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IN THE SUPREME COURT

OF THE STATE OF HAWAI‘I

FOR OUR RIGHTS, a Hawai‘i corporation, *et al.*, Petitioners-Plaintiffs-Appellants, vs. DAVID IGE, in his official capacity as Governor of the State of Hawai‘i, *et al.*, Respondents-Defendants-Appellees.	SCWC-21-0000024 ICA CAAP-21-0000024 CIVIL NO. 5CCV-20-0000091 APPLICATION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE INTERMEDIATE COURT OF APPEALS FILED ON FEBRUARY 5, 2022 Hon. Katherine G. Leonard, Presiding Judge, Hon. Sonja M. P. McCullen, Assoc. Judge Hon. Karen T. Nakasone, Assoc. Judge

APPLICATION FOR WRIT OF CERTIORARI

APPENDICES “A” – “C”

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Petitioners For Our Rights, *et. al* ("Petitioners"), by counsel, submit this Application for Writ of Certiorari in the above-captioned matter, in accordance with Hawai'i Rules of Appellate Procedure, Rule 40.1. The Record on Appeal is the JIMS docket sheet for CAAP-21-0000024, which contains links to all referenced documents, cited herein as Dkt <#>. *See* Appx. B and C.

STATEMENT OF QUESTIONS FOR REVIEW

1. Whether Governor Ige's Ninth, Tenth, and Eleventh Proclamations were (and are) unconstitutional and exceed the authority statutorily delegated by Hawai'i Revised Statutes ("H.R.S") § 127A-14 and related sections,[1] because they effectively extend an initially-declared emergency and promulgate rules and regulations to broadly command, restrict, and otherwise regulate commercial operations and private citizens' lives without a time limit, despite that the Hawai'i Constitution invests the Governor with no such power and Section 127A-14(d) limits the authorized declaration of emergency and concomitant exercise of power to 60 days?[2]

2. Whether the Governor of the State of Hawai'i may evade the 60-day limit set by Section 127A-14 upon the Governor's power to unilaterally declare regulations (some carrying criminal penalties for violations), by declaring a series of "proclamations" based upon the same asserted basis as the initial proclamation of emergency, thereby ruling the state by edict indefinitely?

STATEMENT OF PRIOR PROCEEDINGS

Petitioner For Our Rights (et al.) filed its initial complaint on September 1, 2020, and its First Amended Complaint (the "Complaint") on September 24, 2020. Dkt 22, items 1, 6. The Complaint alleged two counts: (1) Governor Ige's Ninth, Tenth, Eleventh Proclamations and all such proclamations, including also the enforcement of all such Proclamations, were (and are)

[1] Citations to statutes within H.R.S. Chapter 127A are hereinafter abbreviated as "Section."
[2] Respondent Governor's temporary powers under H.R.S. chap. 127A are expressly reviewable and limited per Section 127A-1(c).

unconstitutional and exceed the authority statutorily delegated by the Hawai‘i Legislature to the Hawai‘i Governor to declare an emergency and promulgate rules and regulations to facilitate the government response to such a declared emergency; and (2) Governor Ige’s Ninth, Tenth, and Eleventh Proclamations were and are unconstitutionally vague and deprive(d) Petitioners of due process under the constitutions of the State of Hawai‘i and the United States of America.

Respondents filed on October 8, 2020, a Motion to Dismiss Plaintiffs’ First Amended Complaint (Motion to Dismiss), seeking dismissal in the entirety. Dkt 22, items 26, 46. Petitioners filed an opposition memorandum on November 9, 2020. Dkt 22, item 50. After Respondents filed timely a reply memorandum, the Fifth Circuit Court heard the matter on November 17, 2020, and entered its order dismissing Petitioners’ Complaint with prejudice on November 19, 2020; the judgment reflecting the order was entered on December 23, 2020. Dkt 22, items 55, 70, 74, 77, 81, 85. Petitioners timely noticed their appeal on January 18, 2021. After full briefing by the parties, the Intermediate Court of Appeals (ICA) heard oral arguments on January 26, 2022, and issued its opinion and decision dated February 25, 2022. Dkt 22, item 87. A copy of the decision is attached to this Petition as Appendix A.

The ICA affirmed the Fifth Circuit Court’s essentially one-paragraph decision dismissing Petitioners’ Count One, but vacated and remanded on Count Two. Per Hawai‘i Rules of Appellate Procedure (HRAP), Rule 40.1, Petitioners may challenge and this Court may rule upon the ICA’s adverse decision on Count One despite the remand of Count Two.

STATEMENT OF THE CASE AND MATERIAL FACTS

As documented in the ICA decision (Appendix A pp. 3-5, Lexis star pages 3-5, editing and quotations omitted): On March 4, 2020, Respondent Governor Ige issued a proclamation (Initial Proclamation) addressing the Covid-19 pandemic, pursuant to Hawai‘i Revised Statutes (HRS)

§§ 127A-2, -12, -13, -14, -16, -30 (Supp. 2019), which by its terms expired on April 29, 2020. Respondent Governor Ige issued subsequent Covid-19-related proclamations on March 16, 2020, March 21, 2020, March 23, 2020, March 31, 2020, April 16, 2020, April 25, 2020, May 5, 2020, and May 18, 2020, each denominated as "supplementary" to the Initial Proclamation but without revoking any prior proclamatory language. Subsequently, Respondent Governor issued on June 10, 2020 a Ninth Supplementary Proclamation, on July 17, 2020, a Tenth Proclamation Related to the Covid-19 Emergency, on August 6, 2020, and an Eleventh Proclamation, on August 20, 2020, all of which continued the practice of incorporating by reference all prior proclamatory language without revoking any.

Petitioners as Plaintiffs filed their Complaint challenging the Governor's rule by supplementary proclamations from the Second through the Eleventh Proclamation. The proclaimed series of accumulating requirements, restrictions, and prohibitions, most or all enforceable by criminal prosecution, were presented to the lower courts and are publicly available on the Hawai‘i Governor's website: https://governor.hawaii.gov/emergency-proclamations. Petitioners filed the instant Complaint when the Eleventh Proclamation reinstated (or redoubled) onerous burdens upon personal intra-state travel among the Hawaiian Islands.

Respondent Governor issued sixteen more proclamations and amendments starting August 20, 2020 through February 5, 2022, grounded on the same "emergency." (See the Governor's website cited above.) These Proclamations tactically described themselves (unless purely amendments) as "new" proclamations, no longer "supplementary" as the second through eleventh had been denominated.

The ICA expressly held Petitioners' challenge to the Governor's continuing rule by successive proclamation, through and past the Eleventh Proclamation to the present, is viable and ripe for judicial consideration:

> [W]e conclude that the questions presented *are clearly of a public nature, as the expansive powers granted to the Governor under the Emergency Management Act can be applied, with few exceptions, to virtually everyone in the State*, whether resident or visitor, as well as all government and private enterprises and public and private properties. An authoritative determination of whether HRS chapter 127A, as currently enacted, limits the Governor's emergency powers to a single period of no more than 60 days and whether, *inter alia*, the mandates, restrictions, and criminal penalties imposed in Governor Ige's proclamations would be desirable, as the same or similar mandates, restrictions, and criminal penalties remain in place as of this Opinion or could be imposed in future emergency proclamations. … *[T]he mandates, restrictions, and criminal penalties have in fact reoccurred since the proclamations that were specifically challenged in the Complaint and it seems likely that similar measures might be taken in the future* in the face of an emergency or disaster in light of language of the Act, as well as its application in response to the Covid-19 pandemic.

For Our Rights, Appendix A, p. 26, 2022 Haw. App. LEXIS 40, *32-33 (emphasis added).

ARGUMENT

I. This Petition Frames Issues Of Widespread Public Importance And Bedrock Constitutional Principles.

When a major state-wide emergency arises, a law-abiding society stands upon organic law to respond in a manner consistent with first principles and the will of the people. The State of Hawai‘i operates under its constitution and the Legislature's enactments. The Hawai‘i Legislature delegated to the Governor the power to declare an emergency when necessary, and to undertake comprehensive control powers to address such an identified emergency – *for 60 days only*. Governor Ige, however, chose to declare and extend the same emergency more than nineteen times, thus extending unilateral power *since March 4, 2020* – and now *over two years*. The Governor has by fiat taken power legitimately belonging to the Legislature only. The

Governor's assumption of power violates the statutory 60-day time limit, and it violates the separation of powers inherent in the Constitution of Hawai'i.[3]

In this state, the lawful response to an emergency starts with the Governor taking action unilaterally for 60 days, allowing for the Legislature to either extend the Governor's period of authority or otherwise pass remedial laws. That procedure follows the emergency action statute (HRS chapter 127A) and accords with the constitutional separation of powers.

That procedure was not followed here. Respondents have defended their deviation from law by asserting the Legislature wrote the 60-day limit to have no meaning and impose no limit upon the Governor's exercise of unilateral power. Respondents have urged that a single individual, the Governor, may lawfully concentrate power into his or her hands to rule over government entities, businesses, and individuals statewide, for as long as the Governor desires, *now over two years*. This Court should reject such unprincipled power concentration as violating HRS chapter 127A and the Hawai'i Constitution's definitions and separation of powers.[4]

Respondents have argued below that the Legislature intended by enacting Section 127A-14 to install legislative power in the Governor for as long as he wants it, but this Court must not accede to that view. "Although courts are especially reluctant to interfere with the internal workings of the legislature, they may not shirk from their duty to give full effect to the

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[3] *See* Haw. Const. art. III, § 1 (vesting the "legislative power" in the Legislature to "extend to all rightful subjects of legislation"); *id.*, art. V, § 1 (vesting the "executive power" in the Governor); *Alakai Na Keiki, Inc. v. Matayoshi*, 127 Hawai'i 263, 275, 277 P.3d 988 (2012) (noting "the separation of powers doctrine" applies to Hawai'i law because, "like the federal government, Hawai'i's government is one in which the sovereign power is divided and allocated among three co-equal branches"), *citing Haw. Insurers Council v. Lingle*, 120 Hawai'i 51, 69, 201 P.3d 564 (2008)).

[4] *Contra* the Respondents' arguments below, the U.S. Supreme Court reminds the nation: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 425, 54 S. Ct. 231 (1934).

provisions of the Constitution relating to the enactment of laws, [] and *they cannot stand powerless in the face of a manifestly unauthorized exercise of power*." *Armstrong v. United States,* 759 F.2d 1378, 1380 (9th Cir. 1985) (emphasis added; internal quotations omitted), *citing Marshall Field & Co. v. Clark*, 143 U.S. 649, 670, 12 S. Ct. 495 (1892), *and Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691 (1962). Bluntly, the Florida Supreme Court warned when "the powers of both the legislative and executive branches are lodged in one body," there forms a "concentration of power that is prohibited by any tripartite system of constitutional democracy and cannot stand." *Chiles v. Childrena*, 589 So. 2d 260, 267-68 (Fla. 1991).[5]

II. In Section 127A-14, The Legislature Expressly Limited A Governor's Unilateral Power To Rule The State By Emergency Powers.

In pertinent parts, Section 127A-14 states:

> (a) 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.
> …
> (c) The 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 …. This section shall not limit the power and authority of the governor under section 127A-13(a)(5).
>
> (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.

Section 127A-14 expressly limits the Governor's emergency power to 60 days. "The fundamental starting point of statutory interpretation is the language of the statute itself."

[5] Separation of powers in a free state must be inviolable: "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty" than the separation of powers. *The Federalist* No. 47, □ 3 (James Madison, 1788). "[The] separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty." *Id.*, No. 51, □ 2 (James Madison, 1788).

Priceline.com, Inc. v. Dir. of Taxation, 144 Haw. 72, 87, 436 P.3d 1155 (2019), *quoting State v. Alangcas*, 134 Hawai‘i 515, 525, 345 P.3d 181 (2015) (citing *Hawaii Gov’t Emps. Ass’n v. Lingle*, 124 Hawai‘i 197, 202, 239 P.3d 1 (2010)). Where the statutory language is plain and unambiguous, Hawai‘i courts must give effect to its plain and obvious meaning. *Priceline, Inc.*, 144 Haw. at 87, *citing 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 quotations omitted).

A. The “Shall Terminate Automatically” Language is Plain and Mandatory.

The plain, unambiguous language of Section 127A-14(d) declares: “A state of emergency and a local state of emergency *shall terminate automatically sixty days after the issuance of a proclamation* of a state of emergency or local state of emergency[.]” (Emphasis added.) The 60-day limit is phrased as mandatory, not discretionary and not merely suggestive. The “shall terminate” verb must be construed as mandatory because of both: (1) the default meaning of the “shall” modal verb; and (2) the judicial policy of interpreting “shall” as mandatory and “may” as discretionary when the Legislature has used both verb forms in the same statute. It is well-settled that “shall” verbs take their ordinary meanings as mandatory, especially in statutes that use both “shall” and “may” verbs (with “may” verbs generally being non-mandatory). *Leslie v. Bd. of Appeals of the Cty. of Hawai‘i*, 109 Haw. 384, 393-94, 126 P.3d 1071 (2006) (stating that “shall” is generally understood in statutes and contracts as “imperative or mandatory,” and holding the ordinary mandatory meaning of “shall” applied in the statute under analysis, rendering it unnecessary to “look at legislative intent”); *accord, Umberger v. Dep’t of Land & Nat. Res.*, 140 Haw. 500, 526, 403 P.3d 277 (2017) (stating the principle), *citing State v. Cornelio*, 84 Hawai‘i 476, 493, 935 P.2d 1021 (1997) *(*citing *Gray v. Admin. Dir. of the Court, State of Haw*., 84 Hawai‘i 138, 149, 931 P.2d 580 (1997)); *In re Tax Appeal of Fasi*, 63 Haw.

624, 626-27, 634 P.2d 98 (1981) (same); *see Ling v. Yokoyama*, 91 Haw. 131, 133-34, 980 P.2d 1005 (App. 1999) (holding the statute's use of "shall" would be mandatory to require a hearing within a statute's defined time). Section 127A-14(d) thus mandates the state of emergency "shall terminate" in 60 days, not by the action of anyone, but by operation of law. (A legal status change that takes place automatically is typically deemed as occurring by operation of law. *See Black's Law Dictionary* 1119 (7th ed. 1999).)

The plain language of Section 127A-14 should be given full effect, including the 60-day limit. *See Priceline, Inc.*, 144 Haw. at 87; *see also Camara v. Agsalud*, 67 Haw. 212, 215-16, 685 P.2d 794 (1984) (reaffirming the "cardinal rule" of construction, including that ordinarily no word should be construed as superfluous, void or insignificant). If the statute's express 60-day limit does not actually mean to cabin the otherwise broad and arbitrary powers of the Governor, then nothing limits the duration of the Governor's proclaimed powers.

B. Statutory Interpretation Does Not Vary to Achieve a Party's Chosen Goals.

Hawai'i courts are resolved not to interpret statutory language in different ways depending upon the underlying facts of a case. As this Court has repeatedly declared:

> *We cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts*. We do not legislate or make laws.

State v. Demello, 136 Haw. 193, 197, 361 P.3d 420 (2015) (emphasis added), *citing and quoting State v. Dudoit*, 90 Haw. 262, 271, 978 P.2d 700 (1999) *and State v. Meyer*, 61 Haw. 74, 77, 595 P.2d 288 (1979)). The Respondents argue below that 60-day limit must be ignored because the emergency was the Covid pandemic. This Court should follow its longstanding precedent to interpret Section 127A-14(d) in a manner that accords with its plain language and ordinary meanings of the words.

III. The Emergency Powers Statute Would Be Unconstitutional If The 60-day Limit Were Not Enacted And Followed.

A. Absent the 60-day Limit, the Governor's "Legislative" Powers Extend Indefinitely.

Simply stated: Section 127A-11(a) and Section 127A-14 (a) are unconstitutional if the 60-day limit in Section 127A-14(d) is deemed meaningless or unenforceable. Here is why. The Legislature delegated enormous power to the Governor to deal with emergencies that the Governor chooses to declare. Section 127A-11(a). The Governor is the *sole* decision-maker about the "existence" of a statewide emergency situation. Section 127A-14(c). Among a long list of stated powers delegated to the Governor who declares an emergency is the power to "*suspend any law* that impedes or tends to impede or be detrimental to the expeditious and efficient execution of, or to conflict with, emergency functions…" Section 127A-13(a)(3) (emphasis added); *see* Robert H. Thomas, *Hoist the Yellow Flag and Spam Up: The Separation of Powers Limitation on Hawai'i's Emergency Authority*, 43 U. Haw. L. Rev. 71, 83-4 (2020) ("*Separation of Powers*") (listing emergency powers with statute citations). The Governor decides whether a law "tends to impede or be detrimental" to the emergency actions being taken by the Governor's decree. The Governor effectively becomes both the Executive *and* the legislator who can overrule the Legislature.

"The *only systemic check on the governor's emergency authority* is process-based and temporal [i.e., that a] declared state of emergency automatically terminates no more than sixty days after proclamation." *Separation of Powers*, 43 U. Haw. L. Rev. at 84 (emphasis added; footnote omitted). If the 60-day limit is void of meaning, then the Legislature has delegated nearly unlimited power to the Governor to legislate or nullify legislation for an indefinite period

of time.[6] Such a delegation of power, however, abrogates the separation of powers built into the Hawai‘i Constitution and violates the non-delegation doctrine.

Unequivocally, Section 127A-1(c) expressly declares the proclamation power statutes "shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States[.]" Under the U.S. Constitutional doctrines of separation of powers and nondelegation, the legislative branch may not delegate its powers to the executive branch. *Touby v. United States*, 500 U.S. 160, 164-65, 111 S. Ct. 1752 (1991). The same doctrine and principle applies to the Hawai‘i Constitution. *In re Kauai Elec. Div.*, 60 Haw. 166, 181, 590 P.2d 524 (1978) (confirming Hawai‘i "has adopted the non-delegation doctrine as part of its own body of constitutional law"). Therefore, Section 127A-14 would violate constitutional law if it delegated broad power to the Governor to combine the executive and legislative powers in one person with no limit on duration.

B. Absent the 60-day Limit, the Governor Becomes a One-Person Legislature.

The Governor's proclamations at issue extend far beyond executive orders – they are *de facto* legislative enactments. Section 127A-11(a)(1) empowers the Governor to declare a disaster or emergency, unilaterally make findings of fact to support the exercise of emergency power, and then write the controlling laws having immediate effect. His activities are therefore *legislative* because they involve:

> The selection of that policy which is most advantageous to the whole [and] involves a host of considerations that must be weighed and appraised. That

[6] "Hawai‘i's time limit serves as an essential democratic check on arrogation of executive power by emphasizing that *the delegation to the governor from the people via the legislature is muscular—but temporary.* And that once the delegation automatically terminates, *absent a separate declaration setting forth separate reasons, the authority to declare and manage emergencies reverts to the legislature." Separation of Powers*, 43 Haw. L. Rev. at 87 (emphasis added).

> function is more appropriately for those who write the laws [the legislature], rather than for those who interpret them.

United States v. Gilman, 347 U.S. 507, 511-13 (1954), *quoted and cited in Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *accord, Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1299, 141 P.3d 288, 305 (2006) ("it is for the Legislature to weigh the competing policy considerations"). To address an emergency or disaster, the Hawai'i Legislature empowered the Governor to legislate, but only for a limited time. No basis exists to believe the Legislature had either the constitutional power or the intent to divest itself of legislative power indefinitely so the Governor could rule by edict. The Hawai'i Constitution nowhere authorizes such broad and deployed power in the executive branch.

C. The Legislature Must be Presumed to Have Intended a True 60-day Limit to Preserve the Constitutionality of the Statute.

The foregoing analysis shows the Legislature may not constitutionally imbue the Governor with the power to legislate and suspend legislation indefinitely at the Governor's sole discretion. Indeed, the Legislature must be presumed to have not enacted unconstitutional legislation. *League of Women Voters of Honolulu & Common Cause v. State*, 150 Haw. 182, 194, 499 P.3d 382 (2021) (stating the presumption). Logically, the Legislature must be presumed not to have enacted Sections 127A-11 and 127A-14 so as to violate the Hawai'i Constitution's separation of powers and the non-delegation doctrine. Therefore, the Section 127A-14's 60-day limit must be understood as the Legislature's express means of *not* delegating powers to the Governor in violation of the Constitution's separation of powers and non-delegation doctrines.[7]

[7] The Legislature followed the path of sister states: "Hawai'i is a part of an overwhelming majority of states that have concluded these rule-by-decree emergency powers of executive officers should be granted only for a very limited time and should not be open-ended." *Separation of Powers*, 43 Haw. L. Rev. at 87 (footnote omitted).

IV. Persuasive Sister-State Supreme Court Precedents Support This Petition's Merits.

Before the ICA, Petitioners have previously fully briefed two sister-state supreme court precedents that upheld statutory time limits on their governors' emergency powers during the Covid-19 pandemic based upon plain language statutory interpretation and separation of powers / nondelegation doctrine grounds: *Midwest Inst. of Health, PLLC v. Governor of Mich. (In re Certified Questions from the United States Dist. Court)*, 506 Mich. 332, 385, 958 N.W.2d 1 (2020) *and Fabick v. Evers*, 396 Wis. 2d 231, 257, 956 N.W.2d 856 (2021). *See* Dkt 28, 95. The Michigan Supreme Court invalidated the Michigan governor's attempt to wield broad "emergency" powers past the statutory 28-day limit and thus rule with no time limit. The Wisconsin Supreme Court rejected that state governor's extension of power past the statutory 60-day limit by his issuing successive proclamations, holding the "duration-limiting language *forbids* the governor from declaring successive states of emergency on the same basis as a prior state of emergency[.]" *Fabick*, 396 Wis. 2d at 253, ¶ 36 (emphasis added). If this Court grants review of this Petition, Petitioners respectfully request the opportunity to supply the same detailed analysis of these directly analogous, persuasive precedents in either initial or reply briefing, as appropriate.

CONCLUSION

Petitioners respectfully request their Petition be granted and this Court reverse the decisions of the ICA and Fifth Circuit Courts that had dismissed Petitioners' First Amended Complaint.

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CERTIFICATE OF SERVICE

I certify that the above document and exhibits were served electronically through the Court's JEFS system upon the following on the 22nd day of April, 2022:

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