NO. CAAP- 21-0000024
IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

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 Schulkind, Daniel Hashimoto, Christina Cole, Francesca Woolger, Na'ea Lindsey, Michael Mazzone, Lanette J. Harley, and Loraine L. Patch, Plaintiff-Appellants vs. DAVID IGE, in his official capacity as Governor of the State of Hawai'i, CLARE E. CONNORS, in her official capacity as Attorney General for the State of Hawai'i, and STATE OF HAWAI'I, Defendant-Appellees	CASE NO. 5CCV-20-0091 PLAINTIFFS' APPEAL FROM FINAL JUDGMENT (December 24, 2020) DISMISSING THE FIRST AMENDED COMPLAINT; CERTIFICATE OF SERVICE APPELLANTS' REPLY BRIEF

REPLY BRIEF OF APPELLANT FOR OUR RIGHTS
CERTIFICATE OF SERVICE
ON APPEAL FROM THE FIFTH CIRCUIT COURT
HONORABLE KATHLEEN N. A. WATANABE, PRESIDING

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INTRODUCTION[1]

A major emergency arises, the Governor takes action to address the emergency, and within 60 days the Legislature convenes a special session to enact a law to extend the Governor's authority for an additional period of time. The emergency action statute is obeyed, each branch of government has followed the Constitution, and the emergency is addressed. That procedure was known and available since the Covid-19 pandemic started.

Appellees, however, urge this Court to stretch statutory construction to the breaking point, ignore the letter of the law, and bypass the Constitutional separation of powers. And worse: They do so to concentrate power into the hands of one individual to rule the entire state by edict for an indefinite period of time, now over 494 days. This Court should reject the temptation to approve Appellees' disrespect of the laws and Constitution of the State of Hawai'i.

ARGUMENT

I. Appellees Have Failed To Justify The Governor's Rule By Edict Beyond the Statutory 60-Day Limit.

A. Appellees' "Hands Tied" Argument Mischaracterizes the Constitution and Disingenuously Imagines a False Dichotomy That Should Not Become Law.

Appellants have shown the compelling reasons to treat the express 60-day limit on the Governor's unilateral rule by edict during emergencies, stated in Hawai'i Revised Statutes ("HRS") § 127A-14(d), as a power limit that must be respected and enforced by the courts.

Appellees' Brief (cited as "App. Answ.") on page 11 countercharges: "Under Appellants' reading, the Governor's hands would be tied after 60 days, no matter how long-lasting the emergency." Appellees' charge is worse than wrong. Their assertion erects a false dichotomy: Either the Governor holds all the power indefinitely – or – no government entity can do anything to address an ongoing serious statewide problem.[2]

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[1] Appellants stand upon their opening brief and the record on appeal, presenting this necessarily short Reply to address certain of Appellees' arguments without waiving any position already briefed.

[2] Appellees' Brief repeats the false dichotomy on page 10, accusing Appellants of reading Section 127A-14 "as *completely depriving* the Governor and mayors of *any* power to respond to any emergency lasting longer than 60 days." (Appellees' emphasis.) Appellants have never argued that. As explained *infra*, according to the Appellees' view of government power, the Legislature can readily confer authority upon the Governor to act for longer terms, and Section 127A-14 can thus be properly superseded by proper lawmaking. No hands are tied.

Appellees double down on the false dichotomy by misleadingly citing the Hawai‘i Constitution. In its Brief on pages 25-26, Appellees argue the Legislature of Hawai‘i cannot legislate quickly "unless the emergency arises during a regular legislative session." (Quotations and citations omitted). Appellees selectively quote from the Constitution to say that the Legislature cannot do anything when an emergency arises. App. Answ. at 26 n. 63 ("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.')"). *Only the Governor can act, they say, because the Legislature will not be in session.*

Their argument misleadingly omits: The Legislature can convene a special session at any time! The section's second paragraph expressly states: "At the written request of two-thirds of the members to which each house is entitled, *the presiding officers of both houses shall convene the legislature in special session*." Haw. Const. art. III, § 10 (emphasis added). Appellees insinuate the Hawai‘i Legislature would care so little about the pandemic that its members would blithely fail to convene a special session sometime within the Governor's 60-day emergency proclamation.

Over 494 days after the Governor's initial Proclamation, Appellees are still defending the Governor's rule by edict, trying to say it is necessary because the Legislature was limited by article III, § 10. If Appellees are correct to say the Legislature can imbue the Governor with sweeping powers, then the Legislature needed only to convene a special session and enact a law saying so. By this straightforward procedure, the 60-day limit under Section 127A-14 would be superseded by the legislative and executive branches functioning constitutionally. Instead, Appellees demand the express 60-day statutory limit be nullified, requiring the principles of statutory construction[3] be either distorted or ignored.

[3] The Hawai‘i Supreme Court still states: "When construing a statute, our *foremost obligation* is to 'give effect to the intention of the legislature, which is *to be obtained primarily from the language contained in the statute itself.*'" *Hawaiian Dredging Constr. Co. v. Fujikawa Assocs.*, 142 Haw. 429, 435, 420 P.3d 360 (2018) (emphasis added), *quoting Morgan v. Planning Dep't, Cnty. of Kauai*, 104 Hawai'i 173, 179-80, 86 P.3d 982 (2004). When the legislature wrote in a 60-day limit to the emergency proclamation power, its intention could not be more concretely stated.

B. Appellees Indulge Contradictory, Power-Maximizing and Rights-Minimizing, Positions About What a 60-day Limit Means.

Appellees have continuously asserted the 60-day limit on the Governor's power to rule by edict does not limit his power in any way. *E.g.*, App. Answ. at 1, 8, 9-10. When the Legislature enacted the 60-day limit, the Legislature did not really mean it, Appellees say.

But then Appellees (misleadingly) bind the entire Legislature to one 60-day session (plus one possible short extension). App. Answ. at 26-27 & n.63 (citing Haw. Const. art. III, § 10). *That 60-day limit* is so broadly restrictive, Appellees contend the Legislature cannot convene, and the Governor must act unilaterally by successive overlapping proclamations for 494 days or more.

The contradiction is stark: The 60-day limit on regular sessions operates to tie the hands of the state's primary law-making body, the legislature – even in a pandemic. But a 60-day limit on the Governor's unilateral exercise of power based upon his personal opinion, means nothing.

Appellees seek to bend the statutes to serve a unilateral ruler by edict. The same Appellees, however, doubtless see no problems with enforcing strict time limits upon everyday citizens. Myriad time limits and deadlines populate the laws, restricting rights or imposing penalties. Appellee Attorney General's organization daily deploys all of these without a microsecond of concern about "absurdity." If a citizen pays a tax a day late, there is a penalty.[4] People with claims of harm against the State will lose that claim if they are filed one day late: "A tort claim against the State *shall be forever barred unless action is begun within two years* after the claim accrues, except in the case of a medical tort claim…" HRS § 662-4 (emphasis added).

Appellees' preferred selective interpretation of laws to favor government power at citizens' expense should not be rewarded.

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[4] The tax authority for Hawai'i describes the penalties and interest owed for late filing in no uncertain terms at its website's FAQ page: https://tax.hawaii.gov/faq/. *See* Information On Hawaii State Taxes (Pub. 1, rev. 2012), *at* https://www.hawaii.edu/policy/docs/temp/Publication-1_Information_on_Hawaii_State_Taxes_Administered_by_the_Department_of_Taxation.pdf. The State's Department of Taxation would not even follow other states' relaxation of filing deadlines in 2020, despite the pandemic. (https://www.khon2.com/local-news/hawaii-officials-say-state-taxes-are-still-due-deny-deadline-extension/) Appellees are not on record as calling these inflexible and sometimes punitive ideas "absurd."

III. Appellees Brief Failed To Support Its Claim That The Rule By Edict Is Limited.

Appellees' Brief tries to justify the Governor's continuous rule by edict by saying, in effect, "he will rule only as long as he has to, for your own good." Thus, on page 13:

> To be clear: Governor Ige fully expects to end the remaining COVID-19 emergency provisions "at the earliest possible date that conditions warrant."

(Citations omitted (content not present).)

And on page 14, without supporting citation:

> 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.

These assertions appear in the Brief filed by the Governor, Attorney General, and the State itself – and there is not a shred of evidence supporting either one. No sworn statement, not even a press release written by a civil servant, not even a speech given to the Legislature.

Appellees' inability to affirm under oath an intention to stop ruling by unchecked edict only confirms Appellants' observations and contentions. The Proclamations were and remain an unconstitutional and unlawful concentration of power into the Executive branch and one individual. And the Executive branch will defend it using statements of counsel rather than a single word from the parties themselves.

IV. Contrary To Appellees' Assertion, The Legislature Does Not Retain Significant And Meaningful Checks On The Governor's Rule By Proclamation.

Appellees' Brief, on page 27, contends: "the Hawai'i Legislature retains significant and meaningful checks on executive power. This makes clear that no separation of powers violation has occurred [.]" *Yet the Brief points to no such checks.*

In footnote 67, Appellees cite *AlohaCare v. Dep't of Hum. Servs*., 127 Hawai'i 76, 86, 276 P.3d 645 (2012), as supporting their assertion. In fact, *AlohaCare* does *not* "make clear" that the Governor has not violated the separation of powers doctrine. *AlohaCare* did not address the instant controversy or anything like it. *AlohaCare* did, however, reaffirm the separation of powers concerns that arise when an executive branch element claims immunity from judicial review. *AlohaCare*, 127 Hawai'i at 87 (citations omitted).

Indeed, the *AlohaCare* court rejected the State's claim that it is fully constitutional for an executive branch element to be reviewed solely by another executive branch element. The court stood upon the separation of powers to criticize a claim of executive branch immunity:

> [Executive branch element's] argument allows the executive branch to exercise unchecked judicial power, and hence does not mitigate separation of powers concerns. Thus, [the] contention that there is no separation of powers issue because an executive agency reviews the decision of an executive purchasing agency is incorrect.

AlohaCare, 127 Hawai'i at 86-7; *see id.* at 89-90 (rejecting claim of immunity from review).

V. Appellees' Interpretation Of HRS § 127A-13(a)(3) Would Constitute A "Standardless" Delegation Of The Legislature's Power To The Governor.

Appellees' Brief at page 26, footnote 66, asserts:

> [HRS] § 127A-13(a)(3) delegates [to the Governor] the power to "suspend laws that impede or tend to impede or be detrimental to the expeditious and efficient execution of, or to conflict with, emergency functions."

(Original editorial marks cleaned up.)

And:

> That delegation is not "standardless" because it sets forth express criteria guiding how to exercise that authority.

(*Citing In re Kauai Elec. Div.*, 60 Haw. 166, 181, 590 P.2d 524 (1978).

Reading *Kauai Elec.*, where Appellees cited, discovers the decision does not support Appellees' position at all. First, *Kauai Elec.* confirms "this jurisdiction has adopted the non-delegation doctrine as part of its own body of constitutional law[.]" *Id.* (citation omitted). Second, *Kauai Elec.* holds the relevant statute for the rate setting proceedings, HRS Chapter 269, "prescribes the powers and duties of the Commission, and *subjects the Commission's proceeding to appropriate administrative procedures*." *Id.*, 60 Haw. at 181 (emphasis added). Here, Appellees can point to no provision within HRS § 127A that subjects the Governor to any "administrative procedures" for oversight or limitations on power. Indeed, Appellees urge this Court to declare the Governor has unlimited power based upon the Governor's personal opinion about any given "emergency." There are no discretion-checking "administrative procedures" involved.

Third, *Kauai Elec.* describes the existence of a legal test to be applied by courts reviewing rate setting decisions: "just and reasonable." *Kauai Elec*., 60 Haw. at 181. Appellees point to no such standard of any kind in HRS § 127A that would objectively evaluate the Governor's exercise of unilateral power even for "reasonableness." Quite the opposite: Appellees contend that only an act of the Legislature can limit the Governor's power – and then Appellees contend the Legislature is powerless to act because it is not in session. App. Answ. at 25-26. So, there is nothing like the administrative or other oversight procedures approved in *Kauai Elec*. to place any check or balance upon the Governor's serial edicts.

VI. Appellees' Brief Repeatedly Misconstrues or Misapplies Case Law in Vain Attempts to Justify the Continuing Rule by Edict.

A. *Dalton v. Spector* (1994).

Appellees' Brief asserts on page 33:

> 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").

Appellees omit to mention: The *Dalton* Court expressly reaffirmed that when the chief executive (e.g., the President) exceeds the executive's constitutional powers and effectively acts like a legislature, under a general delegation of the legislature's power, then *the executive's acts are scrutinized under the separation of powers doctrine. See Dalton*, 511 U.S. at 473 n.5.

Appellees' Brief repeatedly declares the Governor can act as a legislature, ruling by edict, indefinitely, and asserts that was exactly the Legislature's intention. Appellees urge the Legislature was authorized to confer legislative powers upon the Governor for as long as the Governor could self-define as necessary. They cite *Dalton*, but *Dalton* approved nothing of the sort. *See id.* at 472 (restating the prior holding "that sovereign immunity would not shield an executive officer from suit if the officer acted either 'unconstitutionally or beyond his statutory power'").

B. *Desrosiers v. Governor* (2020).

Appellees' Brief cites *Desrosiers v. Governor*, 158 N.E.3d 827 (Mass. 2020), as though it were authority for conferring power upon the Governor of Hawai'i indefinitely unless the legislature acts to terminate that power. Perhaps inadvertently, Appellees' Brief shows exactly why the comparison to Massachusetts law is inapt. The Massachusetts Civil Defense Act of 1950 ("CDA"), 1950 Mass. Acts 639, prescribes no time limit upon that commonwealth's governor's emergency power once seized. *See Desrosiers*, 158 N.E.3d at 841 n.24. Accordingly, *Desrosiers* held the Massachusetts governor's power was unlimited in time unless the legislature cut it off, all the while conceding the Michigan statute did limit the extent of the Michigan governor's power. *Id.*

Desrosiers itself drew the clear distinction between the presence or absence of statutory time limits. As Appellants' Opening brief showed, Hawai'i's law *states a time limit* akin to that in Michigan law.[5] Unlike the Massachusetts CDA but like the Michigan statute, the Hawai'i statute does not confer power for as long as the Governor decides he wants it.

C. *In re Kauai Electric Division* (1978).

Appellees' Brief on page 30 asserts "Hawaii's separation of powers doctrine… emphasizes flexibility," and cites *In re Kauai Elec. Div.*, 60 Haw. at 181, 590 P.2d 524. *Kauai Elec.* dealt with utility company rate setting decisions. *Kauai Elec*. had nothing to do with a succession of gubernatorial statewide edicts that lock down the population, forbid travel, shutter businesses and schools, and destroy livelihoods. No such holding or implication appears in *Kauai Elec.* where Appellees cited it. Rather, *Kauai Elec*. there held the Public Utilities Commission had the power to order a refund as a condition to an interim rate increase, provided the increase was "itself reasonable under the circumstances." *Id.*

D. Numerous Inapposite Out-of-State Cases Cited to Establish "Meaningful Guideposts" Under Hawai'i Law.

Using a remarkable rhetorical stratagem, Appellees' Brief on page 26 first asserts: "[T]he [Hawai'i] Legislature has provided meaningful guideposts regarding how the [Hawai'i] Governor is to exercise emergency powers." Then the Brief recites out-of-context quotations

[5] See the extended discussion of the Michigan statute in *Midwest Inst. of Health, PLLC v. Governor of Mich. (In re Certified Questions from the United States Dist. Court)*, 506 Mich. 332, 958 N.W.2d 1 (2020), and how it applies to the Arizona statute, in Appellants' Opening Brief.

from five out-of-state jurisdictions' cases as though such snippets could prove anything about Hawai'i's "meaningful guideposts." None purport to interpret or predict Hawai'i law.

E. *Mayor of City of Philadelphia v. Educ. Equal. League* (1974).

Appellees' Brief on page 23, footnote 23, asserts:

> [Appellants'] 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.

Appellees' red herring cannot distract from the truth. The courts of Hawai'i have adopted the separation of powers doctrine as described by federal precedents. The doctrine of separation of powers derives from the distribution of power among the three branches of government. *AlohaCare*, 127 Haw. at 86, 276 P.3d at 655, *citing Clinton v. Jones*, 520 U.S. 681, 691 (1997) (stating definition), and *Hawaii Insurers Council v. Lingle*, 120 Hawai'i 51, 69, 201 P.3d 564 (2008) (explaining the separation of powers doctrine preserves the checks and balances such that "sovereign power is divided and allocated among three co-equal branches"). Federal precedents supply sources and persuasive interpretive authority. The *Mayor of Philadelphia* decision, however, addressed issues concerning the power of a mayor to appoint persons to a school board under circumstances of alleged racial discrimination. 415 U.S. at 606-09. The precedent is irrelevant to the facts here.

VII. Appellees Raise "Political Question" Doctrine For The First Time on Appeal; The "Parade of Horribles" Cannot Occur if The Legislative Plan Enacted as HRS § 127A is Followed as Written.

For the first time in this litigation, Appellees assert the "political question" doctrine.[6] The only discussion offered is on page 34 of Appellees' Brief, where it conjures a parade of horrible

[6] Appellees's Brief nominally cites *Ching v. Case*, 145 Haw. 148, 174, 449 P.3d 1146 (2019), as authority for a "political question" defense, but nowhere carries out the required analysis. The *Ching* Court declared: "This court has adopted the test for identifying a political question articulated by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 [1962]." In *Baker v. Carr*, the Court held: "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." *Id.* at 217. "[A] claim whose resolution also includes resolution of a political question can be

consequences to the judicial system and the whole state if Section 127A-14 were enforced as written:

> If Appellants were correct that additional proclamations based on the "same underlying emergency" …. or "the same Covid-19 concerns" … are not permitted, courts would become embroiled in hopelessly complex, sensitive, and fine-grained disputes over what exactly constitutes 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."

(Citation omitted.)

Quite by accident, Appellees got one point right, albeit for different reasons. An endless sequence of changing "additional proclamations" does present problems. But HRS § 127A sets up a plan for the Governor to act quickly and immediately to address an emergency. Within the next 60 days, the Legislature would mobilize to convene and decide whether the emergency needed to be extended and on what terms. The Legislature would pass a law,[7] the Governor would sign it. No more unilateral proclamations would be necessary. And therefore, none of the feared "disputes over what constitutes the same emergency" would appear in any court.

Follow the statutory system as written – the emergencies will be addressed quickly as both executive and legislative branches work together.

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dismissed on that basis only if the political question is 'inextricable.'" *Al-Tamimi v. Adelson*, 916 F.3d 1, 13 (D.C. Cir. 2019), *citing Baker*, 369 U.S. at 217. Appellees offer no legal support for the "political question" issue on its elements or on the "inextricability" criterion, likely because the argument was an after-thought. "The political question doctrine is certainly the most amorphous aspect of justiciability." *Trs. of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 169, 737 P.2d 446 (1987). Effectively not briefed by Appellees at any time in this litigation, the issue is not properly before this Court. *See* ***Error! Main Document Only.****State v. Moore*, 82 Haw. 202, 206 n.1, 921 P.2d 122 (1996).

[7] **Error! Main Document Only.**Lawmaking "should be done through the conscious decision making process of the legislature as the voice of the people." *Del Rio by Del Rio v. Crake*, 87 Haw. 297, 303, 955 P.2d 90 (1998). Fundamentally, "[t]he Legislature is the voice of the people[.]" *Maestas v. Hall*, 274 P.3d 66, 77, ¶ 32 (N.M. 2012). Public and judicial policy should always default to rely upon active legislative efforts, not rule by fiat by a single state executive without any check or balance.

CONCLUSION

The Supreme Court of Hawai‘i has declared: "[W]here the statutory language is plain and unambiguous, *our sole duty is to give effect to its plain and obvious meaning*." *Priceline.com, Inc. v. Dir. of Taxation*, 144 Haw. 72, 87, 436 P.3d 1155 (2019) (emphasis added), *quoting Schmidt v. Bd. of Dirs. of Ass'n of Apartment Owners of Marco Polo Apartments*, 73 Haw. 526, 531-32, 836 P.2d 479 (1992) (citations and quotes omitted). HRS § 127A-14 expressly limits the Governor's emergency power to 60 days – the legislature's directive is plain and obvious. Appellants respectfully request this Court reverse the Circuit Court decision and judgment, and remand this matter for litigation on the merits.

DATED: July 30th, 2021

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CERTIFICATE OF SERVICE

I certify that the above document was served electronically through the Court's JEFS system upon the following on the 30th day of July, 2021:

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