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CLARE E. CONNORS and DAVID Y. IGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

LEVANA LOMMA,

Plaintiff,

v.

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; and
DEREK S.K. KAWAKAMI, in his
individual and official capacity as Mayor
of the County of Kaua'i,

Defendants.

Civil No.: 1:20-cv-00456-JAO-RT

**STATE DEFENDANTS'
RESPONSE TO ORDER
REQUESTING EXPLANATION
WHETHER A STAY IS
APPROPRIATE PENDING THE
DISPOSITION OF THE STATE
COURT APPEAL IN FOR OUR
RIGHTS, ET AL. V. IGE, ET
AL.; DECLARATION OF EWAN
C. RAYNER; EXHIBITS "A"-
"D"; CERTIFICATE OF
SERVICE**

District Judge: Hon. Jill A. Otake

Magistrate Judge: Rom A. Trader

No Trial Date Set

**STATE DEFENDANTS' RESPONSE
TO ORDER REQUESTING EXPLANATION WHETHER A STAY IS
APPROPRIATE PENDING THE DISPOSITION OF THE STATE COURT
APPEAL IN FOR OUR RIGHTS, ET AL. V. IGE, ET AL.**

I. Relevant Background

Plaintiff's Second Amended Complaint ("SAC") is essentially a constitutional challenge to the Governor's Mask Mandate, which requires individuals in certain circumstances to wear a face covering. First, Plaintiff suggests that the Mask Mandate "violates the plaintiff's First Amendment rights to free speech and expression under the United States Constitution abridging the plaintiff's ability to speak audibly and clearly, [and] removing facial expression which is an aspect of the content of speech[.]" *Id.* at ¶ 2. Second, Plaintiff asserts that the Mask Mandate "forc[es] the adoption of a cult-like religious tradition, which violates plaintiff's own religious convictions." *Id.* Finally, Plaintiff asserts that the Mask Mandate "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.*

Read liberally, the SAC may also intend to challenge the Mask Mandate under State law, specifically that the "government has not shown the Covid-19 disease qualifies as a public health emergency under HRS 127A-2[.]" SAC at ¶65.

In *For Our Rights et al. v. Ige et al.*, No. 5CCV-20-0000091, the plaintiffs first alleged that Hawai'i Revised Statutes (HRS) Chapter 127A only authorized

the Governor to issue a single, 60-day emergency proclamation and that all proclamations or supplements issued after that 60-day period were invalid. *Id.* at ¶¶35-48. Second, they alleged that the challenged emergency proclamations were unconstitutionally vague. *Id.* at ¶62.

Among other things, the plaintiffs in *For Our Rights* requested that the Court issue a declaratory judgment “stating that the Eleventh Proclamation, the Tenth Proclamation, and the June 10th Supplement inclusive of all exhibits and any existing or predecessor documents they include by reference, are unconstitutional, invalid, null, and void.” *Id.*, Prayer for Relief.

The State in *For Our Rights* moved to dismiss the complaint and on November 19, 2020, the Court granted the State’s motion. *See Exhibit B, For Our Rights v. Ige, Order Granting Motion to Dismiss.* In relevant part, the order stated:

The Court agrees with, and hereby incorporates, the arguments presented by the Defendants. 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. 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.

Id.

The Court in *For Our Rights* entered final judgment in favor of the State Defendants, *See Exhibit C, For Our Rights, Final Judgment*, and on March 10, 2021, the plaintiffs filed a notice of appeal. *See Exhibit D, For Our Rights v. Ige,*

Notice of Appeal to the Hawai'i Intermediate Court of Appeals. The appeal is docketed as *For Our Rights, et. al. v. Ige, et al.*, CAAP-21-0000024, and the opening brief is due on April 29, 2021.

II. Legal Standard:

A District Court has inherent discretionary power to stay proceedings:

Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among those competing interests are [1] the possible damage which may result from the granting of a stay, [2] the hardship or inequity which a party may suffer in being required to go forward, and [3] the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265 (9th Cir.1962)).

In addition, federal courts may invoke *Pullman* abstention, “an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions.” *San Remo Hotel v. City & Cty. of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998). *Pullman* abstention is 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.

Id.

III. Discussion

With respect to the first *Lockyer* factor, there will be no damage should the Court stay this case. As discussed in the State Defendants' motion to dismiss Plaintiff's amended complaint, the Mask Mandate does not infringe on any protected constitutional rights nor has Plaintiff pled any cognizable constitutional injury. To the contrary, the public health and safety of the people of Hawaii will be significantly jeopardized should Plaintiff be allowed to thwart an important component of the government's emergency response.

With respect to the third factor concerning the orderly course of justice, an appellate decision in *For Our Rights* could conceivably affect this case by rendering it moot: Because the plaintiffs in *For Our Rights* seek declaratory and injunctive relief that would in effect invalidate any emergency proclamation issued by the Governor more than sixty days after the very first COVID-19 emergency proclamation,¹ if plaintiff in *For Our Rights* should ultimately prevail on appeal, Plaintiff's claims theoretically could be mooted because the challenged Mask Mandate would be invalidated and thus no longer in effect.

Regarding *Pullman* abstention, the first prong is satisfied because the

¹ Governor Ige's first proclamation relating to the COVID-19 pandemic and declaring an emergency was issued on March 4, 2020. https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation_COVID-19.pdf (last visited April 12, 2021). Thus, plaintiffs in *For Our Rights* seek to invalidate any proclamation that extended beyond May 3, 2020.

requirement for individuals to wear masks during a pandemic plainly “touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.” *Sinclair Oil Corp. v. Cty. of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996). The second prong is also satisfied because, as discussed above, the state court ruling in *For Our Rights* could moot this case. And finally, the third prong is likely satisfied because, while State Defendants are confident in the State’s position in the *For Our Rights* case and believe the State will ultimately prevail, it is true that the State appellate courts have not previously ruled on the question that *For Our Rights* raises. *See Sinclair Oil Corp.*, 96 F.3d at 410 (ruling that the third prong was satisfied because the land use plan in question “has not yet been challenged in the state courts.”).

DATED: Honolulu, Hawai‘i, April 12, 2021.

/s/ Ewan C. Rayner

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