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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

LEVANA LOMMA, Plaintiff, vs. CLARE E. CONNORS, in her individual and official capacity as Attorney General of the State of Hawai’i, DAVID Y. IGE, in his individual and official capacity as Governor of the State of Hawai’i, DEREK S.K. KAWAKAMI, in his individual and official capacity as Mayor of the County of Kaua’i, Defendants.	CIVIL NO. CV20-00456 JAO RT (Other Civil Action) DEFENDANT DEREK S.K. KAWAKAMI’S STATEMENT CONCERNING THE APPROPRIATENESS OF A STAY; CERTIFICATE OF SERVICE Judge: Honorable Jill A. Otake Trial Date: None

DEFENDANT DEREK S.K. KAWAKAMI'S STATEMENT CONCERNING THE APPROPRIATENESS OF A STAY

The disposition of the state court appeal in *For Our Rights, et al. v. Ige, et al*., could affect this case and a stay pursuant to the *Pullman* abstention doctrine would be appropriate.

Plaintiff's *Second Amended Complaint for Declaratory and Emergency Injunctive Relief* is a constitutional challenge to the face mask requirement in Governor Ige's 'Supplemental Proclamation Related to the Covid-19 Emergency.' ECF No. 37 at 2. Plaintiff alleges the face mask requirement

> violates the plaintiff's First Amendment rights to free speech and expression under the United States Constitution by abridging the plaintiff's ability to speak audibly and clearly, removing facial expression which is an aspect of the content of speech, forcing the adoption of a cult-like religious tradition, which violates plaintiff's own religious convictions, and at the same time acts to obstruct plaintiff's God-given right to breathe freely and to simply be left alone, which are fundamental rights protected under the Ninth Amendment of the United States Constitution.
>
> Id. at 2-3.

On September 1, 2020, Plaintiff along with 16 co-plaintiffs filed in the Hawai'i Circuit Court for the Fifth Circuit a complaint in, *For Our Rights, et. al. v. David Ige, et. al.*, 5CCV-20-0000091. Plaintiffs' First Amended Complaint alleges that the Governor's supplementary proclamations are unconstitutional because they exceed the legislature's delegated authority and are unconstitutionally vague so as to deprive Plaintiffs of due process.

The *Pullman* abstention doctrine authorizes district courts to postpone "the exercise of federal jurisdiction when 'a federal constitutional issue ... might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959)). "And it is not even necessary that the state adjudication 'obviate the need to decide all the federal constitutional questions' as long as it will 'reduce the contours' of the litigation." *Smelt v. County of Orange*, 447 F.3d 673, 679 (9th Cir. 2006) (quoting *id.* at 380).

Pullman abstention is appropriate where:

> (1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the proper resolution of the possible determinative issue of state law is uncertain.

Courthouse News Serv. v. Planet, 750 F.3d 776, 783–84 (9th Cir. 2014) (citation omitted); *see Smelt*, 447 F.3d 673, 679 (citation omitted). The Court lacks discretion to abstain when the foregoing requirements are not met. *See Courtney v. Goltz*, 736 F.3d 1152, 1163 (9th Cir. 2013) (citation omitted).

1. Sensitive Area of Social Policy

Generally, "[f]ederal courts should be reluctant to abstain in civil rights cases[.]" *Pearl Inv. Co. v. City & County of San Francisco*, 774 F.2d 1460, 1463

(9th Cir. 1985) (citations omitted). However, "there is no per se civil rights exception to the abstention doctrine," *C-Y Dev. Co*., 703 F.2d at 381, and abstention may "be proper in a civil rights case to avoid unnecessary interference with an important state program." 774 F.2d at 1463 (citations omitted).

For instance, the Ninth Circuit upheld the lower court's abstention under *Pullman* where plaintiffs alleged that using California's pandering and prostitution statutes to prevent them from making sexually explicit films violated their federal and state constitutional rights. *Almodovar v. Reiner*, 832 F.2d 1138, 1139 (9th Cir. 1987). The court concluded that "the regulation of prostitution and of sexually explicit films are controversial issues of great local interest," and noted that the 'sensitive social policy' prong "recognizes that abstention protects state sovereignty over matters of local concern, out of considerations of federalism, and out of 'scrupulous regard for the rightful independence of state governments.'" *Id*., (quoting *Pullman*, 312 U.S. at 501, 61 S.Ct. at 645).

This case and the related state appellate case concern the Governor's supplemental proclamations made pursuant to Hawai'i's Emergency Management Act. The Act's purpose is "to ensure that the preparations of this State will be adequate to deal with [] disasters or emergencies; to ensure the administration of state and federal programs providing disaster relief to individuals; and generally to protect the public health, safety, and welfare, and to preserve the lives and property

of the people of the State" HRS § 127A-1 (a). The Act and its application are sensitive matters of local concern and the first prong is therefore satisfied.

2. Avoidance of Federal Constitutional Adjudication

The second factor requires "[a] state law question that has the potential of at least altering the nature of the federal constitutional questions." *C-Y Dev. Co*., 703 F.2d at 378. "For Pullman purposes ... it is sufficient if the state law issues might 'narrow' the federal constitutional questions." *Sinclair Oil*, 96 F.3d at 409 (citation omitted).

In the state court appeal, Plaintiffs assert that the Governor's emergency proclamations "exceed his delegated authority" and "circumvent the limitations upon his authority" contained in Chapter 127A. The resolution of the state statutory issues could avoid or narrow the adjudication of the federal constitutional issues. Moreover, the federal claims turn on underlying questions of state law, the resolution of which could obviate the need for a determination of federal constitutional questions. See *Sederquist v. City of Tiburon*, 590 F.2d 278, 282 (9th Cir. 1978); *Almodovar*, 832 F.2d at 1140-41.

3. Uncertainty of Determinative State Law Issues

"Uncertainty for purposes of Pullman abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law." *Pearl Inv. Co*., 774 F.2d at 1465 (citation omitted). Resolution

of state law issues "might be uncertain because the particular statute is ambiguous, or because the precedents conflict, or because the question is novel and of sufficient importance that it ought to be addressed first by a state court." *Id.*

Here, the Court cannot predict with any confidence how Hawai'i's courts would decide Plaintiff's state law challenges to the Governor's emergency proclamations and supplemental proclamations. Indeed, the Chapter 127A scheme is complicated, and the state law issues are novel and sufficiently important such that they should be addressed by the state courts first. For these reasons, the Court should find that the third requirement is met.

DATED: Līhu'e, Kaua'i, Hawai'i, April 12, 2021.

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