CAAP-21-0000024

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

FOR OUR RIGHTS, a Hawai‘i corporation, DIANA LOMMA, DAVID R. HAMMAN, RANDI HAMMAN, JANET EISENBACH, LEVANA LOMMA KEIKAIKA, LAWRENCE K. PAILLE, GERALYN SCHULKIND, LEONARD SHULKIND, DANIEL HASHIMOTO, CHRISTINA COLE, FRANCESCA WOOLGER, NA‘EA LINDSEY, MICHAEL MAZZONE, LANETTE J.HARLEY, and LORRAINE L. PATCH,

Plaintiffs-Appellants,

v.

DAVID IGE, in his official capacity as the Governor of the State of Hawai‘i; CLARE E. CONNORS, in her official capacity as Attorney General of the State of Hawai‘i, and the STATE OF HAWAI‘I,

Defendants-Appellees.

CASE NO. 5CCV-20-0091
(OTHER CIVIL ACTION)

APPEAL FROM ENTRY OF FINAL JUDGMENT FILED DECEMBER 24, 2020

CIRCUIT COURT OF THE FIFTH CIRCUIT, STATE OF HAWAI‘I

HON. KATHLEEN N.A. WATANABE

CLARE E. CONNORS 7936
Attorney General of the State of Hawai‘i

KIMBERLY T. GUIDRY 7813
Solicitor General of the State of Hawai‘i

NICHOLAS M. MCLEAN 10676
EWAN C. RAYNER 10222
DAVID D. DAY 9427
CRAIG Y. IHA 7919
Deputy Attorneys General
Department of the Attorney General
425 Queen Street
Honolulu, Hawai‘i 96813

Attorneys for Defendants-Appellees DAVID IGE, in his official capacity as Governor of the State of Hawai‘i; CLARE E. CONNORS, in her official capacity as Attorney General of the State of Hawai‘i; and the STATE OF HAWAI‘I

ANSWERING BRIEF OF DEFENDANTS-APPELLEES GOVERNOR DAVID IGE, ATTORNEY GENERAL CLARE E. CONNORS, AND THE STATE OF HAWAI‘I

DECLARATION OF NICHOLAS M. MCLEAN

EXHIBITS “1” - “25”

CERTIFICATE OF SERVICE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Legislative History

Other Authorities

ANSWERING BRIEF OF DEFENDANTS-APPELLEES GOVERNOR DAVID IGE, ATTORNEY GENERAL CLARE E. CONNORS, AND THE STATE OF HAWAIʻI

Defendants-Appellees DAVID IGE, in his official capacity as the Governor of the State of Hawaiʻi; CLARE E. CONNORS, in her official capacity as the Attorney General of the State of Hawaiʻi; and the STATE OF HAWAIʻI (collectively, "**Appellees**" or "**the State**") submit this Answering Brief in response to Appellants' Opening Brief ("**AOB**").[1]

I. INTRODUCTION

Appellants advance a broad but meritless challenge to the State's response to the COVID-19 pandemic. In particular, Appellants argue that the Governor and mayors have been legally barred from establishing any state of emergency to deal with the COVID-19 pandemic since at least May 2020, a mere two months after COVID-19 began to threaten Hawaiʻi. If the Court were to agree with Appellants, the results would be disruptive and dangerous: Many actions taken by the State might be invalidated—from the eviction moratorium,[2] to the pre-travel testing program,[3] to vaccine-promotion efforts.[4] Because Appellants' arguments are legally infirm, the Court should affirm the circuit court's dismissal of the complaint. Alternatively, the Court should dismiss this appeal on standing, mootness, or political question grounds.

Appellants' Opening Brief lists five points of error, but their challenge boils down to two core theories—one statutory claim (point of error 1) and one constitutional claim (point of error 3). Both lack merit. First, Appellants contend (AOB8-22) that Hawaii's emergency-powers statute, HRS chapter 127A, limits the Governor to a single 60-day emergency period related to the COVID-19 pandemic. Appellants theorize that all emergency periods associated with subsequent proclamations relating to COVID-19 have been unlawful. But Appellants misread the statute: Nothing in chapter 127A limits the State to just one 60-day emergency period. Under HRS § 127A-14(d), when an underlying emergency lasts for more than 60 days, the Governor may issue proclamations establishing additional emergency periods, each lasting up to 60 days.

---

[1] JIMS Dkt. No. 28, 33.

[2] *See, e.g.*, Office of the Governor, *Twenty-First Proclamation Related to the COVID-19 Emergency* (June 7, 2021), https://governor.hawaii.gov/wp-content/uploads/2021/06/2106080-ATG_21st-Emergency-Proclamation-for-COVID-19-distribution-signed.pdf (last visited July 7, 2021) (McLean Decl. Ex. 1) [Twenty-First Proclamation].

[3] *See, e.g.*, Twenty-First Proclamation at 8-10.

[4] *See, e.g.*, Twenty-First Proclamation Ex. A ("The following rules are necessary … to provide for the performance of COVID-19 vaccinations.").

This has been crucial in enabling the State to respond to an ongoing emergency. The alternative—interpreting chapter 127A in a way that "depriv[es] the governor of authority to respond to a continuing crisis"—"would be an absurd outcome because an emergency can certainly last more than sixty days, as the COVID-19 pandemic illustrates."[5]

Second, Appellants argue (AOB22-26) that chapter 127A is unconstitutional because it transgresses the limits of the "nondelegation doctrine." That argument also fails. To start, Appellants did not allege this claim in their complaint and cannot make it on appeal. In any event, chapter 127A does not violate the nondelegation doctrine or separation-of-powers principles. Hawai'i courts properly recognize the need for "flexibility"[6] in the separation of powers. The delegation of emergency powers to the Governor comports with constitutional requirements because: (1) it is limited in scope; (2) the Legislature has provided meaningful guideposts regarding how the powers should be exercised; and (3) the Legislature has retained important checks on executive power. Well-reasoned judicial decisions have upheld similar delegations of emergency power. If the Court reaches the merits of this waived constitutional challenge, it should follow the approach of the California,[7] Connecticut,[8] Kentucky,[9] Massachusetts,[10] New Mexico,[11] and Pennsylvania[12] courts and reject this challenge—not follow an outlier, unpersuasive approach adopted by razor-thin majorities on the Wisconsin[13] and Michigan[14] supreme courts.

Not only are Appellants' claims meritless, they are also barred by three justiciability doctrines: mootness, standing, and the political question doctrine. Appellants contend that the

---

[5] Robert H. Thomas, *Hoist the Yellow Flag and Spam® Up: The Separation of Powers Limitation on Hawaii's Emergency Authority*, 43 U. Haw. L. Rev. 71, 90 (2020); *see State v. Sylva*, 61 Haw. 385, 388, 605 P.2d 496, 498 (1980) (courts will not interpret statutes in a that "lead[s] to … unreasonable, unjust, impracticable, or absurd consequences").
[6] *Biscoe v. Tanaka*, 76 Hawai'i 380, 383, 878 P.2d 719, 722 (1994) (quotation omitted).
[7] *Newsom v. Superior Ct. of Sutter Cty.*, 278 Cal. Rptr. 3d 397 (2021) (McLean Decl. Ex. 2) [*Newsom*].
[8] *Casey v. Lamont*, -- A.3d --, 2021 WL 1181937 (Conn. 2021) (McLean Decl. Ex. 3) [*Casey*].
[9] *Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020) (McLean Decl. Ex. 4) [*Beshear*].
[10] *Desrosiers v. Governor*, 158 N.E.3d 827 (Mass. 2020) (McLean Decl. Ex. 5) [*Desrosiers*].
[11] *Grisham v. Romero*, 483 P.3d 545 (N.M. 2021) (McLean Decl. Ex. 6) [*Grisham*].
[12] *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020) (McLean Decl. Ex. 7) [*DeVito*].
[13] *Fabick v. Evers*, 956 N.W.2d 856 (Wisc. 2021) (McLean Decl. Ex. 8) [*Fabick*].
[14] *Midwest Inst. of Health, PLLC v. Gov. of Mich.*, 958 N.W.2d 1 (Mich. 2020) (McLean Decl. Ex. 9) [*Michigan Certified Questions*].

circuit court erred by determining that this case was moot in part. The circuit court did not err. Rather, it correctly concluded that "Plaintiffs' claim in regards to the vagueness of prior emergency proclamations, which are no longer in effect, is … moot and is dismissed with prejudice." JEFS Dkt. No. 77 at 2.[15] In any event, Appellants have abandoned their void-for-vagueness challenge in this appeal. Appellants further argue that (1) the case is not moot and (2) even if it were, an exception to mootness should apply. These arguments fail.

Appellants also lack standing. They cannot establish the existence of an "actual controversy," nor can they establish that "antagonistic claims exist between the parties … that indicate imminent and inevitable litigation," nor "a concrete interest in a legal relation, status, right, or privilege[.]" *Tax Found. of Hawai'i v. State*, 144 Hawai'i 175, 202, 439 P.3d 127, 154 (2019). Appellants do not allege that they have ever been cited for, or suspected of, violating the State's emergency proclamations or rules.[16] Absent a "concrete" controversy, a "generalized grievance about the correctness of governmental conduct," *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016), is not cognizable. Additionally, Appellants cannot state a claim under HRS § 632-1 because there is no private right of action to enforce HRS § 127A-14(d).

Finally, separate from Appellants' lack of standing, this Court should also decline to hear Appellants' political question doctrine claim because, among other things, the issue of when—and under what circumstances—to issue emergency proclamations necessarily implicates "policy determination[s] … of a kind normally reserved for nonjudicial discretion."[17]

Thus, the Court should affirm the dismissal of Appellants' complaint. Alternatively, the Court should dismiss this appeal based on the mootness, standing, or political question doctrines.

II. COUNTERSTATEMENT OF THE CASE

A. The COVID-19 Pandemic and the State of Hawaii's Response

SARS-CoV-2, also known as COVID-19,[18] is a respiratory disease first detected in December 2019. "The COVID-19 virus is highly infectious and can be transmitted easily from

---

[15] The Record on Appeal is found at JIMS Docket Entry No. 21 & No. 22 in CAAP-21-0000024. References to documents filed in the circuit court will refer to the JEFS docket with the Circuit Court of the Fifth Circuit, and are in the form of "JEFS Dkt No. __ at [page number]."
[16] JEFS Dkt. No. 46 at 6-7; No. 55 at 10 (argument by State before the circuit court).
[17] *OHA v. Yamasaki*, 69 Haw. 154, 174-75, 737 P.2d 446, 458 (1987).
[18] World Health Organization, *Naming the coronavirus disease (COVID-19) and the virus that causes it*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it (last visited July 7, 2021) (McLean Decl. Ex. 10).

person to person. COVID-19 fatality rates increase with age and underlying health conditions such as cardiovascular disease, respiratory disease, diabetes, and immune compromise. If contracted, COVID-19 can cause severe complications or death." *Wilson v. Williams*, 961 F.3d 829, 833 (6th Cir. 2020); *Bannister v. Ige*, Civil No. 20-00305 JAO-RT, 2020 WL 4209225, at *9 (D. Haw. July 22, 2020) ("a COVID-19 outbreak … would quickly overwhelm Hawaii's healthcare system and resources, and Hawaii's geographical isolation would further exacerbate the crisis").[19] As of July 7, 2021, there have been more than 184 million confirmed cases of COVID-19, and more than 3.9 million confirmed deaths worldwide.[20] In the United States, there have been 33.6 million cases and 603,656 deaths.[21] And in Hawai'i, there have been 36,679 cases and 497 deaths.[22]

"Like many states across the nation and countries around the world, Hawai'i has issued a series of Emergency Proclamations to limit the spread of COVID-19[.]" *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1137 (D. Haw. 2020) (quotation omitted). These emergency proclamations, issued by the Governor under chapter 127A, have played a crucial role in helping our State to avoid the catastrophic public-health outcomes that have impacted communities across the country and around the world. In recent months, Hawai'i has also made significant progress in vaccinating its population. As of July 7, 2021, [54%] of the total population has been fully immunized.[23] This enabled the Governor to remove several restrictions, including the outdoor mask mandate[24] and inter-county travel restrictions.[25] As conditions continue to improve and the

---

[19] Appellants do not argue that COVID-19 is not an "emergency" under chapter 127A. Nor could they: COVID-19 plainly satisfies the statute's definition of "emergency"—an "occurrence, or imminent threat thereof, which results or may likely result in substantial injury or harm to the population[.]" HRS § 127A-2. *Cf. DeVito*, 227 A.3d at 889 ("COVID-19 … is, by all definitions, a natural disaster and a catastrophe of massive proportions."); *Casey*, 2021 WL 1181937 (COVID-19 constitutes "major disaster" and "serious disaster" within meaning of state law).

[20] World Health Organization, *Coronavirus disease (COVID-19) pandemic*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (last visited July 7, 2021) (McLean Decl. Ex. 11).

[21] CDC, *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#cases_totalcases (last visited July 7, 2021) (McLean Decl. Ex. 12)

[22] https://health.hawaii.gov/coronavirusdisease2019/what-you-should-know/current-situation-in-hawaii/ (last visited July 7, 2021) (McLean Decl. Ex. 13).

[23] *Id.*

[24] Office of the Governor, *Governor Ige Lifts Mask Requirement for Outdoor Activities, Gives Green Light to Ocean Sports Competitions—Honolulu and Kauai County Orders Also Approved* (May 25, 2021), https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-

State meets immunization benchmarks, the State fully expects to lift more restrictions—and discontinue the issuance of emergency proclamations outright—as soon as it is responsible to do so.[26] But "pandemic conditions … evolve" and "flexibility and vigilance in adapting to these extraordinary circumstances is vital[.]" *In re COVID-19*, SCMF-20-0000152, 2021 WL 1150172, at *1 (Haw. Mar. 25, 2021) (unpublished).[27]

B. Appellants' Lawsuit

On September 1, 2020, Appellants filed a lawsuit in the Circuit Court of the Fifth Circuit. JEFS Dkt. No. 1. A First Amended Complaint (the "**Complaint**") was filed on September 24, 2020. JEFS Dkt. No. 6. The complaint alleged that (1) the "Governor's ninth supplementary proclamation, tenth proclamation and eleventh exceed the legislature's delegated authority and are unconstitutional," Complaint at 19 (Count 1), and (2) the "Governor's ninth supplementary proclamation, tenth proclamation, and eleventh proclamation are all unconstitutionally vague and deprive plaintiffs of due process of law," Complaint at 21 (Count 2).[28]

The State moved to dismiss the Complaint. JEFS Dkt. No. 26-49. Following a hearing, the circuit court granted the motion. JEFS Dkt. No. 69, 77. The circuit court's order provided:

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

---

governor-ige-lifts-mask-requirement-for-outdoor-activities-gives-green-light-to-ocean-sports-competitions-honolulu-and-kauai-county-orders-also-approved/ (last visited July 7, 2021) (McLean Decl. Ex. 14).

[25] Office of the Governor, *Inter-County Travel Restrictions to End on June 15—Gov. Ige Sets Benchmarks for Easing Domestic Travel Restrictions* (Jun. 4, 2021), https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-inter-county-travel-restrictions-to-end-on-june-15-gov-ige-sets-benchmarks-for-easing-domestic-travel-restrictions/ (last visited July 7, 2021) (McLean Decl. Ex. 15).

[26] Office of the Governor, *Governor Ige Sets Additional Vaccination Benchmarks for Gatherings, Restaurants—Also Signs New Proclamation Terminating Some Emergency Provisions* (June 7, 2021), https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-governor-ige-sets-additional-vaccination-benchmarks-for-gatherings-restaurants-also-signs-new-proclamation-terminating-some-emergency-provisions/ (last visited July 7, 2021) (McLean Decl. Ex. 16) ("As Hawai'i's public health outcomes improve and our economic situation appears to be stabilizing, I am ending several of the emergency provisions that have been in place for over a year,' said Gov. Ige. 'By August, I hope the public health situation will allow me to do the same for others.'").

[27] McLean Decl. Ex. 17.

[28] The vagueness claim has been abandoned because the Opening Brief does not raise that claim.

> 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.

JEFS Dkt. No. 77 at 2. Final judgment was entered on December 23, 2020. JEFS Dkt. No. 81. A notice of appeal was filed in this Court on January 18, 2021. JEFS Dkt. No. 87; JIMS Dkt. No. 1.

III. STANDARD OF REVIEW

A. Motions to Dismiss

"A circuit court's ruling on a motion to dismiss is reviewed de novo." *Wright v. Home Depot U.S.A., Inc.*, 111 Hawai'i 401, 406, 142 P.3d 265, 270 (2006). The Court views a complaint in a light most favorable to the plaintiff and accepts factual, non-conclusory allegations as true for purposes of the motion. *Kealoha v. Machado*, 131 Hawai'i 62, 74, 315 P.3d 213, 225 (2013). "[I]n weighing the allegations of the complaint as against a motion to dismiss, the court is not required to accept conclusory allegations on the legal effect of the events alleged." *Id.* (quotations omitted); *id.* (dismissal under Rule 12(b)(6) was required where statute, properly interpreted, did not support plaintiff's legal theory).

B. Constitutional Questions

"Issues of constitutional interpretation present questions of law that are reviewed de novo[.]" *Kaheawa Wind Power, LLC v. Cty. of Maui*, 146 Hawai'i 76, 87, 456 P.3d 149, 160 (2020) (quotation omitted). "[E]very enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt[.]" *State ex rel. Bronster v. Yoshina*, 84 Hawai'i 179, 186, 932 P.2d 316, 323 (1997) (quotation omitted; cleaned up). A constitutional "infraction should be plain, clear, manifest, and unmistakable." *Id.* (quotation omitted). When interpreting the constitution:

> The general rule is that, if the words used in a constitutional provision are clear and unambiguous, they are to be construed as they are written. In this regard, the settled rule is that in the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them.
>
> Moreover, a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it.

Kaheawa, 146 Hawai'i at 87, 456 P.3d at 160 (quotations and alteration omitted).

C. Statutory Interpretation

"The interpretation of a statute or ordinance is a question of law reviewable de novo." *State v. Kaufman*, 92 Hawai'i 322, 326, 991 P.2d 832, 836 (2000). The following principles apply:

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

Ocean Resort Villas Vacation Owners Ass'n v. Cty. of Maui, 147 Hawai'i 544, 552-53, 465 P.3d 991, 999-1000 (2020) (quotation omitted). "[T]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality." *State v. Diaz*, 128 Hawai'i 215, 224, 286 P.3d 824, 833 (2012). In interpreting statutes, "the uniform practical construction of a statute by those charged with carrying out the statute is entitled to much weight." *Chun v. Employees' Ret. Sys.*, 61 Haw. 596, 602, 607 P.2d 415, 419 (1980). Courts "determine substantial compliance with a statute by determining whether the statute has been followed sufficiently such that the intent for which it was adopted is carried out." *State v. Villeza*, 85 Hawai'i 258, 265, 942 P.2d 522, 529 (1997).

D. Standing and the Declaratory Judgment Act

"[T]he issue of standing is reviewed de novo on appeal." *Mottl v. Miyahira*, 95 Hawai'i 381, 388, 23 P.3d 716, 723 (2001). "[T]he plaintiff bears the burden of establishing … standing." *Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, Inc.*, 113 Hawai'i 77, 95, 148 P.3d 1179, 1197 (2006). Because standing is "an issue of justiciability," *Tax Found.*, 144 Hawai'i at 190, 439 P.3d at 142, "courts may consider standing even when not raised by the parties," although "they are not required to do so sua sponte[.]" *Id*. at 192, 439 P.3d at 144. Courts must "weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government." *Id*. at 199-200, 439 P.3d at 151-52. "[A] party has standing to seek declaratory relief in a civil case brought pursuant to HRS § 632-1 (1) where antagonistic claims exist between the parties (a) that indicate imminent and inevitable litigation, or (b) where the party seeking declaratory relief has a concrete interest in a legal relation, status, right, or privilege that is challenged or denied by the

other party, who has or asserts a concrete interest in the same legal relation, status, right, or privilege; and (2) a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding." *Id*. at 202, 439 P.3d at 154.

E. Mootness

"Mootness is an issue of subject matter jurisdiction." *In Re Marn Fam.*, 141 Hawai'i 1, 7, 403 P.3d 621, 627 (2016). "Whether a court possesses subject matter jurisdiction is a question of law reviewable de novo." *Id*. (quotation omitted). "As a general rule, a case is moot if the reviewing court can no longer grant effective relief." *Id*. "[S]ubject-matter jurisdiction cannot be conferred upon a court by agreement, stipulation, or consent of the parties," or "created by estoppel," and a lack of jurisdiction "cannot be waived by the parties[.]" *Cvitanovich-Dubie v. Dubie*, 125 Hawai'i 128, 141, 254 P.3d 439, 452 (2011) (quotation omitted).

F. Political Question Doctrine

"Under the political question doctrine, courts refrain from deciding certain matters that are committed to the discretion of the other branches of government, reasoning that government action in these areas is properly addressed through democratic processes." *Ching v. Case*, 145 Hawai'i 148, 174, 449 P.3d 1146, 1172 (2019). "[A] political question may be found when on the surface of [a] case there is 1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; 2) a lack of judicially discoverable and manageable standards for resolving it; 3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; 4) an unusual need for unquestioning adherence to a political decision already made; or 5) the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id*. at 174-75, 449 P.3d at 1172-73 (quotations omitted).

IV. ARGUMENT

First, contrary to Appellants' argument, HRS § 127A-14(d) does not limit the Governor to just one 60-day state of emergency. Second, Appellants' argument that the circuit court failed adequately to explain its reasoning is both meritless and waived (because it is not developed or supported in Appellants' Opening Brief). Third, on appeal Appellants have abandoned their theory that the void-for-vagueness doctrine rendered the Governor's emergency proclamations unenforceable because they do not raise it in their Opening Brief.[29] Fourth, Appellants'

[29] *See* AOB (*passim*). "Inasmuch as [Appellants] failed to raise such arguments in [their] opening brief, such arguments are deemed waived." *Ass'n of Apartment Owners of Newtown Meadows ex*

"nondelegation" constitutional claim was not preserved because it was not alleged in Appellants' complaint[30]—and, in any event, that claim fails on the merits. Alternatively, the Court should dismiss this appeal based on the mootness, standing, and political question doctrines.

A. Appellants' Interpretation of HRS Chapter 127A Is Wrong: The Use of Additional Emergency Proclamations To Address COVID-19 Is Lawful

The Hawai'i emergency-powers statute, properly interpreted, does not prohibit using successive emergency proclamations to address an ongoing emergency. This is clear from (1) the text of the statute, (2) the statute's purpose, (3) the consistent and pragmatic interpretation of chapter 127A by the executive branch across multiple administrations, and (4) well-reasoned judicial decisions interpreting such statutes.

1. The text of chapter 127A does not prohibit the Governor from issuing additional emergency proclamations to deal with underlying emergency conditions that last longer than 60 days

Each of the Governor's proclamations related to the COVID-19 emergency has been authorized by HRS § 127A-14(a). That provision states as follows:

> 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.

Each subsequent proclamation has been based on a new assessment of emergency conditions because each declaration lasts for 60 days. *Id.* § 127A-14(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").

Chapter 127A does not contain any language prohibiting the Governor or mayors from issuing additional proclamations as needed to combat a continuing emergency. On the contrary, § 127A-14(d) expressly refers to the issuance of "separate proclamation[s]." And § 127A-2 defines "state of emergency" broadly, as "an occurrence in any part of the State that requires

---

rel. its Bd. of Directors v. Venture 15, Inc., 115 Hawai'i 232, 281 n.39, 167 P.3d 225, 274 n.39 (2007). As the State explained in its motion to dismiss (JEFS Dkt. No. 46 at 18-20), the vagueness claim also failed on the merits. *Id.*

[30] Indeed, the word "nondelegation" does not even appear in the operative complaint. JEFS Dkt. No. 6. *Cf. Andrade v. Cty. of Hawai'i*, 145 Hawai'i 265, 278, 451 P.3d 1, 14 (App. 2019) (where claim was "not mentioned in [plaintiff's] Complaint," "declin[ing] to address this argument"); HRS § 641-2(b) (appellate courts "need not consider a point that was not presented in the trial court in an appropriate manner").

efforts by state government to protect property, public health, welfare, or safety in the event of an emergency or disaster, or to reduce the threat of an emergency or disaster, or to supplement the local efforts of the county." Nothing in the text of § 127A-14(d) limits how many emergency proclamations the Governor may issue to address an ongoing emergency. Instead, each proclamation appropriately triggers a 60-day period during which the Governor exercises emergency powers under that proclamation. Had the Legislature intended to require a "one and done" rule—a rule that no further emergency declarations may be issued, no matter how long-lasting the emergency—the Legislature would have said so explicitly. It did not.

Appellants' theory should be rejected because statutes do not "hide elephants in mouseholes[,]" *Morita v. Gorak*, 145 Hawai'i 385, 399, 453 P.3d 205, 219 (2019) (quotation omitted), and courts will not "read … a sweeping rebalancing of power" into "what appears to be a minor administrative accommodation." *Id.* Appellants invite this Court to do just that—to take a common-sense rule that sunsets the provisions of a particular emergency proclamation after 60 days unless an additional proclamation is issued, and instead read it as completely depriving the Governor and mayors of any power to respond to any emergency lasting longer than 60 days. That reading is inconsistent with statutory text, statutory purpose, legislative history, and the executive branch's consistent interpretation of the statute. Nor is Appellants' reading consistent with common sense—because it would lead to absurd and unworkable results.

2. The purpose of chapter 127A—to "confer comprehensive powers" on the Governor—further supports the use of additional proclamations to address an ongoing emergency

The purpose of chapter 127A—to grant the Governor broad and comprehensive powers to respond to emergencies—further supports the State's reading of § 127A-14(d). The Legislature sought "to provide for and confer comprehensive powers," and it directed that chapter 127A "be liberally construed to effectuate its purposes[.]" HRS § 127A-1(c) (emphasis added). The purposes of the statute are detailed in HRS § 127A-1(a), and reflect:

> the existing and increasing possibility of the occurrence of disasters or emergencies of unprecedented size and destructiveness resulting from natural or man-made hazards, and in order to ensure that the preparations of this State will be adequate to deal with such 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[.]

Id. (emphasis added); HRS § 127A-1(a)(2) (explaining that the purposes of the statute include "confer[ring] upon the governor … the emergency powers necessary to prepare for and respond to emergencies or disasters[.]").[31] Section 127A-12(b)(19) also empowers the Governor to "[t]ake any and all steps necessary or appropriate to carry out the purposes of this chapter[.]"[32] Indeed, Appellants concede that "[b]y enacting HRS chapter 127A, the legislature of Hawai'i empowered the Governor to declare an emergency[.]" AOB17. But Appellants' belief that the Governor's authority under chapter 127A completely disappears every time an underlying disaster happens to last longer than 60 days is wrong, and would lead to an absurd result.

Under Appellants' reading, the Governor's hands would be tied after 60 days, no matter how long-lasting the emergency. Chapter 127A's purpose—providing comprehensive emergency management powers—would be defeated. "[A] rational, sensible and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable, inasmuch as the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality." *Morgan v. Planning Dep't*, 104 Hawai'i 173, 185, 86 P.3d 982, 994 (2004) (quotation omitted). Appellants also cite a recent law review article written by Professor Robert Thomas. AOB9-10, 25 (quoting Thomas, *supra*, at 75). Appellants selectively quote from that article to make it appear that it supports their "one-and-done" reading of § 127A-14(d). In fact, it does not:

> [HRS § 127A-14(d)] should not be read as depriving the governor of authority to respond to a continuing crisis. That would be an absurd outcome because an emergency can certainly last more than sixty days, as

[31] *Cf. Casey*, 2021 WL 1181937, at *5 (concluding that "an expansive reading" of the state's emergency-powers statute was "warranted" "given that the [Legislature] instructed him to exercise the powers delegated to him … broadly for 'the protection of the public health' and 'to protect the health, safety and welfare of the people of the state'" (citations omitted)).

[32] The State's reading of chapter 127A also accords with the Governor's inherent executive authority under the State Constitution to respond to ongoing emergencies in exigent circumstances. The Hawai'i Constitution provides that "[t]he executive power of the State shall be vested in a governor," Hawai'i Const. art. V, § 1, that "[t]he governor shall be responsible for the faithful execution of the laws," Hawai'i Const. art. V, § 5, and that "[t]he governor shall be commander in chief of the armed forces of the State," *id.* This vesting of the "executive power of the State" suggests the existence of "inherent … constitutional power [that] the Governor might have in his role as chief executive officer of the state." *Nat'l Tax-Limitation Com. v. Schwarzenegger*, 8 Cal. Rptr. 3d 4, 19 (Cal. App. 2003); *DeVito*, 227 A.3d at 885 ("The Governor derives broad authority from our Constitution, as it vests him with 'supreme executive power' and directs him to 'take care that the laws be faithfully executed.'" (quotation omitted)).

> the COVID-19 pandemic illustrates. There are two alternatives: the delegated emergency response authority terminates not later than the sixtieth day and returns to the legislature, or the governor can simply issue a new, "separate" declaration of an emergency based on the then-current situation, which would terminate the existing declaration and re-start the sixty-day clock.

Thomas, *supra*, at 90 (emphasis added). It would indeed be "absurd" to outright cancel emergency powers whenever an underlying emergency happens to last for more than 60 days.[33]

Properly interpreted, § 127A-14(d) does play a meaningful role in the overall statutory scheme, to be sure. By making emergency proclamations expire after 60 days unless a separate proclamation is issued, § 127A-14(d) ensures that a proclamation cannot simply be left in place by default. Restrictions in a proclamation expire automatically—unless they are reissued in an additional proclamation within 60 days. This ensures that emergency provisions are regularly reassessed in light of evolving conditions.[34] It also promotes political accountability. When the Governor or mayors want to extend an emergency restriction, they must do so explicitly by

---

[33] The State's citation to this article does not reflect agreement with other arguments in that paper. For example, although the article argues that a "supplemental" proclamation might be distinguished from a "separate" proclamation (Thomas, *supra*, at 84-94), no such distinction is possible. In any event, Appellants' argument does not rely on a supposed distinction between "a 'new' or a 'supplemental' proclamation[.]" AOB12. In reality, simply because proclamations were labeled as "supplemental" or "supplementary" does not mean that those proclamations were not "separate" from the original proclamation. As a matter of plain meaning, a "supplemental" brief is not the same thing as an original brief; it is a separate document. And even if that were not the case, "any difference between a 'separate' proclamation and a 'supplemental' proclamation" would, at most, be "one of form and not substance[.]" Thomas, *supra*, at 92. Given the broad purposes of chapter 127A (and the exigencies associated with emergencies) what matters is substantial compliance with §127A-14(d). *State v. Villeza*, 85 Hawai'i 258, 265, 942 P.2d 522, 529 (1997) ("We determine substantial compliance with a statute by determining whether the statute has been followed sufficiently such that the intent for which it was adopted is carried out."). By issuing additional proclamations within 60 days of each other, the State has substantially complied with the requirements of HRS § 127A-14(d)—and, for the reasons outlined above, it has also strictly complied with those requirements.

[34] Consistent with this theme of political accountability, the statute also says that "[t]he governor or mayor 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." HRS § 127A-14(c). The statute further promotes accountability by providing that some powers must be "retained by the governor or mayor" and not delegated to others. *See* HRS § 127A-11(a). These powers include "[p]roclaiming a state of emergency or local state of emergency" and "making any other proclamation provided for by this chapter[.]" *Id.*

issuing additional emergency proclamations—thus taking public responsibility for keeping an emergency provision in place.

Throughout the COVID-19 pandemic, the Governor's approach—issuing additional and separate emergency proclamations within successive 60-day periods[35]—has faithfully followed both the text and spirit of HRS § 127A-14(d). The Governor has issued emergency proclamations limited to specific 60-day periods based on periodic reassessments of the underlying emergency conditions, and he has issued proclamations based on these evolving circumstances. *See, e.g.*, Twenty-First Proclamation at 2 (determining that "COVID-19 continues to endanger the health, safety, and welfare of the people of Hawai'i and a response requires the serious attention, effort, and sacrifice of all people in the State to avert unmanageable strains on our healthcare system and other catastrophic impacts to the State," and that "COVID-19 has directly and indirectly caused fiscal and economic catastrophe not previously experienced by the State"). Each proclamation is a distinct and particularized emergency proclamation, supported by a separate determination by the Governor, and based on the Governor's independent evaluation of the circumstances at the time the proclamation is issued. Each proclamation reflects an assessment of "changing facts on the ground"[36]—new developments, changing death counts and case counts, evolving assessments of strains on the State's healthcare system, etc.[37] And each proclamation has, as a matter of law, superseded and rescinded prior emergency proclamations—thus following both the letter and spirit of HRS § 127A-14(d).[38]

Although Appellants conjure the specter of "rule by edict" "for an unlimited period," or "rule by indefinite executive decree," AOB1, 10, 11, 14, this concern is misplaced. To be clear: Governor Ige fully expects to end the remaining COVID-19 emergency provisions "at the earliest possible date that conditions warrant." *Newsom*, 278 Cal. Rptr. 3d at 409 (emphasis added). This accords proper respect to the existing statutory framework because each emergency

---

[35] Thomas, *supra*, at 93 (additional emergency proclamations "might … simply" reflect "the existing emergency updated to account for whatever circumstances might have changed").
[36] *Carmichael*, 470 F. Supp. 3d at 1142 (quoting *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Mem) (Roberts, C.J., concurring)).
[37] *See, e.g.*, Twenty-First Proclamation at 2 (determining that "as of June 7, 2021, the recorded number of cases and deaths has continued to increase, with more than 36,600 documented cases of COVID19 in the State and 505 deaths attributed to this disease"). Appellants' suggestion that each proclamation has been "grounded in the same factual circumstances," AOB12, is incorrect.
[38] Later proclamations clarified that each proclamation "supersedes all prior proclamations." AOB12. This had previously been implicit, and has consistently been true as a legal matter.

proclamation must be supported by a determination "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." HRS § 127A-14(a).[39] The statute also requires that "due consideration … be given to the circumstances as they exist from time to time[.]" HRS § 127A-1(c). And when conditions no longer justify a determination by the Governor that a state of emergency declaration is appropriate, no further emergency proclamations will be issued. Thus, the State's reading of chapter 127A does not contemplate "unlimited" emergency powers—far from it.

As the conditions associated with the pandemic in Hawai'i have changed, so have the provisions in the Governor's emergency proclamations. For example, the Twenty-First Proclamation (issued on June 7, 2021) provided that in light of changing circumstances, the inter-county Safe Travels program would end on June 15, 2021. *See* Twenty-First Proclamation at 12. As the Governor explained, "[t]he easing of travel restrictions is a direct result of our robust vaccination rate, and a community that sacrificed and did what it had to do over the past year and a half to stop the spread of COVID-19."[40]

The 60-day provision of § 127A-14(d) is thus working as intended. And although Appellants would apparently prefer the Legislature take a more active role in the day-to-day management of the State's response to the COVID-19 pandemic, nothing in chapter 127A requires such an approach.[41] Thus, as the Connecticut Supreme Court recently observed, "[s]hould [Appellants] seek to impose greater oversight of the governor's authority under the statutory scheme … the proper avenue is through an amendment to the statute through the legislature, not this court." *Casey*, 2021 WL 1181937, at *15. The same is true here.[42]

---

[39] Per HRS § 127A-2, a "[d]isaster" is defined as "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." An "emergency" is defined as "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.*

[40] McLean Decl. Ex. 15; *see also* McLean Decl. Ex. 16 ("As Hawai'i's public health outcomes improve and our economic situation appears to be stabilizing, I am ending several of the emergency provisions that have been in place for over a year,' said Gov. Ige. 'By August, I hope the public health situation will allow me to do the same for others.'").

[41] Nor does the State Constitution require such an approach, as explained below.

[42] The legislative history of chapter 127A underscores why Appellants' reading is incorrect. The Legislature intended HRS § 127A-14 to "[e]stablish[] how proclamations are promulgated and terminated consistent with current authority for civil defense proclamations[.]" Conf. Committee Report No. 129-14, at 2 ¶10 (Apr. 25, 2014) (emphasis added). Compared to the prior statute, *see*

3. Established practice further clarifies that the use of supplementary proclamations is authorized

Under Hawai‘i law, "the uniform practical construction of a statute by those charged with carrying out the statute is entitled to much weight." *Chun v. Employees' Ret. Sys.*, 61 Haw. 596, 602, 607 P.2d 415, 419 (1980). Here, the settled and uniform practice of the executive branch—including governors and mayors, and across multiple administrations—has been to understand HRS § 127A-14(d) as permitting the use of supplementary emergency proclamations in response to ongoing emergencies. This practical and commonsense understanding of the statute aligns with the text of § 127A-14(d), as discussed above.

The ability to issue additional proclamations when an emergency continues beyond 60 days has proven vital in protecting the public. Emergencies regularly last longer than 60 days—especially when the time necessary for recovery and rebuilding is taken into account. This accords with the Legislature's recognition that chapter 127A must be read as providing the authority necessary to respond to "the occurrence of disasters or emergencies of unprecedented size and destructiveness." HRS § 127A-1. The ability to issue additional emergency proclamations has been a crucial tool in addressing not just the continuing pandemic, but other emergencies as well.[43] It is extraordinary to suggest that the Legislature intended the Governor to

---

HRS § 128-7 (2013), HRS § 127A-14 made a modest adjustment to the status quo by adding a 60-day termination date for each individual emergency proclamation in the absence of a "separate proclamation." Nothing suggests that the Legislature intended this provision to dramatically limit the State's emergency powers, or to effectively bar governors and mayors from responding to any underlying emergency that happens to last for longer than 60 days. That HRS § 127A-14(d) was viewed by lawmakers at the time as being largely "consistent with current authority"—*i.e.*, consistent with the pre-2014 status quo—demonstrates that the Legislature did not intend to make the kind of dramatic change that Appellants suggest. *Cf. Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (reasoning that if lawmakers had intended to make a significant change in the law, they "would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point").

[43] For example, when eruptions from the Pu‘u ‘Ō‘ō vent in the East Rift Zone of the Kīlauea volcano threatened numerous populated areas in the County of Hawai‘i in May 2018, Governor Ige issued an emergency proclamation to respond to the emergency conditions in the area and to protect and assist affected populations. The first was issued on May 3. The situation on the ground evolved and further action was required. Thus, additional proclamations were issued on May 10, June 5, August 3, October 3, and December 3. These were based on the Governor's determinations, made at least once every 60 days, that the measures were needed to respond to the evolving emergency. The fifth proclamation "continue[d] until December 29, 2018," at which point the emergency period set by the fifth proclamation concluded. *See*

have no power to declare a state of emergency or direct the State's emergency response once 60 days elapsed following an initial emergency declaration.[44]

Additionally, by enacting statutory provisions premised on the use of supplemental emergency proclamations, the Legislature has further demonstrated that supplemental emergency proclamations (beyond one initial 60-day period) are permitted. For example, in a recent measure, Act 57, the Legislature has enacted various reforms that will be put in place following the end of the State's eviction moratorium—a moratorium that has been maintained using supplementary proclamations.[45] After recognizing that the eviction "moratorium ha[d] been extended at various times throughout the course of the COVID-19 pandemic," Act 57 outlines what should happen after the expiration of the "final eviction moratorium," defined as "an emergency proclamation or supplementary proclamation, or any extension thereof, issued by the governor and related to the coronavirus disease 2019 pandemic, that prohibits any eviction from a residential dwelling for a failure to pay rent." *Id.* § 2 (emphasis added). It is also surely noteworthy that the Legislature has not acted to prohibit the Governor from issuing additional proclamations. "While legislative inaction does not amount to legislative construction, it does indicate a lack of active disagreement[.]" *State v. Casugay-Badiang*, 130 Hawai'i 21, 27, 305

---

https://governor.hawaii.gov/wp-content/uploads/2018/11/18-11-30-5th-Supplemental-Emergency-Proc-Lava.pdf (fifth proclamation).

[44] The well-reasoned dissent in *Fabick v. Evers* explains:

> [A] "one and done" statutory interpretation … puts forth a position that leads to absurd or unreasonable results contrary to both common sense and recent practice.
>
> As an illustration of the absurdity of this alternative interpretation, consider an example taken from the Governor's brief. Imagine heavy rains leading to a flood that two months later causes a dam to break. If the governor declared a state of emergency because of the initial flooding, he could not issue another for the new flood caused by the dam failure because it shares an underlying cause with the previous state of emergency. This simply could not be the legislature's intent.
>
> Such an interpretation would cause the Governor to engage in a perverse calculation regarding when to use an emergency declaration—should he issue it now or save it and wait to see how bad things get? This undermines the very concept of an emergency: something is happening right now that demands swift action without delay.

956 N.W.2d at 886 (Bradley, J., joined by Dallet & Karovsky, JJ.).

[45] *See* Act 57, https://www.capitol.hawaii.gov/session2021/bills/GM1157_.PDF (last visited July 7, 2021) (McLean Decl. Ex. 18).

P.3d 437, 443 (2013) (quotation omitted; cleaned up).[46] This further supports the State's reading of chapter 127A.[47]

4. The lawfulness of issuing additional emergency proclamations is supported by judicial decisions in Hawai'i and elsewhere

Well-reasoned judicial decisions also support the Governor's authority to issue additional proclamations under chapter 127A. For example, a decision of Third Circuit Court Judge Wendy DeWeese offers a persuasive reading of HRS § 127A-14(d).[48] In *Partal, et al. v. Ige, et al.*, Civil No. 3CCV-20-0000277, the court granted the State's motion to dismiss a complaint that was similar to Appellants' here. The court explained:

> HRS chapter 127A contains no language prohibiting supplementary or additional emergency proclamations. The purpose of 127A is to confer comprehensive powers to protect the public and save lives. There is nothing limiting the number of emergency proclamations. Each additional emergency proclamation triggers a new sixty-day period. The supplementary emergency proclamations are distinct and particularized emergency proclamations based on independent evaluations of the relevant circumstances on the ground by the Governor.

Id. ¶ 19.[49] Judge DeWeese's decision clarifies why Appellants' reading of the statute lacks merit.

Decisions interpreting analogous statutes support this reading. For example, the Illinois emergency-powers law authorizes the governor to "issue a proclamation declar[ing] that a disaster exists." *Cassell v. Snyders*, 458 F. Supp. 3d 981, 2020 WL 2112374, at *13 (N.D. Ill.

---

[46] *Cf. Keliipuleole v. Wilson*, 85 Hawai'i 217, 225, 941 P.2d 300, 308 (1997) ("[p]resumably, the legislature was aware of the status of the law and the policies of the BLNR, yet declined to amend the statute"); *Casey*, 2021 WL 1181937, at *15 (legislative inaction suggests "acquiescence in [the governor's] actions pursuant to his public health emergency authority").

[47] Of course, legislative silence by itself is not always a dispositive or compelling consideration. *See, e.g.*, *Peer News LLC v. City & Cty. of Honolulu*, 143 Hawai'i 472, 485 n.22, 431 P.3d 1245, 1258 n.22 (2018). Here, however, "legislative silence" is not "invoked to validate a statutory interpretation that is otherwise impermissible[.]" *Id.* The clear text of HRS chapter 127A (which does not prohibit additional emergency proclamations), the legislative purpose, and subsequent affirmative actions of the Legislature (recognizing the continuing nature of the Governor's eviction moratorium) together demonstrate that the State's reading of the statute is correct.

[48] McLean Decl. Ex. 19. Such decisions do not have precedential value, but may be persuasive.

[49] The *Partal* court also observed:

> The Court understands that Plaintiffs argue that the executive branch is engaged in an unlawful "power grab." However, the Court notes that the Legislature has not acted in this particular area, despite there being no prohibition against them doing so.

Id. ¶ 26. The plaintiffs in *Partal* did not appeal the circuit court's decision.

May 3, 2020) (quoting 20 Ill. Comp. Stat. § 3305/7).[50] "After that," according to the statute, the Governor "may invoke the Act's emergency powers 'for a period not to exceed 30 days.'" *Id.* (quoting 20 Ill. Comp. Stat. § 3305/7). In *Cassell v. Snyders*, a federal district court considered "whether the Act permits [the Governor] to declare more than one emergency related to the spread of COVID-19." *Id.* The plaintiffs urged that "the ongoing pandemic only justifies a single 30-day disaster proclamation." *Id.* The state argued that "so long as the Governor makes new findings of fact to determine that a state of emergency still exists, the Act empowers him to declare successive disasters, even if they stem from the same underlying crisis." *Id.* "Based on the text and structure" of the statute, the court held that the state "ha[d] the better argument." *Id.* The court added: "[s]ome types of disasters, such as a storm or earthquake, run their course in a few days or weeks," while "[o]ther disasters may cause havoc for months or even years." *Id.* at *14. "It is difficult," the court observed, "to see why the legislature would recognize" the existence of "long-running problems as disasters, yet divest the Governor of the tools he needs to address them." *Id.* at *14. Other courts reached similar conclusions. *See, e.g.*, *Fox Fire Tavern, LLC v. Pritzker*, 161 N.E.3d 1190, 1196 (Ill. App. 2020)[51] (holding that the statute "plainly authorizes the Governor to issue successive disaster proclamations stemming from one ongoing disaster"); *see also H's Bar, LLC v. Berg*, Case No. 20-cv-1134-SMY, 2020 WL 6827964, at *5 (S.D. Ill. Nov. 21, 2020).[52]

That same common-sense conclusion applies here. Chapter 127A "contains no limitation on the number of proclamations the Governor may issue to address an ongoing disaster," and thus "the plain language of [the statute] permits the Governor to issue multiple and successive disaster proclamations and to exercise emergency powers for additional … periods, so long as a disaster continues to exist." *Berg*, 2020 WL 6827964, at *5. It is hard to see why the Legislature would recognize the existence of "disasters or emergencies of unprecedented size and destructiveness," HRS § 127A-1, but categorically deny the Governor any power to respond to every emergency that happens to last for more than 60 days. In reality, the Legislature did <u>not</u> deny the Governor this power: Nothing prohibits issuing additional emergency proclamations—each of which restarts the 60-day clock in HRS § 127A-14(d).

[50] McLean Decl. Ex. 20.
[51] McLean Decl. Ex. 21.
[52] McLean Decl. Ex. 22.

5. Appellants' reliance on Wisconsin and Michigan cases is unavailing

Trying to sell their preferred reading of HRS § 127A-14(d), Appellants present two out-of-state cases from the Wisconsin and Michigan state supreme courts. Their pitch falls short. First, these cases are distinguishable by the text of the relevant statutes, which differ materially from § 127A-14(d). Second, in any event, the cases rest on principles of statutory construction that are incompatible with those applied by Hawai‘i courts.

Appellants first offer *Fabick v. Evers*, 956 N.W.2d 856 (2021). AOB14-22. In *Fabick*, a thin majority on the Wisconsin Supreme Court "declare[d] … unlawful" the governor's emergency orders based on the particular language of a provision of the Wisconsin emergency-powers statute. *Id*. The reasoning of the majority in *Fabick* is inapplicable here. As the comparison of the two statutes in Appellants' own brief makes clear (AOB14-15), the text of the Wisconsin statute is materially different from HRS § 127A-14(d). The Wisconsin statute provided that "[a] state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature." AOB14 (quoting the statute; emphasis added). Based on this text, the majority concluded that the statute had expressly provided only one way for a state of emergency to exceed 60 days: joint resolution of the legislature. Thus, the majority argued, the statute meant that "a state of emergency may be extended longer than 60 days by the legislature alone." *Fabick*, 956 N.W.2d at 864 (emphasis added).[53] The majority emphasized that it was enforcing an "explicit legislative check on the governor's emergency power," *id*. at 869, found in the text of the statute—in particular, the textual requirement that "exten[sions] of "state[s] of emergency" only be done "by joint resolution of the legislature," *id*. at 859 (quotation omitted).[54]

---

[53] This reading was reinforced by considerations relating to "statutory context," *id*. at 865, and "[s]tatutory history," *id.* , that were unique to the Wisconsin framework. *See id*. at 865 (reasoning based on "conspicuous[]" differences between the statewide-emergency provision and the local-emergency provision—a comparison that has no parallel in the context of Hawaii's statute); *id*. at 866 (emphasizing that Wisconsin law had for decades included a requirement that states of emergency "not extend" beyond certain set time periods "unless extended by joint resolution of the legislature"—another factor that has no parallel in the Hawai‘i statute).

[54] The majority suggested that this provision of the Wisconsin statute required it to enforce the legislature's express statutory "power to override a governor's declaration of emergency" or "power to revoke an emergency declaration,"—which, under the statute, the legislature could exercise by withholding consent to an extension of the state of emergency. *Id*. at 869.

The Hawai‘i statute is very different. The text of HRS § 127A-14(d) does not require that the Legislature authorize any extension of a state of emergency beyond 60 days. Instead, § 127A-14(d) simply provides that "[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." Unlike the Wisconsin statute, § 127A-14(d) does not say that the Hawai‘i Legislature must authorize extending a state of emergency beyond 60 days. And § 127A-14(d) refers to an additional outcome not mentioned in the text of the Wisconsin statute: the issuance of a "separate proclamation." There is thus no reason to apply the reasoning of the *Fabick* majority to § 127A-14(d). Indeed, if *Fabick* has any relevance here, it is for the reasoning of the dissent, not the majority opinion. The dissent's approach to statutory interpretation aligns squarely with that of Hawai‘i courts. The dissent explained that an interpretation that provided for only one state of emergency—a "'one and done' statutory interpretation," in the words of the dissent—"puts forth a position that leads to absurd or unreasonable results contrary to both common sense and recent practice." *Id*. at 886 (Bradley, J., dissenting, joined by Dallet & Jarofsky, JJ.); *see Morgan*, 104 Hawai‘i at 185, 86 P.3d at 994.

Next, Appellants cite (AOB22-26) the Michigan Supreme Court's majority opinion in *Midwest Inst. of Health, PLLC v. Gov. of Mich.*, 958 N.W.2d 1 (Mich. 2020) [*Michigan Certified Questions*]. In *Michigan Certified Questions*, the court interpreted a statute that "provide[d] that 'after 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster/emergency terminated, unless a request by the governor for an extension of the state of disaster/emergency for a specific number of days is approved by resolution of both houses of the legislature.'" *Id*. at 9 (quoting the statute; alterations omitted). Based on the text of the statute, the majority held that "the Governor only possesses the authority or obligation to declare a state of emergency or state of disaster once and then must terminate that declaration after 28 days if the Legislature has not authorized an extension." *Id*. at 10. This reflected the specific text of the relevant provision. The court reasoned that "[a]t the end of the [initial] 28 days, the [statute] contemplates only two outcomes: (1) the state of emergency and/or disaster is terminated by order of the Governor; or (2) the state of emergency/disaster continues with legislative approval." *Id*. at 10 (quotation omitted). The court explained that "[t]he only qualifier on the 'shall terminate" language is an affirmative grant of an extension from the Legislature," and "[t]here is no third option for the Governor to continue the state of emergency and/or disaster on

her own, absent legislative approval[.]" *Id.* (quotation omitted). The majority reasoned that "[t]he Governor's declaration of a state of emergency or state of disaster may only endure for 28 days absent legislative approval of an extension" and "if the Legislature does nothing … the Governor is obligated to terminate the state of emergency or state of disaster after 28 days." *Id*. at 11.

Recently, the Supreme Judicial Court of Massachusetts rejected the interpretation offered by the *Michigan Certified Questions* majority, because the text of the Massachusetts statute was distinguishable. So too here. As the court explained in *Desrosiers v. Governor*, "[a]lthough the Michigan Supreme Court [in *Michigan Certified Questions*] addressed facially similar issues," "a deeper look reveal[ed]" "core differences." 158 N.E.3d at 841 n.24. The court explained that "unlike the Michigan [statute], the [Massachusetts statute] does not contain a requirement that a set number of days after declaring a state of disaster or state of emergency 'the governor shall issue an executive order or proclamation declaring the state of disaster or state of emergency terminated, unless a request by the governor for an extension of the state of disaster or state of emergency for a specific number of days is approved by resolution of both houses of the legislature." *Desrosiers*, 158 N.E.3d at 841 n.24 (quotation omitted). That same textual difference is also dispositive here. The Michigan statute requires the Governor to issue an order "terminat[ing]" the state of emergency after 28 days unless a specific criterion—legislative extension—is satisfied. The text of chapter 127A includes no such requirement.

More broadly, the Michigan and Wisconsin opinions cited by Appellants are unpersuasive because those courts applied statutory interpretation principles that differ significantly from those properly applied by Hawaii's courts. Both the Michigan and Wisconsin courts have adopted strict "textualist" approaches to statutory interpretation that deemphasize reliance on legislative purpose.[55] By contrast, the Hawai'i Supreme Court has "rejected an approach to statutory construction which is limited to the words of the statute" and emphasizes that an "interpretation … must be consistent with the legislative purpose[.]" *State v. Oshiro*, 69 Haw. 438, 443, 746 P.2d 568, 571 (1987). Indeed, the majority in *Fabick* outright rejected any reliance on so-called "outcome-focused concerns," *id.* at 862 n.6—apparently a reference to the

[55] Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750, 1798-99 (2010) (explaining that the Michigan and Wisconsin supreme courts have adopted outlier "textualist" approaches to statutory interpretation).

dissent's powerful argument that the majority's interpretation would lead to absurd results.[56] The rule in Hawai'i aligns with the approach of the *Fabick* dissent, not the majority: "[A] rational, sensible and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable, inasmuch as the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality." *Morgan v. Planning Dep't*, 104 Hawai'i 173, 185, 86 P.3d 982, 994 (2004) (quotation omitted).[57]

Thus, Appellants' proposed interpretation of § 127A-14(d) should be rejected.

B. The Circuit Court's Decision Was Proper And Provided Sufficient Reasoning

Next, Appellants advance a procedural argument. They argue that the Circuit Court erred by "adopting the arguments of Defendants' Motion to Dismiss as supporting the Court's decision without identifying precise issues being decided." AOB6. This argument fails. To begin, Appellants have not supported this procedural theory with meaningful support or citation to legal authority in their Opening Brief. This Court thus need not (and should not) address it. *See* HRAP Rule 28(b)(7); *Taomae v. Lingle*, 108 Hawai'i 245, 257, 118 P.3d 1188, 1200 (2005) (court may "disregard [a] particular contention" if the appellant "makes no discernible argument in support of that position") (quotation omitted) . Appellants' argument also fails on the merits. Here, the circuit court adequately explained its reasoning when it granted the State's motion to dismiss. JEFS Dkt. No. 77. It did not simply "deem[] its opinion" to be "Governor Ige's motion brief," as

---

[56] *See id*. at 887 (Bradley, J., dissenting, joined by Dallet & Jarofsky, JJ.) (noting that the majority "takes this dissent to task for even discussing the absurdity or reasonableness" of the "consequences," but emphasizing that "when enacted, the legislature could not have intended that [the Wisconsin statute] would be interpreted to place such a roadblock to effective governmental response to a worldwide pandemic").

[57] *Fabick* and *Michigan Certified Questions* have been criticized by leading scholars and other commentators. *See* Wendy Parmet, *Conservative courts say they can't set health policy — and then they do it anyway*, Washington Post (Apr. 12, 2021), https://www.washingtonpost.com/outlook/2021/04/12/fabick-mask-mandate-conservative-judges/ (last visited July 7, 2021) (McLean Decl. Ex. 23) (suggesting that the *Fabick* "court's refusal to consider the health consequences of its decision reflects a broader trend among conservative jurists, one that may have dire consequences for the nation's health"); Nicholas Bagley, *A Warning From Michigan*, The Atlantic (Oct. 7, 2020), https://www.theatlantic.com/ideas/archive/2020/10/america-will-be-michigan-soon/616635/ (last visited July 7, 2021) (McLean Decl. Ex. 24) (criticizing the majority in *Michigan Certified Questions*).

Appellants suggest. AOB15. It plainly is not reversible error for a circuit court to enter an order adopting the legal arguments advanced by a party a basis for granting a motion to dismiss.[58]

C. The State Has Not Violated the Nondelegation Doctrine or the Separation of Powers

Appellants also incorrectly suggest that the State's response to the COVID-19 pandemic has violated the non-delegation doctrine or otherwise violated the separation of powers. In reality, chapter 127A (and the emergency proclamations issued under that statute) fully comply with these constitutional principles.[59] Although "[t]he separation of powers doctrine is not expressly set forth in any single constitutional provision," *Alakai Na Keiki, Inc. v. Matayoshi*, 127 Hawai'i 263, 275, 277 P.3d 988, 1000 (2012) (quotation omitted), the courts have suggested that "the separation of powers" is "inherent in the Hawai'i Constitution[.]" *Honolulu Civ. Beat Inc. v. Dep't of Att'y Gen.*, 146 Hawai'i 285, 296 n.19, 463 P.3d 942, 953 n.19 (2020). This doctrine helps keep any one branch of government from being "controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments." *Id.* (quotation omitted). But Hawai'i courts—like those in a number of other states—recognize the need for flexibility in weighing separation-of-powers challenges to government action. *See, e,g.*, *Biscoe v. Tanaka*, 76 Hawai'i 380, 383, 878 P.2d 719, 722 (1994).[60] After all, "[i]f the doctrine of the separation of powers were a doctrinaire concept to be made use of with pedantic rigor, the use of the modern administrative agency would have been an impossibility in our law." *McHugh v. Santa Monica Rent Control Bd.*, 777 P.2d 91, 105 (Cal. 1989) (quotation omitted). Courts thus

---

[58] Even if a circuit court fails "to iterate a basis for its decision" (not what happened here) the Hawai'i Supreme Court has held that no reversible error occurs when "it is clear that all of [appellants'] arguments before the circuit court were without merit[.]" *Lee v. Puamana Cmty. Ass'n*, 109 Hawai'i 561, 567, 128 P.3d 874, 880 (2006). Moreover, the "problematic" situation at issue in *Lee*—an alleged failure to articulate a basis for decision—is not present here. *Cf. DL v. CL*, 146 Hawai'i 328, 340, 463 P.3d 985, 997 (2020) ("Hawai'i law does not prohibit wholesale adoption of proposed findings of fact and conclusions of law so long as they are not clearly erroneous or wrong as a matter of law.").

[59] Appellants' suggestion that the State violated "the separation of powers doctrine in the U.S. … Constitution[]" (AOB7) is incorrect. This case involves a challenge to *State* action. The U.S. "Constitution does not impose on the States any particular plan for the distribution of governmental powers." *Mayor of City of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974). Thus, a separation-of-powers challenge can arise only under State law.

[60] State separation-of-powers principles may differ from the approach used in the federal courts. *See, e.g.*, *Marine Forests Soc'y v. California Coastal Com.*, 113 P.3d 1062, 1077 (Cal. 2005) ("in interpreting and applying a state constitutional separation of powers provision, a court must keep in mind potential structural differences between the state and federal constitutions").

understand that "separate powers [are] not intended to operate with absolute independence" but instead must be "integrate[d]" "into a workable government." *OHA v. Yamasaki*, 69 Haw. 154, 168, 737 P.2d 446, 454 (1987) (quotations and alterations omitted).[61] "The critical inquiry" in this context "is whether the actions of one branch" of government unduly "interfere with the functions of another." *Desrosiers*, 158 N.E.3d at 840 (quotation omitted).

And "[o]nly in the event of a total abdication of power" by the Legislature, "through failure either to render basic policy decisions or to assure that they are implemented as made, will [courts] intrude on legislative enactment because it is an 'unlawful delegation.'" *Newsom*, 278 Cal. Rptr. 3d at 407 (quotation omitted; emphasis added). "Thus, the Legislature does not unconstitutionally delegate legislative power" so long as "the statute provides standards to direct implementation of legislative policy." *Id.* "[A] party challenging [a] statute has the burden of showing unconstitutionality beyond a reasonable doubt." *State v. Gaylord*, 78 Hawai'i 127, 137, 890 P.2d 1167, 1177 (1995) (quotation omitted).

Judged against these principles, Appellants have "failed to meet [their] burden of plainly, clearly, manifestly, and unmistakably showing unconstitutionality beyond a reasonable doubt[.]" *Id.* at 142, 890 P.2d at 1182. Chapter 127A's delegation of power comports with constitutional requirements because: (1) it is limited in scope; (2) the Legislature has provided meaningful guideposts on how emergency powers are exercised; and (3) the Legislature has retained important checks on executive power.[62] The statute, and the Governor's actions under it, thus do not violate the separation of powers or nondelegation doctrines.

First, chapter 127A's delegation of authority is not unlimited—and it is far from a "total abdication" of legislative power. On this issue, the reasoning outlined in a recent decision by the Supreme Court of New Mexico is instructive. In *Grisham v. Romero*, 483 P.3d 545, 559 (N.M. 2021), the court rejected an argument—much like the one advanced by Appellants here—that the use of emergency powers meant that the Governor had "seized legislative authority" properly "vest[ed] exclusively in the legislative branch[.]" (quotation and alterations omitted). As explained in *Grisham*, a governor's use of emergency powers "does not work a fundamental

[61] *Cf. Casey*, 2021 WL 1181937, at *10 ("Recognizing that executive, legislative and judicial powers frequently overlap, we have consistently held that the doctrine of the separation of powers cannot be applied rigidly.") (quotation omitted).

[62] Among other things, "the legislature itself" is free to "revisit its decision to have passed the statute in the first place[.]" *Casey*, 2021 WL 1181937, at *16.

disruption of the balance of powers between the branches of government in the context of this public health crisis." *Id.* The *Grisham* court reasoned that the state "has not entered a new normal,' nor do the temporary emergency orders constitute 'long-term policy' decisions." *Id.* The same is true in Hawai'i. Here, the Governor's use of emergency powers under chapter 127A—like the use of emergency powers in New Mexico—is not permanent. On the contrary, the use of emergency powers under chapter 127A will be discontinued as soon as it is responsible to do so. Thus, there has not been a "fundamental disruption of the balance of powers between the branches of government[.]" *Id.*

The broader context of the COVID-19 pandemic further illustrates why no constitutional violation has occurred, because legislative management of the State's day-to-day disaster response would be impossible. As the New Mexico Supreme Court observed, "[t]he argument that special sessions of the Legislature should be used in lieu of . . . emergency orders is so facially unworkable that it only reinforces the conclusion that it was appropriate for the Legislature to grant the executive branch ample authority to immediately and flexibly respond to a public health emergency." *Grisham*, 483 P.3d at 559 (emphasis added). The Kentucky Supreme Court reached the same conclusion. It explained that "[w]hatever import the principle of properly delegated legislative authority has in the ordinary workings of government, its import increases dramatically in the event of a statewide emergency in our Commonwealth." *Beshear v. Acree*, 615 S.W.3d 780, 812-13 (Ky. 2020). This was crucial because "[a] legislature that is not in continuous session and without constitutional authority to convene itself cannot realistically manage a crisis on a day-to-day basis by the adoption and amendment of laws." *Id.* at 813 (emphasis added). The Connecticut Supreme Court agrees. *See Casey*, 2021 WL 1181937, *13-14 (agreeing with *Beshear* that "it was reasonable for the governor to have greater authority in times of emergency given the government's tripartite structure with a legislature that is not in continuous session," and the legislature cannot "legislate quickly in the event of emergency unless the emergency arises during a regular legislative session" (quotation omitted)). Our Legislature—like New Mexico's, Kentucky's, and Connecticut's—does not sit in continuous

session.[63] It is thus not reasonable or practical for it to have to "manage a crisis on a day-to-day basis by the adoption and amendment of laws." *Id.*[64]

Second, the Legislature has provided meaningful guideposts regarding how the Governor is to exercise emergency powers. When it comes to HRS chapter 127A, "[t]he text, structure, history, and context" of the statute "together demonstrate the existence of an intelligible principle," *In re NSA Telecom. Recs. Litig.*, 671 F.3d 881, 895-96 (9th Cir. 2011), for how the Governor should exercise emergency powers. Crucially, "[b]road discretion and standardless discretion are not the same thing." *Wolf v. Scarnati*, 233 A.3d 679, 705 (Pa. 2020).[65] Chapter 127A delegates broad—but not standardless—powers. Here, as in *Scarnati*, the Legislature "has provided adequate standards which will guide and restrain the Governor's powers." *Id*. at 704 (quotation omitted). In Hawai'i, as in Pennsylvania, "[t]he powers delegated to the Governor are admittedly far-reaching, but nonetheless are specific[.]" *Id.* To that end, Hawai'i law allocates to the Governor a number of specific delegated powers. *See* HRS § 127A-13(a) (explaining that "[i]n the event of a state of emergency declared by the governor pursuant to section 127A-14, the governor may exercise the following additional powers pertaining to emergency management," and listing several delegated powers).[66] This is a broad—but not "standardless"—delegation of authority. Of course, emergency situations are inherently difficult to predict, and "there are myriad serious disasters that could arise and the actions the governor would be required to take could vary significantly from one serious disaster to another." *Casey*, 2021 WL 1181937, at *13. Accordingly, a broad delegation of authority is necessary. But Appellants are incorrect to suggest

---

[63] *See* Hawai'i Const. art. III, § 10 ("Regular sessions shall be limited to a period of sixty days. … Any session may be extended a total of not more than fifteen days.").

[64] The State Constitution's restriction on "special laws" might also complicate legislative efforts to manage day-to-day aspects of emergency response. *See generally Sierra Club v. Dep't of Transportation of State of Hawai'i*, 120 Hawai'i 181, 214, 202 P.3d 1226, 1259 (2009).

[65] *Casey*, 2021 WL 1181937, at *13 ("A broad grant of authority … is not the same as limitless or standardless authority.")

[66] For example, § 127A-13(a)(3) delegates the power to "[s]uspend" "law[s] that impede[] or tend[] to impede or be detrimental to the expeditious and efficient execution of, or to conflict with, emergency functions[.]" (emphasis added). That delegation is not "standardless" because it sets forth express criteria guiding how to exercise that authority. *Cf. In re Kauai Elec. Div.*, 60 Haw. 166, 181, 590 P.2d 524, 535 (1978) (no constitutional violation where, "[u]nlike the unlimited authority [found to violate the nondelegation doctrine in other contexts] our statute … prescribes the powers and duties of the Commission, … subjects the Commission's proceeding to appropriate administrative procedures[, and] requires that all rates and charges must be 'just and reasonable'").

that issuing emergency proclamations equates to "legislative" "activities" (AOB13), or somehow constitute "endless[]" (AOB30) or "unlimited power" (AOB28). Moreover, "standards for administrative application of a statute need not be expressly set forth; they may be implied by the statutory purpose[.]" *Newsom*, 278 Cal. Rptr. 3d at 407 (quoting *People v. Wright*, 639 P.2d 267, 271 (Cal. 1982)). By articulating clear policies and purposes—*e.g.*, HRS § 127A-1—the Legislature provided sufficient and meaningful guidance on the exercise of chapter 127A powers. This is not a "standardless" delegation of the kind that transgresses the nondelegation doctrine. Nor does the mere fact that the Governor can reissue emergency proclamations under HRS § 127A-14(d) somehow transform a permissible delegation into the sort of entirely "standardless" "abdication" that would exceed constitutional limits. *See Slidewaters LLC v. Wash. State Dep't. of Lab. & Indus.*, --- F.4th ----, 2021 WL 2836630, at *6 (9th Cir. July 8, 2021) (rejecting separation-of-powers challenge to Washington State's response to the COVID-19 pandemic; reasoning that "[t]he delegation of power by the legislature to the executive to act in a time of emergency under the standards set out by the legislature and using the procedures dictated by the legislature does not present separation of powers concerns").

Third, the Hawai'i Legislature retains significant and meaningful checks on executive power.[67] This makes clear that no separation of powers violation has occurred, and that Appellants are wrong to characterize the Governor's chapter 127A powers as "unchecked[.]" AOB9. For example, the State Legislature remains absolutely free to "revisit its decision to have passed [chapter 127A] in the first place[.]" *Casey*, 2021 WL 1181937, at *16; *Desrosiers*, 158 N.E.3d at 841 (rejecting separation-of-powers challenge in part because the challenged "emergency orders do not … deprive the Legislature of its full authority to pass laws" (quotation omitted)). Indeed, the Hawai'i Legislature could vote to repeal chapter 127A entirely. It has not. The Connecticut Supreme Court properly emphasized this factor in rejecting a separation-of-powers challenge to that state's emergency-powers statute, and it acknowledged that "[s]everal high courts of our sister states have noted the importance of such legislative oversight under similar statutory schemes" in rebuffing such challenges. *Casey*, 2021 WL 1181937, at *14 (citing cases). The Kentucky Supreme Court similarly highlighted that continuing checks and balances counsel against finding a separation-of-powers violation. It reasoned that "[w]hile the authority

[67] *See AlohaCare v. Dep't of Hum. Servs.*, 127 Hawai'i 76, 86, 276 P.3d 645, 655 (2012) (emphasizing the importance of checks and balances to the separation of powers).

exercised by the Governor in accordance with [the Kentucky emergency powers statute] is necessarily broad, … checks on that authority" include "judicial challenges … to the content of a particular order or regulation; legislative amendment or revocation of the emergency powers granted the Governor; and finally the 'ultimate check' of citizens holding the Governor accountable at the ballot box." *Id.* at 812-13. These factors show why no separation-of-powers violation occurred here. If a party believes that the Governor's use of his HRS chapter 127A powers have violated their individual constitutional rights, litigation remains an option.[68] The Legislature can exercise oversight over the executive using legislative committees,[69] or amending chapter 127A. And all citizens can hold officials accountable through elections.

In sum, well-reasoned judicial decisions from across the country have upheld delegations and exercises of emergency powers to respond to the COVID-19 pandemic. In upholding the constitutionality of chapter 127A, the Court should follow the approach taken by the California,[70] Connecticut,[71] Kentucky,[72] Massachusetts,[73] New Mexico,[74] and Pennsylvania[75] courts. Appellants instead invite the Court to follow outlier and unpersuasive decisions from the Michigan and Wisconsin supreme courts. The Court should decline that invitation.

First, consider the Michigan Supreme Court's decision in *Michigan Certified Questions*. AOB24-26. That court "conclude[d] that [a] delegation of power to the Governor to 'promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property,' constitutes an unlawful delegation of legislative power to the executive and is therefore unconstitutional[.]" 958 N.W.2d at 24 (citation omitted). It concluded that the statute

---

[68] *See, e.g.*, HRS § 127A-27 (providing procedures for judicial challenges to emergency orders); *Carmichael*, 470 F. Supp. 3d 1133 (challenging quarantine); *Denis v. Ige*, -- F. Supp 3d --, 2021 WL 1911884 (D. Haw. May 12, 2021) (challenging mask mandate on First Amendment grounds).

[69] Multiple legislative committees have been highly active over the past year in exercising vigorous oversight over the State's pandemic response. *See, e.g.*, *Senate Special Committee on COVID-19*, https://www.capitol.hawaii.gov/specialcommittee.aspx?comm=scovid&year=2020 (last visited July 7, 2021); *House Select Committee on COVID-19 Economic and Financial Preparedness*, https://www.capitol.hawaii.gov/specialcommittee.aspx?comm=cov&year=2020 (last visited July 7, 2021).

[70] *Newsom*, 278 Cal. Rptr. 3d 397.

[71] *Casey*, 2021 WL 1181937.

[72] *Beshear*, 615 S.W.3d at 812-13.

[73] *Desrosiers*, 158 N.E.3d at 839-41.

[74] *Grisham*, 483 P.3d at 559.

[75] *DeVito*, 227 A.3d 872.

was invalid because it "neither supplie[d] genuine guidance to the Governor as to how to exercise the authority delegated to her by the [statute] nor constrains her actions in any meaningful manner." *Id*. at 23.

But that analysis was rejected and powerfully criticized in a dissent joined by three justices. "[U]ntil today," the dissent explained, "the United States Supreme Court and [the Michigan Supreme Court] have struck down statutes under the nondelegation doctrine only when the statutes contained no standards to guide the decision-maker's discretion." *Id*. at 53 (McCormark, C.J., dissenting in part, joined by Bernstein and Cavanagh, JJ.). The dissent explained that "[t]he particular standards in the [Michigan statute] are as reasonably precise as the statute's subject matter permits." *Id*. at 53. Emergencies are inherently difficult to predict, and necessarily require broad delegation, and the majority, the dissent explained, could invalidate the Michigan statute "only by breaking new ground in our nondelegation jurisprudence[.]" *Id*. at 54. Crucially, it was the analysis in the dissent in *Michigan Certified Questions*—not the majority's analysis—that has been adopted by the Connecticut[76] and

---

[76] In *Casey*, the Connecticut Supreme Court explained that it found "the reasoning of the Chief Justice's concurrence and dissent to be more persuasive" than the majority opinion:

> We are not persuaded [by the *Michigan Certified Questions* majority opinion]. As the Chief Justice of the Michigan Supreme Court noted in her concurring and dissenting opinion in that case, the statute does not violate the separation of powers provision because "there are many ways to test the [g]overnor's response to this life-and-death pandemic." Namely, "the statute allows a legal challenge to the [g]overnor's declaration that COVID-19, as a threshold matter, constitutes a 'great public crisis' that 'imperil[s]' 'public safety.' ... For another example, any order issued under the statute could be challenged as not 'necessary' or 'reasonable' to 'protect life and property or to bring the emergency situation within the affected area under control.' ... In these ways and others, the courts can easily be enlisted to assess the exercise of executive power, measuring the adequacy of its factual and legal bases against the statute's language." (Citations omitted.) *Id.* The Chief Justice also noted that the legislature itself might revisit its decision to have passed the statute in the first place. *Id*. Specifically, "[i]f the [l]egislature saw fit, it could repeal the statute. Or, the [l]egislature might amend the law to alter its standards or limit its scope. Changing the statute provides a ready mechanism for legislative balance." *Id.* The Chief Justice further explained that the governor is also politically accountable to voters, which serves as an additional check. *Id.*

Casey, 2021 WL 1181937, at *16 (emphasis added). This same reasoning is persuasive here.

Kentucky[77] supreme courts. That analysis should also be adopted by this Court. It is more consistent with Hawaii's separation of powers doctrine, which emphasizes flexibility, than the *Michigan Certified Questions* majority is. *See Kauai Elec.*, 60 Haw. at 181, 590 P.2d at 535 (upholding standard of "just and reasonable" rates as adequate for nondelegation purposes).

Second, Appellants cite (AOB2, 21) to a concurring opinion in the *Fabick v. Evers* case from the Wisconsin Supreme Court. 956 N.W.2d at 870 (Bradley, J., concurring). But that concurrence conflicts with modern separation-of-powers and nondelegation principles and should be rejected out-of-hand by this Court. Justice Bradley's concurrence advocates for a radically different nondelegation jurisprudence—one that would be "far removed from the modern doctrine[.]" *Id*. at 875 (quotation omitted). It would jettison the "intelligible principle" test entirely, *id.*, and discard a bedrock legal principle underpinning much of modern administrative law. The radical changes to the separation of powers and nondelegation doctrines

---

[77] In *Beshear v. Acree*, the Kentucky Supreme Court explained why the reasoning of the *Michigan Certified Questions* majority was inapt and unpersuasive:

> While the authority exercised by the Governor in accordance with [the Kentucky emergency statute] is necessarily broad, the checks on that authority are the same as those identified in Chief Justice McCormack's dissenting opinion: judicial challenges to the existence of an emergency or to the content of a particular order or regulation; legislative amendment or revocation of the emergency powers granted the Governor; and finally the "ultimate check" of citizens holding the Governor accountable at the ballot box.
>
> Whatever import the principle of properly delegated legislative authority has in the ordinary workings of government, its import increases dramatically in the event of a statewide emergency in our Commonwealth. A legislature that is not in continuous session and without constitutional authority to convene itself cannot realistically manage a crisis on a day-to-day basis by the adoption and amendment of laws. In any event, we decline to abandon approximately sixty years of precedent that appropriately channels and limits the delegation of legislative power in Kentucky.

615 S.W.3d at 812-13. As the above passage makes clear, the court held that the *Michigan Certified Questions* was distinguishable because Michigan's legislature sits continuously, while Kentucky's "is not continuously in session" and thus not "ready to accept the handoff of responsibility for providing the government's response to an emergency such as the current global pandemic." *Id*. at 812. "A legislature that is not in continuous session and without constitutional authority to convene itself cannot realistically manage a crisis on a day-to-day basis by the adoption and amendment of laws." *Id*. at 813. Hawaii's Legislature (like Kentucky's, but unlike Michigan's) does not sit continuously and so "cannot realistically manage a crisis on a day-to-day basis" by enacting legislation. *Id.*

urged by the *Fabick* concurrence would be exceptionally destabilizing, and might invalidate many aspects of the modern administrative state. This Court should reject such an approach.

In short: Chapter 127A does not violate the nondelegation doctrine.

D. Appellants Lack Standing

Appellants also fail to establish standing.[78] In the circuit court, Appellants sought declaratory relief under HRS § 632-1. That provision confers standing only:

> (1) where antagonistic claims exist between the parties
>
> (a) that indicate imminent and inevitable litigation, or
>
> (b) where the party seeking declaratory relief has a concrete interest in a legal relation, status, right, or privilege that is challenged or denied by the other party, who has or asserts a concrete interest in the same legal relation, status, right, or privilege; and
>
> (2) a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.

Tax Found., 144 Hawai‘i at 202, 439 P.3d at 154 (additional formatting added; emphasis added). When judged against this standard, Appellants plainly lack standing. First, Appellants have not alleged (or otherwise established) that they will participate in an "imminent" or "inevitable" lawsuit. Appellants do not allege that they have ever been cited for, or suspected of, violating the State's emergency proclamations or the rules issued thereunder. Nor (with the apparent exception of Appellant Lomma[79]) could they make such allegations. Nor have Appellants adequately alleged a concrete interest in a legal relation, status, right, or privilege. Instead, Appellants vaguely complain that the State allegedly acted in a manner inconsistent with either § 127A-14(d) or the constitution. But a "generalized grievance about the correctness of governmental conduct," *Markham*, 136 A.3d at 145, is not cognizable. Here, Appellants have not

[78] The State challenged Appellants' standing before the circuit court. JEFS Dkt. No. 46 at 6-7 (motion to dismiss); No. 55 at 9-10 (reply). Even if the State had not raised this issue, "Hawai‘i state courts may consider standing even when not raised by the parties[.]" *Tax Found.*, 144 Hawai‘i at 192, 439 P.3d at 144.

[79] Appellant Levana Lomma "is a defendant in [a] related case," "*State v. Levana Keikaika, Levana Lomma*, Kaua‘i – Fifth Circuit Court, case number 5DCW-21-0000413." AOB33. That case "pertains to a misdemeanor charge for an alleged violation of the Governor's proclamation." *Id.* But if Lomma wishes to challenge the legality of that prosecution, she should do so as a defense in that criminal prosecution, not through a separate challenge here. "[D]eclaratory relief will not ordinarily be employed to determine the enforcement of criminal statutes[.]" *Kahaikupuna v. State*, 109 Hawai‘i 230, 235, 237, 124 P.3d 975, 980, 982 (2005).

adequately alleged or established a "concrete interest," rather than a mere generalized grievance stemming from the general interest in proper application of law.

E. Appellants' Claims Are Moot

This case is moot because "it has lost its character as a present, live controversy[.]" *Queen Emma Found. v. Tatibouet*, 123 Hawai'i 500, 506-07, 236 P.3d 1236, 1242-43 (App. 2010). The emergency proclamations that Appellants sought to challenge (and referenced in their complaint and FAC) have been superseded and are no longer effective. *See, e.g.*, *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) ("a case challenging … [an] executive order … usually becomes moot if the challenged law has expired or been repealed"); *Ministries v. Newsom*, 465 F. Supp. 3d 1068, 1072 (S.D. Cal. 2020) (challenge held moot where new "guidelines superseded the orders challenged in [the p]laintiff's papers").[80] Moreover, the State anticipates moving to dismiss this appeal once the Governor has ceased issuing emergency proclamations and once no state of emergency remains in place. At that point, dismissal on mootness grounds will be warranted. Nor have Appellants established that this case falls within one of the exceptions to the mootness doctrine. Among other things, Appellants cannot establish that the COVID-19 pandemic—an unprecedented, once-in-a-century pandemic—is likely to recur in the future. AOB29-30; *id*. (looking to "likelihood of future recurrence").

F. Appellants Do Not Have a Private Right of Action To Enforce Chapter 127A

The declaratory judgment statute, HRS § 632-1, cannot supply a right of action where the statute itself does not provide one. "In order for a party to sue … under HRS § 632-1," there must be "an express or implied private right of action." *Alakai*, 127 Hawai'i at 285, 277 P.3d at 1010. After all, "[a]s the declaratory judgment statute … makes clear, there must be some 'right' at issue in order for the court to issue relief." *Rees v. Carlisle*, 113 Hawai'i 446, 458, 153 P.3d 1131, 1143 (2007); *id.* at 459, 153 P.3d at 1144 (rejecting "[p]rivate enforcement" of a statute "by way of declaratory judgment would not be consistent with the legislative scheme" as shown by the lack of a private right of action). Here, as in *Rees*, "[n]othing in the text of [chapter 127A] appears to create a right protecting members of the public from the activities it prohibits." *Id*. at 458, 153 P.3d at 1143. Appellants thus "cannot circumvent the … legislature's decision not to provide a private right of action by relying on the Declaratory Judgment Act." *Iolani Islander,*

[80] Certainly, the determination that the "claim in regards to the vagueness of prior emergency proclamations, which are no longer in effect" was moot (JEFS Dkt. No. 77 at 2) was correct.

LLC v. Stewart Title Guar. Co., Civ. No. 16-00429 ACK-RLP, 2017 WL 11139924, at *8 (D. Haw. Nov. 7, 2017). In short, the absence of a private right of action "stops [the] declaratory judgment action in its tracks." *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 907 (6th Cir. 2014).[81] Crucially, the private-right-of-action question is distinct from whether standing exists. *See Cnty. of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 406 n.20, 235 P.3d 1103, 1118 n.20 (2010) ("The private right of action inquiry focuses on the question of whether any private party can sue to enforce a statute, while the standing inquiry focuses on whether a particular private party is an appropriate plaintiff."). If Appellants' theory is that any exercise of executive authority that exceeds a statutory authorization is automatically unconstitutional, courts have rejected such a view. *See, e.g.*, *Dalton v. Specter*, 511 U.S. 462, 472 (1994) (rejecting the notion that an action in excess of statutory authority equates to a constitutional violation; "[o]ur cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is ipso facto in violation of the Constitution").

G. The Political Question Doctrine Bars Judicial Determination Of When The Emergency Periods Associated With COVID-19 Should Be Ended

Finally, this Court should decline to hear this appeal because it unavoidably implicates political questions that are inappropriate for judicial resolution. In deciding to invoke this doctrine, this Court considers:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Yamasaki, 69 Hawai'i at 170, 737 P.2d at 455.

[81] *Tax Foundation* does not alter this analysis. 144 Hawai'i 175, 439 P.3d 127. That case, which involved taxpayer standing, clarified that courts "cannot limit a cause of action [the legislature] created merely because 'prudence' dictates," nor are federal principles of Article III standing properly imported wholesale into Hawai'i standing law. But here, the crucial point is there is simply no preexisting "right" to enforce the 60-day provision of § 127A-14(d).

If Appellants were correct that additional proclamations based on the "same underlying emergency" (AOB8) or "the same Covid-19 concerns" (AOB18) are not permitted, courts would become embroiled in hopelessly complex, sensitive, and fine-grained disputes over what exactly constitutes the "same" emergency. For example, is a particular outbreak or surge of COVID-19 in March 2021[82] the "same" emergency as the one that prompted the Governor's initial emergency proclamation in March 2020? Are economic dislocations caused by the pandemic the "same" emergency? Is the appearance of dangerous new strains of COVID-19[83] the "same" emergency? There is simply no way for the courts to decide such disputes without making "an initial policy determination of a kind clearly for nonjudicial discretion," nor could courts decide such cases given the "lack of judicially discoverable and manageable standards for resolving" such matters. *Yamasaki*, 69 Hawai'i at 170, 737 P.2d at 455. Deciding such questions would also violate § 127A-14(c)'s mandate that "[t]he 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[.]" HRS §127A-14(c) (emphasis added). Because "[a] public emergency is not a time for uncoordinated, haphazard, or antagonistic action," *Macias v. State of California*, 10 Cal. 4th 844, 858, 897 P.2d 530, 539 (Cal. 1995)—and because the risk of "multifarious pronouncements by various departments," *Yamasaki*, 69 Hawai'i at 170, 737 P.2d at 455, is particularly significant in the context of emergency management—the political question doctrine applies.

/ /

/ /

/ /

/ /

/ /

/ /

[82] *E.g.*, *Maui church linked to at least 55 COVID cases refuses to cancel in-person services*, Hawai'i News Now (Apr. 1, 2021), https://www.hawaiinewsnow.com/2021/03/31/doh-raises-alarms-after-covid-cluster-linked-maui-church-grows-cases/ (last visited July 7, 2021) (McLean Decl. Ex. 25).

[83] *E.g.*, Sophie Cocke, *Delta coronavirus variant, which may cause more severe illness, detected in Hawaii*, Honolulu Star-Advertiser (June 14, 2021), https://www.staradvertiser.com/2021/06/14/breaking-news/delta-coronavirus-variant-which-may-cause-more-severe-illness-detected-in-hawaii/ (last visited July 7, 2021) (McLean Decl. Ex. 25).

V. CONCLUSION

The Court should affirm the decision below or, alternatively, dismiss this appeal.

DATED: Honolulu, Hawai‘i, July 8, 2021.

/s/ Nicholas M. McLean
NICHOLAS M. MCLEAN
EWAN C. RAYNER
DAVID D. DAY
CRAIG Y. IHA
Deputy Attorneys General

Attorneys for Defendants-Appellees DAVID IGE, in his official capacity as the Governor of the State of Hawai‘i; CLARE E. CONNORS, in her official capacity as the Attorney General of the State of Hawai‘i; and the STATE OF HAWAI‘I

DECLARATION OF NICHOLAS M. MCLEAN

I, NICHOLAS M. MCLEAN, hereby declare under penalty of law that the following is true and correct:

1. I am a Deputy Attorney General with the Department of the Attorney General of the State of Hawai‘i and am one of the attorneys representing Defendants Governor DAVID IGE, in his official capacity as Governor of the State of Hawai‘i, Attorney General CLARE E. CONNORS, in her official capacity as Attorney General for the State of Hawai‘i, and the STATE OF HAWAI‘I in the above-captioned matter.

2. Attached as Exhibit "1" is a true and correct copy of Office of the Governor, *Twenty-First Proclamation Related to the COVID-19 Emergency* (June 7, 2021), https://governor.hawaii.gov/wp-content/uploads/2021/06/2106080-ATG_21st-Emergency-Proclamation-for-COVID-19-distribution-signed.pdf (last visited July 7, 2021).

3. Attached as Exhibit "2" is a true and correct copy of *Newsom v. Superior Ct. of Sutter Cty.*, 278 Cal. Rptr. 3d 397 (2021).

4. Attached as Exhibit "3" is a true and correct copy of *Casey v. Lamont*, -- A.3d --, 2021 WL 1181937 (Conn. 2021).

5. Attached as Exhibit "4" is a true and correct copy of *Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020).

6. Attached as Exhibit "5" is a true and correct copy of *Desrosiers v. Governor*, 158 N.E.3d 827 (Mass. 2020).

7. Attached as Exhibit "6" is a true and correct copy of *Grisham v. Romero*, 483 P.3d 545 (N.M. 2021).

8. Attached as Exhibit "7" is a true and correct copy of *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020).

9. Attached as Exhibit "8" is a true and correct copy of *Fabick v. Evers*, 956 N.W.2d 856 (Wisc. 2021).

10. Attached as Exhibit "9" is a true and correct copy of *Midwest Inst. of Health, PLLC v. Gov. of Mich.*, 958 N.W.2d 1 (Mich. 2020).

11. Attached as Exhibit "10" is a true and correct copy of World Health Organization, *Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it/ (last visited July 7, 2021).

12. Attached as Exhibit "11" is a true and correct copy of World Health Organization, *Coronavirus Disease (COVID-19) Pandemic*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (last visited July 7, 2021).

13. Attached as Exhibit "12" is a true and correct copy of CDC, *COVID Data Tracker,* https://covid.cdc.gov/covid-data-tracker/#cases_totalcases (last visited July 7, 2021).

14. Attached as Exhibit "13" is a true and correct copy of *Hawaii COVID-19 data*, https://health.hawaii.gov/coronavirusdisease2019/what-you-should-know/current-situation-in-hawaii/ (last visited July 7, 2021).

15. Attached as Exhibit "14" is a true and correct copy of Office of the Governor, *Governor Ige Lifts Mask Requirement for Outdoor Activities, Gives Green Light to Ocean Sports Competitions—Honolulu and Kauai County Orders Also Approved* (May 25, 2021), https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-governor-ige-lifts-

mask-requirement-for-outdoor-activities-gives-green-light-to-ocean-sports-competitions-honolulu-and-kauai-county-orders-also-approved/ (last visited July 7, 2021).

16. Attached as Exhibit "15" is a true and correct copy of Office of the Governor, *Inter-County Travel Restrictions to End on June 15—Gov. Ige Sets Benchmarks for Easing Domestic Travel Restrictions* (Jun. 4, 2021), https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-inter-county-travel-restrictions-to-end-on-june-15-gov-ige-sets-benchmarks-for-easing-domestic-travel-restrictions/ (last visited July 7, 2021).

17. Attached as Exhibit "16" is a true and correct copy of Office of the Governor, *Governor Ige Sets Additional Vaccination Benchmarks for Gatherings, Restaurants—Also Signs New Proclamation Terminating Some Emergency Provisions* (June 7, 2021), https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-governor-ige-sets-additional-vaccination-benchmarks-for-gatherings-restaurants-also-signs-new-proclamation-terminating-some-emergency-provisions/ (last visited July 7, 2021).

18. Attached as Exhibit "17" is a true and correct copy of *In re COVID-19*, SCMF-20-0000152, 2021 WL 1150172 (Haw. Mar. 25, 2021) (unpublished).

19. Attached as Exhibit "18" is a true and correct copy of Act 57, https://www.capitol.hawaii.gov/session2021/bills/GM1157_.PDF (last visited July 7, 2021).

20. Attached as Exhibit "19" is a true and correct copy of *Partal, et al. v. Ige, et al.*, Civil No. 3CCV-20-0000277.

21. Attached as Exhibit "20" is a true and correct copy of *Cassell v. Snyders*, 458 F. Supp. 3d 981, 2020 WL 2112374 (N.D. Ill. May 3, 2020).

22. Attached as Exhibit "21" is a true and correct copy of *Fox Fire Tavern, LLC v. Pritzker*, 161 N.E.3d 1190 (Ill. App. 2020).

23. Attached as Exhibit "22" is a true and correct copy of *H's Bar, LLC v. Berg*, Case No. 20-cv-1134-SMY, 2020 WL 6827964 (S.D. Ill. Nov. 21, 2020).

24. Attached as Exhibit "23" is a true and correct copy of Wendy Parmet, *Conservative Courts Say They Can't Set Health Policy—And Then They Do It Anyway*, Washington Post (Apr. 12, 2021), https://www.washingtonpost.com/outlook/2021/04/12/fabick-mask-mandate-conservative-judges/ (last visited July 7, 2021).

25. Attached as Exhibit "24" is a true and correct copy of Nicholas Bagley, *A Warning from Michigan*, The Atlantic (Oct. 7, 2020), https://www.theatlantic.com/ideas/archive/2020/10/america-will-be-michigan-soon/616635/ (last visited July 7, 2021).

26. Attached as Exhibit "25" is a true and correct copy of *Maui church linked to at least 55 COVID cases refuses to cancel in-person services*, Hawai'i News Now (Apr. 1, 2021), https://www.hawaiinewsnow.com/2021/03/31/doh-raises-alarms-after-covid-cluster-linked-maui-church-grows-cases/ (last visited July 7, 2021).

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, July 8, 2021.

/s/ Nicholas M. McLean
NICHOLAS M. MCLEAN