SCWC-21-0000024

IN THE SUPREME COURT 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 Shulkind, Daniel Hashimoto, Christina Cole, Francesca Woolger, Na’ea Lindsey, Michael Mazzone, Lanette J.Harley, and Lorraine L. Patch,

Petitioners / Plaintiffs-Appellants,

v.

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,

Respondents / Defendants-Appellees.

CAAP-21-0000024
CIVIL NO. 5CCV-20-0000091
(OTHER CIVIL ACTION)

APPEAL FROM FINAL JUDGMENT
FILED DECEMBER 23, 2020

RESPONSE OF RESPONDENTS / DEFENDANTS-APPELLEES DAVID IGE, HOLLY T. SHIKADA, AND THE STATE OF HAWAI‘I IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS

Leonard, Nakasone, and McCullen, JJ.

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RESPONSE OF RESPONDENTS / DEFENDANTS-APPELLEES DAVID IGE, HOLLY T. SHIKADA, AND THE STATE OF HAWAI‘I IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

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Respondents / Defendants-Appellees DAVID IGE, in his official capacity as the Governor of the State of Hawai‘i; HOLLY T. SHIKADA, in her official capacity as the Attorney General of the State of Hawai‘i; and the STATE OF HAWAI‘I (collectively, "**Respondents**" or "**the State**") respectfully submit this Response to the Application for Writ of Certiorari (the "**Application**") filed by Petitioners/Plaintiffs-Appellants ("**Petitioners**").

For the reasons set forth below, Petitioners' Application should be rejected.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Intermediate Court of Appeals ("**ICA**") gravely erred in declining to reach Petitioners' claim that the Governor's exercise of emergency authority under HRS chapter 127A violated the Hawai‘i Constitution, where neither the circuit court nor the ICA "reach[ed] any sort of constitutional challenge to the statute" (App. Appx. A at 12[1]) because no such challenge was properly raised or pleaded?
2. Whether the ICA gravely erred when it affirmed the circuit court's rejection of Petitioners' theory that HRS § 127A-14(d) limited the Governor's exercise of emergency powers to just one *single* 60-day state of emergency to address the COVID-19 pandemic?

INTRODUCTION

This Court should reject the Application because neither Petitioners' unpleaded nondelegation/separation-of-powers challenge under the Hawai‘i Constitution (Question 1) nor their statutory interpretation claim (Question 2) warrants this Court's review.

To begin, the ICA correctly held that it would not be proper in this appeal to address Petitioners' constitutional argument—specifically, their argument that the Governor's exercise of emergency powers violated separation-of-powers and nondelegation principles under state constitutional law—because that theory was never raised in the circuit court and thus was not properly before the court in this appeal. Rather, the ICA correctly recognized that "[t]he question before this court is limited to whether the statute itself prohibits the Governor from

[1] Citations to the ICA's opinion are to the slip opinion dated February 25, 2022, which was attached to Petitioners' Application as Exhibit A. The opinion is also available at 151 Hawai‘i 1, 507 P.3d 531 (App. 2022).

declaring more than one state of emergency, lasting no longer than 60 days, per emergency, and concomitantly, whether the statute authorizes the Governor to issue more than one emergency proclamation—in this instance, numerous emergency proclamations collectively spanning a period of years—in response to essentially the same emergency." App. Appx. A at 12-13. And, with respect to that statutory interpretation issue, the ICA got it exactly right. Certiorari is not warranted with respect to Petitioners' statutory argument that HRS § 127A-14 limited the Governor issuing just one state of emergency in response to the COVID-19 pandemic because the ICA plainly did not err—much less gravely err—when it rejected Petitioners' theory. The ICA's careful and well-reasoned interpretation of chapter 127A was readily supported by the text, structure, and purpose of the statute, and the court's analysis faithfully applied the settled statutory interpretation principles to which this Court has consistently adhered. Petitioners thus cannot establish any "[g]rave errors" or "[o]bvious inconsistencies" in the ICA's opinion under HRS § 602-59(b).

Additionally, this Court's review is especially unwarranted at this time in light of pending amendments to HRS § 127A-14 that will ensure that the statutory interpretation controversy at the center of this case—whether the Governor can issue supplementary emergency proclamations in response to a continuing emergency situation—will not recur in future. A bill from the 2022 legislative session, SB3089, confirms and clarifies that under chapter 127A "the governor may re-declare the existence of a state of emergency in the State pursuant to this chapter if an emergency or a disaster has occurred or there is imminent danger or threat of an emergency or a disaster in any portion of the State," and that "the governor . . . shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to . . . an extension . . . of a state of emergency[.]"[2] In light of SB3089's further clarification of the Governor's statutory authority under chapter 127A, it is hard to see why any errors in the ICA's statutory interpretation analysis (even if such errors existed, which they do not) would rise to the level of a "magnitude . . . dictating the need for further appeal" in this Court. HRS § 602-59(b).

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[2] S.B. 3089 S.D. 2 H.D. 2 C.D. 1, *A Bill for an Act Relating to Emergency Management*, https://www.capitol.hawaii.gov/session2022/bills/SB3089_CD1_.htm (last visited May 24, 2022).

COUNTERSTATEMENT OF THE CASE AND PRIOR PROCEEDINGS

I. The COVID-19 pandemic and the State's response

The COVID-19 pandemic created an extraordinary public health emergency that presented unprecedented challenges across all aspects of State government. In response to the onset of the pandemic, on March 4, 2020 Governor Ige issued an initial emergency proclamation pursuant to his authority under HRS chapter 127A. App. Appx. A at 3. That proclamation declared a state of emergency under HRS § 127A-14(a), which provides that "[t]he 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." Under chapter 127A, an "[e]mergency" 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." HRS § 127A-2. The COVID-19 pandemic—which has infected tens of millions and claimed a million lives within the United States[3]—readily qualified as an "emergency" under chapter 127A at all times relevant to this appeal, and Petitioners apparently do not argue otherwise. Indeed, as the ICA correctly observed, Petitioners "did not challenge Governor Ige's Initial Proclamation." App. Appx. A at 7; *see also id*. at 11 (recognizing that Petitioners "do not dispute that HRS § 127A-14(a) authorized Governor Ige's declaration of a state of emergency in the Initial Proclamation").

When extraordinary emergency conditions caused by the global COVID-19 pandemic evolved and worsened, additional emergency proclamations followed. *See* App. Appx. A at 4-5 (cataloging subsequent COVID-19-related proclamations). Each emergency proclamation, including the Governor's initial (March 2020) proclamation, created a state of emergency that terminated within 60 days. This is because "[t]he plain language of HRS § 127A-14(d) provides for the automatic termination of any state of emergency no later than 60 days after the issuance of a proclamation of a state of emergency." App. Appx. A at 11. "Alternatively, a state of

[3] Centers for Disease Control and Prevention, *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited May 24, 2022); *see also* Johns Hopkins University of Medicine Coronavirus Resource Center, *U.S. Officially Surpasses 1 Million COVID-19 Deaths*, May 17, 2022, https://coronavirus.jhu.edu/from-our-experts/u-s-officially-surpasses-1-million-covid-19-deaths (last visited May 24, 2022).

emergency can be terminated sooner, by means of a separate proclamation of the governor declaring that the emergency is over." *Id.*[4]

II. Prior proceedings

A. Circuit court

The ICA correctly recounted the procedural history of this case as follows:

> For Our Rights filed a complaint on September 1, 2020, and a First Amended Complaint (the Complaint) on September 24, 2020. The Complaint alleged that the individual plaintiffs, along with other people in Hawaii, were suffering and would continue to suffer from numerous harms as a result of Governor Ige's Covid-19-related proclamations, including the specific harms to the plaintiffs that were identified in the Complaint, including but not limited to anxiety, prevention of travel to see family, lost employment, destruction of business, lost income and other heavy financial losses, lost business opportunities, lost mental health care and other health care services, loss of freedom, serious emotional distress, depression, hopelessness, homelessness, isolation, social exclusion, pain, injury to health, alienation, fear, suicidal thoughts, and other deprivations.
>
> The Complaint asserted two causes of action (Count I and Count II). In Count I, the Complaint alleged, *inter alia*, that Governor Ige's Ninth, Tenth, and Eleventh Proclamations are unconstitutional and exceed the authority statutorily delegated by the Hawaii Legislature to the Hawaii Governor to declare an emergency and promulgate rules and regulations to facilitate the government response to such declared emergency, and that Appellants are suffering harms directly related to the continued application and enforcement of those and any preceding supplemental proclamations. More specifically, Count I alleges that, under the Hawaii Constitution, the Governor does not hold an enumerated power to declare states of emergency and that the emergency powers statutorily conferred by the Legislature to the Governor are expressly limited to a period not to exceed 60 days. Count I further alleges that Governor Ige's use of supplemental proclamations is an unauthorized attempt to circumvent the Legislature's express 60-day limit and therefore, the Ninth, Tenth, and Eleventh Proclamation, and any and all such supplemental proclamations, exceed the Governor's statutory and constitutional authority.
>
> In Count II, the Complaint further alleged, inter alia, that Governor Ige's Ninth, Tenth, and Eleventh Proclamations are unconstitutionally vague and deprive Appellants of due process under the constitutions of the State of

[4] *See generally* HRS § 127A-14(d) ("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, respectively, or by a separate proclamation of the governor or mayor, whichever occurs first.").

Hawaii and the United States.[5] Appellants did not challenge Governor Ige's Initial Proclamation. The Complaint sought, *inter alia*, declaratory and injunctive relief with respect to the Ninth, Tenth, and Eleventh Proclamations, as well as any and all further supplemental proclamations, including a declaration that such supplemental proclamations are unconstitutional, invalid, null, and void, and that Appellees (among others) be enjoined from enforcing them.

On October 8, 2020, Appellees filed a Motion to Dismiss Plaintiffs' First Amended Complaint (Motion to Dismiss), arguing that the Complaint in its entirety should be dismissed for failure to state a claim upon which relief can be granted, and contending that: (1) because Appellants did not challenge the subsequent emergency proclamations that were then in effect, Appellants lack standing and their claims are moot; (2) Governor Ige's emergency proclamations are fully authorized under HRS chapter 127A; and (3) Appellants' void-for-vagueness arguments failed to meet applicable legal standards.

On November 9, 2020, Appellants filed a memorandum in opposition in which they argued, *inter alia*: (1) the Complaint is not moot because the controversy is capable of repetition yet evading review, the public interest exception to the mootness doctrine applies, and contrary to Appellees' contention, injunctive and declaratory relief remain justiciable based on the Complaint's allegations; (2) neither the Hawaii Constitution nor HRS chapter 127A confer unlimited and unreviewable powers on the Governor; and (3) unless the applicable statutes impose an enforceable limitation, the Governor's authority to declare an emergency amounts to a blank check to usurp legislative power and here, Governor Ige's proclamations have ignored and therefore failed to avert their catastrophic impacts and protect the welfare of the people of the Hawaii. Appellees filed a reply memorandum contending, inter alia, that the restrictions in the emergency proclamations have saved lives and that the proclamations were based on reassessments and evolving circumstances.

On November 17, 2020, a hearing was held on the Motion to Dismiss and the matter was taken under advisement. On November 19, 2020, the Circuit Court entered the Dismissal Order granting the Motion to Dismiss with prejudice, and stating:

> The Court agrees with, and hereby incorporates, the arguments presented by the Defendants. Specifically, Haw. Rev. Stat. ("HRS") chapter 127A, as properly interpreted, does not support Plaintiffs' claim. The language, purpose, and history of HRS chapter 127A all demonstrate that the Governor is empowered to issue supplementary emergency proclamations extending beyond a single 60-day period. Further, Plaintiffs' claim in regards to the

[5] The pleaded vagueness/due process claim is entirely different from the separation-of-powers/nondelegation claim that Petitioners subsequently asserted before the ICA and in their Question No. 1 before this Court.

> vagueness of prior emergency proclamations, which are no longer in effect, is deemed moot and is dismissed with prejudice.
>
> The Judgment was entered on December 23, 2020. For Our Rights timely filed a notice of appeal on January 18, 2021.

App. Appx. A at 5-8.[6]

B. On appeal

Before the ICA, Petitioners raised "five points of error on appeal, contending that the Circuit Court erred: (1) in its interpretation of HRS chapter 127A; (2) in the Dismissal Order by adopting Appellees' arguments without further reasoning; (3) by tacitly adopting Appellees' arguments that Governor Ige may exercise emergency powers for an indefinite period of time; (4) by tacitly adopting Appellees' arguments that the Complaint was moot; and (5) by tacitly adopting Appellees' arguments that Appellants lacked standing on the grounds of mootness." App. Appx. A at 9. The ICA heard oral argument on January 26, 2022 and issued a published opinion, authored by Judge Leonard,[7] on February 25, 2022. App. Appx. A at 1-28. The ICA affirmed the judgment of the circuit court in part, vacated in part, and remanded the case to the circuit court for further proceedings. App. Appx. A at 27.[8]

The ICA began by addressing what it correctly characterized as Petitioners' "primary contention on appeal"—namely, "that the Circuit Court erred as a matter of law in its interpretation of key provisions of HRS chapter 127A[.]" App. Appx. A at 10. Specifically, the ICA addressed Petitioners' theory that "HRS § 127A-14 limits the Governor's emergency powers to a single, 60-day period." App. Appx. A at 11; *see id.* at 12:

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[6] The Record on Appeal is the JIMS docket sheet for CAAP-21-0000024, which contains links to all referenced documents, cited herein as Dkt. <#>. Petitioners' operative complaint (the First Amended Complaint) appears at Dkt. 22 at 6. The State's motion to dismiss, dated October 8, 2020, appears at Dkt. 36. Petitioners' response to the State's motion to dismiss, dated November 9, 2020, appears at Dkt. 50. The State's reply in support of its motion to dismiss, dated November 12, 2020, appears at Dkt. 55. The circuit court's order granting the State's motion to dismiss appears at Dkt. 77. The Final Judgment filed in the circuit court, dated December 23, 2020, appears at Dkt. 81. Petitioners' notice of appeal appears at Dkt. 87.

[7] Judge McCullen joined the panel opinion in full. Judge Nakasone wrote separately; she concurred in part but, with respect to the ICA's affirmance of the Circuit Court's dismissal of Count 1 of the Complaint, concurred in the result only. *See* App. Appx. A at 28 (Nakasone, J., concurring in part).

[8] This case thus remains in an interlocutory posture.

> The disputed issue is whether Governor Ige acted beyond his statutorily-granted authority when he issued subsequent emergency proclamations in response to the same emergency—in this case, the worldwide outbreak of Covid-19—notwithstanding the continuing nature of the emergency. Appellants urge this court to interpret HRS § 127A-14(d) as a hard limit on the Governor's use of emergency powers, one 60-day period only, one and done.

Following a careful review of the text and structure of HRS chapter 127A, as well as the broader purpose of the statute, the ICA properly rejected Petitioners' incorrect and unduly narrow "one and done" reading of the statute. *See* App. Appx. A at 10-23.

The ICA also concluded that its review was properly limited to the Petitioners' statutory claims. Although Petitioners also briefed a separate constitutional theory—asserting that the Governor's exercise of emergency powers violated separation-of-powers and nondelegation principles—that claim was raised for the first time on appeal: It was not pleaded in their operative complaint, nor was it reached or discussed by the circuit court. Thus, reflecting the "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them[,]" App. Appx. A at 12 (quoting *City & Cty. of Honolulu v. Sherman*, 110 Hawai'i 39, 56 n.7, 129 P.3d 542, 559 n.7 (2006)), the ICA declined to reach Petitioners' unpleaded constitutional claim. Instead, the ICA remanded the case to the circuit court for further proceedings. App. Appx. A at 27. Finally, the ICA addressed each of the other points of error asserted by Petitioners. *See* App. Appx. A at 23 (holding that the circuit court's "Dismissal Order includes sufficient detail to allow this court to review the Circuit Court's ruling"). The ICA also concluded that the case was not moot. App. Appx. A at 24-26.

Petitioners filed an Application for a Writ of Certiorari on April 22, 2022. *See* App. at 1-12. Petitioners limited their focus at the certiorari stage to two questions, which appear as Questions 1 and 2 in their Application (App. at 1) and have been rephrased and restated above.

STATEMENT OF REASONS WHY THE APPLICATION SHOULD NOT BE GRANTED

The Court should reject the Application. The ICA correctly declined to reach Petitioners' unpleaded nondelegation/separation-of-powers challenge under the Hawai'i Constitution (which is, in any event, meritless), and correctly rejected Petitioners' incorrect reading of the statute.

I. The ICA correctly declined to reach Petitioners' constitution claim, which was not raised in the circuit court

The ICA was correct to decline to reach the merits of Petitioners' unpleaded nondelegation doctrine/separation-of-powers claim. A claim that has not been pleaded in a complaint or considered by a circuit court need not and should not be decided in the first instance on appeal. *See, e.g.*, *State v. Naeole*, 62 Haw. 563, 570, 617 P.2d 820, 826 (1980) ("an issue raised for the first time on appeal will not be considered by the reviewing court"); HRS § 641-2 (an "appellate court may correct any error appearing on the record, but need not consider a point that was not presented in the trial court in an appropriate manner"). This rule is especially crucial for constitutional claims, as the ICA recognized. App. Appx. A at 12 ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." (quotation omitted)). The ICA did not err in declining to address the nondelegation/separation-of-powers claim.

II. Petitioners' nondelegation/separation-of-powers claim is meritless, in any event

As explained at length in the State's answering brief, Petitioners' constitutional challenge also fails on the merits because the Governor's exercise of emergency powers to address the COVID-19 pandemic has not violated the nondelegation doctrine or the separation of powers. To begin, Hawai‘i law properly recognizes the need for "flexibility" in the separation of powers. *Biscoe v. Tanaka*, 76 Hawai‘i 380, 383, 878 P.2d 719, 722 (1994) (quotation omitted). Here, the delegation of emergency powers to the Governor comports with constitutional requirements because, among other things, the Legislature has provided meaningful guideposts regarding how the powers should be exercised and the Legislature has retained important checks on executive power. Although HRS chapter 127A delegates broad authority to the Governor, "[a] broad grant of authority . . . is not the same as limitless or standardless authority." *Casey v. Lamont*, 258 A.3d 647, 666 (Conn. 2021). Moreover, a broad delegation of authority is crucial in an emergency management statute because "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." *Id*. at 667; *see also Grisham v. Romero*, 483 P.3d 545, 559 (N.M. 2021) ("The 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."). In short: "The 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." *Slidewaters LLC v. Wash. State Dep't of Lab. & Indus.*, 4 F.4th 747, 756 (9th Cir. 2021).

Accordingly, not only was the ICA correct in declining to reach this constitutional issue, but no viable constitutional claim would have existed even if the ICA had reached that issue.

III. The ICA correctly interpreted HRS § 127A-14

With respect to the statutory claim, the ICA's interpretation of chapter 127A was correct.

Consistent with settled principles of Hawai'i statutory interpretation, the ICA began by examining the text of chapter 127A. It concluded that "HRS § 127A-14(d) does not expressly state that the Governor is precluded from issuing more than one emergency proclamation based on the same emergency[.]" App. Appx. A at 13. The court also considered that provision "in the context of the entirety of HRS chapter 127A[.]" *Id.* The ICA read chapter 127A in light of its purpose: the court recognized that the Legislature made clear that "[i]t is the intent of the legislature to provide for and confer comprehensive powers for the purposes stated herein," and that "[t]his chapter shall be liberally construed to effectuate its purposes[.]" *Id*. at 15 (quoting HRS § 127A-1(c)).

The ICA correctly explained that "[t]he only condition or limitation in HRS § 127A-14(a) to the Governor's authority to issue an emergency is a finding by the Governor 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].'" *Id*. at 19 (citation omitted). Thus, the ICA concluded:

> Read together with HRS § 127A-14(c) & (d), and in light of the Emergency Management Act as a whole, we hold that HRS § 127A-14(a) authorizes the Governor to declare the existence of a state of emergency *whenever*, in his or her sole judgment, he or she finds that circumstances giving rise to a declaration of a state of emergency have occurred (or that there is imminent danger or threat of an emergency), regardless of whether a prior emergency proclamation has been issued based on the same, continuing, and/or otherwise related circumstances. This statutory authority, in essence, requires an independent finding by the Governor that such circumstances exist each time a proclamation is issued; in other words, the statute does not permit the Governor to "extend" a prior state of emergency in contravention of the automatic termination provision in HRS § 127A-14(a). That said, there is no requirement that the Governor's finding state that new circumstances giving rise to a declaration of a state of emergency have occurred.

> We recognize the breadth and gravity of this statutory interpretation. However, we have reviewed the legislative history of the Emergency Management Act and found nothing inconsistent with or casting doubt on our reading of the Act. At oral argument, Appellants acknowledged that nothing in the legislative history supports an alternative conclusion.

App. Appx. A at 19-20. The ICA's careful and well-reasoned analysis was entirely correct. Thus, there is no basis to grant certiorari.[9]

Petitioners cite (App. at 12) to out-of-state decisions from Michigan and Wisconsin to support their "one-and-done" reading of chapter 127A. *See Fabick v. Evers*, 956 N.W.2d 856, 862 (Wis. 2021); *In re Certified Questions From the United States District Court, Western District of Michigan, Southern Division v. Governor of Michigan*, 958 N.W.2d 1 (Mich. 2020). But those cases are readily distinguishable, as the ICA correctly held. *See* App. Appx. A at 20-21. If the Court were inclined to look to out-of-state authorities, other decisions interpreting more analogous statutes support the ICA's appropriate and commonsense reading of chapter 127A. 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, 1001 (N.D. Ill. May 3, 2020) (quotation omitted). "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

[9] The ICA's interpretation was also consistent with other judicial interpretations of the statute. For example, a federal district court in the District of Hawai'i has also reached a similar conclusion in assessing this provision of Hawai'i law. *See Denis v. Ige*, 557 F. Supp. 3d 1083, 1099 (D. Haw. 2021) ("The language of the statute supports the State. Section 127A-14 states that the Governor may declare a state of emergency whenever he or she finds that an emergency or disaster has occurred. There is no prohibition on supplementary or successive proclamations. Thus, the plain language of the statute suggests that if the Governor finds that a disaster is still ongoing after 60 days, the Governor can issue a supplemental proclamation to restart the 60-day period."); *see also id*. at 1098 (applying principles of statutory interpretation as set forth by this Court in *Nakamoto v. Kawauchi*, 142 Hawai'i 259, 268, 418 P.3d 600, 609 (2018), and concluding, "[b]ased on those principles," that "the State's construction of section 127A-14" is correct).

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 explained that "[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 1002. And "[i]t is difficult," the court observed, "to see why the legislature would" "divest the Governor of the tools he needs to address" such disaster. *Id*.; *see also Fox Fire Tavern, LLC v. Pritzker*, 161 N.E.3d 1190, 1196 (Ill. App. 2020) (reasoning that the Illinois that the statute "plainly authorizes the Governor to issue successive disaster proclamations stemming from one ongoing disaster").

Because the ICA correctly interpreted chapter 127A, certiorari is unwarranted.

IV. The pending enactment of S.B. 3089—which confirms and clarifies that Petitioners' reading of chapter 127A is wrong—further counsels against granting certiorari

Even if there had been error in the ICA's opinion (which there was not), review by this Court would be particularly unwarranted given the pending enactment of S.B. 3089, which clarifies chapter 127A and confirms that the Governor has the clear statutory authority to "re-declare the existence of a state of emergency" and "extend" a state of emergency when necessary.[10] Because the version of HRS chapter 127A that was interpreted by the ICA likely will no longer be in effect upon S.B. 3089's passage, this further demonstrates why additional review by this Court would be unnecessary and unwarranted.

CONCLUSION

The Application for Writ of Certiorari should be rejected.

[10] S.B. 3089 was enrolled to the Governor for his signature on May 6, 2022. *See* Hawai'i Legislature, *SB3089 SD2 HD2 CD1*, https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=3089&year=2022 (last visited May 24, 2022). Additionally, S.B. 3089 also adds a provision to chapter 127A indicating that "[t]he legislature may, by an affirmative vote of two-thirds of the members to which each house is entitled, terminate a state of emergency, in part or in whole, declared by the governor pursuant to this section." This further demonstrates the absence of any separation-of-powers violation in chapter 127A, as it highlights the Legislature's clear retention of checks on executive power exercised under chapter 127A. *See* https://www.capitol.hawaii.gov/session2022/bills/SB3089_CD1_.htm.

DATED: Honolulu, Hawai‘i, May 24, 2022.

/s/ Nicholas M. McLean

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date set forth below, a true and correct copy of the foregoing has been served by electronic service through the Judicial Electronic Filing System (JEFS) or by US Mail where noted upon the following:

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