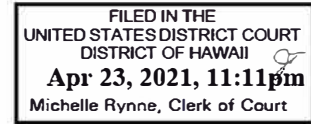


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In Propria Persona



**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

FURTHER DISCUSSION ON
A PULLMAN ABSTENTION IN
RELATION TO DISPOSITION ON
*CASE FOR OUR RIGHTS ET AL.
V. IGE ET AL*, 5CCV-20-0000091;
DECLARATION OF PLAINTIFF;
CERTIFICATE OF SERVICE

District Judge: Hon. Jill A. Otake

Magistrate Judge: Rom A. Trader

NO TRIAL DATE SET

**PLAINTIFF’S EXPLANATION CONCERNING THE
INAPPROPRIATENESS OF ABSTENTION PENDING DISPOSITION OF
RELATED CASE FOR OUR RIGHTS, ET AL. V. IGE, ET AL**

I. Introduction

Plaintiff has properly brought forth constitutional claims related to a government mandate that clearly infringes upon protected fundamental rights, resulting in a cause of action that calls for relief through federal jurisdiction. Continued injury to the plaintiff and the public at large, is a serious consequence of a decision to stay the proceedings.

The related case, *For Our Rights, et al. v. Ige, et al.*, No. 5CCV-20-0000091 challenges the defendant’s statutory authority in issuing executive orders related to the ‘Covid-19 Emergency’ beyond the 60-day limit unambiguously stated in HRS 127A-14(d), while also claiming that the proclamations are unconstitutionally vague and overbroad.

This court must assert its jurisdiction since there are federal constitutional claims that are not before the state court in the related case. Assuming that the state court rules that the emergency proclamations are illegal, it does not necessarily follow that the mask mandate will not continue. Plaintiff argues that the legislature has abdicated its powers to the executive and there is no check on it but through the courts. So if the court does not assert its federal jurisdiction where the federal civil liberties claims are stated then to whom will the plaintiff seek relief? Does not the

federal court exist for this very purpose? With successive emergency proclamations issued again and again every sixty days, defendants could argue to stay the case until such proclamations cease, but if the first amendment rights are being violated then the court cannot abstain. Plaintiffs injuries are ongoing and if the court abstains, such alleged injuries will continue.

II. Legal Standard

The Ninth Circuit has held that “*Pullman* abstention is rarely appropriately invoked in cases implicating the First Amendment.” See *Courthouse News Service v. Planet*, 750 F.3d 776 (9th Cir. 2014). Federal courts have an unwavering duty to exercise jurisdiction over First Amendment claims. Only in the rarest case can such a court abstain. This is not such a case. Federal court abstention is an extraordinary judicial maneuver that remains uncommon. A federal court may refuse to hear a case over which it has jurisdiction only in unusual circumstances, and a parallel suit is not reason enough.

This Court has held a long tradition of opposing abstention in First Amendment cases. See, e.g., *Courthouse News Service v. Planet*, 750 F.3d at 784; *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010); *Porter v. Jones*, 319 F.3d at 492-93; *Ripplinger v. Collins*, 868 F.2d at 1048. Only once in this Court’s history has it applied *Pullman* abstention in a First Amendment case. See *Almodovar v. Reiner*, 832 F.2d 1138 (9th Cir. 1987). There, the federal court

abstained under *Pullman* because a parallel state case had already reached the Supreme Court of California. *Id.* at 1140. This court held that the district court could abstain because the risk of a chilling effect was low when a final resolution was imminent. There is no imminent final resolution in the disposition of *For Our Rights*, as it is only before an intermediate appellate court and not before the Supreme Court as was the case with *Almodovar*.

This court has determined that *Pullman* abstention is only appropriate when:

(1) the federal plaintiffs complaint requires resolution of a sensitive question of federal constitutional law; (2) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (3) the possibly determinative issue of state law is unclear.

See San Remo Hotel v. City & Cty. of San Francisco, 145 F.3d 1095, 1104 (9th Cir. 1998)

III. Discussion

A. A Chilling Effect is Not The Issue at Hand

The defense brings in the argument that “[S]pecial concern with abstention in the First Amendment context arises in part from the fact that in many cases, the delay that comes from abstention may itself chill the First Amendment rights at issue.” *Porter v. Jones*, 319 F.3d 483, 492–93 (9th Cir. 2003)(citing *Zwickler v. Koota*, 389 U.S. 241, 252, 88 S.Ct. 391, 397–98, 19 L.Ed.2d 444 (1967)). Then the defense uses this reference to argue their motion to dismiss plaintiff’s first

amendment claims. Fundamental rights are being blatantly violated day in and day out for as long as this unwarranted ritual of masking healthy people continues. The issue of a chilling effect does not apply in this case, the rights in question are already **frozen**, and arguments for dismissal of first amendment claims are inappropriate when the request was to address the appropriateness of abstention.

B. The State Ruling Will Not Prevent Future Injury

The defense presents to the court that a decision to reverse the ruling in *For Our Rights* will render the federal controversy moot, however this is incorrect due to the fact that the mask mandate may be reimposed at any time. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, where Governor Cuomo's emergency orders were struck down for violating First Amendment rights, it was affirmed that the controversy was not rendered moot on account of the policy change "because the applicants remain under a constant threat that the area in question will be reclassified as red or orange." Such is the case with the mask mandate if a legislative act were to afford powers to the defendants or any of their agents to reimpose this regulation. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 592 US ___, 208 L. Ed. 2d 206 - Supreme Court, 2020

A Supreme Court ruling decided on March 8, 2021 in *Uzuegbunam et al. v. Preczewski et al.* determined that "a plaintiff's request for nominal damages can satisfy the redressability requirement for Article III standing and can keep an

otherwise moot case alive," Justice Kavanaugh, concurring. (*See Uzuegbunam et al. v. Preczewski et al.* 378 F. Supp. 3d 1195 - Dist. Court, ND Georgia 2018) and (Court of Appeals 11th Circuit, 2019). Because plaintiff has requested fees and costs be recovered in addition to any other relief deemed just and proper, plaintiff also asserts that the federal case will survive any state disposition that would have otherwise rendered the case moot, and for this reason abstention is improper.

C. The Three Prongs of A Pullman Analysis Are Not Satisfied

Referring again to the three requirements involved in the invocation of a *Pullman* abstention we find that the only prong that has been satisfied is that there is a sensitive federal question that requires resolution through federal constitutional law. Any relief granted through the disposition of the state case has the potential to be overturned through a legislative act and it is only through adjudication within a federal forum that permanent relief can be granted based on the unconstitutional nature of the mandate. The adjudication of the state claims serve only to determine whether the defendants were afforded the authority to issue executive orders, and does **not** resolve the claim that the mask mandate violates the plaintiff's rights to free speech, religion and bodily integrity. Abstention will therefore not eliminate the constitutional claims but rather will only delay them being heard and place undue hardship on the plaintiff. Additionally, the plaintiff must be allowed the opportunity, through federal procedure and evidence rules, to bring forth evidence

that supports the plaintiff's claims. While the state argues that the regulation in question is intended to prevent harm to the public (claiming Covid-19 is a "deadly pandemic" when there has been merely one death labeled as such in this county) plaintiff argues that the regulation is ineffective and in fact *causes* harm. This is all the more reason why fact finding in a federal forum without delay is so important.

A recent Stanford study released by the NCBI, which is under the National Institutes of Health, showed that masks do absolutely nothing to help prevent the spread of Covid-19 and their use is even harmful. NIH published a medical hypothesis by Dr. Baruch Vainshelboim (Cardiology Division, Veterans Affairs Palo Alto Health Care System/Stanford University, Palo Alto, CA, United States) entitled " Facemasks in the COVID-19 era: A health hypothesis" found here <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7680614/>

which concluded that:

The existing scientific evidences challenge the safety and efficacy of wearing facemask as preventive intervention for COVID-19. The data suggest that both medical and non-medical face masks are ineffective to block human-to-human transmission of viral and infectious disease such as SARS-CoV-2 and COVID-19, supporting against the usage of facemasks. Wearing facemasks has been demonstrated to have substantial adverse physiological and psychological effects. These include hypoxia, hypercapnia, shortness of breath, increased acidity and toxicity, activation of fear and stress response, rise in stress hormones, immunosuppression, fatigue, headaches, decline in cognitive performance, predisposition for viral and infectious illnesses, chronic stress, anxiety and depression. Long-term consequences of wearing facemask can cause health deterioration, developing and progression of chronic diseases and premature death.

The third prong in a *Pullman* analysis is that the proper resolution of the state ground for the decision must be unclear. This prong has also not been met. The issue concerning the defendants authority to engage in actions that violate the plaintiff's constitutionally protected rights is very simply determined by the plain, unambiguous language of the statute in question (HRS 127a-14(d)) and the defense agrees as stated in the supplemental memorandum on page 8 which reads, "Here, the statutes in question, in HRS Chapter 127A, are not ambiguous, nor do precedents conflict."

There is nothing confusing or unclear about this law which reads, "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.**" (emphasis added). No where in the language of this statute does it provide authorization to *extend* a state of emergency by separate proclamation. If that were the case there would be no need for the words "or" and "whichever occurs first." Because the language of this statute is very obviously clear, there is no justification for an abstention as a means of avoiding an erroneous judgment.

Typically, the greater the ambiguity of a state law, the greater is the difference in the capacities of the state and federal systems to reach the ‘correct’ result, and the more warranted is abstention, but “there is no sharp dichotomy between the state and federal system’s judicial abilities; both face the possibility of error, and both are capable of arriving at ‘correct’ decisions in most cases.”

Abstaining in order to increase the likelihood of a proper ruling is not proportionately worth the cost involved in abstention particularly if the abstention doctrine were applied indiscriminately in order to obtain the state courts' state law solutions in all cases in which state regulations were said to violate the federal constitution. “Limiting abstention to cases in which the state law issue is extremely unclear” serves to narrow the body of cases for abstention in such a way that the difference in likelihood of correct adjudication between state and federal judicial systems is achieved. “The more unclear the state issue is, the more likely federal error would appear to be.” See *Martha A. Field Abstention In Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071 (1974).

D. The Dissimilarity of Claims in the State Case v. Federal Case

Review of the transcript from the oral arguments in *For Our Rights* illustrates that the two cases are entirely different. [See Exhibit “1”] *For Our Rights* challenges the legality of the emergency orders based on statutory

interpretation whereas the instant case claims that the statute itself is unconstitutional for violating the separation of powers doctrine. *For Our Rights* challenges the emergency orders as being unconstitutionally vague and over broad whereas the instant case challenges the mask mandate specifically for violations to protected fundamental rights and the state constitutional argument of the violation to the separation of powers. The only similar argument is centered on the 60-day provision of HRS 127A-14(d) however there is no way to determine that the final ruling in a state court on the issue will address the separation of powers question, nor will a disposition in favor of the plaintiffs eliminate the possibility of future injury.

IV. Conclusion

An improvident exercise of discretion is an error of law and grounds for reversing a decision on appeal. It is clear that an exceptional circumstance to warrant an abstention does not exist in this case and that to stay the proceedings would deprive the plaintiff of her rights to timely relief in a federal forum. Unless a final resolution is already at the doorstep, as in *Almodovar*, abstention is improper in First Amendment cases where the most highly protected rights are being violated. Plaintiff asserts a right to relief through federal jurisdiction where the federal rules of evidence may allow for proper adjudication of the matter, and so does ask the court to not delay this case.

DATED: Kapa'a, Kaua'i, Hawai'i, April 23, 2021

Levana Lomma
Levana Lomma, Plaintiff

DECLARATION OF PLAINTIFF

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

Attached hereto as Exhibit “1” is the transcripts from the oral arguments on the defendant’s motion to dismiss in the related case *For Our Rights, et al. v. Ige, et al.*, No. 5CCV-20-0000091 which illustrates that disposition of the state case will not moot the federal controversy.

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

DATED: Kapa`a, Kaua`i, Hawai`i, April 23, 2021

Levana Lomma

Levana Lomma, Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of *Plaintiff's Explanation Concerning the Inappropriateness of Abstention Pending Disposition of Related Case For Our Rights, et al. v. Ige, et al.* 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: 04/23/2021

Levana Lomma

Levana Lomma

EXHIBIT "1"

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IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

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)	
FOR OUR RIGHTS, a Hawaii)	
Corporation, Et al.,)	
)	CAAP-21-0000024
Plaintiffs,)	5CCV-20-000091
)	
Vs.)	TRANSCRIPT OF
)	ELECTRONICALLY
DAVID IGE, in his official)	RECORDED PROCEEDINGS
capacity as Governor of the)	ON APPEAL
State of Hawaii, Et al.,)	
)	
Defendants.)	
)	
-----)	

TRANSCRIPT OF ELECTRONICALLY RECORDED PROCEEDINGS
ON APPEAL

had before the Honorable Kathleen N.A. Watanabe,
Circuit Court Judge presiding, on Tuesday, November
17, 2020, in the above-entitled matter.

Transcribed by:

Melissa Noble, RPR, CSR 376
State of Hawaii
Official Court Reporter

1 APPEARANCES:

2 (Counsel appearing via video conferencing)

3 Attorney for Plaintiffs Jody L. Broaddus, Esq.
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8 Attorney for Defendants Nicholas M. McLean
9 Deputy Attorney General
State of Hawaii

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1 **TUESDAY, NOVEMBER 17, 2020**

2 *******

3 THE BAILIFF: All rise. This court is
4 back in session, the Honorable Judge Kathleen N.A.
5 Watanabe presiding. Thank you.

6 Calling 5CCV 20-091, For Our Rights, et
7 al Vs. David Ige, et al. Motion to dismiss
8 plaintiff's first-amended complaint.

9 THE COURT: Good afternoon, Counsel.
10 Please state your names for the record beginning with
11 the plaintiff's attorney.

12 MS. BROADDUS: Thank you. My name is
13 Jody Broaddus. I'm an attorney with the Attorneys
14 for Freedom. Thank you, your Honor.

15 THE COURT: Okay. Good afternoon.
16 And for the defendants.

17 MR. MC LEAN: Good afternoon, your
18 Honor. Nicholas McLean from the Attorney General's
19 Office on behalf of Defendants David Ige, Clare
20 Connors, and the State of Hawaii.

21 THE COURT: All right. Good afternoon.
22 Now, I understand that there are other co-counsel
23 that may be listening in. I just wanted to make it
24 clear that the only attorneys who will be speaking
25 this afternoon will be Ms. Broaddus -- am I

1 pronouncing your name correctly?

2 MS. BROADDUS: That's correct, your
3 Honor. It's like "Broadway," Broaddus.

4 THE COURT: Okay. Thank you. And also
5 Mr. McLean.

6 And I'll note for the record also that
7 aside from Court staff, there are no spectators in
8 the courtroom. Okay. And this is a public hearing
9 and the doors are open. I just wanted to note for
10 the record that there is no one else in the
11 courtroom.

12 All right. So I'd like to, first of
13 all, acknowledge that the Court has reviewed the
14 defendants' motion to dismiss, the opposition that
15 was filed by the plaintiffs, and the reply that was
16 filed by the defendants.

17 Now, is there anything else that was
18 submitted that I have not acknowledged for the
19 record?

20 MS. BROADDUS: Not from the plaintiff's
21 perspective, your Honor.

22 THE COURT: Okay. Thank you. All
23 right.

24 MR. MC LEAN: Not from the defendants'
25 perspective.

1 THE COURT: Thank you, Mr. McLean. So
2 with that, we're going to begin with the movant.
3 Mr. McLean, statements in support of the motion to
4 dismiss.

5 MR. MC LEAN: Yes. Thank you, your
6 Honor.

7 We're generally prepared, I think, to
8 stand on our briefs subject to any particular
9 questions this Court might have. That said, I'd be
10 happy to just take a moment to briefly summarize the
11 arguments in support of our motion to dismiss. I
12 think that in reading plaintiff's first-amended
13 complaint, it appears (inaudible) to us that there
14 are really essentially (inaudible) in the current
15 complaint. I think first there's an allegation that
16 the governor exceeded his authority under HRS Chapter
17 127A by issuing additional emergency proclamations in
18 response to the COVID-19 pandemic.

19 And then second, the plaintiffs are
20 also asserting a constitutional claim that the
21 emergency proclamations are void on vagueness
22 grounds. So looking to the complaint, it seems to us
23 that those are really the two claims that are
24 alleged.

25 I think if you look at the opposition

1 to the motion to dismiss, there are a couple of other
2 possible claims, I think, that they referenced.

3 There's an allegation that, for example, COVID-19 is
4 not a true emergency or that the facts (inaudible) --

5 THE COURT: Mr. McLean --

6 MR. MC LEAN: -- justify the issuance
7 of an emergency and then --

8 THE COURT: Mr. McLean. Excuse me,
9 Mr. McLean. For some reason you're breaking up. I'm
10 not sure what it is.

11 THE CLERK: (Inaudible). Internet
12 connection.

13 THE COURT: Okay. Are you in your
14 office?

15 MR. MC LEAN: I am in my home office
16 currently. If you'd like, I could try to turn off my
17 video. Would that be more conducive? If there's a
18 (inaudible). It's never been a problem in the past.
19 I apologize. Can you hear me now?

20 THE COURT: Okay. Right now you sound
21 fine. There were two times when -- I'm not sure if
22 maybe it was your movement or where you're sitting,
23 but it seemed to have frozen for a few second --

24 MR. MC LEAN: Okay.

25 THE COURT: -- and then restarted.

1 MR. MC LEAN: Understood. Well, I
2 apologize for that, your Honor. With your Honor's
3 permission, if you'd like, I could turn off the video
4 for a few minutes and we could see if the problem
5 resolves itself or we could proceed and perhaps it
6 won't repeat.

7 THE COURT: Okay. Why don't you
8 proceed and let's see if this happens again.

9 MR. MC LEAN: Okay. Thank you, your
10 Honor. Pardon me, your Honor. Do I have you?

11 THE COURT: Yes. Go ahead.

12 MR. MC LEAN: Thank you. And so there
13 were two possible claims that it seems like the
14 plaintiffs are referencing in their -- in the
15 opposition to the motion to dismiss.

16 Number one, the idea that there's sort
17 of a factual challenge to whether COVID-19 is a true
18 emergency and that (inaudible) hasn't been, in our
19 view, alleged in the complaint. And then there is
20 also a reference to the nondelegation doctrine, and
21 again that's a claim that, in our view, is not
22 adequately alleged in the complaint itself.

23 THE COURT: Excuse me, Mr. McLean. It
24 happened two more times. Is there a strong internet
25 connection from where you're working?

1 MR. MC LEAN: Yes. I can -- if you'll
2 excuse me, I will try to ensure that we have a better
3 connection.

4 THE COURT: Okay.

5 MR. MC LEAN: Can you hear me now? Is
6 it --

7 THE COURT: I can hear you fine. If
8 you'd like to try and go forward, then let's see if
9 that happens.

10 MR. MC LEAN: If I may continue without
11 the video, your Honor, I think that may resolve any
12 bandwidth issues that there may have been.

13 THE COURT: Okay. Go ahead.

14 MR. MC LEAN: All right. Thank you,
15 your Honor.

16 And so there's a reference (inaudible)
17 in our view that, that is also not alleged in the
18 complaint. So (inaudible) two allegations in the
19 complaint, as I mentioned, are the use of additional
20 emergency proclamations under HRS Chapter 127A and
21 the void for vagueness claim.

22 So with reference first to the
23 additional emergency proclamations, plaintiff's
24 argument essentially is that there's only (inaudible)
25 60-day period to respond to --

1 THE COURT: Okay. I'm sorry.

2 MR. MC LEAN: -- underlying emergency
3 situation.

4 THE COURT: Excuse me, Mr. McLean.
5 It's happening again. I'm not sure what it is.

6 MR. MC LEAN: I'm very sorry about
7 that. Let me try switching to a different source and
8 I think, hopefully, that will work better. Your
9 Honor, I'm currently in the waiting room on a
10 different line if we can try to have me admitted on
11 that line.

12 THE COURT: Okay.

13 MR. MC LEAN: Thank you, your Honor.
14 Just to confirm, can you hear me now?

15 THE COURT: Yes.

16 MR. MC LEAN: And I apologize again for
17 the technical issues of the brave new world we're all
18 in.

19 But I think -- to pick up the thread, I
20 think the -- so the two claims, in our view, that are
21 alleged are the use of additional emergency
22 proclamations under Chapter 127A and the assertion of
23 a void for vagueness challenge by the plaintiffs.

24 Now, with respect to the second claim,
25 it's our view that there the mootness and standing

1 issues that we've raised in our complaint have
2 totally foreclosed that claim because they're
3 challenging an aspect of the emergency proclamations
4 that simply does not exist anymore. We've
5 subsequently made clear that additional emergency
6 proclamations fully supercede prior emergency
7 proclamations and replace those earlier proclamations
8 or those earlier restrictions.

9 So as we read it, their vagueness
10 challenge focuses on the potential shifts over time
11 in the emergency restrictions that are set forth in
12 the proclamations, but we've now -- we think the
13 current version makes abundantly clear that, that is
14 not -- is no longer an issue because there's a clear
15 language now going forward that additional emergency
16 proclamations supercede earlier issued proclamations.

17 And to the extent that plaintiffs are
18 trying to assert a facial challenge to the statute on
19 vagueness grounds, you know, we think that the law is
20 quite clear that, you know, you really are supposed
21 to be asserting a vagueness challenge as applied to
22 your own conduct rather than advancing sort of an
23 abstract claim about vagueness in the abstract or in
24 possible applications; that the much more appropriate
25 format or vehicle for raising a vagueness challenge

1 like this would be as a defense in an enforcement
2 action. So with respect to the vagueness challenge,
3 we think that these threshold issues of standing and
4 mootness fully dispose of that claim.

5 And then with respect to the first
6 claim, the use of sequential emergency proclamations,
7 in our view, there's a -- you know, when you look at
8 the text and the purpose and the structure of the
9 emergency power statute that's HRS Chapter 127A, we
10 think that it's clear that this argument is
11 foreclosed and it is not a reasonable reading of the
12 statute, and the core issue there is that there is
13 nothing in the text of the statute that prohibits the
14 use of additional emergency proclamations.

15 The legislative intent as set forth in
16 the purpose of the statute and in the legislative
17 history, we think, is very clear that the purpose of
18 this emergency powers statute was to give very broad
19 powers to the governor to respond to emergency
20 situations. And so to have this theory that you have
21 60 days to respond and then all the emergency powers
22 just disappear automatically, we simply don't think
23 that's a reasonable reading of the statute.

24 And in this regard, we think that the
25 Third Circuit Court's recent decision in Partel

1 (phonetic) Vs. Ige really confirms this reasoning.
2 And we've attached that to our reply brief and we
3 would certainly urge the Court to follow that
4 reasoning which we think is persuasive. So unless
5 your Honor has any further questions, I think that
6 summarizes our opposition.

7 THE COURT: Mr. McLean, are you still
8 standing on your argument that this Court's lacking
9 subject matter jurisdiction on the issue because of
10 the timing of the filing of the motions and the --
11 the complaint -- excuse me -- the first-amended
12 complaint? Are you still standing on that argument?

13 MR. MC LEAN: Well, I think with
14 respect to the -- yes, we are. We are arguing that
15 certainly to the extent they are challenging
16 provisions that no longer appear in the emergency
17 proclamations, it's our position that the case is
18 moot to that extent and mootness being an aspect of
19 subject matter jurisdiction. So yes, we would be
20 continuing to assert that.

21 THE COURT: Okay. And, you know, you
22 reference the opposition. One of the arguments made
23 in the opposition is that in the motion to dismiss,
24 the argument is made that subsequent proclamations
25 were based on new assessments of emergency

1 conditions, now the argument being that, if I
2 understand this correctly, and, of course,
3 Ms. Broaddus will have an opportunity to address it
4 in a few minutes -- but the argument being that the
5 statute doesn't say that you go through this analysis
6 regarding new assessments or certainly the
7 proclamations don't address specifically this process
8 of new assessments. So would you like to address
9 that?

10 MR. MC LEAN: Oh, absolutely, your
11 Honor, and thank you for the question. I think the
12 key aspect there is that there is, in fact, an
13 assessment by the governor with respect to each
14 additional emergency proclamation.

15 Now, we don't think there's any
16 obligation that assessment be sort of specifically
17 set forth or spelled out in the emergency
18 proclamation itself, but I think there's no question
19 that whenever the State and the governor issues a new
20 emergency proclamation, that is certainly not
21 something that's undertaken lightly and it always
22 involves an assessment of what the current status of
23 the emergencies are, you know, where things currently
24 stand.

25 And so it reflects both a policy

1 judgement and sort of an assessment of the underlying
2 empirical realities of COVID-19 whenever there's a
3 new proclamation issued.

4 And although the proclamation in the
5 "whereas" clause certainly references some of the
6 relevant factual predicates, it does not nor is it
7 required to reference all of the factual predicates
8 that underlay the decision to issue an additional
9 emergency proclamation.

10 THE COURT: All right. And the other
11 question I had was in the opposition there's an
12 argument made that, I guess, citizens in all of the
13 counties have suffered massive personal,
14 professional, financial, educational, et cetera,
15 disruptions and losses, and that it's not addressed
16 in the governor's proclamations. Now, I'd like you
17 to address that in light of the wording in the
18 statute.

19 MR. MC LEAN: Yes, your Honor. I think
20 that certainly there is no question that everyone in
21 State leadership, I think, takes very seriously the
22 impacts of all of these orders. It is necessarily, I
23 think, to some extent, a balancing act between the
24 effects of the emergency proclamation, the medical
25 and public health, advice that the State is

1 receiving, and ultimately there is no question these
2 are difficult choices that are embedded in the
3 governor's decision to issue an emergency
4 proclamation and the contents of those proclamations.

5 We certainly would never want to
6 minimize the hardship that the responses to COVID-19
7 potentially entails. I think that's certainly
8 something that is very much a consideration, but
9 ultimately it's a question for the governor as the,
10 you know, elected head of the government to make
11 those assessments and to promulgate emergency
12 proclamations as he judges appropriate in light of
13 all of the circumstances.

14 THE COURT: Well, actually, it's the
15 call of the legislature, correct, in terms of the
16 wording of the statute and the intent of the statute?

17 MR. MC LEAN: Yes, your Honor. I think
18 that the overall statutory framework is certainly a
19 matter of the legislative purpose, and it's our
20 position that the legislature has granted broad power
21 to decide how to use those emergency powers to the
22 governor in addition to his own inherent powers under
23 the State constitution.

24 But I think that -- to the extent the
25 plaintiffs are arguing that the effects of the

1 emergency proclamations are something that the
2 legislature -- to the extent that the plaintiffs are
3 arguing that because the emergency proclamations can
4 have substantial effects, if it's the plaintiff's
5 argument that because of that, the legislature
6 therefore wants to put on its absolute 60-day sort of
7 one-and-done rule that says you can never have any
8 emergency proclamations for a particular underlying
9 emergency after 60 days, we submit there simply isn't
10 any evidence that, that was, in fact, the
11 legislature's intent.

12 THE COURT: All right. Mr. McLean,
13 looking at the statute itself, if you look at
14 127A-14(d) --

15 MR. MC LEAN: Yes.

16 THE COURT: Now, the argument, as I
17 understand it, that the State is making is that the
18 governor is not precluded from subsequent
19 proclamations, emergency proclamations. The argument
20 made by the plaintiffs is that there is no specific
21 authority for the governor to take it past 60 days.

22 I mean, that's a very rough summary of the arguments.

23 Now, if you look at the wording in (d)
24 where it says, "Or by separate proclamation," doesn't
25 that at least intimate that there is an expectation

1 or certainly an allowance for an emergency
2 proclamation's life to go beyond the 60 days or for
3 there to be subsequent proclamations if the need
4 arises?

5 MR. MC LEAN: Yes, absolutely, your
6 Honor. That is certainly our position. And I think
7 whether you look at it as a provision for a separate
8 proclamation to extend a state of emergency or
9 whether you look at it as a supplementary state of
10 emergency -- so, in other words, you might look at it
11 as there's nothing to stop an additional state of
12 emergency from being declared, so you would look at
13 each additional supplementary proclamation as
14 establishing sort of an additional state of
15 emergency, or you could look at 127A-14(d) as
16 indicating the possibility of an extension of a
17 pre-existing state of emergency by a separate
18 proclamation. And we think both of those readings
19 are plausible, but whichever one the Court uses or
20 whichever one ultimately is relied on, the result is
21 the same.

22 THE COURT: All right. Thank you,
23 Mr. McLean.

24 MR. MC LEAN: Thank you, your Honor.

25 THE COURT: And I'd like to hear from

1 Ms. Broaddus.

2 MS. BROADDUS: Thank you, your Honor.
3 Again, my name is Jody Broaddus, and actually this is
4 my first time doing an oral argument at any court in
5 Hawaii and I'm very excited about this and I
6 appreciate the opportunity, especially on such an
7 important issue dealing with constitutional issues
8 here, statutory construction. That's why (inaudible)
9 when I got into law school, I didn't think I would be
10 taking this route, but I actually really enjoy it and
11 I think it's extremely important, and there's a lot
12 of things here that are important.

13 One thing I think to remember is that
14 it's important enough that good intentions even by
15 the government, you know, the (inaudible) notable,
16 it's still insufficient to uphold a government action
17 against a constitutional challenge. In other words,
18 just because the government means well, does not mean
19 that a statute or an action is constitutional in and
20 of itself.

21 Here we're dealing with a statutory
22 structure that's set forth by the legislation.
23 Certainly statutes for allowing emergency -- in
24 emergency situations, the governor and the government
25 to do certain things and they set the parameters for

1 that, and in that and -- this statute was actually
2 changed back in 2014. Prior to 2014, there was not a
3 60-day limitation. That was added in 2014. So at
4 that time when this was added, the legislation
5 decided hey, we need to put a limit on how long these
6 things can be in place. Otherwise, we end up in a
7 situation where a governor could enact a proclamation
8 that's indefinite and basically it's a governor
9 creating law.

10 So the legislation went into effect and
11 they decided we're going to enact this statute and
12 they changed some stuff around and made a lot of
13 different changes, but a critical one was adding this
14 60-day limitation. And it's important to look at the
15 statutory language here which says that a state of
16 emergency shall terminate automatically 60 days after
17 the issuance.

18 There's nothing -- and it talks about
19 the state of emergency. It doesn't mean an emergency
20 necessarily ends. Of course, that's not what the
21 statute says. But what it does is it limits the
22 governor to declaring a state of emergency beyond the
23 60 days. It automatically terminates. There's
24 nothing in the statute to resurrect a state of
25 emergency, and I think that's an important part

1 because the legislature certainly could have decided
2 that.

3 And if you think back in time when we
4 had a pretty bad volcano situation and the governor
5 did issue a proclamation and there were some
6 subsequent ones but they were not challenged, there
7 was a state of emergency that extended beyond that
8 time. So the legislation was aware that they
9 could -- there could be an emergency situation that
10 could extend beyond 60 days. The legislature has met
11 numerous times since then, and they have chosen not
12 to change that even since this COVID situation has
13 arisen, which was earlier this year just after the
14 bar exam in February.

15 In March, it really became a huge issue
16 and that's when things started changing.
17 Legislatures met numerous times here and could have
18 changed the language of the statute. They did not do
19 that. What they did was set a limitation on here
20 that they felt was appropriate and they didn't change
21 that. So upon the 60-day termination, the state of
22 emergency no longer is allowed to exist under this
23 statute. Would an emergency still exist? Yes.

24 THE COURT: Ms. Broaddus, two
25 questions --

1 MS. BROADDUS: Sure.

2 THE COURT: Your reference to the
3 statute -- of course, what you're leaving out is the
4 reference to the automatic termination 60 days after
5 the issuance or by a separate proclamation. So
6 certainly the governor has that authority as declared
7 by the legislature; correct?

8 MS. BROADDUS: You are correct, your
9 Honor. The governor has authority under the statute
10 that the state of emergency shall automatically
11 terminate within 60 days or it can terminate by a
12 separate proclamation of the governor. So he can
13 stop it sooner. So, for example, if he puts in an
14 emergency declaration like, let's say here with COVID
15 when there was a lot of restrictions, and COVID was
16 cured within 30 days, he could enter a proclamation
17 to terminate sooner, but it doesn't give the
18 authority to extend it beyond that time or resurrect
19 the state of emergency, is our position on that.

20 THE COURT: Okay. The other question I
21 have is it's interesting that you reference that the
22 legislature has met a number of times and have not
23 taken the opportunity to change the law. At the same
24 time, what would preclude the legislature from
25 passing emergency legislation if our policy makers

1 were of the belief that the governor was not
2 following the intent of the law as they passed -- I
3 mean, are they precluded from doing that?

4 MS. BROADDUS: They are not precluded.
5 And the thing is the legislature has the ability to
6 act but they also have the inability to act, and here
7 we don't know why they act or why they didn't act in
8 this circumstance. But there's also -- the 60 days
9 gives them time if they wanted to act where they
10 could issue more stringent laws or enact emergency
11 legislation. As you said, they chose not to do so,
12 and these are the legislatures. They are the people.
13 It's not a single person deciding on what they want
14 to do.

15 THE COURT: Right, but --

16 MS. BROADDUS: Yes --

17 THE COURT: Right, but we've been in a
18 pandemic for at least the last eight months, and as
19 you correctly noted, the legislature has convened.
20 They have specially convened and there's -- I'm not
21 aware of any attempt to amend the law, you know, of
22 127A-14. So I'm trying to understand, I guess, your
23 argument is that the legislature has chosen not to
24 extend the authority given to the governor. At the
25 same time, I guess it can be argued that they haven't

1 acted to change the statute.

2 MS. BROADDUS: You know, that's a fair
3 assessment, your Honor. They certainly could, but
4 then if you look at the wording of the statute is --
5 really, what's at stake here is when you look at the
6 plain meaning of the statute, it does not allow the
7 governor to resurrect a state of emergency. There's
8 nothing in the statute that allows it.

9 Now, also in the statute it says it's
10 forbidden, but that's not the normal way that we
11 would look at a statute because if that was the way
12 we look at statutes, well, the state of emergency in
13 all these statutes doesn't prevent the governor from
14 saying you can tar and feather someone. Well, it
15 doesn't say you can't. It doesn't say you can, so,
16 therefore, you can. We have that same argument here.

17 THE COURT: Okay. But what meaning do
18 you give to the wording in the statute with respect
19 to the phrase, "Or by a separate proclamation of the
20 governor"?

21 MS. BROADDUS: The way this is read is
22 a state of emergency shall terminate automatically
23 within 60 days or by separate proclamation of the
24 governor. So it can either terminate within which by
25 the 60 days automatically or the governor can

1 terminate sooner than the 60 days, is the way that I
2 believe the plain language of this -- is that it can
3 terminate at the 60 days or by separate order,
4 whichever occurs first. So you have something here
5 that there's also that language at the end that says
6 "whichever occurs first."

7 So it's either going to automatically
8 terminate within 60 days or it will terminate by an
9 earlier separate proclamation by the governor, so
10 that's my -- that's our position.

11 THE COURT: So your interpretation
12 doesn't support a subsequent proclamation from
13 being --

14 MS. BROADDUS: Absolutely. And,
15 actually, your Honor, that would render the
16 "whichever occurs first" -- when it talks about shall
17 terminate, whichever occurs first, a second
18 proclamation would be terminated by this 60 days if
19 there was a second one.

20 So to read the statute to say that a
21 governor has unilateral power to issue a proclamation
22 and can unilaterally extend it, renders the "shall
23 terminate automatically within 60 days" superfluous
24 and irrelevant as well as "whichever occurs first"
25 because here it's allowing a shall terminate in

1 either automatically 60 days or by separate
2 proclamation, whichever occurs first.

3 So when you read this statute as a
4 whole, it really doesn't allow for an extension
5 beyond that or to allow the governor to resurrect a
6 state of emergency.

7 THE COURT: Now, in the passage of a
8 subsequent emergency proclamation, what is your
9 position in terms of what that does to the previous
10 proclamation? Does it not terminate it?

11 MS. BROADDUS: No, our position is that
12 it would be invalid if it's past the 60 days. So
13 what could happen in a circumstance is the governor
14 could issue a proclamation within the 60 days, change
15 the proclamation, but it still would terminate within
16 the 60 days, or if the governor terminates it within
17 a different amount of time that's shorter than that
18 time period.

19 So there's nothing in the statute that
20 allows an extension of that 60 days, rather whichever
21 occurs first indicates that the maximum will be
22 60 days that any authority of the governor would
23 exist.

24 THE COURT: Okay. You can move on to
25 any other arguments you'd like to make.

1 MS. BROADDUS: Thank you, your Honor.
2 And I apologize. I don't want to repeat anything
3 that's already been in our briefs, but I would like
4 to address another point and that is talking about
5 this -- what's in these proclamations and how that's
6 impacted by the statutes and how it impacts the
7 people, how due process is implicated and just a
8 summary of that is this:

9 Under Hawaii law, as well as under the
10 emergency statutes, there's a quarantine statute and
11 then there's a quarantine enforcement under the
12 emergency management statutes. And I'll just tell
13 you that quarantine is HRS 127A-13, and the regular
14 statute is HRS 325A. Both of them have limitations on
15 quarantines, and there's some requirements to have a
16 quarantine even under the emergency statute. And
17 under that emergency statute, a quarantine can only
18 exist to segregate or quarantine or restrict two
19 types of people: One, people who have been infected;
20 that they know they have been; that there is still a
21 contamination that, that person has undergone. The
22 second one is if they're believed to be exposed to
23 that contamination. Those are the only two times
24 under even the emergency management statutes as well
25 as under the HRS regular scheme that a quarantine can

1 exist.

2 And here you have an overbroad, an
3 overreaching proclamation that quarantines everyone
4 even though the statute only limits quarantining to
5 those people affected or believed to be exposed, and
6 it limits on what you can do. And also under HRS
7 325-8, there's due process embedded in the statute
8 that allows for hearings. It requires the Court --
9 it requires the government to go to the Court to get
10 an order. That same type is not under the management
11 emergency ones. Under the emergency statutes, you
12 don't have to get that prior, but you still have to
13 have that limitations on those affected and those
14 believed to be exposed.

15 And here you have an overbroad,
16 overreaching statute that deprives people who are not
17 in those categories of their constitutional rights,
18 not only to due process, but the freedom to move
19 about, to have any type of rights. They're
20 restricted in all sorts of means here by not being
21 allowed to move about freely in society, by engaging
22 in ways to do their income that they normally would.
23 Obviously, the impact on Hawaii has been devastating
24 in every aspect to individuals and businesses.

25 So you look at this statute or the

1 proclamations -- so you have this issue on
2 constitutionality on being overbroad and how is that
3 affecting the plaintiffs in this case. Well, they're
4 restricted. They're restricted even though they
5 haven't been exposed or infected by a contamination.
6 They're still being restricted in violation of their
7 due process rights. So you're looking at how they
8 have been affected. They certainly are. They're
9 ordered to do these things, and if they don't, they
10 can be punished.

11 Mootness has come up before this Court.
12 We've extensively briefed that, and there's several
13 exceptions to mootness, and one of these is obviously
14 the capability of a repetition evading review, and
15 that's one of the problems -- situations we have here
16 where the government is claiming that well, hey,
17 there's different proclamations. We now decided
18 we're going to change it, so that will get rid of
19 this lawsuit, but maybe in the future we can still do
20 this and maybe we'll lose some other ones. We have a
21 situation where this can happen again and again and
22 again. So it is capable of repetition and evade of
23 review.

24 The second thing is there is a public
25 policy exception or public interest exception that

1 when things impact numerous amounts of the public or
2 the public in general -- so there's an exception for
3 that, that exists here.

4 You also have justiciability which
5 we're asking for an injunction, prohibit enforcement.
6 We're asking for declaratory relief, asking that the
7 (inaudible) unlawful or unconstitutional. Then we're
8 also asking for declaratory relief, that the
9 governor's rules should not be cited as legal
10 authority or source of law. It's not evidence.

11 So those are some of the things that
12 we're asking for, which I realize those -- the
13 details of those are not at issue here, but the point
14 is, is mootness has been raised. But we have these
15 issues here that we -- that put it outside that or
16 fall into the exception of the mootness argument.

17 Your Honor, I know we briefed a lot of
18 stuff. You had an extensive amount of information to
19 read and I appreciate your patience, and, obviously,
20 you've gone through that in detail. I don't know if
21 there is something specific that you'd like me to
22 address --

23 THE COURT: I had a few other
24 questions. First of all, I'd like you to comment on
25 the case that came out of the Third Circuit. I think

1 it's Partel (phonetic).

2 MS. BROADDUS: Partel, yes, your Honor.

3 THE COURT: Yes, the decision that was
4 issued by judge which appears to basically have
5 addressed the issue that's before this Court today.

6 MS. BROADDUS: You are correct, your
7 Honor. There's some issues -- I don't know what was
8 actually argued or briefed in that case. I don't
9 know what was presented to that case.

10 THE COURT: Okay. You didn't read
11 the -- did you read the opinion or the --

12 MS. BROADDUS: I did, and I do have the
13 opinion, yes, so I'm basing this on the opinion. And
14 one of the things that the Court did in the Third
15 Circuit is they said well, this statute that has the
16 60-day limitation -- well, it doesn't specifically
17 prohibit the governor from doing it even though it
18 doesn't say he can, it doesn't say he can't;
19 therefore, he can.

20 And that goes to my point that I
21 disagree respectfully with that Court's decision on
22 that. If that were the case, you could take any
23 statute and if it doesn't say one thing or another,
24 then you could do that. For example, here where I
25 mentioned earlier, which I know is an exaggeration,

1 that the governor could say and we're going to tar --
2 the proclamation is we're going to tar and feather
3 anybody who violates this. Well, the proclamation
4 doesn't say that you can do that. Well, it doesn't
5 say you can't either, so, therefore, you're allowed
6 to do. But it also avoids the plain language of the
7 statute which I believe -- which we've talked about,
8 your Honor. I don't want to repeat that. But it
9 talks about termination. It doesn't talk about
10 resurrection of a state of emergency.

11 THE COURT: All right. Well, you know,
12 going to the statute itself, 127A, the reference in
13 that statute is to emergencies of unprecedented size
14 and destructiveness. Also, the purpose of the
15 statute is to empower the governor to take any and
16 all steps necessary or appropriate to carry out the
17 purposes of the chapter.

18 And this is -- you know, I'm
19 referencing what's in the reply by the State. This
20 is on the top of page 3. So, you know, we're talking
21 about -- we're not talking about, you know, any old
22 emergency. We're talking about what is specifically
23 referenced in the statute.

24 So do you hold that position, again
25 knowing specifically what is addressed in 127A?

1 MS. BROADDUS: Your Honor, I believe
2 that there are restrictions even though it says
3 there's not. First of all and foremost, you have
4 constitutional restrictions. This does not allow --
5 just because there's a statute that allows a governor
6 to execute whatever he needs to, whatever he wants to
7 do on an order or in an emergency, there is still
8 constitutional protections that are in play. And
9 even according to what the laws say and what Hawaii
10 law is, you still can't deprive people of their
11 rights. There are limitations to that. When it's
12 unfettered, you have some problems and that's what
13 you have here.

14 There are -- but there are limitations.
15 And I think it's important to note that when the
16 legislature puts in limitations, that those should be
17 noted. Those shouldn't be disregarded, and that's
18 what's happening here is yes, you can have -- they're
19 going to give you the authority to do what's
20 necessary, but I believe to say to do what's
21 necessary, does not mean to ignore what the statutory
22 language allows you to do.

23 So I think by expanding beyond and
24 creating new information or new laws that don't exist
25 under what is authorized -- I mean, the reality is,

1 is the legislature went to quite an extensive amount
2 of work on doing additional powers in 127A-13 and
3 subsection (12) as well. The legislature went to
4 extensive -- a lot of work on this to allow it and
5 set forth here are numerous types of things that you
6 can do while during the emergency period, and I think
7 what they're saying is you can do certain things, but
8 you can't expand beyond limitations that are set
9 forth in the statute because if they're allowed to do
10 whatever is necessary, the governor under that
11 interpretation can say well, I'm going to enact new
12 laws that the legislature has to accept and put into
13 HRS that these are my laws that I want to add.

14 That would be another example of saying
15 well, he was doing it because it's a state of
16 emergency and they want to have him have a lot of
17 authority to do so, but obviously, that's not
18 something that he can do. He can't go and create new
19 laws. There is a restriction on that.

20 The state of these emergency statutes
21 do allow him to create certain things for a limited
22 amount of time which is set forth in the statute.
23 It's not unfettered where he can just automatically
24 say this is a new law and we're going to keep it in
25 place for whatever -- until I say.

1 THE COURT: Well, let me ask you
2 another question: So what happens when there's an
3 emergency that goes beyond the 60-day period such as
4 what we're currently in right now with the pandemic
5 that has taken us at least eight months?

6 MS. BROADDUS: I think that's a
7 situation that is important for the people of Hawaii
8 to have their elected representatives deal with that
9 situation. That's why we have the legislature. That
10 is why the people elect those people is to decide and
11 make laws and do things that they think is necessary.

12 So I think even in emergencies, as you
13 said, the legislature could create emergency
14 proclamations and emergency legislation. But you got
15 to figure these people elected -- the people of
16 Hawaii elected these officials to make those
17 decisions, and to enact legislation they would like
18 to have, they think they would like to have.

19 And here what they did is they thought
20 that people wanted this restriction and they put it
21 in the statute. And if there is an emergency that
22 goes beyond that period of time and the governor's
23 proclamation is no longer valid because it
24 automatically terminated, well, it was terminated --
25 or it was terminated by the governor, then the

1 legislature has the duty and the obligation to step
2 in and do what the people want them to do.

3 THE COURT: All right. And I'd like
4 you to also address the case that you relied on which
5 is Midwest Institute which references the statute
6 that is not in the same ballpark, frankly, as the
7 Hawaii statute.

8 MS. BROADDUS: Yes, that's the case out
9 of Michigan, and the statutes aren't identical but
10 there's a lot of similarities. For example, the
11 quarantine statutes are identical, which they
12 addressed as well, but they also talk about that the
13 important part is when a governor acts or when a
14 government (inaudible) they still are confined by
15 the constitutional ramifications of that, and that
16 they still have -- their authority is limited by two
17 things: Number one, by what congress has allowed
18 them and limited them to do, and number two, by the
19 constitution, both the state and federal
20 constitutions obviously. But those are ramifications
21 related to that and I think those are important
22 things to recognize. The Court in Michigan also
23 (inaudible).

24 THE COURT: Excuse me. I'm sorry. I
25 apologize for interrupting you. I just want to

1 remind everyone who is participating this afternoon
2 to mute yourself. We're getting -- someone's
3 conversation is interrupting.

4 MR. MC LEAN: Okay. Thank you.

5 THE COURT: Okay. Thank you. I'm
6 sorry. You may continue.

7 MS. BROADDUS: Thank you, your Honor.
8 The Court in Michigan was very careful and they
9 really did, I think, a good job analyzing the issue
10 that is present in all these cases throughout the
11 country is that there's a balance between what a
12 government can do and the constitutional rights of
13 people. And when looked at -- and it looked at the
14 different statutes, that there is some minor
15 differences between the statutes, but yes, the big
16 portion of that case is dedicated to people still
17 have rights. Whether they choose to enforce them is
18 up to them, but they still have their rights. They
19 still have the ability to make good and bad decisions
20 on behalf of themselves. It's not the government's
21 role to play a parent and constantly put restraints
22 on its citizens. It's actually the opposite.

23 The constitution and this country has
24 been founded on personal freedoms, and that state
25 recognized -- the Michigan courts -- I'm sorry --

1 there, the Michigan Courts recognized that there is
2 that importance.

3 However, there are certain things the
4 government is allowed to do, but when they cross the
5 line and when they get into those areas where they
6 exceed their authority, either statutory authority or
7 constitutional authority, then it's unconstitutional
8 and inappropriate and unlawful.

9 THE COURT: All right. I guess the big
10 difference that I see between the statutes is that
11 the Michigan statute basically requires the governor
12 to go back to the legislature and get permission for
13 an extension.

14 MS. BROADDUS: Correct. That option is
15 not available under Hawaii law. Hawaii could have
16 put that into their statute. They could have put a
17 lot of things in there. They could have put in there
18 that the governor is allowed to resurrect a state of
19 emergency that extends beyond the 60 days. They
20 could have put in there that -- you know, they could
21 have put a lot of things in them, but they didn't do
22 that.

23 So I do understand there is a
24 difference in the statute, your Honor, that they did
25 have -- they directed their governor to do something

1 specific. Here, it doesn't even provide the governor
2 with that option. It leaves it up to the legislature
3 and the people electing those people to decide how
4 they want to go forward after the 60-day terminates.

5 THE COURT: So in your opinion, which
6 statute is more restrictive?

7 MS. BROADDUS: I believe that the
8 Hawaii statute is a little more restrictive, your
9 Honor, and the reason for that is the governor here
10 is limited that he can't go back and can't extend
11 under the statute. Under the plain meaning of the
12 statute, the state of emergency is going to terminate
13 in 60 days or unless the governor does a proclamation
14 terminating it sooner. It does not give authority to
15 go to the legislature.

16 Certainly the governor could have said
17 hey, we need more authority on this. I need
18 authority to be able to do this because when
19 (inaudible) issue emergency legislation. That way I
20 can do that. You know, he certainly could have. But
21 I think that -- to answer your question, your Honor,
22 I think that the statute in Michigan, because it does
23 allow another means for a governor to do something
24 different, that it's a little more broad.

25 THE COURT: And I also wanted to give

1 you an opportunity to address the argument, as I
2 understand it, made by the State in that the -- in
3 determining the intent behind these statutes, that
4 one has to keep in mind the inherent executive powers
5 that the governor enjoys.

6 So how do you address that in terms of,
7 you know, your arguments about the governor doesn't
8 have unfettered discretion and basically he has his
9 hands tied unless he's specifically given authority
10 by the legislature?

11 MS. BROADDUS: That's a process of
12 government, unfortunately, your Honor. Here we have
13 a situation that if the governor wanted more
14 authority, he could certainly talk to the
15 legislature. We saw President Trump constantly going
16 to congress asking -- you know, telling them to do
17 this, telling them to do that. I hate using that as
18 an example. I apologize, your Honor. But that's an
19 example that if the governor wanted more authority,
20 he could have gone to them and said hey, this is
21 restricting me. I need more authority. I want you
22 guys to do this. He certainly could have taken steps
23 and have that taken care of.

24 I just think that the way this is
25 worded -- and I understand, your Honor. I'm not

1 trying to minimize any emergency situation. You
2 know, there's a lot of things going on in the world
3 right now and this is a unique time, but that doesn't
4 still afford someone the right to just violate --
5 yes, he's the governor. Yes, he's the top official
6 in the state, but he's still subject to
7 constitutional challenges, and that's what we're
8 looking at here. He's still required to abide by the
9 laws. He's still required to abide by the
10 constitutions. He still has those types of things
11 that reign in what he can and cannot do.

12 So I don't think that it's meant for
13 him to be a dictator of Hawaii. I don't think that
14 what the statutory scheme is intended to do -- I
15 think it's structured to say here's what the people
16 of Hawaii want and allow the governor to do -- to
17 govern us.

18 THE COURT: Okay. Thank you.

19 Mr. McLean.

20 MR. MC LEAN: Yes thank you, your
21 Honor. Just very briefly, a couple of points if I
22 can respond. First, I think it's really important to
23 bear in mind that, you know, this is a motion to
24 dismiss. It's focused on the face of the plaintiff's
25 complaint. And, you know, we've heard a lot of

1 wide-ranging arguments, but I think a lot of them are
2 not apparent from the face of the complaint itself,
3 and so I do think it's important to bear that in
4 mind.

5 So, for example, with respect to the
6 particular quarantine powers set forth in 127A-13, I
7 think your Honor is exactly right. It's important to
8 reference also the powers that are set forth in
9 127A-12 and elsewhere in the statute, but I think
10 more broadly, that's simply not a challenge that's
11 been alleged in the complaint, and so we feel that
12 argument is not properly before the Court at this
13 point.

14 And then I think more broadly, there's
15 a sort of hypothetical that we heard a few times
16 about well, could the governor order somebody, you
17 know, tarred and feathered or issue an emergency
18 proclamation, and I think that example is just
19 completely different because here we have a statute
20 127A, 127A-14, that specifically says the governor
21 may declare a state of emergency. And we have a
22 provision in 127A -- 127A(d) that -- 127A-14(d),
23 rather -- excuse me -- that talks about the 60-day
24 period, but there is a clear authorization to declare
25 emergencies, and there is nothing that says and you

1 can only have one emergency.

2 And so here it's not that there's
3 simply a suggestion that this is a new power that's
4 nowhere to be found in the statute, it is
5 specifically provided for in the statute that the
6 governor may issue emergency proclamations, and
7 there's nothing in the statute that says and the
8 governor may only issue one emergency proclamation or
9 can never issue an emergency proclamation 60 days
10 after an underlying emergency has begun, so we can we
11 think that is an important distinguishing factor.

12 And I think to pick up, again, on the
13 point about the complaint, I mean, there are
14 certainly claims that other plaintiffs have made with
15 respect to, for example, the due process clause, the
16 right to travel, equal protection. Those arguments
17 again are not before this Court because they simply
18 are not alleged in the complaint. So to the extent
19 there's a focus on constitutional rights, in reading
20 the first-amended complaint the only reference that
21 appears, as far as I can tell, to constitutional
22 rights is the due process clause in relation to the
23 void for vagueness challenge.

24 So I think we just (inaudible)
25 emphasize again that it's really the scope of the

1 allegations in the complaint that indicate the scope
2 of the review at this point. And unless your Honor
3 has any other additional questions, I don't have
4 anything further.

5 THE COURT: I'd just like you to
6 quickly compare the Michigan statute with the Hawaii
7 statute.

8 MR. MC LEAN: Absolutely, your Honor.
9 The Michigan statute specifically says that the
10 governor shall terminate an emergency proclamation
11 after a certain period of time, and it provides -- it
12 says if you want to have any kind of extension beyond
13 that or any kind of anything beyond that, it
14 essentially orders and it provides for a very
15 particular way. It essentially proscribes how the --
16 how an extension is to happen, and that makes it very
17 different from our statute.

18 We certainly disagree with plaintiffs
19 that the Michigan statute is less restrictive than
20 the Hawaii statute. In our view, the Michigan
21 statute is much more restrictive because it doesn't
22 just say you can issue an emergency proclamation and
23 you can issue a separate or supplementary
24 proclamation. Rather, it says and the legislature
25 must be involved if there is going to be any kind of

1 extension beyond this.

2 And so it's our position that by
3 proscribing how an additional proclamation has to be
4 issued, that makes it considerably more restrictive.
5 And so it's clear that, I think, is a basis to why
6 the decision is distinguishable. And we think that
7 the Illinois decisions are more appropriate. And, of
8 course, the most appropriate is Partel (phonetic)
9 which considered this very statute as (inaudible).

10 THE COURT: All right. Thank you.

11 Anything else either side feels
12 compelled to state for the record?

13 MS. BROADDUS: I have nothing further
14 from the plaintiff, your Honor.

15 MR. MC LEAN: Nothing else, your Honor.

16 THE COURT: All right. Then I'd like
17 to thank both counsel. I'm going to take this under
18 advisement. You've been very helpful in responding
19 to the questions that the Court has had and I'd like
20 to basically mull over your responses to the Court's
21 questions and incorporate that into the analysis that
22 the Court is doing. You can expect you'll have a
23 decision from the Court. It will be later this week
24 okay.

25 MS. BROADDUS: Thank you.

1 THE COURT: Thank you, very much.

2 MR. MC LEAN: Thank you, your Honor.

3 MS. BROADDUS: Thank you, your Honor.

4 Have a great Tuesday.

5 THE COURT: Thank you. All right.

6 With that, court is adjourned.

7

8 (At which time the proceedings were concluded.)

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C E R T I F I C A T E

I, Melissa Noble, a Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages, 1 through 47 inclusive, were transcribed to the best of my ability and comprise a full, true and correct transcript of the proceedings had in connection with the above-entitled cause

Dated this 15th day of March, 2021.

/s/ Melissa Noble, RPR, CSR 376

Melissa Noble, RPR, CSR 376
State of Hawaii
Official Court Reporter