IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

LEVANA LOMMA, Plaintiff, vs. CLARE E. CONNORS, in her individual and official capacity as Attorney General of the State of Hawai’i, DAVID Y. IGE, in his individual and official capacity as Governor of the State of Hawai’i, DEREK S.K. KAWAKAMI, in his individual and official capacity as Mayor of the County of Kaua’i, Defendants.	CIVIL NO. CV20-00456 JAO RT (Other Civil Action) MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This action "is a constitutional challenge to the Fourteenth Supplementary Proclamation issued by the governor of Hawaii, David Ige, on October 13, 2020, stating: 'All persons must wear face coverings in compliance with county orders, rules and directives approved by me pursuant to Section I.'" ECF No. 8, PageID #51. Plaintiff has also named Kaua'i Mayor Derek S.K. Kawakami ("Mayor Kawakami") and state Attorney General Clare E. Connors in their individual and official capacities.

Plaintiff asserts that the face covering requirement "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, and at the same time 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." ECF No. 8, PageID #51. Plaintiff asks the court to declare the Fourteenth Supplemental Proclamation unconstitutional and to issue an injunction barring defendants from enforcing the face covering requirement contained therein. Id. at PageID #60.

According to the CDC, there have been a total of 22,965,957 COVID-19 cases in the U.S. and 383,351 COVID-19 deaths.[1] "When people with COVID-19 cough, sneeze, sing, talk, or breathe they produce respiratory droplets."[2] "Infections occur mainly through exposure to respiratory droplets when a person is in close contact with someone who has COVID-19."[3] The CDC states that "Cloth face coverings are one of the most powerful weapons we have to slow and stop the spread of the virus – particularly when used universally within a community setting."[4]

Hawai'i's state-wide face covering rule is currently provided in the Governor's *Seventeenth Proclamation Related to the Covid-19 Emergency*, Dec. 16, 2020, which states in relevant part,

> 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.
>
> *Id*. at p. 5.

Exhibit J to the Seventeenth Proclamation provides exceptions to the face covering requirement:

A. Individuals with medical conditions or disabilities where the

[1] https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days
[2] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html
[3] Id.
[4] https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html

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;
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.

The purposes of the regulations contained in the proclamation are given in 'whereas' clauses as follows:

WHEREAS, as of December 16, 2020, the recorded number of cases and deaths has continued to increase, with more than 19,500 documented cases of COVID-19 in the State and 278 deaths attributed to this disease;

WHEREAS, COVID-19 continues to endanger the health, safety, and welfare of the people of Hawai'i and a response requires the serious attention, effort, and sacrifice of all people in the State to avert unmanageable strains on our healthcare system and other catastrophic impacts to the State;

> WHEREAS, COVID-19 has directly and indirectly caused fiscal and economic catastrophe not previously experienced by the State;
>
> NOW, THEREFORE, I, DAVID Y. IGE, Governor of the State of Hawai‘i, hereby authorize and invoke the following as set forth herein…
>
> Id. at p. 2.

As will be discussed, the Ninth Amendment does not guarantee any specific constitutional right as required for pursuing a constitutional claim, and Plaintiff therefore may not proceed against the Defendants based on the Ninth Amendment. The face covering requirement does not implicate the First Amendment and easily satisfied rational basis review. It also satisfies intermediate scrutiny, which would be the appropriate standard if the face covering requirement could be said to implicate the First Amendment since it is unrelated to the content of speech. Finally, Mayor Kawakami, in his individual capacity, is entitled to qualified immunity. Mayor Kawakami therefore respectfully asks this court to dismiss Plaintiff's complaint as to him in both his official and individual capacities.

II. JUDICIAL NOTICE OF CDC WEB PAGE

Courts "may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

In *Uribe v. Perez*, No. 5:17-00558 CJC (ADS), 2020 WL 1318358, at *4 (C.D. Cal. Mar. 3, 2020), report and recommendation adopted, No. 5:17-00558

CJC (ADS), 2020 WL 1317727 (C.D. Cal. Mar. 20, 2020) judicial notice was taken of three CDC web pages since "[t]he information provided was published on the official website of the CDC, which is a government entity"; "It is accessible to the public"; and "the CDC information is not subject to dispute because it can be accurately and readily determined from the CDC website." *Id*. (citing *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 999 (9th Cir. 2010) (taking judicial notice of information compiled by government entities and made publicly available on their websites); *United States v. Thornton*, 511 F.3d 1221, 1229 n. 5 (9th Cir. 2008) (taking judicial notice of a U.S. Bureau of Prisons policy statement that was publicly available)).

"The Court may take judicial notice of CDC information which is not subject to reasonable dispute, in part, because it is readily determined from a source the accuracy of which cannot reasonably be questioned (i.e., the CDC website)." *Dubrin v. Cty. of San Bernardino*, No. EDCV 15-589 CJC(JC), 2017 WL 8940181, at *21 (C.D. Cal. Sept. 7, 2017)(parentheses in original), report and recommendation adopted, No. EDCV 15-589 CJC(JC), 2017 WL 4339645 (C.D. Cal. Sept. 29, 2017)(citing *Holifield v. UNUM Life Insurance Company of America*, 640 F. Supp. 2d 1224, 1234-35 & nn.8-16 (C.D. Cal. 2009) ("appropriate to take judicial notice of the full complement of [ ] materials about [Chronic Fatigue Syndrome ("CFS")]" on CDC web site, including "CFS Basic Facts,"

"Recognition and Management of [CFS]," and "[CFS] Treatment Options"); *Harris v. Lappin*, 2009 WL 789756, *12 (C.D. Cal. Mar. 19, 2009) (taking judicial notice of answers to "Frequently Asked Questions" about Hepatitis C from CDC website); *Gent v. CUNA Mutual Insurance Society*, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (taking judicial notice, in part, of relevant facts regarding causes, symptoms, diagnosis, testing, and transmission of Lyme disease taken from CDC website, which facts "are 'not subject to reasonable dispute.' "); *Garrett v. Davis*, 2017 WL 1044969, *2 (S.D. Tex. Mar. 20, 2017) (taking judicial notice of analysis on CDC website regarding evidence of "the health risks of sleep deprivation" which "information [was] not subject to reasonable dispute because it can be accurately determined from sources whose accuracy cannot reasonably be questioned")).

Defendant asks this court to take judicial notice of information related to COVID-19 contained on the Centers for Disease Control website.

III. STANDARD

A. Motion to Dismiss.

A complaint will survive a motion to dismiss when it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). When considering a Rule 12(b)(6) motion, a court must

"accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff." Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir.2000). Although a complaint need not include "detailed factual allegations," it must offer "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678, 129 S.Ct. 1937. Conclusory allegations or allegations that are no more than a statement of a legal conclusion "are not entitled to the assumption of truth." Id. at 679, 129 S.Ct. 1937. In other words, a pleading that merely offers "labels and conclusions," a "formulaic recitation of the elements," or "naked assertions" will not be sufficient to state a claim upon which relief can be granted. Id. at 678, 129 S.Ct. 1937 (citations and internal quotation marks omitted). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief." Id. at 679, 129 S.Ct. 1937.

B. First Amendment.

Courts apply three levels of scrutiny to laws that affect First Amendment rights – rational basis, intermediate scrutiny, and strict scrutiny. *Retail Digit. Network, LLC v. Prieto*, 861 F.3d 839, 847 (9th Cir. 2017). Courts apply rational basis review to "non-speech regulations of commerce and non-expressive conduct." *Id*. Regulations of First Amendment-protected speech are subject to strict or intermediate scrutiny depending on whether the regulation is content-

based or content-neutral. A regulation that restricts protected expression based on the content of the speech is constitutional only if it withstands strict scrutiny, see *United States v. Playboy Ent. Grp., Inc*., 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000), meaning that it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). A content-neutral regulation is constitutional if it is "justified without reference to the content of the regulated speech, ... [is] narrowly tailored to serve a significant governmental interest, and ... leave[s] open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)).

IV. ARGUMENT

A. The Ninth Amendment Does Not Secure Any Constitutional Right for Purposes of Pursuing a Civil Rights Claim.

Plaintiff asserts that the face covering requirement "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." ECF No. 8, PageID #52. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall

not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

The Ninth Circuit has observed that the Ninth Amendment "has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim." *Griego v. Cty. of Maui*, No. CV 15-00122 SOM-KJM, 2017 WL 1173912, at *11 (D. Haw. Mar. 29, 2017)(citing *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986).

Because the Ninth Amendment does not guarantee any specific constitutional right, as required for pursuing a constitutional claim. Therefore, Plaintiff may not proceed against the Defendants based on the Ninth Amendment.

B. The Mask Requirement Does Not Implicate the First Amendment.

The mask requirement should be subject to rational basis review because it does not concern speech but rather is a generally applicable health order requiring that everyone wear face coverings. Plaintiff alleges that the mask requirement "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[.]" Compl. ECF No. 8 at PageID #51.

The Supreme Court has previously applied First Amendment scrutiny when "'speech' and 'nonspeech' elements are combined in the same course of conduct." *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 684–85 (9th Cir. 2019)(citing *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). But "restrictions on protected expression are distinct from restrictions …on nonexpressive conduct."; *Id*. (citing *Sorrell v. IMS Health Inc*., 564 U.S. 552, 567, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011). While the former is entitled to protection, "the First Amendment does not prevent restrictions directed at …conduct from imposing incidental burdens on speech." *Id*; see also *Arcara v. Cloud Books, Inc*., 478 U.S. 697, 702, 706, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986)(The Supreme Court has "not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because" it "will have some effect on the First Amendment activities of those subject to sanction.").

In *Arcara*, the Supreme Court identified two different types of restrictions properly subjected to First Amendment scrutiny: (1) restrictions "where it was conduct with a significant expressive element that drew the legal remedy in the first place" and (2) restrictions "where a statute based on nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity." *Id*. at 706-07, 106 S.Ct. 3172.

The face covering requirement does not fit into either category of restriction implicating First Amendment scrutiny. It clearly was not imposed to prevent people from "speak[ing] audibly and clearly" but rather to prevent the spread of COVID-19. Nor does it "inevitably single out" those "engaged in First Amendment protected activities for the imposition of its burden." *Id*. at 705, 106 S.Ct. 3172.

In *Arcara*, a civil complaint was filed against an adult bookstore because prostitution was occurring on the premises in violation of New York's public health law. *Id*. at 699, 106 S.Ct. 3172. The bookstore argued "a closure of the premises would impermissibly interfere with [its] First Amendment right to sell books on the premises." *Id*. at 700, 106 S.Ct. 3172. The Court held "the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." *Id*. at 707, 106 S.Ct. 3172.

In *Mitchell v. Newsom*, No. CV208709DSFGJSX, 2020 WL 7647741, (C.D. Cal. Dec. 23, 2020), tattoo shop owners challenged a state stay-at-home order requiring all businesses except those qualifying as essential critical infrastructure and retail remain closed for a period of several weeks in an effort to mitigate effects of the COVID-19 pandemic. *Id*. at *1. Plaintiffs argued that by requiring

tattoo shops to close, the stay-at-home order violated their First Amendment rights under the Free Speech Clause. *Id*.

The Ninth Circuit had previously held that a "tattoo itself, the process of tattooing, and even the business of tattooing are ... purely expressive activity fully protected by the First Amendment." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010). The plaintiffs argued that "the forced closing of tattoo business must [therefore] survive stricter scrutiny than a regulation of non-protected businesses." *Id*. at *3.

The Court disagreed and found that the stay-at-home order did not single out those engaged in expressive activity, reasoning that

> "Singling out by definition would require tattoo parlors to be treated uniquely from all other types of businesses or to bear disproportionately the burden of the restriction. That is not the case here. All personal care services are treated the same by the order, as are numerous other businesses including recreational facilities, hair salons, bars, and amusement parks. None of these other types of businesses are engaged in protected expressive activity.
>
> *Mitchell* at *4.

Having determined that rational basis review applies, the Court considered whether the stay-at-home order was "rationally-related to a legitimate governmental interest." *Id*. at *5 (quoting *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001)). The court found that the State's interest in stemming the spread of

COVID-19 is a substantial government interest and that the regulation easily passes the "legitimate interest" test. *Id*.

Like the stay-at-home order in *Mitchell*, the face covering requirement here was not imposed to prevent expressive activity but rather to prevent the spread of COVID-19. Nor does it inevitably single out those engaged in First Amendment protected activities for the imposition of its burden. Here, as in *Arcara*, even though mask wearers may be engaging in protected expressive activity, such activity is not the "significant expressive element that drew the legal remedy in the first place." 478 U.S. at 706.

If the face covering requirement can be said to impose any burdens at all on speech, they are only incidental burdens and not prevented by the First Amendment. Rational basis review is therefore the appropriate standard and the face covering requirement is rationally related to the legitimate governmental interest of stemming the spread of COVID-19. The Complaint should therefore be dismissed.

C. Even if the Face Mask Requirement Could be Said to Burden Free Speech, it is Unrelated to the Content of Speech and Intermediate Scrutiny Would Therefore Be the Appropriate Standard.

Even if it could be said that the face covering requirement targets speech, it is content-neutral, and survives intermediate scrutiny. "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny,

because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497 (1994)(citing *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3068–3069, 82 L.Ed.2d 221 (1984).

A law restricting speech on a viewpoint-neutral and content-neutral basis is constitutional as long as it withstands intermediate scrutiny—i.e., if: (1) "it furthers an important or substantial government interest"; (2) "the governmental interest is unrelated to the suppression of free expression"; and (3) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 434 (9th Cir. 2008)(citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662, 114 S.Ct. 2445, 2469, 129 L.Ed.2d 497 (1994).

Plaintiff's complaint alleges that state face mask requirement "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[.]" Compl. ECF No. 8 at PageID# 51.

Under the allegations stated in the complaint, the face mask requirement is

unrelated to the content of speech. If the face mask requirement can be said to restrict speech at all, it does so on a viewpoint-neutral and content-neutral basis and is therefore constitutional as long as it withstands intermediate scrutiny. The elements of intermediate scrutiny will be discussed in turn.

1. The Face Mask Requirement Furthers Important Government Interests.

"Protection of the health and safety of the public is a paramount governmental interest[.]" *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300, 101 S.Ct. 2352, 2373, 69 L.Ed.2d 1 (1981); see also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 476, 115 S.Ct. 1585, 1587, 131 L.Ed.2d 532 (1995)("The Government has a significant interest in protecting the health, safety, and welfare of its citizens[.]"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296, 120 S.Ct. 1382, 1395, 146 L.Ed.2d 265 (2000)("The first factor of the *O'Brien* test is whether the government regulation is within the constitutional power of the government to enact. Here, [the city's] efforts to protect public health and safety are clearly within the city's police powers.").

The face covering requirement is to slow or stop the spread of COVID-19. Because the purpose of the face mask requirement is for the health and safety of the public, it furthers an important governmental purpose.

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2. The Governmental Interest is Unrelated to the Suppression of Free Expression.

These health and safety interests are unrelated to the suppression of free expression, because the mask requirement "does not prevent the expression of any particular message or viewpoint." *United States v. Tomsha-Miguel*, 766 F.3d 1041, 1048 (9th Cir. 2014); See also *Jacobs v. Clark County Sch. Dist*., 526 F.3d 419, 436 (9th Cir. 2008)(School District's requirement that students wear school uniforms served stated interests of "increasing student achievement," "promoting safety," and "enhancing a positive school environment" and were "unrelated to the suppression of free expression," and therefore satisfied the second prong of the intermediate scrutiny test).

As stated on the CDC website, "Cloth face coverings are one of the most powerful weapons we have to slow and stop the spread of the virus – particularly when used universally within a community setting."[5] The purpose of the face covering requirement is to help slow and stop the spread of COVID-19 and is unrelated to the suppression of free expression.

3. The Incidental Restriction on Alleged First Amendment Freedoms is No greater Than is Essential to the Furtherance of that Interest.

To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of

[5] https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html

narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward v. Rock Against Racism*, 491 U.S. 781,799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985)). "Narrow tailoring in this context requires, in other words, that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Ward*, 491 U.S., at 799, 109 S.Ct., at 2758.

"[A]n incidental burden on speech is no greater than is essential, and therefore is permissible …, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Tomsha-Miguel*, 766 F.3d 1041, 1049 (9th Cir. 2014)(citing *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc*., 547 U.S. 47, 67, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (internal quotation marks omitted)).

As discussed above, the face covering requirement is a neutral regulation that promotes a substantial governmental interest. The CDC states that "Cloth face coverings are one of the most powerful weapons we have to slow and stop the spread of the virus – particularly when used universally within a community setting." In other words, the substantial governmental interest of slowing and stopping the spread of COVID-19 would be achieved less effectively absent the

face covering requirement.

Because the face covering requirement (1) "furthers an important or substantial government interest"; (2) "the governmental interest is unrelated to the suppression of free expression"; and (3) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest," the face covering requirement withstands intermediate scrutiny and Plaintiff's complaint should be dismissed.

D. Defendant Derek S.K. Kawakami, in His Individual Capacity, is Entitled to Qualified Immunity.

"Qualified immunity is 'an immunity from suit rather than a mere defense to liability.'" *Pearson v. Callahan*, 555 U.S. 223, 237 (2009). The Supreme Court has set forth a two-pronged analysis for determining whether qualified immunity applies. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001), overruled in part on other grounds by *Pearson v. Callahan*, 555 U.S. 223 (2009). The court may analyze the two prongs in either order. See *Pearson*, 555 U.S. at 236.

In one prong, the court considers whether the facts, taken in the light most favorable to the party asserting the injury, show that the defendant's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. Under the other prong, the court examines whether the right allegedly violated was clearly established at the time of the violation. *Id*. The "clearly established" prong requires a determination of whether the right in question was clearly established in light of

the specific context of the case, not as a broad general proposition. *Saucier*, 533 U.S. at 201. At this second step, "the question is whether the defendant could nonetheless have reasonably but erroneously believed that his or her conduct did not violate the plaintiff's rights." *Krug v. Lutz*, 329 F.3d 692, 698–99 (9th Cir. 2003)(quoting *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir.2001)).

As discussed above, the face covering requirement easily passes rational basis scrutiny and, even under intermediate scrutiny, Defendants cannot be said to have violated Plaintiff's constitutional rights. Therefore, the first prong of *Saucier* is satisfied and Mayor Kawakami is entitled to qualified immunity.

Even if the face covering requirement could be said to violate Plaintiff's free speech rights, Defendant can find no cases in this or any other jurisdiction establishing the right to not wear a face covering during a pandemic to reduce the spread of disease. Such right was therefore not clearly established and defendant could have reasonably if erroneously believed that the face covering requirement did not violate the plaintiff's rights. In such a case, Mayor Kawakami would still be entitled to qualified immunity.

IV. CONCLUSION

The Ninth Amendment does not guarantee any specific constitutional right as required for pursuing a constitutional claim, and Plaintiff therefore may not proceed against the Defendants based on the Ninth Amendment. The

face covering requirement does not implicate the First Amendment and easily satisfied rational basis review. It also satisfies intermediate scrutiny, which would be the appropriate standard if the face covering requirement could be said to implicate the First Amendment since it is unrelated to the content of speech. Finally, Mayor Kawakami, in his individual capacity, is entitled to qualified immunity. Mayor Kawakami therefore respectfully asks this court to dismiss Plaintiff's complaint as to him in both his official and individual capacities.

DATED: Līhu'e, Kaua'i, Hawai'i, January 15, 2020.

MATTHEW M. BRACKEN
County Attorney

By /s/ Charles A. Foster
CHARLES A. FOSTER

Attorneys for Defendant
DEREK S.K. KAWAKAMI, in his individual and official capacity as Mayor of the County of Kaua'i