NO. CAAP- 21-0000024
IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAIʻI

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| FOR OUR RIGHTS, a Hawaiʻi corporation, Diana Lomma, David R. Hamman, Randi Hamman, Janet Eisenbach, Levana Lomma Keikaika, Lawrence K. Paille, Geralyn Schulkind, Leonard Schulkind, Daniel Hashimoto, Christina Cole, Francesca Woolger, Na'ea Lindsey, Michael Mazzone, Lanette J. Harley, and Loraine L. Patch,<br><br>Plaintiff-Appellants<br><br>vs.<br><br>DAVID IGE, in his official capacity as Governor of the State of Hawaiʻi, CLARE E. CONNORS, in her official capacity as Attorney General for the State of Hawaiʻi, and STATE OF HAWAIʻI,<br><br>Defendant-Appellees | CASE NO. 5CCV-20-0091<br><br>PLAINTIFFS' APPEAL FROM FINAL JUDGMENT (December 24, 2020) DISMIexhibitSSING THE FIRST AMENDED COMPLAINT; EXHIBIT 1; CERTIFICATE OF SERVICE<br><br>APPELLANTS' OPENING BRIEF |

OPENING BRIEF OF APPELLANT FOR OUR RIGHTS
EXHIBIT 1
STATEMENT OF RELATED CASES
CERTIFICATE OF SERVICE
ON APPEAL FROM THE FIFTH CIRCUIT COURT
HONORABLE KATHLEEN N. A. WATANABE, PRESIDING

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## INTRODUCTION

The legislature of Hawai‘i empowered Governor Ige to declare an emergency when necessary, and to undertake comprehensive control powers to address such emergency – *for 60 days only*. The Governor chose to declare the same emergency 19 times, so as to extend his comprehensive control for at least 395 days and counting. By doing so, the Governor has usurped the legislature's role and became a unilateral maker of law, rules, and policies for Hawai‘i for an indefinite period of time. The Governor's assumption of power violates the statutory 60-day time limit, and it violates the separation of powers inherent in the Constitution of Hawai‘i.

Appellants ask this Court to carry out its solemn constitutional duty to enforce the legislature's 60-day power limitation, and thereby to maintain the integrity of this State's three branches of government. When "the powers of both the legislative and executive branches are lodged in one body," there forms a "concentration of power that is prohibited by any tripartite system of constitutional democracy and cannot stand." *Chiles v. Childrena*, 589 So. 2d 260, 267-68 (Fla. 1991).

Even if *arguendo* the legislature were to say it intended to install legislative power in the Governor for as long as he wants it, this Court must not bow to the sentiment. "Although courts are especially reluctant to interfere with the internal workings of the legislature, they may not shirk from their duty to give full effect to the provisions of the Constitution relating to the enactment of laws, [] and they cannot stand powerless in the face of a manifestly unauthorized exercise of power. []" *Armstrong v. United States*, 759 F.2d 1378, 1380 (9th Cir. 1985) (internal quotations omitted), *citing Marshall Field & Co. v. Clark*, 143 U.S. 649, 670, 12 S. Ct. 495 (1892) ("We recognize … the duty of this court, from the performance of which it may not

shrink, to give full effect to the provisions of the Constitution relating to the enactment of laws…"), *and Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691 (1962) ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority").

"While some may find the limitations on the Governor's power frustrating, those limitations specifically exist to protect our liberty and other constitutional freedoms. 'Admittedly, the legislative process can be an arduous one. But that's no bug in the constitutional design: it is the very point of the design.' *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). Escaping the imposition of a single ruler's dictates on the people impelled the founding fathers to risk their lives, their fortunes, and their sacred honor in 1776." *See Fabick v. Evers*, 2021 WI 28 (2021) (Rebecca Grassl Bradley, J., concurring) (citing the *Declaration of Independence)*.

## STATEMENT OF THE CASE

### A. Relevant History of Governor's Proclamations.

Governor Ige issued a Proclamation on March 4, 2020, declaring a state of emergency based upon concerns about the spread of Covid-19 virus into Hawai'i, suspending some state laws, and imposing other restrictions and directives.[1] *See* Record on Appeal ("RA") 6, Exh. 1 to the First Amended Complaint ("FAC"). The March 4 Proclamation expressly was set to expire no later than April 29, 2020. The Proclamation was issued upon authority delegated by the legislature via Hawai'i Revised Statutes ("HRS") §§ 127A-2,-11,-12, and -14. Under HRS § 127A-14(d): "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

[1] This entire paragraph is drawn from FAC, ¶ 1.

emergency, respectively, or by a separate proclamation of the governor or mayor, whichever occurs first." (Emphasis added.) Defendant Governor circumvented the limitation upon his delegated authority, however, by issuing a series of "Supplementary Proclamations" purporting to incorporate the initial Proclamation and extend the period of the state of emergency far beyond the statutory 60-day limit. Under the Ninth Supplementary Proclamation ("Proclamation 9"), issued June 10, 2020, the declared emergency was extended to July 31, 2020 – 159 days after the initial Proclamation. *See* RA 6, Exh. 2 to FAC.

On July 17, 2020, Defendant Governor issued a document entitled "Tenth Proclamation Related to the Covid-19 Emergency" ("Proclamation 10").[2] *See* RA 6, Exh. 3 to FAC. Although entitled a "Proclamation" instead of a "Supplementary Proclamation," Proclamation 10 expressly extended all of the provisions of the initial Proclamation and all Supplementary Proclamations, while adding additional "Health Screening" and related "Self-Quarantine for Travelers to the State." *Id*. Proclamation 10 did not repeal any prior proclamation documents, and therefore Proclamation 10 was in law the equivalent of any of the preceding supplementary proclamations. Under Proclamation 10, the declared emergency extended to August 31, 2020 – 190 days after the initial Proclamation. *Id*.

On August 6, 2020, Defendant Governor issued a document entitled "Eleventh Proclamation Related to the Covid-19 Emergency" ("Proclamation 11").[3] *See* RA 6, Exh. 4 to FAC. Although entitled a "Proclamation" instead of a "Supplementary Proclamation," Proclamation 11 expressly extended all of the provisions of the initial Proclamation and all Supplementary Proclamations including Proclamation 10. *Id*. Proclamation 11 affected the

[2] This entire paragraph is drawn from FAC, ¶ 2.
[3] This entire paragraph is drawn from FAC, ¶ 3.

collection of orders, recommendations, prohibitions of the prior proclamation documents, by *inter alia* reinstating an inter-island quarantine. *Id*. Proclamation 11 did not repeal any prior proclamation documents, and therefore the Proclamation 11 was in law the equivalent of any of the preceding supplementary proclamations. *Id*. Proclamation 11 expressly states it is continuing the provisions and emergency period through the date set forth in Proclamation 10. *Id*. The declared emergency thus extended to August 31, 2020 – 190 days after the initial Proclamation.

Each successive Supplementary Proclamation (to include the nominally titled Tenth and Eleventh Proclamations, hereinafter all referenced as "Supplementaries") incorporated the initial Proclamation, and most Supplementaries modified or added additional prohibitions and restrictions upon the people living in, working in, or even visiting in any of the Hawaiian Islands.[4] The Proclamation and the Supplementaries invoked the delegated power of HRS § 127A-25 to declare their provisions to have the force and effect of law. They also invoked the delegated power of HRS § 127A-29 to arrest, prosecute, convict, and punish violations of their provisions as misdemeanors.

On September 22, 2020, the Governor issued a Thirteenth Proclamation ("Proclamation 13").[5] Starting with this proclamation, the Governor's lawyers inserted the language stating it "supersedes all prior proclamations." Subsequent proclamations were issued *seriatim*, all including the "supersedes" language, up to and including the Nineteenth Proclamation Related to The Covid-19 Emergency ("Proclamation 19"), issued on April 9, 2021, and still including

[4] This entire paragraph is drawn from FAC, ¶ 4.
[5] https://governor.hawaii.gov/wp-content/uploads/2020/09/2009139-ATG_Thirteenth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf

definitions of crimes carrying criminal penalties.[6] Procl. 19 at §§ III(D), IV(D), V, & Exh. B, G.

**B. Litigation History.**

Plaintiff-Appellants filed their initial Complaint on September 1, 2020, and their FAC on September 24, 2020. RA 1,6. Defendant-Appellees filed their Motion to Dismiss on October 8, 2020. RA 26-33 (several documents). Plaintiff-Appellants filed their Memorandum in Opposition on November 9, 2020. RA 50-52 (several documents). Defendant-Appellees filed their reply on November 12, 2020. RA 55-67 (several documents). The Honorable Kathleen Watanabe conducted a remote hearing on the matter on November 17, 2020. RA 70. The Order granting the Motion was filed on November 19, 2020, with the final Judgment entered on December 23, 2020. RA 77, 81, 85. A copy of the decision is provided as Exhibit 1 hereto.

Notice of this appeal was timely filed on March 10, 2021. RA 87.

## ISSUES: POINTS OF ERROR

**1. First Point of Error**

(A) The Circuit Court erred in granting Defendants' Motion to Dismiss by applying erroneous interpretations of HRS 127A-14. RA 81 at 2.

(B) In pertinent part, the text of HRS 127A-14 states:

> (a) The governor may declare the existence of a state of emergency in the State by proclamation if the governor finds that an emergency or disaster has occurred or that there is imminent danger or threat of an emergency or disaster in any portion of the State.
> …
> (c) The governor … shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency in the State …. This section shall not limit the power and authority of the governor under section 127A-13(a)(5).

[6] https://governor.hawaii.gov/wp-content/uploads/2021/04/2104031-ATG_Nineteenth-Emergency-Proclamation-for-COVID-19-distribution-signed.pdf

> (d) A state of emergency … shall terminate automatically sixty days after the issuance of a proclamation of a state of emergency, or by a separate proclamation of the governor[,] whichever occurs first.

(C) The erroneous holding quoted verbatim: "Specifically, Haw. Rev. Stat. ("HRS") chapter 127A, as properly interpreted, does not support Plaintiffs' claim. The language, purpose, and history of HRS chapter 127A all demonstrate that the Governor is empowered to issue supplementary emergency proclamations extending beyond a single 60-day period." RA 81 at 2.

(D The error stems from the Court's adopting the Defendant's arguments in their Motion to Dismiss. RA 81 at 2.

(E) Plaintiffs opposed the Circuit Court's holding by filing a brief opposing the Defendants' Motion to Dismiss and arguing same before the court. RA 50.

**2. Second Point of Error**

(A) The Circuit Court erred in adopting the arguments of Defendants' Motion to Dismiss as supporting the Court's decision without identifying precise issues being decided. The Court's ruling did not elaborate or identify any reasoning expressly (except as quoted above) nor did it cite precedents upon which it relied. RA 81.

(B) The errors in Defendants' Motion, adopted by reference in the Circuit Court's decision, are found throughout Defendant's Motion's memoranda. RA 81 at 2; RA 27, 55.

(C) Appellants do not concede any argument contained in Defendant's Motion (RA 27) or Reply (RA 55), or in any supporting documents. Appellants opposed all of Defendants' arguments in the opposition brief and, as they arose, at oral argument. RA 50, 70.

(D) The potential issues on review to this Court depend in part upon whether they are deemed the "holdings" of the Circuit Court decision, as further discussed below.

**3. Third Point of Error**

(A) The Circuit Court erred by tacitly adopting Defendants' Motion's arguments that the Governor may exercise "emergency" power and legislate to control the entire state for an indefinite time, in derogation of the separation of powers doctrine in the U.S. and Hawai'i Constitutions. RA 81 at 2; *see* RA 27 at 8-12 & n. 11 (making said arguments); RA 55 at 3 n.2 (same).

(B) Plaintiff-Appellants opposed Defendants' arguments in writing and, as they arose, in oral argument, which constituted alerting the Circuit Court to the errors in those arguments. RA 50 at 9-12; RA 70.

**4. Fourth Point of Error**

(A) The Circuit Court erred by tacitly adopting Defendants' Motion's arguments that Plaintiffs' FAC was moot. RA 81 at 2; *see* RA 27 at 7.

(B) Plaintiff-Appellants opposed Defendants' arguments in writing and, as they arose, in oral argument, which constituted alerting the Circuit Court to the errors in those arguments. RA 50 at 4-8.

**5. Fifth Point of Error**

(A) The Circuit Court erred by tacitly adopting Defendants' Motion's arguments that Plaintiffs lacked standing on grounds of mootness. RA 81 at 2; *see* RA 27 at 6.

(B) Plaintiff-Appellants opposed Defendants' arguments in writing and, as they arose, in oral argument, which constituted alerting the Circuit Court to the errors in those arguments. RA 50 at 8-9.

## STANDARD OF REVIEW

A circuit court's ruling on a motion to dismiss is reviewed *de novo*, and the interpretation of a statute is a question of law also reviewed *de novo*. *Bank of Am., N.A. v. Reyes-Toledo*, 143 Haw. 249, 256, 257, 428 P.3d 761 (2018) (citations omitted).

## ARGUMENT

### I. Defendant Governor's "Supplemental" and "New" Proclamations Based Upon The Same Underlying "Emergency" Are Unlawful Under HRS § 127A-14 And The Hawai'i Constitution.

The Circuit Court expressly held: "The language, purpose, and history of HRS chapter 127A all demonstrate that the Governor is empowered to issue supplementary emergency proclamations extending beyond a single 60-day period." Respectfully, the Circuit Court erred as a matter of law.

On its face, HRS § 127A-14 ("Section 127A-14") limits the emergency power to 60 days. "The fundamental starting point of statutory interpretation is the language of the statute itself." *Priceline.com, Inc. v. Dir. of Taxation*, 144 Haw. 72, 87, 436 P.3d 1155 (2019), *quoting State v. Alangcas*, 134 Hawai'i 515, 525, 345 P.3d 181 (2015) (citing *Hawaii Gov't Emps. Ass'n v. Lingle*, 124 Hawai'i 197, 202, 239 P.3d 1 (2010)). Where the statutory language is plain and unambiguous, Hawai'i courts must give effect to its plain and obvious meaning. *Priceline, Inc.*, 144 Haw. at 87, *citing Schmidt v. Bd. of Dirs. of Ass'n of Apartment Owners of Marco Polo Apartments*, 73 Haw. 526, 531-32, 836 P.2d 479, 482 (1992) (citations and quotations omitted).

The plain, unambiguous language of Section 127A-14(d) declares: "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[.]" No interpretation is needed; the terms are clear.

### A. Section 127A-14 Plainly Defines the Unambiguous and Enforceable 60-day Limit.

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

The plain language of the statute should be given full effect, including the 60-day limit. *Priceline, Inc.*, 144 Haw. at 87; *see Camara v. Agsalud*, 67 Haw. 212, 215-16, 685 P.2d 794 (1984) (reaffirming the "cardinal rule" of construction, including that ordinarily no word should be construed as superfluous, void or insignificant). If the statute's express 60-day limit does not actually mean to cabin the otherwise broad, arbitrary, and unreviewable powers of the Governor, then nothing limits the Governor's powers.

Prof. Robert H. Thomas reached the same conclusion in the scholarly article, *Hoist the Yellow Flag and Spam Up: The Separation of Powers Limitation on Hawaii's Emergency Authority*, 43 U. Haw. L. Rev. ___ (2020) (forthcoming) ("*Separation of Powers*"). RA 52, Exh. 2 to Plaintiff's Opposition. Prof. Thomas wrote:

> Most state emergency power statutes, like Hawaii's, contain internal limitations on delegated emergency power. … Hawaii's statute contains a single major check on the governor's delegated authority: *the "automatic termination" provision, under which an emergency proclamation terminates by law the sixtieth days after it was issued*, or when the governor or mayor issues a "separate" proclamation,

> whichever comes first. *This provision is an essential limitation on the power of the governor*, with the only real question being whether that limitation will be enforced by the courts. … [T]he statute's clear limitation on power [should be enforced by the courts].

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

The 60-day limit must be meaningful, lest Hawai‘i descend into "rule by indefinite executive decree." *Id.* at p. 6. In fact, HRS § 127A-1(c) expressly states the proclamation power statutes "shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States[.]" Under the U.S. Constitutional doctrines of separation of powers and nondelegation, the legislative branch may not delegate its powers to the executive branch. *Touby v. United States*, 500 U.S. 160, 164-65, 111 S. Ct. 1752 (1991). The same doctrine and principle applies to the Hawai‘i Constitution. *In re Kauai Elec. Div.*, 60 Haw. 166, 181, 590 P.2d 524 (1978) (confirming Hawai‘i "has adopted the non-delegation doctrine as part of its own body of constitutional law").

### B. The Governor of Hawai‘i Holds No Constitutional Authority to Legislate by Executive Proclamation.

The Governor of Hawai‘i wields limited constitutional powers, *not* unilateral, broad, and unchecked powers. The constitution of Hawai‘i defines the three branches of government as co-equal but separate. Haw. Const. art. III (legislature), art. V (executive), art. VI (judiciary); *Hanabusa v. Lingle*, 105 Haw. 25, 35, 93 P.3d 670 (2004) (affirming co-equal branches). The separation of powers doctrine operates "'to *preclude a commingling of . . . essentially different powers of government in the same hands* and thereby prevent a situation where one department would be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.'" *AlohaCare v. Dep't of Human Servs.*, 127 Haw. 76, 86, 276 P.3d 645 (2012) (emphasis added; citation omitted). Additionally, the legislature is precluded from

delegating its powers to the executive branch. *Touby*, 500 U.S. at 164-65 (stating the nondelegation doctrine, rooted in the constitutional separation of powers, under which "Congress may not constitutionally delegate its legislative power to another branch of Government"); *In re Kauai Elec. Div.*, 60 Haw. at 181 (confirming Hawai'i courts adopted the nondelegation doctrine).

The Governor advocates interpreting HRS chap. 127A in a way that violates both the separation of powers and nondelegation doctrines. Long settled constitutional law principles preclude the Governor from wielding power to virtually run the entire state for an unlimited period. Therefore, the Circuit Court's decision, holding the Governor may exercise broad legislative power indefinitely, is erroneous as a matter of law.

### C. The Governor's Successive Proclamations Have Contravened the Statutory and Constitutional Limits and Imposed Rule Executive Degree.

#### 1. The sequence of proclamations is unbroken and continuing.

It is a matter of public record that Governor Ige issued his first emergency proclamation concerning Covid-19 on March 4, 2020.[7] *See* RA 6, FAC at ¶ 14 & Exh. 1. Under Section 127A-14, that proclamation could extend no longer than 60 days and would expire after that time.

The Governor did not abide by Section 127A-14's 60-day limit, however. Instead, he extended that very proclamation starting with several proclamations still within the 60-day limit but having expiry dates past the 60 days. RA 6 at ¶¶ 16. On May 18, 2020, the Governor issued

[7] All of the Governor's proclamation documents are available publicly at https://governor.hawaii.gov/emergency-proclamations. The effective dates are listed on the web page.

Proclamation 8 concerning Covid-19, incorporating by reference all prior proclamations without revoking any provisions. RA 6 at ¶¶ 16, 53. May 18 itself was past the 60-day statutory limit.

The Governor has continued issuing successive proclamations concerning Covid-19. He issued Proclamation 9 on June 10, 2020, Proclamation 10 on July 17, 2020, and Proclamation 11 on August 6, 2020. RA 6 at ¶¶ 41-43. The Governor issued yet another "supplemental" proclamation of this type as Proclamation 12 on August 20, 2020. All of these proclamation documents restated their predecessors; none revoked any predecessor.

Likely in response to lawsuits filed to challenge the Governor's abuse of power by indefinite extensions of the March 4 proclamation, the Governor issued Proclamation 13 related to Covid-19 on September 23, 2020, which declared it "supersedes all prior proclamations."[8] At this point the Governor could claim he had issued a "new" proclamation. Of course, Proclamation 13 was grounded in the same factual circumstances, i.e., the "same emergency" related to Covid-19. Whether it was called a "new" or a "supplemental" proclamation, Proclamation 13 extended the Governor's broad powers to run the State just as had the predecessors.

There has been no break in the Governor's legislative reign since March 4, 2020, to the present, inclusive. Proclamation 19 was just issued on April 9, 2021, over a year after the first proclamation.[9] This latest proclamation "supersedes" all prior proclamations and nominally

[8] Full text publicly available at https://governor.hawaii.gov/wp-content/uploads/2020/09/2009139-ATG_Thirteenth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf

[9] Full text publicly available at https://governor.hawaii.gov/wp-content/uploads/2021/04/2104031-ATG_Nineteenth-Emergency-Proclamation-for-COVID-19-distribution-signed.pdf

expires on Jun 8, 2021, but there is every reason to expect the Governor to extend his power again indefinitely.

### 2. The unbroken sequence of proclamations usurps the power of the legislature.

Crucial to observe: The Governor's proclamations are beyond executive orders – they are *de facto legislative* enactments. Via HRS 127A-11(a)(1), the legislature conferred the broad but temporary power upon the Governor to declare a disaster or emergency. Under that temporary power, the Governor makes findings of fact to support the exercise of that power, and then writes the controlling laws having immediate effect. His activities are legislative. They involve "[t]he selection of that policy which is most advantageous to the whole [and] involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws [the legislature], rather than for those who interpret them." *United States v. Gilman*, 347 U.S. 507, 511-13 (1954), *quoted and cited in Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *accord, Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1299, 141 P.3d 288, 305 (2006) ("it is for the Legislature to weigh the competing policy considerations").[10] In an emergency or disaster, this state's legislature empowered the Governor to legislate, but only for a limited time. There is no basis to believe the legislature had either the power or the

[10] "As a much-quoted early case commented, 'the executive, in every republican form of government, has only a qualified and destructive legislative function, and never creative legislative power.'" *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1086, 742 P.2d 1290 (1987), *quoting State v. Holder*, (1898) 76 Miss. 158, 23 So. 643, 645 (1898). "It [is] a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; *the executive cannot exercise either legislative or judicial power*; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department *emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule*." *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 201-02, 48 S. Ct. 480 (1928) (emphasis added).

intent to divest itself of legislative power indefinitely so the Governor could rule by edict. And the constitution of Hawai‘i does not authorize such amassed and deployed power in the executive branch.

## II. The Wisconsin Supreme Court Squarely Rejected The Governor's Attempt To Ignore The 60-day Emergency Power Limitation In Wisconsin's Directly Analogous State Statute.

The Wisconsin Supreme Court's *Fabick v. Evers* decision provides thoroughly reasoned persuasive authority to guide the interpretation and application of Section 127A-14. A copy of *Fabick v. Evers*, 2021 WI 28, 2021 Wisc. LEXIS 47, 2021 WL 1201478, is attached in the Appendix; citations herein are to its enumerated paragraphs. Six distinct reasons and direct analogies show why this Court should follow *Fabick's* lead.

### A. The Operative Language of the Wisconsin Statute is Directly Comparable to Section 127A-14.

The language of the Wisconsin Statute, Wis. Stat. § 323.10, contains the same relevant elements found in Section 127A-14, as shown in relevant part (emphasis added):

| **Wis. Stat. § 323.10** | **HRS § 127A-14** |
|---|---|
| The governor may issue an executive order declaring a state of emergency for the state or any portion of the state if he or she determines that an emergency resulting from a disaster or the imminent threat of a disaster exists. *If the governor determines that a public health emergency exists, he or she may issue an executive order declaring a state of emergency related to public health for the state or any portion of the state* and may designate the department of health services as the lead state agency to respond to that emergency. … A state of emergency *shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature.* A copy of the executive order shall be filed with the secretary of state. The | **(a)** The governor may declare the existence of a state of emergency in the State by proclamation if the governor finds that an emergency or disaster has occurred or that there is imminent danger or threat of an emergency or disaster in any portion of the State. …<br>**(c)** The governor … shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency in the State or a local state of emergency in the county, as applicable. This section shall not limit the power and authority of the governor under section 127A-13(a)(5).<br>**(d)** A state of emergency and a local state of emergency *shall terminate automatically sixty* |

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| executive order may be revoked at the discretion of either the governor by executive order or the legislature by joint resolution. | *days after the issuance of a proclamation of a state of emergency* […,] or by a separate proclamation of the governor […,] whichever occurs first. |

### B. Both States' Statutes Limit the Governors' Unilateral Power to 60 Days Maximum.

The two statutes contain similar language for similar elements: (1) the Governor's power to declare an emergency in the state; (2) the state of emergency "shall not exceed" or "shall terminate automatically after" 60 days; and (3) the Governor's executive order or proclamation declaring the emergency may be revoked sooner than "60 days." Neither statute's language empowers the Governor to unilaterally extend the emergency proclamation. Both statutes use the "shall" verb, which means the limiting language is mandatory.[11] The word "shall" is ordinarily "the language of command." *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S. Ct. 428 (1947) (citation omitted).

Governor Ige's motion brief (RA 27), which the Circuit Court deemed its opinion, fails to explain why the mandatory "shall terminate automatically" should be deemed discretionary, non-binding, and non-mandatory. Yet in the same statutory context, the *Fabick* Court without hesitation held that "shall not exceed 60 days" to be a "clear statutory command[], plainly stated." *Fabick*, ¶¶ 27-28.

[11] The term "shall" is presumed to carry the ordinary meaning, i.e., requiring a mandatory effect. *See State v. Nago*, 148 Haw. 297, 305, 473 P.3d 758, 767-68 (App. 2020), *citing and following Gray v. Admin. Dir. of the Court*, 84 Hawai'i 138, 149, 931 P.2d 580, 591 (1997); *Black's Law Dictionary* (11th ed. 2019) (entry for "shall"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35, 118 S. Ct. 956 (1998) (recognizing that "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"). *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("shall" verb form is presumed mandatory).

### C. Both States' Statutes Contain the Same Two Determinate Limiting Factors.

The *Fabick* Court identified two factors that limit the Governor's exercise of emergency powers under Wis. Stat. § 323.10: (1) the *enabling condition*; and (2) the *duration limit*. *Fabick*, ¶¶ 23-25 & n.7, 27-28. The same two factors appear in Section 127A-14.

The *enabling condition* in both statutes appears as the Governor's finding of a "public health emergency" (Wisconsin)[12] or an "emergency or disaster" (Hawai'i).[13] It was undisputed in both Wisconsin and Hawai'i that when the first executive proclamations were issued, the Governors legitimately could declare an emergency concerning the looming Covid-19 pandemic. *See Fabick* at ¶ 26.

The *duration limit* in both statutes is 60 days. The plain language of the Hawai'i statute should be given full effect, including the 60-day limit. *See Camara v. Agsalud*, 67 Haw. 212, 215-16, 685 P.2d 794 (1984) (reaffirming the "cardinal rule" of construction, including that ordinarily no word should be construed as superfluous, void or insignificant), *quoted and cited by In re Robert's Tours & Transp.*, 104 Haw. 98, 103, 85 P.3d 623 (2004). The *Fabick* Court held exactly that. *Fabick* at ¶ 28 ("The plain language of the statute explains that the governor may, for 60 days, act with expanded powers to address a particular emergency").

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[12] In Wisconsin law, "Disaster" means a severe or prolonged, natural or human-caused, occurrence that threatens or negatively impacts life, health, property, infrastructure, the environment, the security of this state or a portion of this state, or critical systems, including computer, telecommunications, or agricultural systems. Wis. Stat. § 323.02. "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. *Id.*

[13] In HRS chapter 127A, "Disaster" means any emergency, or imminent threat thereof, which results or may likely result in loss of life or property and requires, or may require, assistance from other counties or states or from the federal government; "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. HRS § 127A-2.

### D. Both States' Statutes Show Legislative Intent to Give Governors Expansive but Temporary Powers.

By enacting HRS chapter 127A, the legislature of Hawai‘i empowered the Governor to declare an emergency, undertake control of broad sectors of the state, its economy and its people, and delegate some of the powers to executive agencies – for a limited time only. HRS §§ 127A-14(a) (emergency), 127A-11 (powers), 127A-12 (delegation); 127A-14(d) (time limit).

The Wisconsin legislature similarly empowered its governor to declare an emergency, exercise broad powers over people, business, property and administration, delegate powers to other agencies, but for a limited time only. *Fabick* at ¶¶ 34-36. The *Fabick* Court thus held:

> The statutory language suggests the legislature gave the executive branch expansive, but temporary, authority to respond to emergencies. When the governor employs those powers *beyond the time limits* imposed by the legislature, or after revocation of those powers by the legislature, *he wields authority never given to him by the people or their representatives*.

*Fabick* at ¶ 36 (emphasis added; footnote omitted).

Against a challenge similar to that raised in Defendants' motion in the Circuit Court, where Defendants asserted that limits on the Governor's power were "absurd" (RA 27 at 18; RA 55 at 2, 6), the *Fabick* Court explained why limits on power are fundamental:

> The dissent finds it an absurd result that a governor's power to act on an emergency basis would be temporary and terminable by the legislature when a threat like the present virus exists for an extended period of time. Quite the contrary. It is not only not absurd, *it is eminently reasonable to think that the legislature drafted a law that conferred limited executive power to act unilaterally*, but reserved for itself the power to enact or not enact laws to guide the state through a prolonged crisis. *Legislative, rather than executive, policy-making is how our constitutional design ordinarily works*.

*Fabick* at ¶ 36 n.16 (emphasis added).

The same reasoning should apply with equal force in Hawai‘i.

### E. Both States' Governors Issued Successive Executive Orders to Extend Their Power Indefinitely.

It is undisputed that Governor Ige issued an initial Proclamation on March 4, 2020, which expressly expired on April 29, 2020. The Governor then issued successive "supplemental" proclamations based upon the same Covid-19 concerns, incorporating by reference all prior proclamations, revoking no prior language, and making additional changes and additions to the proclamation, up to and including Supplemental Proclamation 12. *See* Stmnt. of Case, § A, *supra*. Starting with Proclamation 13, Governor Ige's lawyers changed the wording so that subsequent proclamations would be deemed "new" proclamations and revoke the prior proclamations. *See id.* Whether Governor Ige dubbed the proclamations "supplemental" or "new," they form a series of executive orders exceeding the 60-day limit – now past 13 months -- and imposing unilateral executive power without lawful authority – indefinitely.

The *Fabick* Court addressed nearly identical conduct by Wisconsin's Governor Evers. Governor Evers started with Executive Order #72 on March 12, 2020, which proclaimed a public health emergency based upon the Covid-19 virus concern. *Fabick* at ¶ 5. The Order was to expire and did expire in 60 days. *Id.* Governor Evers issued Executive Order #82 on July 30, 2020, proclaiming the same public health emergency and taking the broad powers again, and then issued another Executive Order #90 on September 22, 2020, doing the same. *Fabick* at ¶ 6. After that Order expired in November, 2020, "Governor Evers stated and followed through on his intention to continue declaring states of emergency under similar theories." *Fabick* at ¶ 8 n.3.

On procedural posture, chronology, and the merits, the *Fabick* decision arose from circumstances directly analogous to those in the instant Hawai‘i case. As a directly analogous decision by a sister state's highest court, *Fabick's* reasoning and result should be persuasive here.

### F. As Held by the *Fabick* Court, the Governors' Stratagem to Sidestep the 60-day Limit Must Not Be Approved.

Wisconsin, like Hawai'i, encountered the Covid-19 pandemic, and its governor acted under emergency authority to quickly respond as best he knew at the time. "The question in this case is not whether the Governor acted wisely; *it is whether he acted lawfully*." *Fabick* at ¶ 1 (emphasis added). The Wisconsin Court declared: "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." *Fabick* at ¶ 14 (citation omitted). The same is true of the State of Hawai'i's government.

The focus in *Fabick* is not wisdom of policy – it is lawfulness of power. "Whether the policy choices reflected in the law give the governor too much or too little authority to respond to the present health crisis does not guide our analysis. Our inquiry is simply *whether the law gives the governor the authority to successively declare states of emergency in this circumstance*." *Fabick* at ¶ 15 (emphasis added).

As described above, *Fabick* analyzed the 60-day power limitation statute by examining its "enabling condition" and its "duration limitation." *Fabick* at ¶ 14. Section 127A-14 contains the same two elements. *Fabick* held that Governor Evers initially proclaimed the emergency and undertook the statutory powers because the enabling condition was satisfied by the Covid-19 pandemic. *Fabick* at ¶¶ 24-26. Plaintiff Appellants here agree Governor Ige could lawfully issue his first Proclamation.

Also as described above, *Fabick* examined whether the Wisconsin statute's 60-day limitation on the governor's emergency powers was an actual enforceable limitation on executive power. The *Fabick* Court held the 60-day limit must be viewed as a concrete limit; else the statute is practically meaningless:

> The plain language of the statute explains that the governor may, for 60 days, act with expanded powers to address a particular emergency. Beyond 60 days, however, the legislature reserves for itself the power to determine the policies that govern the state's response to an ongoing problem. Similarly, when the legislature revokes a state of emergency, a governor may not simply reissue another one on the same basis. Therefore, *where the governor relies on the same enabling condition for multiple states of emergency, or declares a new state of emergency to replace a state of emergency terminated by the legislature, the governor acts contrary to the statute's plain meaning. If it were otherwise,* § 323.10's *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.

*Fabick* at ¶ 28 (emphasis added).

The same reasoning applies to Governor Ige and Section 127A-14. The legislature "gave the executive branch," such as Governor Ige, "expansive, but temporary, authority to respond to emergencies." *Fabick* at ¶ 36. "When the governor employs those powers beyond the time limits imposed by the legislature," as has Governor Ige, "he wields authority never given to him by the people or their representatives." *Id.* The *Fabick* Court held the Wisconsin statute's "duration-limiting language forbids the governor from declaring successive states of emergency on the same basis as a prior state of emergency[.]" *Id.* This Court should follow *Fabick* and uphold the lawmaking authority of Hawai'i's truly representative government body, the legislature. That includes enforcing the legislature's express limits on emergency powers.

The opposing faction in Wisconsin argued "that a new emergency may be declared [by the governor] as long as the governor drafts 'a new set of on-the-ground facts.'" *Fabick* at ¶ 37 (citing the dissenting opinion). Governor Ige's motion in the Circuit Court did not even concede the Governor had any duty to evaluate the state of the facts, but only that "emergency orders are reevaluated at least once every two months." Def. Mot. at 13. The Governor argued each successive proclamation might be "tailored to the evolving conditions on the ground." *Id.*

The *Fabick* Court roundly rejected such a vague, amorphous but permanent claim to unilateral power:

> This approach, however, does what a proper consideration of the entire statute does not permit—*it reads the duration limitations right out of the law*. A governor will surely have little difficultly drafting a new emergency order stating that the challenges or risks are a little different now than they were last month or last week. So long as the emergency conditions remain, the governor would possess indefinite emergency power under this atextual theory. *The more reasonable reading is that the 60-day time limit and legislative revocation power are real limitations that constrain the governor's power to deploy emergency powers with regard to that emergency*. *Statutory restrictions on executive power cannot be avoided by modest updates to the "whereas" clauses of an emergency declaration.*

*Fabick* at ¶ 38 (emphasis added).

Indeed, as the *Fabick* concurring opinion observed:

> 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." 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." [] 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." []

*Fabick* at ¶ 50 (Rebecca Grassl Bradley, J., concurring), *citing and quoting A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (internal citations to which are omitted).

In the year when the pandemic began, in *Wis. Legislature v. Palm*, 942 N.W.2d 900 (2020), the Court explained the clear logic of delegating broad powers to the governor but only for a limited time:

> [T]he Governor's emergency powers are premised on the inability to secure legislative approval given the nature of the emergency. For example, if a forest fire breaks out, there is no time for debate. Action is needed. The Governor could declare an emergency and respond accordingly. *But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely*.

*Wis. Legislature v. Palm*, 942 N.W.2d 900 at 914 (emphasis added).

The Hawai‘i Constitution and Section 127A-14 mean what they say. The Governor's emergency powers are limited. It is not "absurd" to stay true to the fundamental principles of a democratic republican government.

## III. The Michigan Supreme Court Similarly Held The Governor's Exercise Of Emergency Powers Beyond Statutory Limits Or Outside Of Such Limits Violated The Statute And Was Unconstitutional Under The Separation Of Powers Doctrine

In another analogous case, *Midwest Inst. of Health, PLLC v. Governor of Mich*., 2020 Mich. LEXIS 1758, 2020 WL 5877599 (Oct. 2, 2020) ("*Midwest Inst.*") (all citations to star pages in LEXIS edition, RA 52 Exh. 3), the Michigan Supreme Court invalidated the Michigan governor's attempt to wield broad "emergency" powers with no time limit.

The Michigan governor had deployed two different state Acts (statutes) to declare both an "emergency" and a "disaster." In doing so the Michigan governor obtained powers comparable to those Hawai‘i Governor Ige had obtained. The Michigan governor employed both Acts – and the Michigan Court invalidated both of the governor's actions on statutory and constitutional grounds.

### A. Successive Emergency Declarations Past the Express Statutory Time Limit Are Invalid.

First, under Michigan's Emergency Management Act, Michigan Compiled Laws (MCL) § 30.403(3) and (4),[14] the procedure is: (1) Governor recognizes an "emergency"; (2) Governor declares a "state of emergency" and acquires vast powers; (3) the declared "state of emergency" remains in effect no later than 28 days; (4) after the 28 days, Governor *must* terminate the "state of emergency" *unless* the legislature approves Governor's request for extension.

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

*Midwest Inst.* thus accords with *Fabick* as discussed above: the state supreme courts held that the express 60-day or 28-day limit on emergency power means exactly what it says. Both courts rejected the argument that the time limits could be side-stepped by issuing successive declarations on the same emergency. The same holding should apply to give meaning and uphold Section 127A-14's express 60-day limit on the Hawai‘i Governor's power to rule by successive declarations.

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

### B. A Statute Conferring Emergency Powers Without Time Limitation is Unconstitutional Under the Separation of Powers Doctrine.

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

The Michigan governor issued her emergency proclamation using the Covid-19 pandemic as the "public emergency." *Id.* That proclamation imposed myriad direct orders that closed businesses, locked people in their homes, destroyed livelihoods, and endangered the futures of young and old alike. *See id.* at *13-15 (listing powers and directives).[15] The Michigan Supreme Court held the EPGA to be *unconstitutional* because it violated the state constitution's separation of powers doctrine. *Id.* at *24. The legislative power is vested in the state legislature, not the governor. *Id.* at *25. The courts must ensure that no one branch of government acts substantially in the purview of a different branch:

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

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

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

The *Midwest Inst.* precedent applies constitutional law doctrine having equal force in Hawai‘i courts. HRS § 127A-1(c) expressly states the proclamation power statutes "shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States[.]" Under the U.S. and Hawai‘i Constitutional doctrines of separation of powers and nondelegation, the legislative branch may not delegate its powers to the executive branch. *Touby*. 500 U.S. at 164-65; *In re Kauai Elec. Div.*, 60 Haw. at 181 (confirming Hawai‘i "has adopted the non-delegation doctrine"). The legislature of Hawai‘i cannot lawfully relinquish or abdicate its responsibilities and powers to the Governor.

Prof. Thomas reached the same conclusion as *Midwest Inst*.– the Hawai‘i legislature confers a temporary power with time limitations, to avoid rule by edict:

> [L]ike Hawai‘i —the overwhelming majority of other states have concluded that these rule-by-decree emergency powers of executive officers should be granted only for a very limited time, and should not be open-ended. Thus, although process-based, Hawai‘i's time limit serves as an essential democratic check on arrogation of executive power by emphasizing that *the delegation to the governor from the people via the legislature is muscular—but temporary.* And that once the delegation automatically terminates, *absent a separate declaration setting forth separate reasons, the authority to declare and manage emergencies reverts to the legislature.*

*Separation of Powers*, p. 19 (emphasis added; footnote omitted).

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

Separation of powers is a serious concern, as that separation protects individual liberty in a free state. *Id.* at *24 (citation omitted). "'[T]he *accumulation of all powers, legislative,*

*executive, and judiciary, in the same hands*, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of *tyranny*.'" *Midwest Inst.*, at *24-25 (emphasis added), *quoting 46th Circuit Trial Court v Crawford Co*, 476 Mich. 131, 141, 719 N.W.2d 553 (2006) (quoting *The Federalist No. 47* (Madison) (Rossiter ed, 1961), p 301). Topmost among the constitutional defects in the Michigan EPGA was the broad scope of conferred power that would persist at the governor's discretion indefinitely. *Midwest Inst.*, at *24-45 (extended discussion). If Section 127A-14 is construed to permit repeated extensions of unilateral emergency powers via proclamation, disregarding the express 60-day limit, then Section 127A-14 is constitutionally defective as was Michigan's statute.[16]

## IV. The Issues Before This Court Are Not Moot.

### A. The Circuit Court's Decision Itself Implies the Issues Are Not Moot.

The Circuit Court, by adopting the Governor's brief as its opinion, *might* be viewed as holding "this Court lacks subject-matter jurisdiction because the First Amended Complaint seeks to invalidate proclamations that are no longer in effect. … Mootness is an issue of subject matter jurisdiction." RA 27, Def. Mot. at 7 (citations omitted).

First to observe: If the Circuit Court lacked subject matter jurisdiction, then it lacked authority to rule on any other issue presented. "A judgment is void … if the court that rendered it lacked jurisdiction of the subject matter[.]" *Bank of Haw. v. Shinn*, 120 Haw. 1, 14, 200 P.3d 370 (2008), *quoting Meindl v. Genesys Pac. Techs., Inc. (In re Genesys Data Techs., Inc.)*, 95

[16] "'No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty' than the separation of powers." *Fabick* at ¶ 53 (concurring opinion), *quoting* The Federalist No. 47, at 301 ((James Madison) (Clinton Rossiter ed., 1961), *and citing* The Federalist No. 51, at 321-22 (James Madison) ("[The] separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty").

Haw. 33, 38, 18 P.3d 895 (2001) (internal quotation and citation omitted). The Circuit Court's own written decision, however, declared a judicial holding concerning the 60-day limit in Section 127A-14 as well as whether other issues raised in the pending complaint were themselves moot. RA 81, 85, Cir. Ct. Dec. at 2. The Circuit Court expressly ruled on mootness *of a specific contention within the FAC*[17] but said nothing about mootness depriving the court of subject matter jurisdiction. *Id.* It is fair to presume that the FAC was *not* dismissed because of mootness and lack of jurisdiction.

### B. The Governor's Issuing Successive Proclamations Based Upon the Same Emergency Presents a Controversy Capable of Repetition Yet Evading Review.

The Defendants' Motion argued that the instant FAC is moot because the pleadings refer to proclamations that have been superseded by the Governor's subsequent proclamations. RA 27 at 7. That facial claim of mootness claim is overcome by the exceptions to the mootness doctrine.[18]

Under Hawai'i law, a case may be deemed moot "where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where 'events . . . have so affected the relations between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy – have been compromised.'" *In re Thomas*, 73 Haw. 223, 225-27, 832 P.2d 253 (1992), *quoting Wong*

[17] "Further, Plaintiffs' claim in regards to the vagueness of prior emergency proclamations, which are no longer in effect, is deemed moot and is dismissed with prejudice." Cir. Ct. Dec. at 2.

[18] Defendants' Motion supplied as Exhibit C a copy of the hearing transcript in which the judge issued the decision in *Partal, et al. v. Ige, et al.*, Civil No. 3CCV-20-0000277 (September 1, 2020), RA 31, dismissing a challenge to the Governor's power to issue successive proclamations. Although the Governor had issued a proclamation after the filing of the lawsuit that challenged the prior proclamations, Judge DeWeese did not rule that the lawsuit was moot.

*v. Board of Regents, University of Hawaii*, 62 Haw. 391, 394, 616 P.2d 201 (1980). A key exception to the mootness doctrine arises, however, where the governmental action is "capable of repetition, yet evading review." *Hamilton v. Lethem*, 119 Haw. 1, 5-6, 193 P.3d 839 (2008), *citing, inter alia, In re Thomas*, 73 Haw. at 226-27.

The FAC presents precisely such a controversy, "capable of repetition yet evading review." The FAC challenged Defendant Governor's 11th and preceding proclamations and supplements, all of which were incorporated and restated into one unwieldy corpus. When drafted, the FAC was totally live, not moot. Between the date of drafting and the date of Defendants' Motion, Defendant Governor issued Proclamations 12 and 13, and there was issued Proclamation 14 *after* Defendants' own Motion was filed. Proclamations 11 through 14 all declare they are based on the same finding by the Governor about the Covid-19 pandemic. Proclamations 11 through 14 all: (a) declare severe restrictions upon the lives and liberties of the people visiting or living in Hawai‘i; and (b) declare policies that are purportedly enforceable by criminal prosecution. The succession of Proclamations has continued uninterrupted through Proclamation 19 issued on April 9, 2021. Common to all proclamations: The Governor contends he has unlimited power to issue more proclamations on the same subject without any time limit. *See* RA 27 at 8-11.

The Governor first issued a series of supplemental proclamations that restated or overlapped prior proclamations all on the same subject matter. Then the Governor starting issuing proclamations on the same subject matter, but declaring the proclamations superseded prior proclamations. There is no end in sight. The FAC seeks declaratory and injunctive relief to stay or invalidate whatever the latest proclamation version is issued. Under HRS § 632-1(b), "[r]elief by declaratory judgment may be granted in civil cases where an actual controversy

exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, … and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding[.]"

"[T]he dispositive question under HRS § 632-1 (1993), authorizing actions for declaratory judgment, is 'whether "the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.' This is a question of law." *Kaho'ohanohano v. State*, 114 Haw. 302, 332, 162 P.3d 696 (2007), *quoting Island Ins. Co. v. Perry*, 94 Hawai'i 498, 502, 17 P.3d 847 (App. 2000). This Court can decide that any current Proclamation stemming from the same underlying emergency is an unconstitutional edict on the same core grounds that prior proclamations (after the initial proclamation) were unconstitutional. The differences between Proclamation 19 and prior proclamations do not affect the constitutionality issues at all.

### C. The Public Interest Exception to the Mootness Doctrine Also Applies.

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

*Workers, AFSCME, Local 646 v. Yogi*, 101 Hawai'i 46, 58, 62 P.3d 189 (Acoba, J., concurring) (quoting *Johnston v. Ing*, 50 Haw. 379, 381, 441 P.2d 138 (1968)).

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

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

Third, the sequence of sporadic but continuing proclamations and supplements shows a high likelihood that the constitutionality question will recur. *See* Proclamation 13, p.1 (listing sequence of proclamations and supplements); Proclamation 14, p. 1 (updated listing); Proclamation 19 (updated listing). Bolstering this conclusion is the Defendant Governor's Motion, which argued that no constitutional provision or statute restricts the Governor from issuing as many "emergency" proclamations as he (or she) desires, for as long as the Governor desires. *See* RA 27 at 15-18. Indeed, the Defendants considered any statutory limitation upon endless serial unilateral proclamations "absurd." *Id.* at 18; RA 55 at 2, 6.

The Governor's position means these plaintiffs in the FAC and a growing number of others will need to successively challenge the Governor's proclamations, only to find a "new" proclamation is issued to "moot" their challenges. With all three criteria of the public interest exception indisputable, the exception applies to overcome any mootness claim.

## V. Plaintiff-Appellants Have Standing to Litigate the Issues Presented.

The Circuit Court did not expressly rule on the issue of standing. Rather, the Circuit Court went to the merits of the case and expressly ruled on the validity of Section 127A-14.[19] Defendants' Motion, which the Circuit Court adopted, asserted lack of standing based upon the mootness of the complaint. RA 27 at 6. As shown above, the FAC is not moot. The Motion also asserted lack of standing based upon the spurious claim that "no antagonistic claims exist between the parties: litigation seeking prospective relief as to superseded proclamations is neither imminent nor inevitable." RA 27 at 7. That claim was disingenuous when it was advanced last year when there were only 14 proclamations. With Proclamation 19 in place, Plaintiff-Appellants present the same challenge to the lawfulness of proclamations extending past the 60-day limit imposed by Section 127A-14.

Plaintiff-Appellants maintain the same standing they always had. The Governor cannot lawfully evade review and deprive challengers of standing by successive proclamations. "[T]he dispositive question under HRS § 632-1 (1993), authorizing actions for declaratory judgment, is 'whether "the court is satisfied also that a declaratory judgment will serve to terminate the

[19] As noted above, Defendants' Motion supplied as Exhibit C a copy of the hearing transcript in which the judge issued the decision in *Partal, et al. v. Ige, et al*., Civil No. 3CCV-20-0000277 (September 1, 2020), RA 31, dismissing a challenge to the Governor's power to issue successive proclamations. The entire hearing reveals *no challenge to the citizens' standing to litigate the Section 127A-14 issue, and Judge DeWeese did not mention it,* instead ruling on the merits of the complaint.

uncertainty or controversy giving rise to the proceeding.' This is a question of law." *Kaho'ohanohano*, 114 Haw. at 332, *quoting Island Ins. Co. v. Perry*, 94 Hawai'i at 502. This Court can decide the issue of the lawfulness and constitutionality of the Governor's successive proclamations and thereby resolve the live and continuing controversy.

## CONCLUSION

Appellants respectfully request this Court reverse the Circuit Court decision and judgment, and remand this matter for litigation on the merits.

DATED: April 29, 2021

ATTORNEYS FOR FREEDOM LAW FIRM

/s/ *Jody L. Broaddus*
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## APPENDIX

1. *Fabick v. Evers*, 2021 WI 28, 2021 Wisc. LEXIS 47, 2021 WL 1201478

## STATEMENT OF RELATED CASES

1. *State v. Levana Keikaika*, Levana Lomma, Kaua`i – Fifth Circuit Court, case number 5DCW-21-0000413. Levana Lomma, who is a named plaintiff in this appeal, is a defendant in this related case. The related case pertains to a misdemeanor charge for an alleged violation of the Governor's proclamation.

Plaintiffs are unaware of any other pending related cases.

**CERTIFICATE OF SERVICE**

I certify that the above document and exhibit were served electronically through the Court's JEFS system upon the following on the 29th day of April, 2021:

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