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IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

COUNTY OF KAUA'I, STATE OF HAWAI'I

FOR OUR RIGHTS, a Hawai'i corporation, et al., Plaintiffs, vs. DAVID IGE, in his official capacity as Governor of the State of Hawai'i, et al., Defendants.	CIVIL NO. 5CCV-20-000091 (Other Civil Action) MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS (SUPPORTING DOCUMENTS FILED SEPARATELY); CERTIFICATE OF SERVICE Hearing Date: November 17, 2020 Hearing Time: 1:30 p.m. Judge: The Honorable Kathleen N.A. Watanabe No Trial Date Set

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INTRODUCTION

Plaintiffs' First Amended Complaint (the "FAC") challenges Defendants' ongoing regime of rule by indefinite decree. Defendants' Motion urges such a regime is lawful and beneficial, resting primarily upon the presence of "cases" of Covid-19 infections within the state as constituting an "emergency."[1] The Governor needs only to declare an "emergency," based upon his or her opinion with no requirement for objective justification, and the regime proceeds without regard to harms its decrees cause to the people.

Unlimited power wielded upon the mere assertion of "emergency" is unconstitutional. The Hawai‘i statute authorizing the Governor's emergency powers expressly states the law confers no power or authority to act "which is inconsistent with the Constitution and laws of the United States."[2] The U.S. Supreme Court has expressly condemned the notion that merely declaring an "emergency" cannot trump all constitutional forms of power, rights, and protections:

> *Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.* The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the states were not determined in the light of emergency and they are not altered by emergency. *What power was thus granted and what limitations were thus imposed are questions* which have always been, and always will be, *the subject of close examination under our constitutional system.*

[1] The Hawai‘i Tribune Herald reported on October 19, 2020, data showing only about 1% of the entire state population have tested positive for Covid over the entire period. "DOH reports 39 new COVID-19 cases statewide; fifth death reported at Life Care Center," *Haw. Trib. Herald* (Oct. 19, 2020), viewed at www.hawaiitribune-herald.com/2020/10/19/hawaii-news/doh-reports-39-new-covid-19-cases-statewide-fifth-death-reported-at-life-care-center/

[2] HRS § 127A-1(c).

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425-426 (1934) (emphasis added).

Defendants' Motion contends the Governor's "emergency declaration" is all it takes to rule by fiat indefinitely. This state's enabling statute, however, forbids exercise of power beyond the contours of U.S. Constitutional principles. The legislature of Hawai'i has delegated the emergency authority with a binding time limit so that the Governor does not violate the Constitutional limit upon indefinite unchecked rule by executive proclamation.

STATEMENT OF ESSENTIAL FACTS

Plaintiffs' FAC alleges a full set of facts; the essential facts relevant to the Defendants' Motion follow here and below. The FAC was filed on September 24, 2020, challenging Defendant Governor's Eleventh Supplementary Proclamation ("Proclamation 11"), which itself had incorporated and restated all prior proclamations and supplements. The FAC did not expressly challenge the Governor's Twelfth Proclamation ("Proclamation 12"), issued on August 20, but that does not affect the FAC's validity because the Twelfth Proclamation did not revoke or supersede the prior proclamations and supplements.

About a day before the FAC was filed, Defendant Governor issued a Thirteenth Proclamation ("Proclamation 13") on September 23, 2020. Def. Mot. Exh. D. For the first time in the sequence of proclamations and supplements, Proclamation 13 declared it "supersedes all prior proclamations." Defendants filed their Motion to Dismiss on October 8, 2020, contending *inter alia* that the issuance of Proclamation 13 mooted the FAC's legal challenges. Subsequent to Defendants' Motion, however, Defendant Governor issued a

Fourteenth Proclamation ("Proclamation 14") on October 13, 2020, also purporting to supersede all prior proclamations. *See* Exh. 1.

The FAC's core allegations are that the Hawai'i Legislature did not grant the Governor the power to unliterally declare one emergency and then extend – without time period limit or other limits – the Governor's power to lock down private citizens, close or heavily restrict business and social activities, and impose quarantines upon Hawai'i residents and incoming visitors that crashed the state's economy generally and severely harmed the Plaintiffs specifically.

The FAC's legal bases for challenging Defendant Governor's proclamations remain: (1) the Governor has no independent power to issue emergency proclamations (Haw. Const. art. V); (2) the Legislature granted the Governor power to declare an emergency and to issue a proclamation to undertake temporary control of many state and citizens' activities, but only for a maximum 60-day period, not for an indefinite time by repeated supplementary proclamations (HRS § 127A); (3) the corpus of vague, overlapping, and incomprehensible directives and prohibitions that existed under Proclamation 11 and its predecessors was and is unconstitutionally vague and deprived Plaintiffs of due process of law; and (4) that unconstitutionally vague corpus must not be used as a basis for arrests, prosecutions, convictions, or penalties.

ARGUMENT

I. The Controversy Alleged in The First Amended Complaint Is Not Moot.

Ironically, the Defendants' Motion and subsequent events betray why the FAC is not moot. The Motion argues the FAC does not challenge the proclamation now in effect. Mot. at 5. But the Motion itself does not even cite to the proclamation now in effect – because Proclamation 14 was not issued until after the Motion was filed.

Defendant Governor's lawyers have discovered the ruse for extending the Governor's power to control and devastate the economy of Hawai‘i and to dodge judicial review. In Proclamations 13 and 14, language is inserted to "supersede" all the prior proclamations and supplements. A lawsuit filed today to challenge the new Proclamation 14 can be mooted by the Governor's simply issuing Proclamation 15 next week. Defendants do not even attempt to explain why this tactic is virtuous, reasonable or lawful.

A. The Controversy is Capable of Repetition Yet Evading Review.

Fortunately, the law of Hawai‘i embraces the mootness doctrine having exceptions that overcome Defendants' tactical shape shifting. A case may be deemed moot "where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where 'events . . . have so affected the relations between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy – have been compromised.'" *In re Thomas*, 73 Haw. 223, 225-27, 832 P.2d 253 (1992), *quoting Wong v. Board of Regents, University of Hawaii*, 62 Haw. 391, 394, 616 P.2d 201 (1980). A key exception to the mootness doctrine arises,

however, where the governmental action is "capable of repetition, yet evading review." *Hamilton v. Lethem*, 119 Haw. 1, 5-6, 193 P.3d 839 (2008), *citing*, *inter alia*, *In re Thomas*, 73 Haw. at 226-27.

The FAC presents precisely such a controversy, "capable of repetition yet evading review." The FAC challenged Defendant Governor's 11th and preceding proclamations and supplements, all of which were incorporated and restated into one unwieldy corpus. When drafted, the FAC was totally live, not moot. Between the date of drafting and the date of Defendants' Motion, Defendant Governor issued Proclamations 12 and 13, and now there is a Proclamation 14 declared *after* Defendants' own Motion was filed. Proclamations 11 through 14 all declare they are based upon a vague "emergency" finding by the Governor that allegedly supports the Governor's exercising unchecked power over all counties and all people in Hawai‘i. Proclamations 11 through 14 all: (a) declare severe restrictions upon the lives and liberties of the people visiting or living in Hawai‘i; and (b) declare policies that are purportedly enforceable by criminal prosecution. And common to all recent proclamations: Defendants contend the Governor has unlimited power to issue more proclamations on the same subject without any time limit. *See* Mot. at 8-11.

The ongoing repeated issuance of proclamations, each either restating or overlapping prior proclamations and all on the same subject matter, has no end in sight. Plaintiffs' FAC seeks declaratory and injunctive relief to stay or invalidate whatever the latest proclamation version is issued. Under HRS § 632-1(b), "[r]elief 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, … and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding[.]"

"[T]he dispositive question under HRS § 632-1 (1993), authorizing actions for declaratory judgment, is 'whether "the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.' This is a question of law." *Kaho'ohanohano v. State*, 114 Haw. 302, 332, 162 P.3d 696 (2007), *quoting Island Ins. Co. v. Perry*, 94 Hawai'i 498, 502, 17 P.3d 847 (App. 2000). This Court can decide that Proclamation 14 is an unconstitutional edict on the same core grounds that prior proclamations (after the initial proclamation) were unconstitutional. The differences between Proclamation 14 and prior proclamations do not affect the constitutionality issues at all.

B. The Public Interest Exception to the Mootness Doctrine Also Applies.

"[W]hen the question involved affects the public interest and an authoritative determination is desirable for the guidance of public officials, *a case will not be considered moot*." *Kaho'ohanohano,* 114 Haw. at 333 (emphasis added), *citing Slupecki v. Admin. Dir. of Courts, State of Hawaii,* 110 Hawai'i 407, 409 n.4, 133 P.3d 1199 (2006) (citations omitted). To invoke the public interest exception to the mootness doctrine, courts examine criteria such as "[(1)] the public or private nature of the question presented, [(2)] the desirability of an authoritative determination for the future guidance of public officers, and

[(3)] the likelihood of future recurrence of the question[.]" *Kaho'ohanohano*, 114 Haw. at 333, *citing United Public Workers, AFSCME, Local 646 v. Yogi*, 101 Hawai'i 46, 58, 62 P.3d 189 (Acoba, J., concurring) (quoting *Johnston v. Ing*, 50 Haw. 379, 381, 441 P.2d 138 (1968)).

All three criteria supporting the public interest exception appear in Plaintiffs' case. Indeed, Proclamations 11 through 14, and even Defendants' Motion itself, support all three criteria. First, Defendant Governor's proclamations addressing a pandemic potentially affecting a large number of people in the state along with criminal-law enforced regulations affecting everyone – and the legal challenges to the proclamations – indisputably present a "public question."

Second, the proclamations affect every county and every resident and visitor to the state. The constitutional validity issue affects whether public officials impose liberty-denying demands and enforce the proclamations via criminal prosecutions statewide. A judicial decision validating or invalidating the proclamations therefore affects public officials and nearly every resident in all counties. This Court can help everyone in Hawai'i by determining whether the proclamations will continue in force.

Third, the sequence of sporadic but continuing proclamations and supplements, none of them significantly loosening the draconian restrictions upon residents of Hawai'i, shows a high likelihood that the constitutionality question will recur. *See* Proclamation 13, p.1 (listing sequence of proclamations and supplements); Proclamation 14, p. 1 (updated listing). Bolstering this conclusion is Defendants' Motion, which argues that no

constitutional provision or statute restricts the Governor from issuing as many "emergency" proclamations as he (or she) desires, for as long as the Governor desires. *See* Mot. at 15-18. Defendants consider any statutory limitation upon endless serial unilateral proclamations "absurd." *Id.* at 18.

Defendants' position means these Plaintiffs and a growing number of others will need to successively challenge Defendants' proclamations as Plaintiffs struggle to stop the life-, health-, business-, family-, and economy-destroying effects of each succeeding proclamation. The likelihood of recurrence criterion is overwhelmingly established. With all three criteria indisputable, the public interest exception applies to overcome Defendants' mootness claim.

C. Contrary to Defendants' Contention, Injunctive and Declaratory Relief Remain Justiciable Based Upon the FAC's Allegations.

The FAC first seeks a declaration that the Governor's proclamation is unlawful and unconstitutional. The FAC's text referred to the then-extant proclamations and supplements. Even though the Governor issued a "new" proclamation in the meantime, many of the same constitutional and statutory issues exist. As shown above, the same controversy exists and is not moot.

Secondly, the FAC seeks an injunction prohibiting any government entity or employee from enforcing any of the proclamations and supplements up through August 2020 (at the very least). This request for relief is not moot if there is any person who could potentially be charged, tried or punished based upon violating any of those proclamations and supplements.

Moreover, the same kind of relief makes sense for those proclamations issued after the FAC was filed, such as Proclamation 14. Arrests and prosecutions under Proclamation 14 can and should be enjoined for the reasons that Proclamation 11 is unconstitutional or otherwise unlawful.

Thirdly, the FAC seeks a declaratory judgment stating that the Eleventh Proclamation, the Tenth Proclamation, and the June 10 Supplement inclusive of all exhibits and any existing or predecessor documents they include by reference, may not be cited or otherwise employed as a source of law or evidence in any civil, administrative, or other legal or quasi-legal proceeding. *Nothing has even arguably mooted this request.*

Defendants' Motion tries to claim the prior proclamations and supplements are nullities, but that cannot be true. If any person is facing a legal matter where those proclamation documents are treated as evidence of facts or law, then the declaratory judgment very much matters. If Defendants truly contend the prior proclamation documents are nullities as to any facts or legal questions, then Defendants should not oppose granting declaratory relief the Plaintiffs request.

II. Contrary To The Defendants' Claims, Neither The Hawai'i Constitution Nor HRS § 127A Confers Unlimited, Unreviewable Arbitrary Power Upon Defendant Governor To Control The Entire State's Economy And Destroy The People's Finances And Livelihoods.

A. The Legislature Expressly Limited the Governor's Emergency to Prevent Usurpation.

Defendants' Motion asserts that the Governor can unilaterally declare an "emergency" and exercise near unlimited power over the state and its people indefinitely.

Mot. at 9-11. The Motion contends that under statutory authority the Governor obtains "comprehensive powers" and *nothing* in the statute "limits the number of emergency proclamations the Governor may issue to address a particular disaster. Rather, each additional proclamation triggers a new 60-day period under which the Governor may exercise emergency powers." *Id.* Either Defendants are wrong on the law, or the State of Hawai‘i is not a free state.

The state Constitution does not authorize the Governor to declare emergencies or take control of the state by fiat. Rather, the legislature has delegated to the Governor a limited power to deal with emergencies. Thus, the Governor is empowered to declare an "emergency" temporarily without any legislative input. HRS § 127A-14 (a), (c). Based upon such declaration, the Governor may exercise far-reaching powers to direct and control government entities, private businesses, social and religious organizations, and individual people's freedom and lives. *See* HRS §§ 127A-12, 127A-13 (describing the powers). To restrain that power, however, the legislature limited the period of unilateral unchecked authority to 60 days. HRS § 127A-14 (d).

The plain language of the statute should be given full effect, including the 60-day limit. *See Camara v. Agsalud*, 67 Haw. 212, 215-16, 685 P.2d 794 (1984) (reaffirming the "cardinal rule" of construction, including that ordinarily no word should be construed as superfluous, void or insignificant), *quoted and cited as authority by In re Robert's Tours & Transp.*, 104 Haw. 98, 103, 85 P.3d 623 (2004). If the statute's express 60-day limit does

not actually mean to cabin the otherwise broad, arbitrary, and unreviewable powers of the Governor, *then nothing limits the Governor's powers*.

This same conclusion was reached in the scholarly analysis by Professor Robert H. Thomas. *See* Exh. 2.[3] Prof. Thomas addressed squarely the issue presented by the FAC:

> Most state emergency power statutes, like Hawaii's, contain internal limitations on delegated emergency power. I argue that *Hawaii's statute contains a single major check on the governor's delegated authority: the "automatic termination" provision, under which an emergency proclamation terminates by law the sixtieth days after it was issued*, or when the governor or mayor issues a "separate" proclamation, whichever comes first. *This provision is an essential limitation on the power of the governor*, with the only real question being whether that limitation will be enforced by the courts. … [T]he statute's clear limitation on power [should be enforced by the courts].

Separation of Powers, pp. 5-6 (emphasis added; footnote omitted).

The 60-day limit must be meaningful, lest Hawai'i descend into "rule by indefinite executive decree." *Id.* at 6. In fact, HRS § 127A-1(c) expressly states the proclamation power statutes "shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States[.]" Under the U.S. Constitutional doctrines of separation of powers and nondelegation, the legislative branch may not delegate its powers to the executive branch. *Touby v. United States*, 500 U.S. 160, 164-65, 111 S. Ct. 1752 (1991); *In re Kauai Elec. Div.*, 60 Haw. 166, 181, 590

[3] Robert H. Thomas, *Hoist the Yellow Flag and Spam® Up: The Separation of Powers Limitation on Hawaii's Emergency Authority*, 43 U. Haw. L. Rev. ___ (forthcoming 2020) (cited hereafter as "*Separation of Powers*"). Page number cites refer to PDF version available via http://www.hawaiifreepress.com/ArticlesMain/tabid/56/ID/25839/The-Separation-of-Powers-Limitation-on-Hawaiis-Emergency-Authority.aspx

P.2d 524 (1978) (confirming Hawai‘i "has adopted the non-delegation doctrine as part of its own body of constitutional law"); see Section II(B)(2) below.

B. The Michigan Supreme Court's Decision in *Midwest Inst. of Health, PLLC v. Governor of Michigan* Analyzes a Comparable State Statute and Should Guide the Decision Here.

In a nationally-known, heavily-litigated case challenging the Michigan governor's attempt to wield broad "emergency" powers indefinitely, the Michigan Supreme Court ruled on October 2, 2020, against the governor and declared unconstitutional the state statute purporting to delegate legislative power to the governor without limitation. *See Midwest Inst. of Health, PLLC v. Governor of Mich.*, 2020 Mich. LEXIS 1758, 2020 WL 5877599 ("*Midwest Inst.*"; all citations to star pages in LEXIS edition), Exhibit 3 hereto. By its analogy and common principles, the Michigan Court's decision refutes Defendants' contention that the Hawai‘i legislature has conferred immense power upon Defendant Governor without any time limitation or legislature involvement.

1. The Two States' Emergency Management Statutes are analogous and both do not permit the Governor to render their time limits nugatory by issuing "new" proclamations.

The Michigan approach involving two different Acts is similar to Hawai‘i's approach that uses one. Under Michigan's Emergency Management Act, Michigan Compiled Laws (MCL) § 30.403(3) and (4),[4] the procedure is: (1) Governor recognizes an "emergency"; (2) Governor declares a "state of emergency" and acquires vast powers;

[4] Subsection (3) and subsection (4) are identical except one applies to "disasters" and the other to "emergencies."

(3) the declared "state of emergency" remains in effect no later than 28 days; (4) after the 28 days, Governor *must* terminate the "state of emergency" *unless* the legislature approves Governor's request for extension.

In the Michigan case, the governor responded to the Covid-19 pandemic by declaring both an emergency and a disaster, acquiring all of the temporary powers to run the economy and control private business and lives. At day 28, the governor terminated the state of emergency and state of disaster, then declared again the same states of emergency and disaster again on the same factual bases. *Midwest Inst.*, at *3, 9. The Michigan Court held the governor's attempt to end-run the statute by terminating one declaration and issuing a new declaration *on the same grounds* violated the enabling statute's legislative purpose. *Id.* at *12-13. The 28-day limit to the governor's power would be rendered nugatory if the governor could simply issue one declaration after another and indefinitely extend the governor's near-total control of the state and its people. *Id.* at *10-11.

Hawai‘i's statute sets up a similar system under HRS § 127A-14: (1) Governor finds there is an "emergency"; (2) Governor declares a "state of emergency" by proclamation and acquires vast powers; (3) the state of emergency automatically terminates 60 days after issuance unless proclaimed terminated sooner. Like Michigan's statute, the Hawai‘i statute puts a definite time limit on the power delegated temporarily to the Governor. Michigan's statute allows the legislature to extend the governor's power after the 28 days, but Hawai‘i's statute affords a longer 60-day period *but places a more absolute limit* with no

legislative option to extend it.

As the emergency powers statutes of Michigan and Hawai‘i are similar in approach and function, the Michigan Supreme Court's conclusion should apply in Hawai‘i: the governor has no statutory or constitutional authority to defeat Michigan's 28-day or Hawai‘i's 60-day time limit by terminating one proclamation and issuing a replacement on the same grounds for the same reasons. *See Midwest Inst.*, at *11-13.

2. The *Midwest Inst.* Decision Shows Why Defendants' Advocating the Governor Can Wield Sweeping Legislative Powers Indefinitely is Pressing for an Unconstitutional Result.

Michigan had also an older statute, the Emergency Powers of the Governor Act (EPGA), MCL § 10.31(1)-(2), which authorized the governor to proclaim a state of emergency under conditions that amounted to "a public emergency." During an EPGA state of emergency, the governor could deploy powers to mandate, regulate, and prohibit in broad areas of private business and personal life. The EPGA allowed the governor to maintain the state of emergency and deploy the sweeping powers *until the governor decided to terminate the emergency*. *Midwest Inst.*, at *13-15.

The Michigan governor issued her emergency proclamation using the Covid-19 pandemic as the "public emergency." *Id.* That proclamation imposed myriad direct orders that closed businesses, locked people in their homes, destroyed livelihoods, and endangered the futures of young and old alike. *See id.* at *13-15 (listing powers and

directives).[5] The Michigan Court held the EPGA to be *unconstitutional* because it violated the state constitution's separation of powers doctrine. *Id.* at *24. The legislative power is vested in the state legislature, not the governor. *Id.* at *25. The courts must ensure that no one branch of government acts substantially in the purview of a different branch:

> [I]t is also the responsibility of this Court in recognizing the separation of powers to ensure that the Legislature does not exceed its constitutional authority in "making the law" either by encroaching upon the powers of another branch *or by relinquishing its own powers to another branch*.

Id. at *23 n.16 (emphasis added).

Separation of powers is a serious concern, as that separation protects individual liberty in a free state. *Id.* at *24 (citation omitted). "'[T]he *accumulation of all powers, legislative, executive, and judiciary, in the same hands*, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of *tyranny*.'" *Id.* at *24-25 (emphasis added), *quoting 46th Circuit Trial Court v Crawford Co*, 476 Mich. 131, 141, 719 N.W.2d 553 (2006) (quoting *The Federalist No. 47* (Madison) (Rossiter ed, 1961), p 301). Topmost among the constitutional defects in the Michigan EPGA was the broad scope of conferred power that would persist at the governor's discretion indefinitely. *Midwest Inst.*, at *24-45 (extended discussion).

The courts must preserve the separation of powers among the branches. If the legislature has delegated to the governor powers too broad and for too long duration, that

[5] "[T]hese policies exhibit a sweeping scope, both with regard to the subjects covered and the power exercised over those subjects. Indeed, they rest on an assertion of power to reorder social life and to limit, if not altogether displace, the livelihoods of residents across the state and throughout wide-ranging industries." *Midwest Inst*., at *34.

delegation of power is unconstitutional:

> [A]s the scope of the powers conferred upon the Governor by the Legislature becomes *increasingly broad, in regard to both the subject matter and their duration*, the standards imposed upon the Governor's discretion by the Legislature must correspondingly become more detailed and precise.

Id. at *31 (emphasis added).

The Michigan Court held the statute conferring upon the governor a sweeping power to control businesses and private citizens, with the power extending indefinitely at the governor's pleasure, was *unconstitutional. Id*. at *43-44. Defendants' Motion urges that Defendant Governor Ige commands precisely that same sweeping power with no time limit – Defendants are urging this Court to shirk its responsibility to protect the separation of powers and affirm an unconstitutional interpretation of the statute.[6]

Like Michigan's, Hawai'i's constitution defines the three branches of government as co-equal but separate. Haw. Const. art. III (legislature), art. V (executive), art. VI (judiciary); *Hanabusa v. Lingle*, 105 Haw. 25, 35, 93 P.3d 670 (2004) (affirming co-equal branches). The separation of powers doctrine operates "'to *preclude a commingling of . . . essentially different powers of government in the same hands* and thereby prevent a situation where one department would be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.'" *AlohaCare v. Dep't of*

[6] Contradicting their own advocacy for unlimited and unchecked governor emergency power, Defendants' Motion cites several other states' laws that expressly provide for legislature involvement as a check, balance, and restraint upon an otherwise limitless "emergency" power exercised by the states' governors. *See* Def. Mot. at 14 nn. 10,11. The other states' laws make clear the legislatures delegate their power only temporarily to the governor, a position Defendants want to reject in Hawai'i's case.

Human Servs., 127 Haw. 76, 86, 276 P.3d 645 (2012) (emphasis added; citation omitted). Additionally, the nondelegation doctrine proceeds from the separation of powers doctrine, and precludes the legislative branch from delegating its powers to the executive branch. *Touby*, 500 U.S. at 164-65 (stating the nondelegation doctrine, rooted in the constitutional separation of powers, under which "Congress may not constitutionally delegate its legislative power to another branch of Government"); *In re Kauai Elec. Div.*, 60 Haw. at 181 (confirming Hawai‘i courts adopted the nondelegation doctrine).

Defendants here advocate interpreting HRS chap. 127A in a way that violates both the separation of powers and nondelegation doctrines. Accepting Defendants' view – that the governor is empowered to virtually run the entire state for an unlimited period – would contradict long settled constitutional principles.

C. Unless the Statutes Impose an Enforceable Limitation, The Governor's Authority to Declare an "Emergency" Has Amounted to a Blank Check to Usurp Legislative Power.

Optimistically, Defendants' Motion assures that each "emergency" situation is carefully analyzed, with "[e]ach emergency proclamation [being] a separate proclamation specifically tailored to the evolving circumstances on the ground." Mot. at 4. Defendants assert "[e]ach subsequent proclamation must be based on a new assessment of emergency conditions, because the Governor may only declare a state of emergency for sixty days at a time." *Id.* at 10.

Defendants' position is utterly fact-free. Per HRS 127A-14 (c), "[t]he governor shall be the sole judge of the existence of the danger, threat, or circumstances giving rise

to a declaration of a state of emergency." There is no clearer way to say "the governor can unilaterally decide there is an emergency and declare it, and he or she does not have to justify it to anyone." *Nothing* in the statute demands or even provides for "a new assessment of emergency conditions" that considers "evolving circumstances on the ground."

1. Defendant Governor has not complied with the duty Defendants themselves contend exists.

Defendants' rosy description of how Defendant Governor has so carefully issued proclamations and supplements is nowhere shown in the proclamation texts. Consider Proclamation 13 (to which the Motion refers): There appears *no* "new assessment of emergency conditions." *See* Proc. 13, pp. 1-2. Only an increase in "the recorded number of cases [11,500]" and "deaths attributed" to Covid (120) is set forth. As the proclamation cites this data as probative, then context matters: 120 deaths in the state's 1.4 million population is 0.008%, about 8 persons in 100,000. By comparison, the U.S. seasonal flu mortality rate in 2018-2019 fell in the range of 0.1% to 0.2% -- over 12 times higher than Hawai'i's Covid mortality rate to date. The Governor of Hawai'i did not take control of the state during the 2018-2019 flu pandemic, and there is less reason now.

Moreover, the "number of cases" is practically meaningless without context. The overall death rate of persons believed infected with Covid is about 3%, with the overwhelming majority of fatalities among older persons.[7] Governor's orders restricting

[7] *CDC COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#demographics (accessed October 17, 2020).

the liberty and destroying the livelihoods of uninfected younger people is not justified by the science. Defendant Governor has presented no scientific basis to warrant the statewide power grab with its devastating consequences.

2. Defendant Governor's untailored statewide edicts failed or made the problems worse.

Breathtaking among the statistics is: Hawai'i's Covid case counts in Honolulu County *increased 10-fold* starting in mid-July 2020.[8] This steep increase in cases occurred only in Honolulu County, and took place while the Governor's Eighth Supplementary and Ninth Supplementary Proclamations were in effect everywhere in the state. The other counties experienced only slight increases in case rates, starting in mid-August.

Conclusion: Defendant Governor's initial Proclamation and subsequent supplemental proclamations were not "specifically tailored" to "evolving conditions" in the state, in the counties, or even in Honolulu County itself. Theses proclamations did not work well, if at all. Meanwhile, people in all of the counties suffered massive personal, familial, professional, financial, and educational disruptions, totally unmentioned in the Governor's proclamations.[9]

D. Defendant Governor's Edicts Have Ignored and Therefore Failed to Avert "Catastrophic Impacts" and Protect the Welfare of All of the People in the State.

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[8] *Confirmed Coronavirus Cases in Hawaii by County*, https://covid-019.com/hawaii (graph) (accessed October 17, 2020).

[9] *Experts: Pandemic wiped out 8 years of economic growth in Hawaii*, www.hawaiinewsnow.com/2020/10/13/visitor-relaunch-nears-hawaiis-economy-continues-bottom-out/ (text and video) (accessed October 17, 2020)

Recall Proclamation 13's other claimed basis: "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[.]" That language is nearly identical to the boilerplate in the prior proclamations, such as the Third Supplementary Proclamation that imposed a lockdown upon every person in the state. The Third Proclamation's justification was: "to provide relief for disaster damages, losses, and suffering, and to protect the health, safety, and welfare of the people," and "the dangers of COVID-19 require 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[.]"

Using identical boilerplate in over a dozen proclamations spotlights the emptiness of Defendants' claims. The boilerplate language says the goal is to protect the people's "welfare" and avert "catastrophic impacts to the State," but the proclamations or Defendants' Motion nowhere even hint that the Governor considered the massive harm and damage caused to the people by the proclamations themselves.[10] The proclamations have also taken no account whatsoever of the budget-breaking public debt created by their

[10] "Hawaii experienced a 42% drop in growth domestic product, which measures the size of the economy and economic growth. Not only is that decline among the worst in the nation, Bonham says there's also no historical comparison. 'We're all the way back at a level of GDP from 2012, so we've essentially wiped out about eight years of economic growth,' said Bonham, who also sits on Hawaii's House Select Committee on COVID-19." *Experts: Pandemic wiped out 8 years of economic growth in Hawaii*, www.hawaiinewsnow.com/2020/10/13/visitor-relaunch-nears-hawaiis-economy-continues-bottom-out/ (text and video) (accessed October 17, 2020)

blanket lockdown policies.[11] Defendants' Motion painfully attempts to protect and advance the Governor's virtually unlimited "emergency" powers by making claims about the Governor's diligence and dedication – ignoring the utter absence of justification for the sustained power grab in any of the proclamations that has caused so much human suffering and economic disaster.

III. Defendants' Reference To The Kilauea Volcano Emergency Is Entirely Inapposite.

Defendants' Motion argues that the Covid-related proclamations and supplements are lawful because they follow how the governor used several serial proclamations to address the lava flow from the 2018 Kilauea volcano eruptions. Def. Mot. at 16-17. This argument lacks merit on every level. First, HRS § 127A-14 did not authorize serial proclamations for the volcanic disaster any more than it authorizes the instant proclamations. "Concisely stated, two wrongs don't make a right[.]" *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 810 (Tex. 2017).

Second, the Kilauea lava flow physically affected an area of about 13 square miles on one island, destroying considerable property in that immediate region and posing dangers and risks posed to residents there and in nearby areas of the Puna district. The

[11] *COVID: Hawaii debt increases by $9 billion over past 8 months, to $97 billion*, Hawai'i Free Press (Oct. 15, 2020) ("Hawai'i's *unfunded liabilities* for infrastructure and public health benefits have increased so far this year to $97 billion" (emphasis added)), http://www.hawaiifreepress.com/ArticlesMain/tabid/56/ID/26561/categoryId/131/COVID-Hawaii-debt-increases-by-9-billion.aspx (accessed October 19, 2020).

Governor's proclamations addressed that emergency in the one local area where people and property were affected.

In complete contrast, Defendant Governor's Covid-related proclamations *affect every island, every county, and every person in the State of Hawai'i.* The lockdowns, quarantines, business closures, social prohibitions, education denials, and misdemeanor penalties for noncompliance (such as walking on the beach) endangered and harmed nearly everyone in the state, when only a tiny fraction of the population was affected by the virus. Defendant Governor has arrogated immense statewide power to himself and the government entities in orders of magnitude greater than in the Kilauea situation. Nothing about responding to the local volcanic emergency bears any relation to the Governor's excessive and unlawful seizure of statewide power for an indefinite period.

IV. The FAC's Void For Vagueness Allegations Present A Live Controversy.

Unless Defendants will forego all arrests and prosecutions under all proclamations up to and including Proclamation 11, the FAC's void for vagueness challenge remains non-moot. The FAC's second cause of action alleges the unconstitutional vagueness generally for the morass of proclamations, and specifically identifies examples: (A) Each proclamation expressly added provisions onto the corpus without revoking any prior provisions, creating an unintelligible morass; (B) "the June 10 Supplement in three places declares the criminal penalties to be imposed for violations of the Supplement's orders: Section III(E), Section IV(F), and 'Exhibit D' (Travel Quarantine Rules)," which are vague and internally contradictory; (C) Earlier proclamations imposed a stay-at-home order, then

the June 10 proclamation said nothing about that but restated all prior proclamations, creating vague, inconsistent, and ultimately unintelligible orders concerning prohibited travel; and (D) The May 18 proclamation, Section III (A), (B) and (C), referencing exhibits, invoke vague and undefined prohibitions while providing confusing directives about self-quarantine and "safe" practices.

A law carrying criminal consequences "cannot be so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Hockings*, 129 F.3d 1069, 1072 (9th Cir. 1997). A law that defines a standard that itself is "internally inconsistent and incomprehensible to a person of ordinary intelligence" is a law that is unconstitutionally vague and thus a "violation of the due process clause of the Hawai'i Constitution, article I, section 5." *State v. Beltran*, 116 Haw. 146, 153 (2007) (internal quotation and citation omitted).

A criminal law must provide "explicit standards for those who apply the statute, in order to avoid arbitrary and discriminatory enforcement and the delegation of basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *State v. Alangcas*, 131 Haw. 312, 316 (App. 2013) (emphasis added), *citing and following State v. Gaylord*, 78 Haw. 127, 138 (1995). The stay-at-home order confusion in the first 11 proclamations shows just one example of many where the lack of "explicit standards" is both evident and then compounded by the existence of unrepealed prior supplementary proclamations – all of which invite "arbitrary and discriminatory enforcement." *Id.*

As the defects in prior proclamations present legal risks and penalties that can affect real people – unless the State expressly declines to enforce all prior alleged violations – the FAC presents a live controversy warranting declaratory relief.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request Defendants' Motion to Dismiss be denied. In the alternative, Plaintiffs request leave to amend the complaint to add the current proclamation as a basis for the relief sought, as well as future proclamations addressing the same matters.

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CERTIFICATE OF SERVICE

I certify that the above document was served electronically through the Court's JEFS system upon the following on the 9th day of November, 2020:

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