Levana Lomma
xxxx xxxxxxx Street
Kapa`a, Hi. 96746
Phone: xxx-xxx-xxxx
E-mail: levana@forourrights.org
In Propria Persona

United States District Court
District of Hawai`i

Levana Lomma, *Plaintiff*, v. Clare E. Connors, et al. *Defendants*.	CASE NO. CV 20-00456-JAO-RT MEMORANDUM IN OPPOSITION TO DEFENDANT'S CONNORS AND IGE MOTION TO DISMISS [ECF NO.40]; DECLARATION OF PLAINTIFF; EXHIBITS "1" - "6"; CERTIFICATE OF SERVICE

MEMORANDUM OPPOSING MOTION TO DISMISS

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I. INTRODUCTION

The following Memorandum in Opposition to the State Defendants' Motion to Dismiss will clearly show the Court that the Plaintiff has sufficiently stated a claim to which the right to relief is warranted under the jurisdiction of this court, and so does ask the Court to deny the Defendant's Motion to Dismiss. Plaintiff asserts that the assumed legal authority of Defendants to issue executive orders which violate Plaintiff's fundamental liberty interests, is procedurally invalid and that the statute purporting this authority is unconstitutional on its face.

Throughout the Defendants' Motion to Dismiss the Defense relies heavily on *Carmichael v. Ige* as the most direct and relevant precedent available. But the most important thing about *Carmichael* is just how much has changed since that decision was handed down. Contained within the *Carmichael* decision is testimony from Dr. Sarah Park, Hawai`i State Epidemiologist, wherein she states that the quarantine remains in effect "...absent a vaccine or cure...". (See *Carmichael v. Ige* Dist. Court, D. Hawaii (2020)) The vaccine has arrived and is being widely distributed, especially among vulnerable populations, leaving no more justification for regulations which violate the people's most fundamental protected rights. Many different, highly effective, treatments for Covid-19 have also been developed. [See EXHIBIT "1"]

Other testimony in *Carmichael*, from Dr. Steven Hankins, Lead Coordinator for Emergency Support Function with HEMA, said that according to HEMA's model, more than 5,000 deaths would have occurred by July 23, 2020, were it not for the anti-Covid measures taken by the State however the number of actual deaths as of July 23rd, 2020 is a mere 26. Total Covid deaths, through March of 2021, even including the exaggerated count from questionable reporting practices is only 439. The model used to convince this Court to justify a declaration of "imminent" emergency in *Carmichael* overstated deaths by a factor of between 10 and almost 200. [See EXHIBIT "2" for facts pertaining to questionable death reporting and violations to federal law.]

The State has also taken action based on guidance and policies promulgated by other government agencies, primarily the Centers for Disease Control (CDC). In the early days of the pandemic, such as when *Carmichael* was heard, it is understandable that it was no time to fact check government experts. But over a year into the emergency declaration regime, the State still resists with all of its power even a simple examination of the facts. Why is that? The reason is plain. Even rudimentary research, nothing more complicated than reading original source medical documents referenced in CDC policy statements, immediately reveals just how thin the actual "science" behind Hawai`i state policies is. It must be stressed that it is the Plaintiff who wishes to force a detailed examination of the facts of the

Coronavirus panic, a thorough and rational analysis that will reveal that the State has based its policies on fear and groupthink, not science.

II. HRS 127A-14 IS UNCONSTITUTIONAL ON ITS FACE

State Defendants cannot succeed on this motion to dismiss, since the claim is to declare Chapter 127A-14 Hawai'i Revised Statutes unconstitutional on its face and in its application. Defendants *assume* they have indefinite and unchecked emergency powers since the statute states that defendants "...shall be the **sole judge** of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency." (emphasis added). This statute also states "[a] state of emergency and a local state of emergency shall terminate automatically sixty days after the issuance of a proclamation of a state of emergency or local state of emergency, respectively, or by a separate proclamation of the governor or mayor, whichever occurs first." (HRS § 127A-14(d))

This statute is an unconstitutional delegation of legislative power to the executive branch if the interpretation is correct that the legislature has given its legislative powers to the executive to continue the emergency even after the 60 day automatic expiration and has even given the executive the *judicial power* to be the sole judge of the existence of the danger. If the power to be the judge of the existence of the danger resides in the legislature then it has given its legislative power to the executive. Under either analysis, the statute is unconstitutional for

violating the separation of powers doctrine of our state constitution. (Haw. St. Const. Art. III, § 15)

Elected officials on whom the people have conferred powers may not circumvent the constitutional confines of their authority even if "they believe that more or different power is necessary." *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 529 (1935). This fundamental principle underlying the foundation of our government prevails even in an emergency because "[e]xtraordinary conditions do not create or enlarge constitutional power." Id. at 528. Even in a pandemic, the government "cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." Id. at 530.

Just like the federal framework, the Hawai'i Constitution protects against any of the three branches of government abdicating their constitutionally-vested powers. In the early days of our Republic, the United States Supreme Court succinctly articulated the separation of powers: "the legislature makes, the executive executes, and the judiciary construes the law." *Wayman v. Southard*, 23 U.S. 1, 22 (1825)

A recent ruling in Wisconsin struck down Governor Evers emergency orders as a matter of law. The ruling was made in regards to the language of the statute governing emergency powers in that extension beyond the provisional 60 day time

limit could only be established through the Wisconsin state legislature. The opinion filed on March 31, 2021 delivered in majority by Justice Hagedorn clearly illustrates Plaintiffs argument concerning HRS § 127A-14(d) in that any interpretation of this statute which seems to suggest that the executive branch be allowed legislative powers indefinitely by way of "supplemental" proclamation, makes it clearly unconstitutional. (See *Fabick v. Evers* Wisconsin State Supreme Court 2020AP1718-OA (2020)) This argument alone is sufficient to warrant striking down all emergency orders at the local and state level.

III. LEGAL STANDARD

As concerns the adequacy of factual allegations to defeat the 12(b)(6) Motion to Dismiss, it is impossible to understand how Plaintiff's factual allegations within the Second Amended Complaint (SAC hereinafter) could possibly fall short by any measure:

1. Plaintiff alleges that universal masking of HEALTHY people violates fundamental rights because it acts to mandate a feeling of unity among citizens, it portrays a particularized message, and it acts to prohibit disfavored speech;
2. Plaintiff alleges that the mask mandate is an act of coercion and that the object is religious;

3. Plaintiff alleges that her own religion is being violated through forced adoption of this cult-like practice which forces one to dishonestly act as if they are sick when they are not;
4. Plaintiff alleges that facts will demonstrate that the declaration of an emergency has proven to be unjustified;
5. Plaintiff alleges that predictive MODELS used to justify a preemptive declaration of "imminent" emergency have not come true, that they have proven to have vastly exaggerated the threat of Covid-19 not only in Hawai`i but literally everywhere in the world, and that this exaggeration is proven by areas of the world including U.S. States where none of the societal restrictions or face mask rules were implemented, but the dire predictions of the models failed to materialize; [See EXHIBIT "3" for facts pertaining to faulty models.]
6. Plaintiff alleges that face masks have not been shown to be effective in combating the spread of Covid-19, and that if allowed to present evidence to the Court all of Defendants' allegations to the contrary will be shown to be based on the thinnest of pretexts, despite the scientific-sounding jargon in which their claims are couched;
7. Plaintiff alleges that asymptomatic transmission of Covid-19 is so extraordinarily rare as to be statistically insignificant, that asymptomatic

transmission is not, and has never been, a significant transmission vector of the virus, and that asymptomatic "rates" of transmission referenced by Defendants are based on yet another faulty model, one which incorporates arbitrary and fallacious assumptions as baseline truths, and that numerous credible studies show asymptomatic patients to be a non-factor in Covid-19 transmission; (See EXHIBIT "4")

8. Plaintiff alleges that Defendants have willfully and intentionally ignored all evidence that might have forced them to change their positions, and have done so primarily out of concern for themselves, their careers, and their reputations.

In the context of a 12(b)(6) Motion to Dismiss, all of Plaintiff's allegations must be taken as factually correct. Surely these allegations, taken as factual, form a sufficient basis for a judgment in favor of the Plaintiff.

As concerns standing, quoting *Carmichael v. Ige*, Dist. Court, D. Hawai`i 2020, a case on which this Court ruled a few months into the pandemic:

> "A Plaintiff must demonstrate three elements to establish that he or she has standing to sue in federal court: (1) "injury in fact" that is "concrete and particularized" and "actual or imminent"; (2) the injury must be fairly traceable to the defendant's conduct; and (3) the injury can be redressed through adjudication.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)..."

In *Carmichael*, the Court declined to reach standing. However, the Court emphasized that the Plaintiffs in Carmichael had *elected* not to travel to Hawai`i. This stands in stark contrast to the current case, where Plaintiff has been forced to adhere to an objectionable ritual, a continuing injury to which one must constantly submit on pain of criminal prosecution. This injury is not only traceable to Defendants' conduct, but is directly mandated by Defendants' proclamations. This injury can be immediately remedied through adjudication, either by invalidating the Governor's unjustified and apparently endless proclamation of emergency, or by applying a narrow judgment and striking down the whole-population mask mandate as unjustified by any rational medical standard.

As concerns the real or substantial relation to public health which the Defendants allege for the mask mandate, the Plaintiff states plainly that there is no data supporting such a relation. Throughout their Motion to Dismiss, Defendants allege this imaginary "...real or substantial relation…" in many ways:

1. They claim scientific consensus about mask efficacy where none exists;
2. They repeat tall tales of the hospital system being "overwhelmed" although it has never occurred in any state, free or locked down;

3. They state as if factual the conjecture that asymptomatic individuals are contagious although actual transmission data indicates this is not the case; and
4. They refer to "temporary" restrictions that are now over a year in effect, with no end in sight.

Only if the rules of 12(b)(6) are turned on their head, disregarding all of Plaintiff's allegations as false, and regarding all of Defendants' allegations as true, can the mask mandate be construed as having a real or substantial relation to public health. The ugly truth is that the Mask Mandate is a political farce and religious practice based on mere faith and belief, rather than true science, and has no relationship whatsoever to a significant emergency.

IV. ARGUMENTS

A. Mask Mandates Act To Convey a Particularized Message

Non-verbal conduct implicates the First Amendment when it is intended to convey a "particularized message" and the likelihood is great that the message would be so understood. See *Nunez v. Davis*, 169 F. 3d 1222 - Court of Appeals, 9th Circuit 1999. Universal masking of HEALTHY people based on the mere BELIEF that they *could be* "asymptomatic carriers" with no rational methodology to separate the ill from the well is clearly a RELIGIOUS practice being passed off as "science". Because mask wearing is viewed as a cultural symbol of duty and

respect for others ***regardless of whether or not you are sick*** it is in essence an attempt by the Defendants to mandate participation in a dishonest ritual in order to create a feeling of unity among citizens. But the Supreme Court has previously ruled against this:

> "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent."
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> *West Virginia Board of Education v. Barnette*, 319 U. S. 624 (1943)

B. Mask Mandates Are Not Content Neutral and Are Therefore Subject to Strict Scrutiny

The Defense claims that Plaintiff's free speech claim fails "because there is *no* free speech right to speak without a mask during a pandemic," [ECF 40, Page ID #467] however, Plaintiff's claim does not fail when the entire existence of a public health emergency is in question. This assertion by the Defense also seems to suggest that unalienable rights are lawfully revoked in times of emergency. The Defendants' claims of a state of "emergency" and a "deadly pandemic" are based on conjecture, not fact. According to the statistical data at the local level there may be a "pandemic" by definition, based on mere cases alone, but it must be noted that a very good portion of these so-called confirmed cases are the result of a false positive reading from an excessive cycle threshold count and the World Health

Organization has openly admitted this "problem" with the RT-PCR test.[1] When we remove the fallacious belief that a public health emergency exists and return to common sense, we can see that the mask mandate is nothing more than a symbolic expression of belief in the irrational, unproven theory that healthy people are capable of spreading disease.

Plaintiff alleges that forced masking is a regulation that acts to prohibit disfavored speech by forbidding the ability to express disagreement with the Cult of Covid by NOT wearing a mask. A mandate which forces the entire population to participate in this false representation that they are carrying disease means you are prohibited from freely expressing to others that you are well. This favored speech also happens to work incredibly well to justify "quarantines" and testing of healthy people. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad. Sys. v. F.C.C.,* 512 U.S. 622, 643, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497 (1994).

As stated in Plaintiff's SAC, the government has taken "guardianship of the public mind" by forcing compliance to a practice that symbolizes submission to endless rights violations under this false belief that perfectly healthy people can

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[1] https://www.who.int/news/item/20-01-2021-who-information-notice-for-ivd-users-2020-05

pose a risk to others. Millions of people around the world know this ritual is not bound in science, yet are helpless to resist when faced with harassment, abuse, criminal prosecution, denial of goods and services and being ostracized by cult members. According to the Supreme Court the First Amendment is intended to protect us from this intrusion of the mind:

> "The First Amendment is a value-free provision whose protection is not dependent on `the truth, popularity, or social utility of the ideas and beliefs which are offered.' *NAACP* v. *Button,* [371 U. S. 415, 445 (1963)]. `The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.' *Thomas* v. *Collins,* [323 U. S. 516, 545 (1945)] (Jackson, J., concurring)." *Id.,* at 1455.

Quoting *Meyer v. Grant*, 486 US 414 - Supreme Court 1988 at 420

C. Mask Mandates Do Not Pass Any Level of Scrutiny

Having determined that a mask mandate does in fact infringe upon fundamental protected rights, such as freedom of speech and the free exercise of religion, we must then determine if such a regulation passes constitutional muster. The Defense argues that the mask mandate is plainly content neutral, but Plaintiff contends that this is false. While the Defendants may be issuing this executive order under the pretense that it serves a medical purpose, it has become clear that those promoting it as such stand to benefit from the underlying symbolism being used to maintain the illusion that a public health crisis exists. Without this visual representation that we are experiencing a “pandemic” (everyone wearing a mask),

there is no other tangible proof that one exists. By mandating this ritualistic practice of covering one's face as a symbol of duty and care, it removes all rights to the symbolic expression in not wearing a mask. An expression which represents truth, sovereignty, bodily autonomy, faith in the human immune system and protest against government overreach.

The Defense continues to claim that preventing "the spread of COVID-19 and [avoiding] overwhelming the health care system… are compelling state interests" (*Carmichael v. Ige*, 470 F. Supp. 3d at 1147) which validates a mandatory mask rule. It seems quite apparent a year later that case counts continued to rise regardless and that our hospitals have never been under a threat of being overwhelmed. Additionally, there are other less intrusive ways that this threat of overwhelmed hospitals could be addressed, such as retaining the hospital ship that was previously docked off the shores of Hawai`i but has long since been removed because it was obviously not needed.

Not only is there no compelling government interest because there is no emergency in the state of Hawai'i, Plaintiff argues that the mask mandate is not narrowly tailored when it is a regulation that holds an element of harm to the population. Erasing facial expression has serious impacts on the human psyche, especially for small children, and the deprivation of oxygen and excess carbon dioxide intake caused by extended mask wearing is detrimental to one's health,

particularly for those working 40 hours a week and for our school children whose brains are still developing. A rule intended to protect life that instead causes harm can hardly be called narrowly tailored.

Additionally, there is no proof that asymptomatic spread is responsible for the increase in cases and even if that were true then clearly the mask mandate has failed. All scientific study prior to the year 2020 has indicated that masking of infected individuals plays no significant role in reduction of secondary spread of any influenza-like illness and more recent studies which look at masking *healthy* people have proven to be the same. It has long been known that asymptomatic individuals are not the drivers of an outbreak and Dr. Anthony Fauci has been quoted saying just this in direct relation to Covid-19.[2] Over 54 studies have been conducted since this began and not one study has proven that individuals who are *not* exhibiting symptoms are responsible for infecting others.[3] It is absolutely baffling at this point that anyone, lay person or professional, can still be denying this fact that is rooted in simple common sense. If you are not sick you cannot spread disease.

Finally, the mask mandate does not leave open ample alternative channels of communication, when "communication" is more than just the sound of a voice

[2] https://youtu.be/ujNaRjIGHn4

[3] https://alachuachronicle.com/university-of-florida-researchers-find-no-asymptomatic-spread/

speaking words. “Communication” also involves kinesic cues and lip reading - two elements that are entirely prohibited under the Mask Mandate. Courts "have long recognized that [First Amendment] protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) Freedom of speech includes not only the right to use your voice or to put words in print, but also the right to distribute, the right to receive, and the right to read (*Martin* v. *Struthers,* 319 U. S. 141, 143) and “reading” can be assumed to include reading expressions and reading lips. The inability to see people smile is also a direct infringement on the right to distribute and to receive communication, particularly for infants.

D. Absent Any Scientific Proof of Efficacy Mask Mandates Are a Religious Practice

"[T]he Supreme Court has made clear that an activity may be religious even though it is neither a part of nor derives from a societally recognized sect." *Malnak I* 440 F. Supp. at 1313. Since the beginning of this Covid-19 fiasco we have seen numerous health experts give the public conflicting advice on the use of masks, with the WHO, the CDC, the Surgeon General and Dr. Anthony Fauci all flip flopping from “no healthy person needs to be in a mask” to “everyone needs to wear two masks!” along with the repeated slogan that we must “follow the science”. Plaintiff has been diligently following the science which clearly shows

that the ongoing narrative that masking is the most effective weapon against the spread of Covid-19 is nothing more than a religious doctrine founded on faith and belief rather than fact.

This idea that anything coming from the CDC is the gospel truth based merely on widespread faith in their authority is exactly the reason why mandatory masking can be equated to a religious practice, ***especially when their own studies can be used to dispute the claims that masking healthy people prevents the spread of Covid-19.*** See Public Record Morbidity and Mortality Weekly Report entitled "Community and Close Contact Exposures Associated with Covid-19 Among Symptomatic Adults > 18 Years in 11 Outpatient Healthcare Facilities -- United States, 2020" published by the Centers For Disease Control and Prevention (CDC) on September 11, 2020 on it's official website at https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6936a5-H.pdf , evidencing the fact that masks are ineffective in preventing spread of Covid-19, stating ***" In the 14 days before illness onset, 71% of case-patients and 74% of control participants reported always using cloth face coverings or other mask types when in public. "*** (emphasis added) This study confirms what many others like it have also confirmed: there is no substantial scientific evidence to prove that widespread masking of healthy individuals reduces the spread of Covid-19. [4] This is why it is

[4] https://swprs.org/covid-masks-review/

not surprising that the World Health Organization advised against asymptomatic individuals wearing masks back in February of 2020. (See EXHIBIT "3") It was known then and it is known now that masking healthy people is pointless.

The Defense cites a case heard in Michigan in December of 2020 where it was ruled that "[a]ny burden on Plaintiff's religious practices is incidental, and therefore, the orders are not subject to strict scrutiny." *See Resurrection Sch. v. Gordon*, No. 1:20-CV-1016, 2020 WL 7639923, at *3 (W.D. Mich. Dec. 16, 2020) however, plaintiff argues that the burden on religious rights is not incidental when the mask rule is intended to *mandate dishonesty*. My religion demands that I live my life in truth and honesty in all I do and wearing a face mask as if I am sick when I am not is a ritual that forces me to be dishonest, infringing upon my own religious convictions. The Supreme "Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non adherents as a disapproval, of their individual religious choices.' *Grand Rapids,* 473 U. S., at 390. (See *Allegheny County v. Greater Pittsburgh ACLU*, 492 US 573 - Supreme Court 1989) Criminal prosecution for non-adherence to this faith-based ritual is clearly an endorsement of the Cult of Covid and promotes clear disapproval of any opposing belief system.

E. Plaintiff Alleges Substantive Rights Violations Protected Under The Ninth Amendment That Meet The Criteria For Pursuing a Civil Rights Claim

Plaintiff's God-given rights are unalienable. One cannot sell, transfer or surrender unalienable rights. The Creator bestowed them on every individual. All human beings possess unalienable rights. Unalienable rights cannot be taken nor surrendered but they can be simply ignored. No where in the Constitution does it say these rights are revoked in times of "emergency". The right to freely exercise one's religion, to free speech and expression and the right to bodily autonomy are rights that remain protected no matter whether there is a real or perceived pandemic. The Supreme Court has recently ruled that "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. ____ (2020)

Using any device that inhibits oxygen intake and therefore affects the physiology of the human body is considered a medical intervention. As stated in the SAC in paragraph 2, page 3, under the Substantive Due Process clause Plaintiff asserts a right to relief from any regulation which violates bodily integrity and the right to refuse to engage in a medical intervention. Plaintiff asserts that the right to freely obtain the most important element of life (oxygen) is a fundamental right not enumerated and so protected under the Ninth Amendment. While a Ninth Amendment argument has never been recognized as *independently* securing any

constitutional right, for purposes of pursuing a civil rights claim, Plaintiff asserts a right to relief under the Substantive Due Process Clause for rights which may also be considered protected under the Ninth Amendment. Namely, the right to bodily autonomy and to regulate one's own oxygen intake.

The Defense argues that a Substantive Due Process claim fails simply because "Plaintiff is challenging efforts to control the spread of a deadly pandemic" [ECF 40, Page ID #484] however, not only is Covid-19 not truly deadly and therefore is not equivalent to an actual emergency, once again, Plaintiff reiterates that unalienable rights remain unalienable regardless of any perceived "emergency". As stated before, the statistical data has proven Covid-19 is not a true emergency with no where near any unusual number of deaths in Hawai`i compared to data from the last three years in a row.[5]

While it may have been justified early on to take a deferential "*Jacobson*" standard in determining the extent to which the government may infringe upon protected rights, we have now had ample time to evaluate the situation, to discover effective treatments, to study the effectiveness of mask wearing and to properly determine that the overall consequence of Covid-19. In a recent ruling which found New York Governor Cuomo's Emergency Orders unconstitutional, Justice Gorsuch gave this powerful opinion in concurrence:

[5] https://health.hawaii.gov/vitalstatistics/

> What could justify so radical a departure from the First Amendment's terms and long-settled rules about its application? Our colleagues offer two possible answers. Initially, some point to a solo concurrence in *South Bay Pentecostal Church* v. *Newsom,* 590 U. S. ___ (2020), in which THE CHIEF JUSTICE expressed willingness to defer to executive orders in the pandemic's early stages based on the newness of the emergency and how little was then known about the disease. *Post,* at 5 (opinion of BREYER, J.). At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from *South Bay,* courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.

Roman Catholic Diocese of Brooklyn v. Cuomo, Supreme Court 2020. See also *Jacobson v. Massachusetts*, 197 US 11 - Supreme Court 1905

In the recently decided *County of Butler v. Wolf*, Dist. Court, WD Pennsylvania (2020) Judge William S. Stickman ruled in favor of the plaintiffs to strike down Defendant Governor Wolf's emergency orders by adopting a strict scrutiny standard of review as opposed to the deferential standard taken in deciding the *Carmichael* case. In looking at this case Plaintiff moves the Court to consider that while the plain language of *Jacobson* allows a public health measure to violate the Constitution, since the time that *Jacobson* was decided, "there has been substantial development of federal constitutional law in the area of civil liberties… That century of development has seen the creation of tiered levels of scrutiny for constitutional claims. **They did not exist when *Jacobson* was decided**. While *Jacobson* has been cited by some modern courts as ongoing support for a broad,

hands-off deference to state authorities in matters of health and safety, other courts and commentators have questioned whether it remains instructive in light of the intervening jurisprudential developments." (See *County of Butler v. Wolf*, Dist. Court, WD Pennsylvania (2020) (Emphasis added)) In Judge Stickman's Opinion he cites Justice Alito's dissent in the Supreme court ruling on *Calvary Chapel Dayton Valley v. Sisolak*, WL 4251360, July 24, 2020, as follows:

> For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency-- and the opening days of the COVID-19 outbreak plainly qualify-- public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic.
>
> But a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.
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> *County of Butler v. Wolf*, Dist. Court, WD Pennsylvania (2020)

Within the meaning of Substantive Due Process, the Mask Mandate impermissibly infringes upon the protected right to bodily integrity, which Plaintiff has clearly pleaded as fact (the right to breathe), and because there is no proof masking healthy people has any significant effect on the spread of Covid-19 the Defense's argument fails. For over a year now, Plaintiff along with many others similarly situated, have suffered needlessly with undue stress, anxiety and shock to

the conscience over being forced to adhere to this unconstitutional cult-like ritual. Although it may be advised that courts exercise the utmost care in expanding the concept of Substantive Due Process, if ever there was a time to do so this would be it. Our children are being physically and psychologically abused, those with genuine health isuues that make masking impossible are being denied goods and services, and neighbors have become pitted against one another in full Nazi Germany fashion to turn each other in for not joining the cult. The right to breathe freely, to be secure in your person, to regulate your own oxygen intake and simply be left alone are the most fundamental of all human rights that warrant the greatest protection.

F. Plaintiff's Request For Relief is Not Barred by The Eleventh Amendment

Plaintiffs' lawsuit falls under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), 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). Plaintiff seeks relief under federal law, not state law. Plaintiff does not cite Hawai`i law as a basis for damages or injunctive relief.

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[.]" [ECF 40, Page ID# 487] 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 Plaintiff points 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 free speech and the free exercise of religion by mandating a religious ritual that also impedes free speech and free expression and imposing criminal prosecution for failure to adhere.

G. An Emergency Cannot Go On For Years

By definition an emergency is an emergent situation that is unusual and unexpected where it may be necessary to curtail the rights of the people

temporarily in order to protect life and property, however to assume that legislation be interpreted to allow the executive branch dictatorial powers for years on end as long as the governor or mayor claims there is an "emergency" is an insult to our law-makers.

The Defense mistakenly claims that Plaintiff's challenge that a pandemic does not qualify as an emergency is barred under the law, referencing *Carmichael* yet again where it was stated that "Plaintiff's theory that no emergency exists here or throughout the United States is contradicted by the record and readily available information", (*See Carmichael v. Ige,* 470 F. Supp. 3d at 1144) however as noted in Plaintiff's SAC in order for a virus to qualify as a public health emergency it must be both highly contagious and deadly. Unbeknownst to many people, in 2009 the World Health Organization changed the definition of a pandemic to remove any reference to widespread death and instead requires only a large number of cases over a wide geographical area. (See EXHIBIT "6") For this reason, and because it is quite clear that the mortality rate for Covid-19 is similar to or even less than the flu, Plaintiff asserts that the existence of a "pandemic" is not equivalent to a state of "emergency".

Even if it can be said that an imminent threat existed at the time the *Carmichael* case was heard, it has now been over a year and therefore the situation is no longer emergent. We have come to a crossroads now where the continued

deprivation of rights under the pretense of an "emergency" must be reexamined in order to protect the very foundation of American jurisprudence. The Hawai`i statute authorizing the Defendants' 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[,]" (HRS § 127A-1(c)) and yet this is exactly what continues for a second year in a row.

V. Conclusion

Defendants close their motion by saying "...the Court should decline any invitation to second-guess the empirical judgment and policy determinations that underlie the Mask Mandate." Plaintiff agrees that no one needs to second-guess anything. Empirical judgment is precisely what is needed. No guessing at all will be required. Instead, it is the moment for a first-time, very thorough, examination of the facts.

Plaintiff has clearly illustrated a right to relief within the jurisdiction of this court and has fulfilled the requirements under Rule 8 of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 8) and so does respectfully ask the court to deny the State Defendant's Motion to Dismiss so that we may proceed to trial.

DATED: Kapa`a, Kaua`i, Hawai`i, April 2, 2021

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Levana Lomma, Plaintiff

DECLARATION OF PLAINTIFF

I, Levana Lomma, am the plaintiff in the above-entitled action. I have read the foregoing and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

Attached hereto as Exhibit "1" is the relevant pages, 8 - 9 subtitled "Executive Summary - Effective Treatments" from a 444 page peer reviewed position paper by GreenMed Info entitled *COVID-19: Restoring Public Trust During A Global Health Crisis* found here: https://cdn.greenmedinfo.com/sites/default/files/cdn/Position_Paper_v24_FINAL.pdf

Attached hereto as Exhibit "2" is the relevant pages, 10 - 11, subtitled "Executive Summary - Violations of Federal Law" from the aforementioned position paper, outlining the facts pertaining to fraudulent death reporting of Covid-19.

Attached hereto as Exhibit "3" is the relevant pages, 12 - 13, subtitled "Executive Summary - Projection Models" from the aforementioned position paper, outlining the facts pertaining to the use of inaccurate models.

Attached hereto as Exhibit "4" is the relevant page, 6, subtitled "Executive Summary - Asymptomatic Transmission" from the aforementioned position paper,

which outlines the methodological flaws taken by the CDC in determining the rate of asymptomatic spread.

Attached hereto as Exhibit "5" is the relevant page from the World Health Organization document entitled *Rational Use of Personal Protective Equipment for Coronavirus Disease 2019 COVID-19* published 27 of February 2020 which states that asymptomatic individuals should not wear any type of mask and can be found here: https://drive.google.com/file/d/1A7211f84chTzj6NS3NwE5Sp2nNahvtXu/view?usp=sharing

Attached hereto as Exhibit "6" is the snapshot from a Google cache for the webpage http://www.who.int/csr/disease/influenza/pandemic/en/ dated May 1, 2009 which shows the previous definition of a pandemic wherein "enormous numbers of death and illness" was a requisite for defining a "pandemic" compared to the updated definition found on the same webpage September 2, 2009 where this has been removed.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Kapa'a, Hawai'i.

DATED: Kapa`a, Kaua`i, Hawai`i, April 2, 2021

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Levana Lomma, Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum in Opposition to the Defendant's Motion to Dismiss* was submitted using the NEF electronic filing system. Receipt of the NEF shall constitute service to all parties pursuant to Fed. R. Civ. P. 5(b)(2)(E)

DATED: 04/02/2021

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Levana Lomma