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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 DEREK S.K.
KAWAKAMI'S MOTION TO
DISMISS [ECF NO.38];
DECLARATION OF PLAINTIFF;
CERTIFICATE OF SERVICE

MEMORANDUM OPPOSING MOTION TO DISMISS

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II. INTRODUCTION

Plaintiff's claims for relief under Fed. R. Civ. P. 8 are both short and plain and its allegations are simple, concise and direct clearly showing the grounds for seeking declaratory and injunctive relief from the current "Supplemental Proclamation Related to Covid-19", executed and enforced by the Defendant.¹ Plaintiff requests that the court declare the emergency proclamation unconstitutional for violation of the due process clause under the first and ninth amendments. Under Fed R. Civ. P. 8 (e) "Construing Pleadings. Pleadings must be construed so as to do justice." Here, plaintiff's Second Amended Complaint (hereinafter, SAC) may be construed to state a claim for relief under both the U.S. and Hawai'i state constitution. The state constitution contains under Article I, a Bill of Rights which includes Section 1: Rights of individuals, Section 3: Freedom of religion, speech, press, assembly and petition, Section 5: Due Process and Equal Protection Due process and Equal Protection and other Rights. Section 3 and 5 are identical to the rights in the U.S. constitution.

Plaintiff in the SAC, then describes with specificity the fundamental rights violated: freedom of speech, expression, religion, bodily autonomy, free association, free movement and the right to breathe oxygen. The SAC may be

¹ Since the filing of the Second Amended Complaint, Defendant Mayor has continued his Sixth and Seventh *Emergency Supplemental Proclamation* which contains the identical language in the *Fifth Emergency Supplemental Proclamation*

construed to include under Article I, section 1 “Rights of People²” to include these fundamental rights and “...must be construed so as to do justice” Fed. R. Civ. P. 8(e).

Defendant Mayor cannot succeed on his 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 fail to understand that it is the *source* of their power that is under attack. This is the irony, that 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

² All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities. [Am Const Con 1978 and election Nov 7, 1978] Hawai’i Consti.

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)

Plaintiff's SAC challenges Defendants' ongoing regime of rule by indefinite decree which continues to deprive the people of their God-given and constitutionally protected rights. Defendants' Motion urges such a regime is lawful and beneficial, resting primarily upon reference to the Centers for Disease Control (CDC) website where a number of "confirmed cases" and "confirmed deaths" from Covid-19 can be found. This reference seems to suggest that a state of "emergency" exists locally yet bears no relevance to the current situation within the jurisdiction of the parties named in this lawsuit.

III. HRS CHAPTER 127A-14 IS UNCONSTITUTIONAL ON ITS FACE

At the outset, we must remember that our constitutional structure does not contemplate unilateral rule by executive decree. It consists of policy choices enacted into law by the legislature and carried out by the executive branch. Therefore, if the defendants have the authority to exercise certain expanded powers not provided in our constitution, it must be because the legislature has enacted a

law that passes constitutional muster and gives the defendants that authority.

Where the defendants rely on the same enabling condition for multiple states of emergency then duration limiting provisions would cease to perform any meaningful function. These limitations would be no more than perfunctory renewal requirements and would serve as merely a trivial check on indefinite emergency executive powers.

In preservation of the people's inherent right to liberty, the Framers of the United States Constitution devised a system of separate and distinct powers among the three branches of government. "To the Framers of the United States Constitution, the concentration of governmental power presented an extraordinary threat to individual liberty: 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny.' The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961)." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶4, 376 Wis. 2d 147, 897 N.W.2d 384 (alterations in original). The Framers were inspired by the wisdom of Montesquieu: "There can be no liberty where the legislative and executive powers are united in the same person." The Federalist No. 47, at 302 (quoting Baron de Montesquieu, XI *The Spirit of the Laws* 216 (John Nourse and Paul Vaillant eds., 1758)). The people of Hawai'i adopted the same separation of governmental powers in our state constitution. It is the legislature's

duty to make the laws that govern our lives, the governor's duty to execute them, and the judiciary's duty to ensure they comport with the constitution.

Where the legislature gave the executive the unilateral authority to declare successive states of emergency, based upon the same underlying cause, with no prescribed end date, and without the approval (much less the input) of the legislature, this is unconstitutional.

If the legislature had actually abdicated its vested powers to the executive, as the defendants would have it, the people of Hawai'i would be subject to the arbitrary will of a single person. Our constitution does not countenance such a consolidation of extraordinary power.

The constitutional separation of powers between the executive and legislative branches would collapse for the duration of any public health emergency. Every 60 days, so long as the underlying cause of the emergency persists, the executive could declare another state of emergency, granting the defendants the extraordinary powers indefinitely. Such unilateral, unchecked power was anathema to the framers of our constitutions.

By separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power. And by restricting lawmaking to one branch and forcing any legislation to endure bicameralism and presentment, the framers sought to make the task of lawmaking more arduous still.

United States v. Nichols, 784 F.3d 666, 670 (10th Cir. 2015) (Gorsuch, J., dissenting).

Plaintiff's SAC states a claim that the definition of emergency under 127A-2 Hawai'i Revised Statutes does not include Covid-19 or other biological threats. Plaintiff asserts that the legislature intended the statute to cover natural disasters and that the legislative intent never included viral infections or pandemics.

IV. PLAINTIFF OBJECTS TO DEFENDANT'S REQUEST FOR JUDICIAL NOTICE OF THE CDC WEBPAGE

Defendant Mayor argues that it has the legal right to issue multiple successive proclamations because of information posted on Centers for Disease Control (CDC) website where a number of "confirmed cases" and "confirmed deaths" from Covid-19 can be found. This reference probably is offered to support defendant Mayor's argument that a state of "emergency" exists locally in Kaua'i, even though such a statistic is not conclusive especially for a "local" state of emergency. Plain and simple: this is a disputed fact. Here, defendant Mayor would have the court take judicial notice of the entire CDC website (probably hundreds of pages, thousands of links, with information posted by unknown sources and non-CDC sources.) What is the offer of proofs and what is the nature of the evidence proffered? Plaintiff objects to any portion of the website being admitted into evidence under Fed. R. Evid. 201 since plaintiff does not know what the "nature of the fact" defendant Mayor requests the court to take judicial notice and

plaintiff also asserts all her rights to an opportunity to be heard. Specifically, exactly what facts it is that the defendant Mayor requests the court take judicial notice (not the entire CDC website) and the offer of proof. For a fair and just opportunity to be heard, plaintiff requests she be given a reasonable opportunity to determine the reliability of the sources and make the appropriate discovery into any purported fact and have a proper evidentiary hearing before any decisive ruling on the motions to dismiss.

The Defense asks the court to “take judicial notice of information related to Covid-19 contained on the Centers for Disease Control website”, providing a reference to the “CDC COVID Data Tracker” where a number of total cases and deaths is listed. (ECF 38, Exhibit “C” Page ID #450). Plaintiff objects to judicial notice being given in regards to “... information related to COVID-19 contained on the Centers for Disease Control website” under Fed. R. Evid. 104 “Preliminary Questions” such as whether a witness is qualified, a privilege exists, or evidence is admissible. The CDC COVID Data Tracker issue requires the court to determine certain preliminary questions that will require discovery under the code.

For instance, the overall consequence of “Covid-19” has varied greatly among states, and nationwide data does not accurately reflect the current state of affairs on Kaua`i. That is to say that the relevance of the proffered COVID Data Tracker depends on the fact whether the data is based on nationwide totals or on

Kaua`i totals. If the relevant fact is nationwide, then it may confuse the trier of fact since it is not relevant as to whether a state of emergency exists on Kaua`i. Also evidence relevant to weight and credibility is at issue since CDC and CDC public health officials have conflicts of interest which will affect finding of facts. For instance, the Office of the Inspector General published a negative report in 2010, that showed a “systematic lack of oversight” of the CDC ethics program.

Plaintiff asserts her rights under Fed. R. Evid. 401-405 to test relevance and its limits. Plaintiff requests her right under the Federal Rules of Evidence to discover whether any of the proffered evidence is lay or expert opinion under Fed. R. Evid. 701 and 702 and the bases of such an expert’s opinion testimony under Fed. R. Evid. 703, opinion on an ultimate issue (Fed. R. Evid. 704), disclosing the facts or data underlying an expert’s opinion (Fed. R. Evid. 705) Further plaintiff objects based on hearsay rules set forth in Fed. R. Evid 802 and asserts her right to attack declarant’s credibility under Fed. R. Evid. 806 and also objects based on authentication and identification of evidence under Fed. R. Evid. 901.

There is a triable issue of fact whether an emergency now exists since the state of Hawai`i has recorded nearly the same number of deaths in 2020 as was recorded in 2019 (11,744 in 2019 and 11,798 in 2020) ³ Plaintiff argues that the existence of a “public health emergency” in this jurisdiction is clearly disputable

³ <https://health.hawaii.gov/vitalstatistics/>

based on local statistics. In *Lee v. City of Los Angeles* the 9th Circuit Court of Appeals determined an error in granting a 12(b)(6) dismissal for a §1983 claim “because it relied on extrinsic evidence and took judicial notice of disputed facts.”

It was stated:

[F]actual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6). Yet, in this case, defendants' arguments in favor of affirming the dismissal of plaintiffs' federal claims rest almost entirely on factual challenges. More importantly, the district court's decision to dismiss plaintiffs' federal claims was rooted in defendants' factual assertions. In granting defendants' motions, the court assumed the existence of facts that favor defendants based on evidence outside plaintiffs' pleadings, took judicial notice of the truth of disputed factual matters, and did not construe plaintiffs' allegations in the light most favorable to plaintiffs.

(See *Lee v. City of Los Angeles*, 250 F. 3d 668 - Court of Appeals, 9th Circuit 2001)

V. STATEMENT OF ESSENTIAL FACTS

On February 12, 2021 Defendant Ige issued, under approval of Defendant Connors, the “Eighteenth Supplemental Proclamation Related to Covid-19” which granted power to Defendant Kawakami to issue rules pertaining to the use of face masks within the County of Kaua`i where Plaintiff resides.⁴ Due to the ongoing demands that “all persons must wear face coverings,” Plaintiff’s rights to free speech and free expression, rights to free association, freedom of religion, and to

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https://governor.hawaii.gov/wp-content/uploads/2021/02/2102078-ATG_Eighteenth-Proclamation-Related-to-the-COVID-19-Emergency-distribution-signed.pdf

breathe life-giving oxygen have all been violated and will continue to be for as long as the mask requirement is enforced.

A strict scrutiny standard of review is implied because forced mask wearing does in fact infringe upon protected expression by regulating content of speech while simultaneously forcing compliance to a religious practice. A Ninth Amendment argument centered on the most fundamental of all human rights — the right to life itself through oxygen — requires a Substantive Due Process analysis. The Hawai'i constitution under Article I, section 2 “Rights of the People” recognizes as a claim “the right to life itself through oxygen.”

VI. ARGUMENT

A. Allegations Denying the Existence of a Public Health Emergency and the Ineffectiveness of Face Masks are Allegations Based on Facts

According to Hawai'i Revised Statutes 127A-2 emergency means “any occurrence, or imminent threat thereof, which results or may likely result in substantial injury or harm to the population or substantial damage to or loss of property.”⁵ It has been over a year and the threat of Covid-19 has clearly not resulted in “substantial injury or harm to the population” and therefore can not lawfully be defined as an “emergency”. We can see that while Covid-19 may be

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https://www.capitol.hawaii.gov/hrscurrent/Vol03_Ch0121-0200D/HRS0127A/HRS_0127A-0002.htm

said to be highly contagious it is certainly not contributing to an unusual amount of deaths. This is not a conclusory statement, it is quite clearly an obvious fact based on local statistical data.

Due to the above stated fact, Plaintiff reiterates the need for judicial review of the authority in the Defendant's actions based on the current existing data and subjective evaluation as to the existence of an "emergency". The Supreme court has decided that "whether the emergency still exists upon which the continued operation of the law depends is **always** [emphasis added] open to judicial inquiry." *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934). P. 290 U. S. 442.

The allegation that universal masking of healthy individuals has not been proven to significantly reduce the number of cases and/or deaths from Covid-19 is also an allegation that is not merely conclusory but rather is based on scientific fact and plain observation. In Plaintiff's SAC reference is made to the CDC study on face masks issued September 11, 2020 which clearly shows the percentage of those who tested positive for Covid-19 is nearly identical to the control group with all participants reporting "always" wearing a mask, proving no significant effect on the reduction of cases. In May of 2020 the CDC also published a report entitled *Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures* where it is stated:

"Although mechanistic studies support the potential effect of hand hygiene or face masks, **evidence from 14 randomized controlled trials of these**

measures did not support a substantial effect on transmission of laboratory-confirmed influenza.” (emphasis added)

On January 22, 2021, the World Health Organization told the public there is no scientific medical reason for any healthy person to wear a mask outside of a hospital. They informed us that if you do not have any respiratory symptoms, such as fever, cough, or runny nose, you do not need to wear a medical mask.⁶ Then in December of 2020 WHO issued the following advice that masks are only of some benefit if used in conjunction with a range of other measures and of limited value:

*“...the use of a mask alone, even when correctly used, is insufficient to provide an adequate level of protection for an uninfected individual or prevent onward transmission from an infected individual.”*⁷

This guidance suggests the usefulness of masks depends on a significant number of factors — type, fit, length of use, purpose and circumstances — which are impossible to effectively account for in universal-masking policies. To date, the science has NOT proven that universal masking is effective for viral containment, and has instead provided substantial grounds for skepticism of such a policy. There are countless other sources of credible evidence affirming this fact which entitles Plaintiff to the assumption of truth, and Plaintiff is prepared to present other supporting evidence of this fact at trial.

⁶ <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

⁷ ‘Mask use in the context of COVID-19 Interim guidance’, December 01, 2020, https://apps.who.int/iris/bitstream/handle/10665/337199/WHO-2019-nCov-IPC_Masks-2020.5-eng.pdf?sequence=1&isAllowed=y

It is important to note that the Defense admits that Plaintiffs allegations may not be conclusory and then attempts to counter that by justifying the Defendant's actions by citing *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct.2072, 138 L.Ed.2d 501 (1997), where "the U.S. Supreme Court held that disagreements among medical professionals do not tie the State's hands in setting the bounds of ... laws." [ECF 38. PageID #418, Page 9] (internal quotes omitted), which illustrates the Defendant is aware that there is disagreement among medical professionals. This acknowledgement of disagreement not only proves that the mask mandate is not based on undisputed scientific reasoning, it also removes any entitlement to qualified immunity for the Defendant in his individual capacity, because his actions are therefore negligent at best.

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

The Supreme Court has previously decided that rights not enumerated within the Constitution are recognized only if they are deemed fundamental. If a court determines that the violated liberty interest is fundamental, the government must narrowly tailor its law to serve a compelling interest. The substantive due process doctrine is the test used to make this determination, however in this process there is often an all or nothing approach. In most cases either the asserted liberty interest is

fundamental or it is not a right at all. The Ninth Amendment itself was specifically written to safeguard against creating overreaching federal power in the absence of a clearly defined right reserved by the people. For this reason Plaintiff argues that the right to breathe without obstruction, although not enumerated, is quite clearly the most fundamental of all human rights. The ongoing violations to the people's civil liberties under the pretense of an emergency with carte blanche power afforded to the governor to be the "sole judge" of the existence of said emergency and with no boundary to the length of time allowed for such powers⁸ is the exact kind of scenario the framers of our constitution likely envisioned when they drafted the Ninth Amendment.

Even if a Ninth Amendment argument can not be used to pursue a civil rights claim, Plaintiff reserves a right to pursue a claim based on the violation of rights to bodily autonomy, free speech and free exercise of religion. The right to refuse to engage in a medical intervention is also a substantive due process claim stated in the complaint that allows Plaintiff to pursue a civil rights claim, and for this reason Defendant's motion to dismiss should be denied.

Plaintiff also claims a right to relief under the Hawai'i state constitution, Article I, Section 2 "Rights of the People."

⁸ HRS §127A-14(c)
https://www.capitol.hawaii.gov/hrscurrent/Vol03_Ch0121-0200D/HRS0127A/HRS_0127A-0014.htm

C. Plaintiffs Claims Based on Violations of Religious Rights Have Been Stated in the Complaint

The Defense alleges that Plaintiff has failed to state a claim in regards to violations of religious rights, however this is clearly not true. Plaintiff has stated that mandating mask wearing by healthy individuals is an act of coercion by the government to participate in a ritual that can be considered religious because it is founded on nothing more than faith and belief. This faith and belief is promulgated through biased “science” and media propaganda that promotes adherence to the doctrine of the Cult of Covid. Members of the cult maintain an irrational, unusual belief that they can eradicate a virus by covering their face, and they have been trained to admonish those who think differently. “[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.” *Lee v. Weisman*, 505 U.S. 577, 587, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

According to the analysis adopted in *Inouye v. Kemna* we can see that the government action is indeed coercive and when the object of the coercion is evaluated using scientific research from various competent sources, it is clearly religious rather than secular. See *Inouye v. Kemna*, 504 F.3d 705, 713 (9th Cir. 2007). The government is mandating a practice which is based on faith and belief rather than science. Decades of scientific study has proven mask wearing has no

significant effect on the spread of any influenza like illness. The act of covering one's face has repeatedly been referred to by the Defendants as a “symbol” of virtue and a representation of responsibility, making it clear in their intent to mandate a feeling of unity among citizens. As stated in Plaintiff’s SAC the Supreme Court has previously ruled that governments must not be afforded the right to mandate “a feeling of unity in its citizens”:

"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."

West Virginia Board of Education v. Barnette, 319 U. S. 624 (1943)

The government may claim that the purpose of the mandate is to prevent the spread of Covid-19, however, the Mask Mandate is indeed of a ritualistic nature and it forces Plaintiff, and those similarly situated, to be dishonest against their will. My religion is Truth. Wearing a mask is forcing me to renounce my religion — to act as if I am sick when I am not, to deny my own faith and belief in the human immune system, and to disrespect my creator by interfering with the process of life itself through breath. I cannot serve God at the same time that I am disrupting the natural functions of His creation. Plaintiff has stated within the complaint the inability to practice her own religion — which involves living truthfully, being in communion with God through breath, and therefore not

submitting to the Cult of Covid — and how the government mandate infringes upon this religious practice. (Page 22, Paragraph #41). If this claim has not been stated clearly enough the complaint can easily be saved by amendment.

D. Face Mask Requirements Implicate the First Amendment Speech Clause as Stated in the Complaint

The Defense claims that Plaintiff's complaint does not allege that the mask requirement is a regulation intended to prevent expressive activity. Once again, this is not true. On page 22 of the SAC, Paragraph 41, Plaintiff states: "As much as a mandatory mask requirement acts to serve as a symbol of compliance to the rules of the 'Cult of Covid', so too does it then act as a law to prohibit disfavored speech when *not* wearing a mask would then signify your disagreement with the cult."

This regulation absolutely acts to single out anyone attempting to stand up for truth, for their right to breathe, for their right to be secure in their person and their right to bodily autonomy. Those who refuse to wear the symbol of submission are discriminated against and harassed by the cult members, and by those who have been trained in the workplace to enforce compliance out of fear of government retaliation.

As stated in the SAC, Plaintiff reiterates: "Denial of the right to give and receive non-verbal communication through facial expressions is an infringement upon the content of speech. Regulations which infringe upon the content of speech

require a strict scrutiny standard of review.” The Defense contends that the highest scrutiny that should be allowed would be an intermediate review but Plaintiff argues that the regulation specifically targets the content of speech in an expressive manner by attempting to mandate favored speech through the visual representation of compliance, prohibiting the expression of disagreement to the Cult of Covid, while also removing the ability to communicate through reading expression and reading lips. "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).

E. The Face Mask Requirement Triggers Strict Scrutiny Because the Government Interest is Related to the Suppression of Free Expression and Infringes on Religious Rights

The Defense claims that “[t]hese health and safety interests are unrelated to the suppression of free expression, because the mask requirement “does not prevent the expression of any particular message or viewpoint.” *United States v. Tomsha-Miguel*, 766 F .3d 1041, 1048 (9th Cir. 2014)” but this is clearly not true when **refusing to wear a mask** expresses a particular message or viewpoint. ECF #38, Page ID #430. Refusing to wear a mask is an act of protest against government overreach and is intended to portray a message of freedom and

autonomy. A statewide mask mandate very clearly does “prevent the expression [of this] viewpoint”.

F. A Statewide Mask Requirement Cannot Pass Any Standard of Review

Strict scrutiny is the highest standard of review which a court will use to evaluate the constitutionality of governmental discrimination. The other two standards are intermediate scrutiny and rational basis review. A rational review standard requires that a law have a rational connection to a permissible state end (a legitimate goal of the government) to be Constitutional. This lower standard is applied when determining the Constitutionality of laws that do not affect an individual's fundamental rights.

Quoting *American Civil Liberties Union of Nevada v. City of Las Vegas*, 466

F. 3d 784 - Court of Appeals, 9th Circuit 2006 at 792:

“Although regulation of speech in a traditional public forum is disfavored, it is not impermissible. The government may place reasonable time, place, and manner restrictions on speech. However, these restrictions must be justified without reference to the protected speech's content. They must be content-neutral and narrowly tailored to serve a significant government interest, leaving open ample alternative channels of expression. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). "The failure to satisfy any single prong of this test invalidates the requirement." *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir.1994). A content-based regulation, on the other hand, is "presumptively unconstitutional," *S.O.C.*, 152 F.3d at 1145, and subject to strict scrutiny, *see Riley*, 487 U.S. at 798-801, 108 S.Ct. 2667.

The prohibition of the use of facial expressions and the inability to read lips caused by mandating the covering of one's mouth within a public forum is a regulation

subject to strict scrutiny in that these actions do relate to the content of speech by disrupting vital kinesic aspects of speech while also forcing compliance to a “particularized message” through a religious ritual. The government regulation is not content-neutral if it forces people to engage in a ritual that violates their own religious beliefs. Just as Jewish men wear a Yarmulka as a symbol of their faith, and Muslim women wear a birka, so too can the face mask be likened to a symbol of duty to the Cult of Covid. The face mask represents fear, submission and acceptance of the “New Normal” as an initiation into the cult. Plaintiff strongly disagrees along with millions of others around the world who rebuke this religion.

The current “Supplemental Proclamation Related to Covid-19” does not pass the two pronged test of strict scrutiny because there is no compelling government interest in this jurisdiction nor does the regulation use the least restrictive means to serve its intended goal. See *United States v. O'brien*, 391 US 367 - Supreme Court 1968 at 377. The current statistical data, at the local level, makes perfectly clear that even while Covid-19 cases may continue to rise (despite the vast majority diligently wearing a mask) the mortality rate remains below any level that would constitute “substantial injury or harm to the population” thereby creating a justification for the invocation of Hawai'i Revised Statutes Chapter 127A.

Perhaps the most important factor in determining that the continued deprivation of fundamental rights is no longer validated and therefore removes any

compelling government interest is the fact that we now have a vaccine for the Covid-19 disease that is “more than 90% effective”.⁹ Up until this point the Defendants have used the argument: “Because there is no cure or vaccine at this time, the most effective way to minimize COVID-19 infections is by “physical distancing” and other behavior modifications [such as] wearing face coverings.”¹⁰ Now that there are several known effective treatments, as well as a vaccination, it cannot be claimed that regulations causing infringements upon protected rights have been narrowly tailored to achieve a compelling, substantial, or even rationally related government interest.

Some of the nation's leading health experts including Dr. Anthony Fauci and Dr. Deborah Birx have previously stated the concern in increased spread of Covid-19 through contact surface spread which has been noted many times as a possible negative consequence of mask wearing due to improper use and sanitation. Several studies have confirmed the fact that an increase in cases can be associated with mask wearing. The only randomised clinical trial that studied the use of cloth masks in comparison to surgical masks was done in 2015. This trial found Influenza Like Illness (ILI) rates were 13 times higher in Vietnamese hospital workers allocated to cloth masks compared to medical/surgical masks, RR

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<https://www.cnbc.com/2020/11/09/covid-vaccine-pfizer-drug-is-more-than-90percent-effective-in-preventing-infection.html>

¹⁰ See *For Our Rights et al. v Ige et al.* Case No. 1:20-cv-00268-DKW-RT

13.25, (95%CI 1.74 to 100.97) and over three times higher when compared to no masks, RR 3.49 (95%CI 1.00 to 12.17). It was concluded that “moisture retention, reuse of cloth masks and poor filtration may result in increased risk of infection.”¹¹

A regulation that is contributing to the problem it was meant to solve can hardly be called narrowly tailored, especially when the regulation also presents many other physical, emotional and spiritual harms. To ignore the negative impacts associated with a regulation intended to “protect public health and safety” is counter intuitive and downright irresponsible. School children are being subjected to oxygen deprivation which can lead to brain damage. Grocery store clerks are suffering through 40 hours a week of headaches, dizziness, increased heart rate and other side effects that can lead to accidents at work. Those who have physical or psychological limitations which make mask wearing impossible are being abused by their neighbors. There is no question that the mask mandate is causing harm to the population while it has obviously not worked to prevent the spread in over a year now of mandating their use.

G. Defendant is Not Entitled to Qualified Immunity

In determining whether a Defendant is entitled to immunity from a suit the Supreme Court has set forth a two-pronged analysis where one prong is the consideration of whether facts, taken in the light most favorable to the plaintiff,

¹¹ <https://bmjopen.bmj.com/content/5/4/e006577>

show that the Defendant's conduct violated a constitutional right. The other prong is an examination to determine if the alleged rights violation was clearly established at the time of the violation. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001)

To maintain that Defendant Kawakami has committed acts that violate Plaintiff's protected rights "erroneously" and that his actions were reasonably believed to *not* violate the Plaintiff's rights is absurd given the extent of the ongoing blatant violations being justified under the false pretense of an "emergency". We have been forced into house arrest without due process, denied equal protection under the laws, restricted from our right to move about freely, had our property seized unlawfully by being deemed "non-essential", been denied our religious rights, and been denied our right to life (breath), liberty and the pursuit of happiness for over a year now. Granting immunity under the pretense of an "honest mistake" would be a shameless miscarriage of justice. Defendant Kawakami has had access to the data concerning the severity and mortality rate of Covid-19 here on Kaua'i, as well as access to the medical journals and other sources of scientific study on the dangers of mask wearing and their ineffectiveness, yet has failed to act accordingly. The Defendant has a fiduciary duty to protect the rights of the people and to uphold his oath to the constitution and has clearly failed on both accounts.

VII. Conclusion

Plaintiff's SAC is a plain statement of claims. A claim that HRS § 127A-14 is unconstitutional. A claim that HRS § 127A-14 limited the executive power to 60 days and also a claim that the statute does not apply to Covid-19. The SAC identifies the due process claims that violate fundamental rights and the under Fed. R. Civ. P. 8(e) the SAC must be construed so as to do justice. Here the SAC seeks the state statute which enables the Emergency Supplemental Orders to be declared unconstitutional which should be construed to include a claim under both the U.S. and Hawai'i state constitution. It is a question of law for the court to determine the constitutionality and meaning of the statute and to grant the relief requested.

Plaintiff has also stated fundamental rights violations which are factually specific and require strict scrutiny. See *Roman Catholic Diocese of Brooklyn, New York v. Andrew M Cuomo*, Governor of New York, 592 U. S. ____ (2020). "...even in a pandemic, the Constitution cannot be put away and forgotten." Page 17 of 26 *Roman Catholic Diocese*.

Plaintiff claims that there is no compelling state interest since there is no emergency nor are the laws narrowly tailored. The burden is on defendants here. Where there is no emergency, even if the executive claims there is one, just saying it is so doesn't make it a conclusive fact as this is a triable issue before this court.

WHEREFORE Plaintiff requests that this court deny defendants' motion to dismiss and grant such further relief as the Court may deem reasonable under the circumstances.

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

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. 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: 04/02/2021

Levana Lomma

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

Levana Lomma