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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

FOR OUR RIGHTS, et al., Plaintiffs, vs. DAVID IGE, in his official capacity as Governor of the State of Hawai'i, CLARE E. CONNORS, in her official capacity as Attorney General for the State of Hawai'i, and STATE OF HAWAI'I, Defendants.	Civil No. Civil No. 1:20-cv-00268 **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION; EXHIBITS 10-15** Dist. Judge: Hon. Derrick K. Watson Magistrate Judge: Hon. Rom Trader Hearing: June 26, 2020 at 10:30 AM

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I. Plaintiffs' Requests for Declaratory Relief are Not Barred by the Eleventh Amendment.

Defendants assert the Eleventh Amendment bars Plaintiffs' lawsuit because it "seeks relief under state law." Defendant's Opposition ("Opp.") at 18. To the contrary, this lawsuit is seeking relief under federal law for rights violations occasioned partly by Defendants' violations of state law.

A. Defendants' Cited Authorities Are Inapposite.

Plaintiffs ask this Court to find Defendants' actions violated federal constitutional fundamental rights. Plaintiffs are not asking for "relief" under any Hawai'i statute, neither damages nor injunctive. Rather, Plaintiffs are showing Defendants are violating the federal constitutional rights in several ways; *Defendants' violations of the Hawai'i statute and Constitution are the central and proximate causes of Defendants' violation of the federal rights*.

Defendants cite *Doe v. Regents of the Univ. of Cal*., 891 F.3d 1147, 1153 (9th Cir. 2018), as saying: "[T]he [*Ex parte*] *Young* exception does not apply when a suit seeks relief under state law[.]" Opp. at 18. *Doe's* language is inapposite here. The *Doe* plaintiff filed a lawsuit against the Regents alleging federal and state law claims, seeking a writ of administrative mandamus under California procedure. *See Doe*, 891 F.3d at 1150-1151. The Ninth Circuit held the Eleventh Amendment barred the federal court action. *Id.* at 1153.

Unlike the *Doe* plaintiff, Plaintiffs here do not cite Hawai'i law as a basis for damages or injunctive relief. Plaintiffs' lawsuit falls under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908) (the "*Young* Doctrine"), which holds the Eleventh Amendment does not preclude suits for injunctive prospective relief against state officers violating federal law, partly as a relief from sovereign immunity that would otherwise prevent redress when state officers violate federal laws. *See Alden v. Maine*, 527 U.S. 706, 747 (1999). Plaintiffs seek relief under federal law, not state law.

Defendants cite *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984), quoting: "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 claims brought into federal court under pendent jurisdiction[.]" Opp. at 18. First to observe: *Pennhurst* involved matters of civil law, not criminal law to which constitutional rights directly pertain. *See Pennhurst*, 465 U.S. at 91-92 (civil matter). *Pennhurst* bars a federal court from considering a claim that state officials failed to comply with a proper interpretation of state law. Plaintiffs' lawsuit is outside *Pennhurst* because Plaintiffs are pointing out the Defendants are violating federal rights based upon no lawful authority. "An unconstitutional law is void, and is as no law." *Ex parte Siebold*, 100 U.S. 371, 376 (1879), *cited as authority, Close v. Sotheby's, Inc*., 909 F.3d 1204, 1210 n.1 (9th Cir. 2018). If a State lacks the legitimate power to prosecute and punish a person's alleged conduct, then "it [cannot] constitutionally insist that he remain in jail." *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016) (citation omitted). The Defendants are substantially interfering with the fundamental federal constitutional right to travel and freedom of movement by their threatening and imposing criminal penalties – and – those penalties have their "legal" basis in the legally void June 10 Supplement.

Plaintiffs seek relief from Defendants' enforcement of the June 10 Supplement because punishment under that edict violates fundamental constitutional rights. This approach was recognized in *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir. 1986):

> To punish a person criminally for an act that is not a crime would seem the quintessence of denying due process of law … *If you argue that Statute X does not make your act a crime, you are making a statutory argument, but in support of a due process claim.*

Id. (emphasis added*), interpreting Davis v. United States*, 417 U.S. 333, 345-47 (1974).

B. Plaintiffs' Allegations Fall Under the *Young* Doctrine.

Under the *Young* Doctrine, to avoid the Eleventh Amendment bar, "a court need only conduct a 'straightforward inquiry into whether [the] complaint [1] alleges an ongoing violation of federal law and [2] seeks relief properly characterized as prospective.'" *Verizon Md. Inc. v. PSC*, 535 U.S. 635, 645 (2002) (enumeration added; citation omitted). These tests are passed, as the Amended Complaint: (1) alleges violations of federal constitutional rights to freedom of travel and due process of law; and (2) seeks prospective relief against future rights violations and criminal penalties.

II. Plaintiffs Have Standing To Seek Prospective Remedies For Constitutional Rights Violations.

A. Plaintiffs Have Individual Standing.

Defendants mistakenly contend Plaintiffs "lack the concrete and particularized injuries-in-fact necessary to establish Article III standing." Opp. at 15. The Supreme Court rejected such a contention in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). To establish Article III standing, Plaintiffs show: (1) an "injury in fact;" (2) a sufficient "causal connection between the injury and the conduct complained of;" and (3) a "likelihood" that the injury "will be redressed by a favorable decision." *Id.* at 157-58 (quotations and citation omitted). Defendants apparently concede elements (2) and (3), as their Opposition contests only element (1). *See* Opp. at 15. *Susan B. Anthony List* explained:

> *When an individual is subject to such a threat [of enforcement]*, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law.

Susan B. Anthony List, 573 U.S. at 158 (emphasis added), *citing Steffel v. Thompson*, 415 U. S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute" as violating constitutional rights), *and MedImmune, Inc. v. Genentech, Inc*., 549 U. S. 118, 128-129 (2007) ("[W]here threatened action by government is

concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat"). The Supreme Court holds a plaintiff need only allege "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List,* 573 U.S. at 159, *quoting and citing Babbitt v. Farm Workers*, 442 U. S. 289, 298 (1979).

Plaintiffs' Amended Complaint alleges both (a) their intentions to engage in constitutionally protected conduct, e.g., travel and personal movement, and (b) the "credible threat of prosecution" they face for doing so. Start with the recognition that people live in the Hawaiian Islands so that they may enjoy the outdoors, travel, hike, and enjoy social events and family visits and relationships. *See State v. Shigematsu*, 52 Haw. 604, 609-610 (1971). Locking people down, blocking them from engaging in family and social events even including religious gatherings, preventing interactions among free people in business settings – these are expressly what the June 10 Supplement and the other supplementary proclamations aim to do.

People in Hawai'i have the right to go outside, visit friends and family in private and business environments, and travel to the Mainland and back to conduct their affairs or visit family. It must be conclusively presumed *all of the Plaintiffs*, and all people on the Islands, *intend to exercise these fundamental rights*. They should not be expected to prove they want their basic human freedoms. *See Shigematsu* at 610 (detailing the freedoms).

Individual Plaintiffs are alleging that they suffer isolation from friends; depression; loss of use of public facilities; inability to make family visits; inability to attend AA meetings; inability to enjoy the outdoors, with resulting stress, depression, and including suicidal ideation; all of which are foreclosed by the threat of prosecution. Am. Cplt., ¶ 61. The threat of prosecution would arise from either the fact of travel and movement or for violating the self-quarantine restrictions after travel.

B. Plaintiffs Have Third-Party Standing Under *Barrows v. Jackson* and *Singleton v. Wulff.*

Undeniably, Plaintiffs' case presents circumstances in Hawai'i having no historical precedent: (1) a worldwide pandemic of a contagious virus that is not often fatal; and (2) a government response to possible virus contagion by imposing travel restrictions, quarantines, and lockdowns that target all people without regard for their infection status or likelihood. Under *Barrows v. Jackson*, 346 U.S. 249 (1953) and *Singleton v. Wulff*, 428 U.S. 106 (1976), Plaintiffs have standing to challenge the deprivation of other persons' fundamental rights.

Plaintiffs are suffering the deprivation of fundamental rights directly, but they are also suffering directly by virtue of the deprivation of fundamental rights of fellow Americans. *See* Am. Cmplt., ¶ 61 & supporting exhibits. For example, one Plaintiff is seeing her vacation rental business destroyed, suffering serious financial losses and the high risk of losing her condominium, because Defendant Governor's June 10 Supplement (incorporating its predecessors) has deprived fellow Americans the fundamental right to travel to Hawai'i. *Id.*, ¶ 61 (E). Another Plaintiff faces dramatic financial losses due to the virtual absence of visitor travel to Hawai'i, caused by the Governor's proclamation and supplements. *Id.,* ¶ 61 (G). Likewise, other Plaintiffs are facing destruction of their livelihoods – all due to the Governor's edicts restricting fellow Americans' right to travel. *Id.,* ¶ 61 (G), (J).

Under *Barrows v. Jackson*, these circumstances should confer standing on Plaintiffs to challenge the Governor's edicts because of their effects on fellow Americans. Although "[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party," Plaintiffs may challenge the constitutionality of a law by showing "[they are] within the class whose constitutional rights are allegedly infringed." *Barrows*, 346 U.S. at 255, 256 (citations omitted).

Most importantly here, Plaintiffs may constitutionally challenge a law where there exists "*a unique situation* in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not *impossible for the persons whose rights are asserted to present their grievance before any court*." *Id.* at 257 (emphasis added); *accord, Miller v. Albright*, 523 U.S. 420, 448, 450 (1998) (plurality opinion, citing *Barrows*). Plaintiffs' case is certainly a "unique situation" where the State will prosecute and convict Americans who travel to Hawai‘i as visitors but fall short of adhering to the 14-day self-quarantine and other restrictions.

The threat of such prosecution has already drastically reduced the numbers of visitors to Hawai‘i. *See* Exh. 10 (news report of 99% decline). Fellow Americans are *legally blocked* from visiting, whether tourists, outdoors enthusiasts, and vacationing families. People who simply want to visit Hawai‘i cannot do so and filing a lawsuit is not even a conceivable option to seek relief. They are denied the right to travel interstate to Hawai‘i without due process of law.

The would-be visitors fall within the ambit of *Singleton v. Wulff*. The usual rule against standing to assert non-parties' rights would apply when "in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Singleton*, 428 U.S. at 113-114. *Singleton* avers: "third parties themselves usually will be the best proponents of their own rights." *Id*. at 114. True – but would-be visitors cannot feasibly advocate for themselves. Large numbers of visitors are deterred by the travel ban. Few if any of the would-be Mainland resident visitors could be expected to file lawsuits in Hawai‘i seeking the right to vacation or even conduct business there.

When the third parties cannot feasibly litigate to secure their rights, *Singleton* shifts to considering "two factual elements to determine whether the rule should apply[.]" *Id.* at 114. First question: "[I]s the relationship of the litigant to the person whose right he seeks to assert," i.e., is "the enjoyment of

the right is inextricably bound up with the activity the litigant wishes to pursue"? When the enjoyment of the right of the Plaintiffs and the non-parties is clearly intertwined, then the Plaintiffs are "fully, or very nearly, as effective a proponent of the right as the [non-parties]." *Id.* at 114-115.

Indisputably here, Plaintiffs are suffering harm caused by the non-parties being deprived of fundamental rights they cannot feasibly litigate to protect. The relationship of property-owner and visiting tenant or family member is one of mutual benefit as each serves the other (at least) in the matter of providing and enjoying shelter. Plaintiffs in Hawai‘i have every bit of the same incentive to litigate for their visitors' rights – and in the case of owners of visitor lodging, they have the aggregated interests of all of the visitors who would foreseeably come during the year.

Singleton's second question: Is "there some genuine obstacle to such assertion [of the fundamental right]" by the third party, such that "the party who is in court becomes by default the right's best available proponent"? *Id.* at 116. Here the obstacle to would-be visitors from the Mainland is immediately clear – it takes a lawsuit like this one to seek a court order allowing exercise of the fundamental right. The costs and prospects of litigation would deter all but the wealthiest and most determined visitors. By contrast, Plaintiffs have daily direct financial incentive to litigate to protect the would-be visitors' rights. Plaintiffs are "the right's best available proponent." *Id.*

C. Plaintiffs Are Forced to Implement the Deprivation of Rights.

The June 10 Supplement requires the Plaintiffs, who own and operate rental properties for visitors to enjoy, to call the police if they suspect a visitor has violated a "self-quarantine" requirement. Am. Cmplt., ¶ 57 & Exh. 9, § IV(C). On pain of being prosecuted, convicted, fined, and jailed, these Plaintiffs must enforce violations of their fellow Americans' fundamental rights to travel and freedom of movement. (The same is true of any Plaintiff who would have a friend or family member visit as a houseguest.)

The *Barrows* precedent applies here because of the Plaintiffs' duty to enforce the Governor's edicts. In *Barrows*, a seller conveyed a residential property to a non-Caucasian buyer, in violation of the neighborhood's racially restrictive covenant. The plaintiff, a neighbor, sued the seller for damages for violating the covenant; if the plaintiff prevailed, the state government machinery would be employed to coerce the seller to pay the judgment. No non-Caucasians were parties to the case, however. *Barrows*, 346 U.S. at 254-255. Could the seller, who was not the victim of the discrimination embodied in the restrictive covenant, enforce the rights of non-Caucasians in this case? The *Barrows* Court answered *yes*, holding the seller had standing to enforce such rights – because she would be the one having to pay damages if the state court were to enforce the racially restrictive covenant. *See id.* at 258.

Directly analogous is Plaintiff's case. Plaintiffs are the ones who are suffering economic harm resulting from the June 10 Supplement, which deters visitors to their properties by subjecting them to the 14-day self-quarantine requirement and effectively prohibits use of parks, beaches and other public spaces in the Islands. Under *Barrows*, Plaintiffs have standing to challenge the edicts violating the third parties' rights when Plaintiffs suffer the economic harm from the unlawful restrictions the State imposes on those third parties.

III. Defendants Do Not Show Likelihood Of Prevailing On The Merits.

Defendants assert the Governor's edicts are unassailable and constitutional because as "emergency orders" they "have a 'real or substantial relation to the protection of the public health and public safety' and meet the deferential standard set forth in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)."[1] *Jacobson* was decided before the Court adopted and elucidated upon the tiers of scrutiny.

[1] Defendants cite *South Bay United Pentecostal Church v. Newsom*, 2020 U.S. LEXIS 3041 (U.S. May 29, 2020) (5-4 decision), a five-paragraph decision denying an application for injunction, as

See Clark v. Jeter, 486 U.S. 456, 461 (1988) (reiterating the tiers: rational basis review, intermediate scrutiny, and strict scrutiny). Jacobson could not have and did not employ those tiers. Moreover, *Jacobson* was decided before the Court began selectively incorporating the Bill of Rights protections as applying to the states under the Fourteenth Amendment starting in 1925. *See Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937) (explaining selective incorporation).

The *Jacobson* opinion mostly deals with the extent of the state's authority to deal with a perceived common danger. *See Jacobson*, 197 U.S. at 24-25. The phrase "fundamental right" does not appear. Thus, whatever analysis of individual rights *vis a vis* state prerogatives occurred in *Jacobson* was not informed by the subsequent century of judicial opinions expanding and clarifying those issues.

Jacobson is factually inapposite as well. *Jacobson* addressed a mandatory vaccination campaign resulting *from a decision of the legislature* (197 U.S. at 361-362), while the instant case involves the Hawai‘i Governor's *unilaterally imposed* edicts restricting the rights of all people, including *de facto* imprisoning them, without due process. Overall, the *Jacobson* opinion does not compel a result or foreclose Plaintiffs' legitimate challenges. Other judicial decisions concerning Covid-19 that rely upon *Jacobson* are similarly problematic and should not control.

IV. The Public Interest Does Not Support the Governor's Supplemental Proclamation.

A. The Governor's Unilateral Proclamation is Not Necessarily "The Public Interest."

Defendants assert "the government's interest *is* the public interest" as though that were a statement of law. Opp. at 10 n.2 (original emphasis). The statement is quoted from *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016), but taken somewhat out of context. Reading

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vitalizing *Jacobson*. Lacking analysis of *Jacobson,* the decision does not support *Jacobson's* reasoning. *See United States Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (noting "customary skepticism" toward short decisions lacking full "reasoned consideration").

the full sentence discovers the court was *not* declaring that every time the government acts, it does so in the public interest. Rather, the court was simply observing that in that specific case the FEC was standing as the advocate for redress that would presumably benefit the public interest. And the court granted the private party a preliminary injunction *against* the FEC. *Id.* at 512.

Defendants also contend the "public interest and the balance of harms generally 'merge' when 'the Government is the opposing party.'" Opp. at 10 n.2, *quoting and citing Nken v. Holder*, 556 U.S. 418, 435 (2009). That may be the general approach, but the *Nken* decision was decided against the government agency, and the Court observed the "public interest" could include protecting the rights of the individual citizen against whom the government is acting. *Nken*, 556 U.S. at 436.

Citing *Nken* and *Pursuing America's Greatness* does not overcome the fact that Defendant Governor is declaring and enforcing edicts unilaterally, as though both executive and legislature. In both cited cases, the government entity was acting within its usual powers. Neither case supports a government denial of fundamental rights. Defendant Governor was initially acting under delegated temporary powers, but then continued to declare and enforce laws without lawful authority. The Governor's edicts are harming the people of Hawai'i. *See* Exh 11, p. 5 (Hawai'i unemployment data). Defendants' footnote 2 does not change the analysis.

B. Defendants Fail to Establish That the Injunction Would Harm the Public Interest.

Defendants assert: "Plaintiffs' proposed injunction [should be denied because it] would increase the potential for COVID-19 transmission and create catastrophic risk to public health." Opp. at 25. An "*increase in potential* for Covid-19 transmission" does not by itself portend a "catastrophic risk to public health," however. For instance, an additional 10 positive tests per week would show "increased transmission" but portend no catastrophe.

(i) Dr. Park's Declaration Offers Mainly Conjecture.

Dr. Park's Declaration contends "ending the remaining quarantine would cause a rapid spike in COVID-19 cases[.]" Opp. Exh. 2, ¶ 30. Dr. Park's Declaration discloses no scientific basis for her contention – not even a citation to a source – thus her statement is conjecture. There is no showing that her contention "is the product of reliable principles and methods." Fed. R. Evid. 702. There is no showing her opinion is sufficiently reliable. *Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1005 (9th Cir. 2001), explains:

> [T]o qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation … [and meet] a standard of evidentiary reliability."

Id. at 1005 (quotations and citations omitted).

The absence of reliable scientific support for Dr. Park's opinions undermines the entire basis for the Governor's edicts. "[W]here such [expert] testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of [the relevant] discipline." *Id.* at 1005, *quoting Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999). Dr. Park's Declaration simply lacks scientific support for the conclusions.

(ii) Dr. Hankins' Testimony Lacks Any Reliable, Tested Scientific Basis.

Defendants offer Dr. Hankins' Declaration as purported additional scientific support for the travel quarantine. Opp. Exh. 3. All of Dr. Hankins' hypothetical likelihoods and predictions are based upon "our model." *Id.*, ¶ 7. It is unstated whether the "model" is a computer program of sorts. Reliance upon an unidentified "model" utterly fails to support Dr. Hankins' testimony.

Before Dr. Hankins' unidentified "model" can be accepted as a basis for his opinions, it must pass a five-factor reliability test: "(1) whether the method has been tested; (2) whether the method 'has

been subjected to peer review and publication;' (3) 'the known or potential rate of error;' (4) whether there are 'standards controlling the technique's operation;' and (5) the general acceptance of the method within the relevant community." *United States v. Johnson*, 875 F.3d 1265, 1280 n.10 (9th Cir. 2017), *quoting and citing Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-95 (1993).

Defendants have submitted nothing to show the scientific reliability of Dr. Hankins' "model." No peer review, no publication, no operational standards, no indications of error rates, no general acceptance, no explication of formulas or equations. Without such showing, his opinions based upon the model are legally inadmissible. *Tellingly, Dr. Hankins does not even testify that the "model" has ever been correct about anything.*

(iii) Publicly Available Contrary Data Was Not Considered.

Neither Dr. Park nor Dr. Hankins took into account publicly available that undermines their opinion. For example, authoritative reports disclose very low infect risks for persons under 65, lower risks, lower death rates than initially projected, and the fact that previous more lethal epidemics in 1958 and 1968 did not result in locking down whole states and quarantining well people. *See* Exh. 12 (international Covid-19 stats), Exh. 13 (Population-level COVID-19 mortality risk study), Exh. 14 (Decl. of Dr. Joel Hay, citing sources); Exh. 15 (Covid-19 facts).

Hawai'i News Now reported in late February: "Hawaii is bracing for 50,000 to 70,000 cases of flu this year."[1] Actual flu deaths for the season: *505*.[2] Those figures, far higher than Covid-19, did not prompt Dr. Park or Dr. Hankins to call for blocking travel or freedom of movement, or for imposing mandatory quarantines on anyone.

[1] https://www.hawaiinewsnow.com/2020/02/24/officials-hawaii-flu-outbreak-complicated-by-virus-fears/.

[2] https://health.hawaii.gov/docd/files/2018/03/FLU_Influenza_Surveillance.pdf

Dr. Joel Hay, professor at the University of Southern California with a long career analyzing public health policy, has testified in parallel litigation before the U.S. District Court, in *Carmichael v. Ige*, that the "14-day quarantines are ineffective because *there is no emergency in Hawaii* or the United States." Exh. 14 (*Carmichael v. Ige*, Case No. 1:20-cv-00273 JAO, Doc. 12, Exh.3), ¶ 36 (emphasis added). Relying upon publicly available information, Dr. Hay shows "why releasing the Hawaii lockdowns will not trigger a public health emergency." *Id.,* ¶ 31. Unlike the declarations of Dr. Park and Dr. Hankins, Dr. Hay's declaration extensively presents the scientific literature and methods supporting his conclusion.

(iv) Recent Data Shows Governor's Edicts Severely Damaged Hawai'i's People.

June 21, 2020 Labor Department statistics show "Nevada had the highest unemployment rate in May, 25.3 percent, followed by Hawaii, 22.6 percent", compared to the national rate of 13.3%.[1] The *Wall Street Journal* observed: "The Nevada and Hawaii economies rely heavily on tourism that has been walloped by the pandemic. But all of these 10 states [with highest unemployment] have had some of the strictest lockdowns."[2] The draconian restrictions, by this measure alone, show how the Governor's edicts are harming the people of Hawai'i.

V. Defendants Offer No Authority For the Quarantine Order.

Defendants assert that "quarantines" such as imposed by the June 10 Supplement are common exercises of state police power. Opp. at 19 n.16. In a footnote Defendants cite *State v. Cotton*, 55 Haw. 138, 142 n.3 (1973), which recited: "Highway regulation is akin to quarantine measures, …, with respect to which the state has exceptional scope for the exercise of its regulatory power," quoting *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 783 (1945) (dicta), which itself drew the term

[1] https://www.bls.gov/news.release/laus.nr0.htm
[2] "Job gains are much greater in states that have reopened faster," *Wall Street Journal* (June 21, 2020).

from *Turner v. Maryland*, 107 U.S. 38, 39-40 (1882) (tobacco inspection case). None of these involved disease or support quarantining people in Hawai‘i or anywhere.

Ultimately, Defendants have cited no authority whatsoever authorizing the Governor of Hawai‘i to unilaterally forbid personal movement and to quarantine people for 14 consecutive days under some supposed "quarantine" power without a showing that the people have been exposed or are carriers of a disease. Under H.R.S. § 127A-13A, quarantine can be imposed only upon persons who are affected with or believed to have been exposed to any infectious, communicable, or other disease[.]"[1] Meanwhile, tourism plummeted over 99% in April alone. *See* Exh. 10 (news report)

VI. The Universal Visitor Quarantine Violation is Not Narrowly Tailored.

Defendants declare: "The self-quarantine requirement is also narrowly tailored." Opp. at 15. Dr. Park declares that testing and screening are not sufficient. Park Decl., ¶¶ 24-28. Yet the UHERO proposal Defendants provided describes a plan of screening and testing it calls epidemiologically sound, which eliminates universal traveler quarantines. Def. Exh. K, pp. 1-3. Defendants have themselves suggested a more narrowly-tailored approach – the universal quarantine is too broad.

Alaska, a state reached typically by airplane, also has a self-quarantine requirement for visitors, but Alaska flexibly provides visitors three alternatives to avoid quarantine: (i) they may produce test results showing they tested negative for COVID-19 shortly before departing for Alaska, (ii) they may test for COVID-19 upon arrival in Alaska and self-quarantine until receiving a negative test result, or () they may provide evidence proving prior positive Covid-19 test but subsequent recovery.[2] The Ninth Supplement's universal quarantine is not "narrowly tailored" at all.

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[1] Defendants concede they do not know who should be quarantined. *See* Opp. at 15 (citing Park Dec.). Without that knowledge, the Governor's edicts do not comport with H.R.S. § 127A-13A.

[2] Governor Mike Dunleavy, *COVID-19 Mandate* § II (June 5, 2020), https://covid19.alaska.gov/wp-content/uploads/2020/06/06152020-COVID-MAN

VII. The Plainly Stated 60-Day Limit in H.R.S. § 127A-14(d) Is Not Surplusage.

Defendants argue the 60-day limit on emergency proclamations in H.R.S. § 127A-14(d) does not actually set a limit. Opp. at 21-22. To the contrary, the statute's plain meaning controls. First, the meaning of a statute is presumed to be discovered from the plain meaning of the words employed. *United States v. Lillard*, 935 F.3d 827, 833-34 (9th Cir. 2019); *Priceline.com, Inc. v. Dir. of Taxation,* 144 Haw. 72, 87 (2019). Second, courts must "'give effect, if possible, to *every clause and word* of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (emphasis added; quotations and citations omitted). No clause, sentence, or word should be treated as "superfluous, void, or insignificant." *Id.* (quotations and citations omitted). Hawai'i courts follow the same rules of construction. *Ben. Haw., Inc. v. Kida*, 96 Haw. 289, 309 (2001). The 60-day limit in H.R.S. § 127A-14(d) means what it says. The Governor's proclamation and supplements have already expired.

VIII. Conclusion

Defendants owe a full explanation to Plaintiffs and the people of Hawai'i for locking down the state, violating fundamental rights, and wrecking the economy. Defendants' Opposition has fallen short and should not prevail on the merits. Plaintiffs' harms are concrete, current and prospective unless an injunction issues. Defendants have offered no admissible evidence of "State interest" to outweigh these harms, and they have not justified the Governor's facially unlawful edicts. Defendants have not contested that the cumulative morass of proclamation supplements is void for vagueness, nor have they contested Plaintiffs' injuries are irreparable. Plaintiffs respectfully request their motion for preliminary injunction be granted.

Date: June 24, 2020

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