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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

FOR OUR RIGHTS, a Hawaii nonprofit corporation, THOR ALVAREZ, GREG BENTLEY, STEVEN FORMAN, JOHN HEIDEMAN, LEVANA LOMMA, BRIAN MOUER-TOZIER, MADHAVA SHAKTI, GERALYN SCHULKIND, DOES 1 through 100, on behalf of them and all other similarly situated people, Plaintiffs, vs. DAVID Y. IGE, in his official capacity as Governor of the State of Hawai‘i and personal capacities, DEREK S.K. KAWAKAMI, in his official capacity as Mayor of Kaua‘i and personal capacities, and COUNTY OF KAUA‘I, DOES 1- 100, Defendants.	CIVIL NO. CV21-00488 JAO-KJM (Other Civil Rights) MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On December 12, 2021, Plaintiffs filed their ninety-one (91) page Complaint pursuant to 42 U.S.C. § 1983 naming Derek S.K. Kawakami, Mayor of the County of Kauai ("Mayor Kawakami"), as one of the defendants. Plaintiffs claim that the

COVID-19 related Emergency Proclamations issued by Hawai‘i Governor David Y. Ige ("Governor Ige") and Mayor Kawakami (collectively referred to as "Defendants' Emergency Proclamations") deprived them of their constitutional rights to due process and equal protection under the First, Fourth, and Fourteenth Amendments to the United States Constitution. Specifically, Plaintiffs allege that Defendants' Emergency Proclamations violated their rights to: (1) the free exercise of religion, (2) the freedom of association, (3) travel, both intrastate and interstate travel, (4) movement, (5) political speech and peaceable assembly (6), personal autonomy and bodily integrity, and (7) work. ECF No. 1, PageID #5, ¶ 2. In short, Plaintiffs allege that the COVID-19 pandemic is fabricated, "a pretext by defendants to establish despotic totalitarian state control through the sacrifice of fundamental constitutional rights under the guise of 'health, safety and welfare.'" *Id*. PageID #10, ¶ 6.

Mayor Kawakami brings the instant motion on the grounds that Defendants' Emergency Proclamations are constitutional and that he, as the Mayor of Kaua‘i, was statutorily authorized to issue his own countywide COVID-19 related emergency proclamations under the State of Hawai‘i's Emergency Management Act. Additionally, Mayor Kawakami's emergency proclamations, which Plaintiffs allege are unconstitutional, do not contain travel restrictions or otherwise interfere with any of Plaintiffs' constitutional rights.

For these reasons, Mayor Kawakami respectfully requests this Court for an order dismissing Plaintiffs' Complaint in its entirety.

II. SUMMARY OF PLAINTIFFS' ALLEGATIONS

A. Thor Alvarez

Plaintiff Alvarez alleges to be a commercial/residential painter and claims that he, on an undisclosed date, was forced to "stay-at-home" under Governor Ige's Third Emergency Proclamation. Plaintiff Alvarez further alleges that Governor Ige's "stay-at-home" order violated his First and Fourteenth Amendment rights, including the right to work and the free exercise of religion. *Id*. at PageID #14, ¶ 15.

However, Plaintiff Alvarez does not factually allege how Mayor Kawakami's countywide emergency proclamations violated his constitutional rights, forced him to "stay-at-home," and interfered with his right to exercise his religion.

B. Greg Bentley

Plaintiff Bentley alleges that Governor Ige's Emergency Proclamation forced him, on an undisclosed date, to self-quarantine for fourteen (14) days when he arrived to Hawai‘i on a plane flight from Michigan. Plaintiff Bentley claims that the self-quarantine violated his right to freely move and travel. In addition, Plaintiff Bentley claims that he was prevented from freely associating with others

and attending church. *Id*. at PageID #15, ¶ 16.

However, Plaintiff Bentley does not factually allege how Mayor Kawakami's countywide emergency proclamations forced him to self-quarantine, violated his right to travel, and exercise religion.

C. <u>Steven Forman</u>

Plaintiff Forman, a resident of Maui, alleges that Governor Ige's Third Emergency Proclamation forced him to "stay-at-home" thereby depriving him of his right to the free exercise of religion under the First and Fourteenth Amendments to the United States Constitution. *Id*. at PageID #15, ¶ 17.

However, Plaintiff Forman does not factually allege how Mayor Kawakami's countywide emergency proclamations caused him to "stay-at-home" and prevented him from attending church.

D. <u>John Heideman</u>

Plaintiff Heideman, a resident of O'ahu, alleges that Governor Ige's Emergency Proclamations forced him to quarantine for 10 days when he returned to Hawai'i on a plane flight from Los Angeles. Plaintiff Heideman further claims that being forced to quarantine violated his First and Fourteenth Amendment rights of the United States Constitution, including the right to travel. *Id*. at PageID #16, ¶ 18.

However, Plaintiff Heideman does not factually allege how Mayor Kawakami's countywide emergency proclamations forced him to quarantine and surrender his right to travel.

E. Levana Lomma

Plaintiff Lomma alleges that after she returned to Kaua'i from a political rally held in O'ahu she was arrested by Kaua'i Police officers for violating quarantine rules set forth in Defendants' Emergency Proclamations. *Id*. at PageID #18, ¶ 20. Plaintiff Lomma further claims that defendants violated her First Amendment rights to move freely, associate, and engage in political speech without retaliation. *Id*. at PageID #18, ¶ 21.

Plaintiff Lomma, in support of her allegations, cites to Mayor Kawakami's May 4, 2020 emergency proclamation and his Seventh Supplementary Proclamation of February 19, 2021 but does not factually allege how either proclamation violated her constitutional rights.

F. Brian Mouer-Tozier

Plaintiff Mouer-Tozier alleges that he, on an undisclosed date, was forced to quarantine for 14 days upon his arrival to Kaua'i on a plane flight from Missouri. Plaintiff Mouer-Tozier further claims that Defendants' Emergency Proclamations violated his First and Fourth Amendment rights of the United States Constitution. *Id*. at PageID #19, ¶ 23.

However, Plaintiff Mouer-Tozier does not factually allege how Mayor Kawakami's countywide emergency proclamations forced him to quarantine for fourteen (14) days.

G. <u>Brian Ridgeway</u>

Plaintiff Ridgeway alleges that after landing in Hawai'i, on an undisclosed date and island, he was detained by the police and forced to return to Los Angeles because his negative COVID-19 test was not from a "trusted partner." Plaintiff Ridgeway further claims that defendants' actions violated his First and Fourteenth Amendment rights of the United States Constitution. *Id*. at PageID #20, ¶ 24.

However, Plaintiff Ridgeway does not factually allege how Mayor Kawakami's countywide emergency proclamations caused him to be detained and forced to return to Los Angeles.

H. <u>Madhava Shakti</u>

Plaintiff Shakti alleges that she, on an undisclosed date, was detained and forced to self-quarantine after taking an interisland flight from the island of Hawai'i to O'ahu. Plaintiff Shakti claims that defendants' actions violated her First and Fourteenth Amendment rights of the United States Constitution, including the right to travel, the free exercise religion, and to be free from medical intervention. *Id*. at PageID #21, ¶ 25.

However, Plaintiff Shakti does not factually allege how Mayor Kawakami's countywide emergency proclamations interfered with her constitutional rights and caused her to be quarantined in O'ahu.

I. Geralyn Schulkind

Plaintiff Schulkind alleges that she, on an undisclosed date, was forced into house arrest after returning to Hawai'i on a plane flight from San Diego. Plaintiff Schulkind claims that defendants' actions violated her First and Fourteenth Amendment rights of the United States Constitution, including to the right to travel, freely exercise religion, and be free from medical intervention. *Id*. at PageID #20, ¶ 26.

However, Plaintiff Schulkind does not factually allege how Mayor Kawakami's countywide emergency proclamations forced her into house arrest and interfered with her constitutional rights.

III. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys*., 534 F.3d 1116, 1121 (9th Cir. 2008). The Court's review under Rule 12(b)(6) is generally limited to the contents of the complaint, documents attached to the complaint, and matters capable of judicial notice. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988

(9th Cir. 2001); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The Court is "not required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Seven Arts Filmed Entm't, Ltd. v. Content Media Corp. PLC.*, 733 F.3d 1251, 1254 (9th Cir. 2013). When considering a motion to dismiss, the Court may consider undisputed matters of public record through a request for judicial notice. *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Including, "government documents available from reliable sources on the internet." *Cal. River Watch v. City of Vacaville*, 2017 U.S. Dist. LEXIS 142560, at *6 n.1, 2017 WL 3840265, at *2 n.1 (E.D. Cal. Sept. 1, 2017).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U. S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). The court in *Iqbal* applied the following two-prong approach to assessing the adequacy of a complaint: 1) identify factual pleadings that are merely conclusory and not entitled to the assumption of truth; and 2) determine whether the nonconclusory factual allegations that are pleaded give rise to a "plausible" theory of defendant

liability. *Id.* at 679. The court provided guidance in making this determination. First, allegations that merely state legal conclusions are not entitled to the assumption of truth. *Id.* at 678. Second, "[t]hreadbare recital of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Generally, courts freely allow plaintiffs to amend complaints that have been dismissed. Nonetheless, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (citing *Bonano v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962). In that regard, futility of amendment, by itself, justifies the court's refusal to allow Plaintiffs a chance to amend. *Nunes v. Ashcroft*, 348 F.3d 815, 818 (9th Cir. 2003).

IV. DISCUSSION

To sustain an action under 42 U.S.C. §1983, Plaintiffs must show that the conduct complained of was committed by a person acting under state law and that conduct deprived plaintiff of his or her constitutional rights. *Rinker v. Napa County*, 831 F.2d 829, 831 (9th Cir. 1987) (citing *Parratt v. Taylor*, 451 U.S. 527, 535, 1010 S.Ct. 1908, 1912 (1981).

A. Quarantine Mandates Are Constitutional

The United States Supreme Court has long recognized that constitutional

rights, even ones deemed fundamental, are not absolute and can be subject to regulation and restriction, especially when the government acts to protect a compelling government interest such as protecting Americans' lives. In the seminal case of *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358 (1905), the Supreme Court upheld a Massachusetts statute which authorized the board of health of any town to require citizens to be vaccinated against smallpox as necessary for the public health and safety. Mr. Jacobson refused to be vaccinated and was criminally charged and convicted. On appeal, Mr. Jacobson argued that the vaccine mandate violated his constitutional rights. The Supreme Court rejected Mr. Jacobson's arguments and held that the State had the right to impose vaccine mandates. The Supreme Court noted that "in every well-ordered society charged with the duty of conserving safety of its members the rights of the individual with respect of his liberty may, at times, under pressure of great dangers, be subjected to such restraint to be enforced by reasonable regulations as the safety of the general public may demand." Id. at 29. The Supreme Court understood that "[t]he authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in somebody; and surely it was appropriate for the legislature to refer that question, in the first instance to the board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with

authority over such matters was not an unusual, nor unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." Id. at 27.

In *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613-1614, 207 L.Ed. 2d 154, 155 (2020), Chief Justice Roberts found *Jacobson* to be controlling relative to the COVID-19 pandemic:

> Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

Recently, the Supreme Court held that "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese v. Cuomo*, 141 S.Ct. 63, 67, 208 L.Ed. 206, 209 (2020).

In *Jeffrey-Steven of the House of Jarrett v. Ige*, 2021 U.S. Dist. LEXIS 219425, 2021 WL 5286552 (D. Haw., Nov. 12, 2021), a Maui resident sued Governor Ige and several others contesting various policies and restrictions

imposed by the State in response to the COVID-19 pandemic. The Maui resident had recovered from COVID-19 and asserted that he was entitled to a medical exemption from the face mask requirement. In addition, he challenged the "vaccine passport"/Safe Travels Program on constitutional grounds. The Maui resident argued that "because the COVID-19 vaccines have not been sufficiently tested, people have a constitutional right to choose whether or not to be vaccinated, and should not be forced to live under a lesser standard in society if they choose not to be vaccinated." His general position was "that the State Defendants' and the County Defendants' … responses to the COVID-19 pandemic are not supported by medical evidence, and information contrary to their positions has been censored in the media, as well as on social media." Both the State and Maui County moved to dismiss the lawsuit. In dismissing the lawsuit with prejudice, Judge Leslie E. Kobayashi observed that "*Jacobson* instructs that all constitutional rights may be reasonably restricted to combat a public health emergency." (quoting *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020). In addition, "[t]he judiciary may not 'second-guess the state's policy choices in crafting public health measures." (quoting *In re Rutledge*, 956 F.3d 1018, 1029 (8th Cir. 2020) (quoting *Abbott*, 954 F.3d at 784)).

In *Carmichael v. Ige*, 470 F. Supp.3d 1133 (D. Haw. 2020), a handful of plaintiffs sued Governor Ige alleging that his COVID-19 related emergency proclamations were unconstitutional under the Fifth and Fourteenth Amendments

to the Constitution.[1] The plaintiffs moved this Court seeking a temporary restraining order enjoining defendants from enforcing the 14-day travel quarantine, which they claimed interfered with their due process and equal protections rights, including the right to travel. In denying the application, this Court concluded that plaintiffs' "theory that no emergency exists here or throughout the United States is contradicted by the record and readily available information." *Id*. at 1144. This Court further found that the quarantine did not amount to a travel ban because "the non-resident Plaintiffs are not barred from entry into and out of Hawai'i nor are they treated differently than residents, there is no plain, palpable conflict with the Fourteenth Amendment." *Id*. at 1146. This Court also debunked plaintiffs' deprivation of liberty claim. *Id*. at 1148.

Clearly, COVID-19 related quarantine mandates are constitutional and this case should be dismissed in its entirety.

1. <u>The Free Exercise of Religion</u>

Plaintiffs Alvarez, Bentley, Foreman, Shakti, and Schulkind contend that Defendants' Emergency Proclamations violated their right to the free exercise religion. However, "[a] person asserting a free exercise claim must show that the government action in question substantially burdens the person's practice of her

[1] *See also*: *Bannister v. Ige*, 2020 U.S. Dist. LEXIS 129127, 2020 WL 4209225 (D. Haw., Sept. 8, 2021).

religion." *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015). The burden placed upon the right by government must be "more than an inconvenience on religious exercise; it must have a tendency to coerce individuals into acting contrary to their religious beliefs or exert substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id*. at 1031-32 (internal quotation marks and punctuation omitted). The Supreme Court has established that "the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Division v. Smith*, 494 U.S. 872 (1990)). It is well settled that "[t]he right to practice religion does not include liberty to expose the community … to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *See also Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health*, 186 U.S. 380 (1902) (rejecting a constitutional challenge to a quarantine order prohibiting healthy passengers from disembarking and entering the community, where they would provide "added fuel" to an ongoing disease outbreak).

Stated simply, short travel quarantine mandates do not place a substantial burden on the free exercise of religion and are constitutional.

2. <u>The Right to Travel</u>

Plaintiffs Bentley, Heideman, Lomma, Shakti, and Schulkind contend that Defendants' Emergency Proclamations violated their right to travel. "However, a law having an incidental impact on travel [ ] but having a purpose other than restriction on the right to travel, and which does not discriminate among classes of persons by penalizing the exercise by some of the right to travel, is constitutionally permissible." (*Sanchez v. City of Fresno*, 914 F.Supp.2d 1079, 1110 (E.D. Cal. 2012) (citing *Tobe v. City of Santa Ana*, 9 Cal.4 th 1069, 1100, 40 Cal.Rptr. 402, 420 (Cal. 1995). More importantly, this Court has already found that the State's quarantine did not amount to a travel ban as "the non-resident Plaintiffs are not barred from entry into and out of Hawai'i nor are they treated differently than residents, there is no plain, palpable conflict with the Fourteenth Amendment." *Carmichael*, 470 F. Supp.3d at 1146.

As for intrastate travel, "while the Supreme Court has recognized a fundamental right to *interstate* travel, neither the Supreme Court nor the Ninth Circuit has recognized a right to *intrastate* travel." *Fournerat v. Veterans Admin.*, 2019 I.S. Dist. LEXIS 23105, at *13, 2019 WL 8810110, at *3 (C.D. Cal. Dec. 19, 2019) (citation omitted). Thus, restrictions imposed on movement do not violate the constitutional right to travel. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277, 113 S.Ct. 753, 763 (1993).

3. The Right to Work

Plaintiff Alvarez alleges that Governor Ige's "stay-at-home" order unconstitutionally prevented him engaging in his job to make a living. However, "[t]he right to work is not a fundamental right; laws affecting the right to work are subject to rational basis review." *Prof'l Beauty Fed'n of California v. Newsom*, 2020 U.S. Dist. LEXIS 102019, at *22, 2020 WL 3056126, at *8 (C.D. Cal. June 8, 2020). "[T]he courts have concluded that legislative enactments affecting the right to work are tested under a 'rational basis' test because there is no fundamental right to work at a particular occupation or for a particular employer." *California Gillnetters Assn. v. Department of Fish & Game*, 39 Cal.App.4th 1145, 1155, 46 Cal.Rptr. 338, 344 (Cal. 1995).

Considering that the government has a compelling interest in stemming the spread of COVID-19, Plaintiff Alvarez's constitutional right to work claim is not legally cognizable and should be rejected accordingly.

B. Mayor Kawakami's Emergency Proclamations

The Emergency Management Act, specifically Section 127A-1(a)(2) of the Hawai'i Revised Statutes ("HRS"), grants Mayor Kawakami special emergency powers necessary to prepare for, and respond to, emergencies and disasters. HRS § 127A-14(b) authorizes Mayor Kawakami to declare a local state of emergency. Under subsection (c) the Governor and the county mayors are the sole judges of

the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency in their respective jurisdictions. Under HRS § 127A-13(b)(5) Mayor Kawakami is authorized to establish priorities as the public welfare may require. HRS § 127A-12(c)(17) empowers Mayor Kawakami to take any and all steps necessary or appropriate to carry out the purposes of the Act. In that regard, HRS § 127A-25(a) allows Mayor Kawakami to adopt rules for the County which have the force and effect of law.

In reliance upon the powers entrusted him under the Emergency Management Act, Mayor Kawakami issued the following emergency proclamations:

1) On March 4, 2020, Mayor Kawakami issued his initial Emergency Proclamation.
2) On April 8, 2020, Mayor Kawakami issued the First Supplementary Emergency Proclamation.
3) On April 27, 2020, Mayor Kawakami issued the Second Supplementary Emergency Proclamation.
4) On June 26, 2020, Mayor Kawakami issued the Third Supplementary Emergency Proclamation.
5) On August 25, 2020, Mayor Kawakami issued the Fourth Supplementary Emergency Proclamation.

6) On October 23, 2020, Mayor Kawakami issued the Fifth Supplementary Emergency Proclamation.

7) On December 22, 2020, Mayor Kawakami issued the Sixth Supplementary Emergency Proclamation.

8) On February 19, 2021, Mayor Kawakami issued the Seventh Supplementary Emergency Proclamation.

9) On April 20, 2021, Mayor Kawakami issued the Eighth Supplementary Emergency Proclamation.

10) On June 18, 2021, Mayor Kawakami issued the Ninth Supplementary Emergency Proclamation.

11) On August 16, 2021, Mayor Kawakami issued the Tenth Supplementary Emergency Proclamation.

12) On October 13, 2021, Mayor Kawakami issued the Eleventh Supplementary Emergency Proclamation.

13) On December 10, 2021, Mayor Kawakami issued the Twelfth Supplementary Emergency Proclamation.[2]

The aforementioned emergency proclamations do not contain travel restrictions at all. The initial emergency proclamation issued by Mayor Kawakami

[2] *See*: Request to Take Judicial Notice and the copies of Mayor Kawakami's Emergency Proclamations appended thereto.

simply declared that an emergency existed and described his powers under the Emergency Management Act. Each of his successive emergency proclamations merely extended the term of the initial emergency proclamation.

Additionally, Mayor Kawakami has been named as a defendant in his official capacity as the Mayor of Kaua‘i. “As long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity.” *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105 (1985). Therefore, Plaintiffs’ claim against Mayor Kawakami in his official capacity must fail.

V. CONCLUSION

For the reasons discussed above, Mayor Kawakami respectfully requests this Honorable Court to grant his motion seeking dismissal of Plaintiffs’ complaint, in its entirety.

DATED: Līhu‘e, Kaua‘i, Hawai‘i, February 16, 2022.

MATHEW M. BRACKEN
County Attorney

/s/ Mark L. Bradbury
MARK L. BRADBURY
Deputy County Attorney

Attorneys for Defendant
DEREK S.K. KAWAKAMI, in his official capacity as Mayor of Kaua‘i and personal capacities