cir. 2005) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)). "To show a defendant's conduct is conscience shocking, a plaintiff must prove a government actor arbitrarily abused his authority or employed it as an instrument of oppression. The behavior complained of must be egregious and outrageous." *Doe v. Woodard*, 912 F.3d 1278, 1300 (10th Cir. 2019). The restrictions here plainly fall far short of this standard.

claims brought into federal court under pendent jurisdiction"). As the Ninth Circuit has explained, "the [*Ex parte*] *Young* exception [to Eleventh Amendment immunity] does not apply when a suit seeks relief under state law, even if the plaintiff names an individual state official rather than a state instrumentality as the defendant." *Doe v. Regents of the Univ. of California*, 891 F.3d 1147, 1153 (9th Cir. 2018). Accordingly, this Court lacks jurisdiction to reach the merits of any state-law claims against the State Defendants.

Moreover, with respect to Plaintiff's federal constitutional claims against Defendants Ige and Connors, such claims are barred by Eleventh Amendment immunity except to the extent Plaintiff is seeking prospective injunctive and declaratory relief. The general rule is that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Similarly, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" when sued for money damages. *Id.* Although "[t]he *Ex Parte Young* doctrine provides that the Eleventh Amendment does not bar suits for *prospective injunctive relief* brought against state officers in their official capacities, to enjoin an alleged ongoing violation of federal law," *Hason v. Med. Bd. of California*, 279 F.3d 1167, 1171 (9th Cir. 2002) (emphasis added), any *damages* claim that

Plaintiff intends to assert against Defendants Ige and Connors cannot be maintained.[8] In view of the above, the only claims against any of the State Defendants that this Court has jurisdiction to hear are prospective injunctive/declaratory claims against Defendants Ige and Connors in their official capacity.

V. In the Alternative, Any State-Law Challenge to the Mask Mandate Also Would Fail On the Merits

Within HRS chapter 127A, HRS § 127A-14 sets forth procedures for enacting emergency proclamations. HRS § 127A-14(c) makes clear that "[t]he governor or mayor *shall be the sole judge* of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency in the State or a local state of emergency in the county, as applicable." (Emphasis added). Crucially, the purpose of HRS chapter 127A was to grant to the Governor broad and comprehensive powers in emergency situations. The Legislature made clear that its intent in enacting HRS chapter 127A is "to provide for and confer *comprehensive powers*," and it has directed that the laws in this area "shall be *liberally construed* to effectuate its purposes[.]" HRS § 127A-1(c) (emphasis

[8] It is not clear whether Plaintiff intends to assert such a claim, although the Complaint does *not* appear to make such a request. Accordingly, the State Defendants assert Eleventh Amendment immunity out of an abundance of caution, and not because the State Defendants believe that the Complaint does adequately make out a damages claim.

added). The purposes of the statute are set forth in detail in HRS § 127A-1(a), and reflect "the existing and increasing possibility of the occurrence of disasters or emergencies of unprecedented size and destructiveness resulting from natural or man-made hazards, and in order to ensure that the preparations of this State will be adequate to deal with such disasters or emergencies; to ensure the administration of state and federal programs providing disaster relief to individuals; and generally to protect the public health, safety, and welfare, and to preserve the lives and property of the people of the State[.]" *Id.* Moreover, HRS § 127A-12(b)(19) expressly empowers the Governor to "[t]ake any and all steps necessary or appropriate to carry out the purposes of this chapter[.]"

Hawaii's statutory framework therefore makes it clear that the sort of challenge Plaintiff apparently contemplates–which seems to amount to an allegation that the COVID-19 pandemic does not qualify as an emergency–is barred under the law.[9] There are good reasons for this; after all, "[a] public emergency is not a time for uncoordinated, haphazard, or antagonistic action." *Macias v. State of California*, 897 P.2d 530, 539 (Cal. 1995).

[9] In any event, even if such a challenge were sustainable, the COVID-19 pandemic plainly constitutes an emergency. *See, e.g., Carmichael*, 470 F. Supp. 3d at 1144 ("Plaintiffs' theory that no emergency exists here or throughout the United States is contradicted by the record and readily available information.").

Accordingly, the Court should decline any invitation to second-guess the empirical judgment and policy determinations that underlie the Mask Mandate.

CONCLUSION

For the above reasons, Plaintiff's First Amended Complaint should be dismissed in full.[10]

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[10] On February 14, 2021, Plaintiff moved to file a second amended complaint. But Plaintiffs' claims would still fail under her proposed amendments and her request is therefore futile. *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1059 (9th Cir. 2018) ("Leave to amend may be denied if the proposed amendment is futile or would be subject to dismissal."). The primary substantive amendment Plaintiff proposes is adding a claim that the Mask Mandate infringes not only her freedom of speech, but also her freedom of religion because "removing facial expression . . . is an aspect of the content of speech, forcing the adoption of a cult-like religious tradition, which violates plaintiff's ow religious convictions." Motion to Amend First Amended Complaint, Exhibit 1, at 3. Such a claim fails as a matter of law. Even if traditional freedom of religion scrutiny is applied to a freedom of religion claim (as opposed to the more deferential *Jacobson* standard), the Mask Mandate easily passes constitutional muster. *First*, it would be subject only to rational basis analysis because it is neutral and generally applicable:

> [M]andating all residents to wear a mask burdens the conduct of all residents, not exclusively conduct motivated by religious belief. *See* [*Church of Lukumi*, 508 U.S. at 535, 543, 113 S.Ct. 2217]; Def.'s Notice Suppl. Authority (Nov. 10, 2020), Ex. B, COVID-19 Order No. 55 § 1. The orders are not underinclusive, because they apply to all persons in Massachusetts. *See Church of Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217. The orders do not subtly target religious conduct for distinctive treatment, and there is no evidence that these orders are the product of animus. *See id.* at 534, 113 S.Ct. 2217; *see generally* Joint Finding. Therefore, as the orders are of general applicability, they need only be rationally related to the interest in stemming the spread of COVID-19.

DATED: Honolulu, Hawai'i, February 16, 2021.

/s/ Ewan C. Rayner

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Delaney v. Baker, No. CV 20-11154-WGY, 2021 WL 42340, at *13 (D. Mass. Jan. 6, 2021). *Second*, the Mask Mandate easily passes this test:

> These orders satisfy this standard. Governor Baker's orders for all residents to wear masks are rationally related to the interest in stemming the spread of COVID-19 because, as the parties stipulated in the joint finding, "[i]t has been proven that the wearing of masks can slow the transmission of the spread of the coronavirus." Joint Finding ¶ 22. Delaney's challenge, therefore, fails the First Amendment test developed under the tiers of scrutiny approach.

Delaney, 2021 WL 42340, at *13. Just as it would under Plaintiffs' other claims, there is plainly a rational basis for the Mask Mandate, and it therefore easily passes constitutional review. As such, Plaintiffs' request to amend her complaint is futile and should be denied.