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IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF HAWAIʻI

FOR OUR RIGHTS, Inc.,
a Hawaii nonprofit corporation,
GREG BENTLEY,
STEVEN FORMAN,
JOHN HEIDEMAN,
LEVANA LOMMA, and
GERALYN SCHULKIND,

Plaintiffs,

v.

DAVID IGE, Governor of the State of Hawaiʻi, in his personal capacity,

Defendant.

CIVIL NO. 21-00488-JOA-KJM

District Judge: Hon. Jill A. Otake

Trial Date: None.

<u>PLAINTIFFS' REPLY TO DEFENDANT'S MOTION TO DISMISS</u>

The Plaintiffs, through their attorney, Sierra Häag, respectfully submit the following in reply to the motion to dismiss of Defendant Ige (ECF No. 41).

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The Defendant Governor Ige has moved to dismiss the Plaintiffs' complaint. The Plaintiffs submit this brief in response thereto and respectfully request that this Honorable Court deny the same.

I. Analysis of Relevant State Law and the Complaint's Theory of Prosecution.

Two laws of Hawai‘i describe when any part of our state government may impose any form of quarantine. During the 2002 regular session of the Hawai‘i legislature, HRS § 325-8 was substantially amended to permit a party to be quarantined in certain specific circumstances. This section defines a "quarantine" as follows:

> "Quarantine" means the compulsory physical separation, including the restriction of movement or confinement of individuals or groups believed to have been exposed to or known to have been infected with a contagious disease, from individuals who are believed not to have been exposed or infected, by order of the department or a court of competent jurisdiction.

Pursuant to HRS § 325-8 (e), probable cause must exist to order a quarantine for any individual: "The court shall grant an *ex parte* order upon finding that probable cause exists to believe a quarantine is warranted pursuant to this section." If a quarantine order is granted, the quarantined party is entitled to a hearing pursuant to § 325-8 (g). In this manner, procedural due process is accorded.

In 2014, the Hawai‘i legislature substantially amended the Emergency Management Act to authorize the Governor during a declared emergency to also

impose quarantines:

> §127A-13: Additional powers in an emergency period.
>
> (a) In the event of a state of emergency declared by the governor pursuant to section 127A-14, the governor may exercise the following additional powers pertaining to emergency management during the emergency period:
>
> (1) Provide for and require the quarantine or segregation of persons who are affected with or believed to have been exposed to any infectious, communicable, or other disease that is, in the governor's opinion, dangerous to the public health and safety, or persons who are the source of other contamination, in any case where, in the governor's opinion, the existing laws are not adequate to assure the public health and safety;

In both § 325-8 and § 127A-13, the public officials authorized to impose a quarantine can do so when there is probable cause to believe a particular party has "been exposed to or known to have been infected with a contagious disease", or "who are affected with or believed to have been exposed to any infectious, communicable, or other disease". Clearly, Hawai'i law mandates that a party can be quarantined only when there is such statutorily required "probable cause."

In this case, all Plaintiffs are alleged to have been healthy and not suffering from COVID-19 when the "Stay at Home" proclamations were issued by the Governor and enforced by his agents, and further when some of them had been "quarantined" for 14 days after they had traveled by air. See ¶¶ 20, 21, 22, 23 of the amended complaint. If these Plaintiffs had been subjected to quarantine pursuant to HRS § 325-8, there would failure to demonstrate the "probable cause" required for a quarantine by that section and, moreover, they would have been entitled to judicial

review of the quarantine order if any had been entered.

In this case, two Plaintiffs did seek to exercise their constitutional right to procedural due process and their statutory right to judicial review authorized by HRS § 325-8. Plaintiff Heideman requested a hearing pursuant to H.R.S. § 325-8(e), but was denied such. Amended complaint ¶32. Similarly, Plaintiff Lomma also sought pursuant to HRS § 325-8 review of any quarantine order that might be imposed against her but, like Heideman, that request was denied. Amended complaint ¶34.

If abridged, they sued, lost in the trial Court held that these two stagehands had been denied procedural due process and were entitled to judgment in their favor and damages.

The Proclamations at issue in this case were implemented by the Governor pursuant to the Emergency Management Act, HRS §127A-1, *et seq*. In Governor Ige's Second Supplementary Proclamation dated March 21, 2020, he imposed a quarantine for all persons traveling to Hawai'i:

> Pursuant to section 127 A-13(a)(1), HRS, all persons entering the State of Hawai'i shall be subject to mandatory self-quarantine, except those persons performing emergency response or critical infrastructure functions who have been exempted by the Director of Emergency Management. The period of self-quarantine shall begin from the time of entry into the State of Hawai'i and shall last 14 days or the duration of the person's presence in the State of Hawai'i, whichever is shorter.[1]

In Governor Ige's Third Supplementary Proclamation dated March 23, 2020,

[1] See Second Supplementary Proclamation, p. 1.

he imposed the "Stay at Home" quarantine and provided that:

> "Pursuant to sections 127A-12(a)(5), 127A-12(b)(14), 127A-13(a)(1), and 127A-13(a)(7), HRS, all persons within the State of Hawai'i are ordered to stay at home or in their place of residence except… [2]

In his Sixth Supplementary Proclamation dated April 25, 2020, the Governor imposed quarantines as follows:

> "Pursuant to sections 127A-12(a)(5), 127A-12(b)(14), 127A-13(a)(1), and 127A-13(a)(7), HRS, all persons within the State of Hawai'i are ordered to stay at home or in their place of residence except…"[3]

> "Pursuant to section 127A-13(a)(1), HRS, all persons entering the State of Hawai'i shall be subject to mandatory self-quarantine, except those persons performing critical infrastructure functions as identified in Section III.A of this Proclamation. The period of self-quarantine shall begin from the time of entry into the State of Hawai'i and shall last 14 days or the duration of the person's presence in the State of Hawai'i, whichever is shorter."

> "Pursuant to section 127A-13(a)(1), HRS, all persons traveling between any of the islands in the State of Hawaiʻi shall be subject to mandatory self-quarantine. The period of self-quarantine shall begin from the date of entry onto the island and shall last 14 days."[4]

Similar provisions regarding the "Stay at Home" and travel quarantines were provided in his Seventh Supplementary Proclamation (pp. 4, 14), and Eighth Supplementary Proclamation (pp. 4, 14). In his Ninth Supplementary Proclamation, limited restrictions on activity outside the home were permitted, but travel to Hawaiʻi and inter-island was still subject to quarantine. It appears that after the Ninth Supplementary Proclamation, restrictions for being outside a person's home were

[2] See Third Supplementary Proclamation, p. 2.
[3] See Sixth Supplementary Proclamation, p. 5.
[4] See Sixth Supplementary Proclamation, p. 25.

lifted, but the quarantines related to travel continued until his Nineteenth Proclamation dated April 9, 2021.

During the time these proclamations were in effect, Plaintiffs Plaintiff Heideman and Lomma specifically requested hearings pursuant to HRS § 325-8 but those requests were either denied or ignored. The Emergency Management Act via HRS § 127A-13 (a)(3) authorizes the Governor to suspend any existing state law "that impedes or tends to impede or be detrimental to the expeditious and efficient execution of, or to conflict with, emergency functions". Was the operation of HRS § 325-8 suspended in some fashion? Suspending existing state laws creates serious constitutional problems.

Article 1, § 15 of the Hawaiʻi Constitution condemns the suspension of laws: "The power of suspending the privilege of the writ of habeas corpus, and the laws or the execution thereof, shall never be exercised except by the legislature, or by authority derived from it to be exercised in such particular cases only as the legislature shall expressly prescribe." Similar provisions are contained in other State Constitutions here in America, but too many know little about the reason and purpose of constitutional provisions of this nature.

There is a common law origin to the principle that an executive officer like the Governor cannot suspend existing laws. In 1685, James II assumed the English throne, and at that time, the Test Act of 1678 barred Catholics from serving in

government offices or the military, and imposed obligations to take oaths to support the Church of England. James was a Catholic and desired that his Catholic friends and supporters be military officers and government officials, and he thus issued his Declaration of Indulgence that suspended the Test Act, and this naturally infuriated Protestants as a result.

In early 1688, James ordered that the Declaration of Indulgence be read in every church in England, but "Seven Bishops" refused to do so, resulting in them being charged with seditious libel. However, at their trial in June, 1688, the jury acquitted them. This trial was one of the events leading in November, 1688, to James' abdication and the subsequent coronation of William and Mary as King and Queen.

The Glorious Revolution followed within a few months. The first substantive provisions of the English Bill of Rights provides "That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal".[5]

But almost 80 years later, King George III was compelled by circumstances beyond his control to engage in the suspension of laws. In early 1766, a torrential rainstorm severely damaged the English corn crop, causing the "Corn Crisis."

[5] See *Texas v. United States*, 555 F. Supp. 3d 351, 406-413 (S.D. Tex. 2021); *Wolf v. Scarnati*, 233 A.3d 679, 699-704 (Pa. 2020); and *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 797-98 & n. 95, 804-09 (2013).

"While Parliament was in recess, grain prices skyrocketed, triggering riots. Mobs destroyed flourmills and seized foodstuffs; some culprits were imprisoned, and others hanged. Believing that it could not wait, the Crown acted unilaterally, banning grain exports in order to preserve the supply for the domestic market."[6] This ban on exports was set to end 3 days after Parliament convened. When Parliament re-convened, it was eventually decided that the government, then being sued because of the unlawful ban on exports, would pay damages as a result of the illegal export ban.[7]

This ban on the suspension of laws contained in the English Bill of Rights had an effect on the drafting of the Bill of Rights and other provisions of the United States Constitution, as well as similar provisions in many state constitutions, such as our Constitution's Art. 1, § 5.

It is clear that this prohibition on suspending laws plays a role in this case. HRS §127A-13(3) authorizes the suspension of laws during emergencies declared by the Governor, and in the Proclamations forming the basis for this case, he suspended many state laws. For example, in his Sixth Supplementary Proclamation dated April 25, 2020, the Governor listed numerous laws he was suspending, with the introduction thereto stating:

V. Suspension of Laws

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[6] *The Imbecilic Executive*, 99 Va. L. Rev. 1361, 1378 (2013).
[7] Supra, *The Imbecilic Executive*, at 1380.

> The following laws are suspended, as allowed by federal law, pursuant to section 127A-13(a)(3), HRS, in order for county and state agencies to engage in emergency management functions as defined in section 127A-2, HRS. (p. 16).

The list of suspended laws in this Proclamation spanned 17 pages. In the subsequent Proclamations, a similar lengthy list of suspended laws was provided.

Apparently, the Governor could also have suspended HRS § 325-8, but he did not do so. In fact, he specifically stated that it remained in effect:

> The self-quarantine mandated in the Travel Rules, or any waiver or exemption therefrom, does not affect or in any way impede or supersede the authority of CDC, or DOH pursuant to sections 321-1 and 325-8, HRS, to require persons to quarantine if they subsequently test positive for COVID-19 or if they are a close contact of a person confirmed positive for COVID-19.[8]

The above demonstrates that the Plaintiffs have a valid claim under state law for deprivations of their constitutional right to procedural due process. Hawai'i law requires that when state officials quarantine a person they must have probable cause that the person either has "been exposed to or known to have been infected with a contagious disease", and if such probable cause exists and that person is subjected to quarantine, that person may request and obtain judicial review. Here, the Plaintiffs were clearly deprived of this procedural due process, and they have a valid state claim based on *Minton v. Quintal*, *supra*.

But, what federal claim do they have?

II. The Plaintiffs' Have a Valid Claim for Violation of 42 US.C. § 1983.

[8] See Fifteenth Proclamation, p . 7.

"A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections. In seeking to defeat a claim of qualified immunity, the plaintiff bears the burden of proving not only that both elements of his claim are resolved in his favor, but also that both elements are 'clearly established' in his favor." Brewster v. Bd. of Educ., 149 F.3d 971, 982 (9th Cir. 1998). See also Ching v. Mayorkas, 725 F.3d 1149, 1159 (9th Cir. 2013)("due process required a hearing with an opportunity for Ching to confront the witnesses against her."). The Plaintiffs' complaint and the facts plead therein demonstrate the validity and merits of their claim.

Here, as shown below, the plaintiffs had clearly established constitutional rights to work and travel. Moreover, they had the constitutional right to procedural due process. But, contrary to these rights, the Governor issued a series of proclamations that first ordered Hawaiians and others to stay at home (making work impossible), followed by 14-day quarantines if thereafter they traveled. To add insult to injury, both of these mandates were imposed without regard to whether the parties subjected to these deprivations were sick with COVID-19 or had been exposed to COVID-19, the *sine qua non* to impose these restrictions as required by state law.

While neither § 325-8 nor § 127A-13 specifically define the term "probable cause" a common definition is "a reasonable amount of suspicion, supported by

circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true". See, *Probable Cause,* Ballentine's Law Dictionary (Legal Assistant ed. 1993). The key to the concept being that it is an individualized determination, supported by specific facts applicable to the individual case.

It would have been a very simple matter to limit these restrictions of “lockdown” and quarantine to only those who were sick or those who had been exposed to this disease. For example, state enforcement agents operating under the direction of the Governor could have, from the very beginning of this epidemic, simply inquired of travelers whether they were sick or whether they had been in contact with those who were sick and limited the travel restriction to those who gave an affirmative reply. The “lockdowns” similarly could have been applied only to those who were either sick or had been exposed to this disease, rather than everyone.

The Governor during this period was very busy being interviewed by the press and was constantly in the news spreading the word about his enforcement of these restrictions set forth in his proclamations. It would have been a very simple matter to have informed the public that, if one was sick or had been so exposed, they were confined to their homes, and this could have been done for travelers as well.

Instead, the Governor imposed these mandates on 100% of the public, the sick as well as those who were not and had not been exposed to this disease. The Plaintiffs

are members of the class who were not sick and had not been exposed, hence this lawsuit.

And Plaintiff Lomma has been criminally charged for violating the Governor's proclamations. Upon her return from a speaking engagement, the Governor's enforcement agents let her go home after she arrived at the airport. She wasn't sick and had not been exposed to COVID-19. Those law enforcement officers of the Governor could not have known or shown at that time that she was sick or had been exposed to COVID-19. Nonetheless, she has been criminally charged. When trial of her case starts, the prosecution in that case will not be able to show that she was sick from COVID-19 or had been exposed to it.

Due process requires particularized notice and a hearing. As to the "Stay at Home" lockdowns, such could have been limited only to the sick or those who had been exposed. If the Governor and his enforcement agents believed that someone was sick or had been exposed, proceedings under state law for quarantine could have been pursued. As to the travel lockdowns, instantaneous "due process" could have been pursued: agents could inquire of a traveler whether that party was sick or had been exposed. A negative answer by the traveler should have been sufficient, but if enforcement agents believed otherwise, proceedings under existing state law could have been pursued.

Instead, the Governor instituted a program that, without any mandated

"probable cause", he locked everyone down for several months at the start of the epidemic, and then required travelers to do the same thing when they exercised their constitutional rights. This was an enormous due process violation.

A. The Constitutional Right to Work.

The right to work is a constitutional right protected by the Fourteenth Amendment, and this right has been recognized numerous times by the Supreme Court. In 1914, Arizona adopted a law mandating that the workforce of any employer in that state must be composed of at least 80% "native-born citizens of the United States". When this law became effective, employee Raich filed suit to enjoin its enforcement, which prompted local prosecutors to file criminal charges against his employer, Truax. A three-judge court concluded that the Arizona law was unconstitutional, which decision was affirmed by the Supreme Court, and it held "that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915). See also *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897)("The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any

lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."); *Coppage v. Kansas*, 236 U.S. 1, 14 (1915); *Meyer v. State of Nebraska*, 262 U.S. 390, 399 (1923); and *Morehead v. N.Y. ex rel Tipaldo*, 298 U.S. 587, 601 (1936)("Nothing is better settled in our constitutional law than that liberty does not mean merely freedom from physical restraint but includes the right to work for a living by using the powers of brain and muscle in the ordinary activities of mankind.").

Certainly, there is a well-recognized right to work.

B. The Right To Travel.

The right to travel "includes the right of men to move from place to place, to walk in the fields in the country or on the streets of a city, [and] to stand under open sky." *State v. Shigematsu*, 52 Haw. 604, 610, 483 P.2d 997, 1001 (1971). "We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own states". *Crandall v. Nevada*, 73 U.S. 35, 49 (1868). This "constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union". *United States v. Guest*, 383 U.S. 745, 757 (1966). See also *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (describing the constitutional

right to leave one state and enter another state freely); *United States v. Davis*, 482 F.2d 893, 912 (9th Cir. 1973)("it is firmly settled that freedom to travel at home and abroad without unreasonable governmental restriction is a fundamental constitutional right of every American citizen"); and *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002)("[T]he right to travel locally through public spaces and roadways enjoys a unique and protected place in our national heritage.").

Certainly, there is a well-recognized right to travel, both interstate and intra-state.

C. Constitutional Rights Do Not Hibernate During Declared Emergencies.

More than a century ago, the Ninth Circuit determined that constitutional rights are not suspended during epidemics or periods of quarantines. In *Wong Wai v. Williamson*, 103 F. 1, 9 (C.C.N.D. Cal. 1900), San Francisco was allegedly suffering from the bubonic plague, and city officials were subjecting certain Chinese residents to an unwanted vaccine, the Haffkine Prophylactic, as well as curtailing their travels by declaring quarantines. The court found that they were "denied the privilege of traveling from one place to another, except upon conditions not enforced against any other class of people", and such violated equal protection principles. See also the related case, *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D. Cal. 1900) ("this quarantine cannot be continued, by reason of the fact that it is unreasonable, unjust, and oppressive, and therefore contrary to the laws limiting the police powers of the state and municipality in such matters; and, second, that it is discriminating in its character,

and is contrary to the provisions of the fourteenth amendment of the constitution of the United States.").[9]

In the instant case, the Hawaiʻi legislature has attempted to isolate and prevent judicial review of the actions of the Governor when implementing the Emergency Management Act. See HRS §127A-14 (c)("The governor or mayor shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency"). It must be noted, however, that the legislature also understands that it cannot via this legislation abridge federal constitutional rights. See §127A-1 (c) ("this chapter shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States").

The Supreme Court has declared, regardless of the existence of any contrary state law, that a state governor cannot abridge FEDERAL constitutional rights. The case of *Sterling v. Constantin*, 287 U.S. 378, 397-98 (1932), involved similar decrees of a state governor in response to a perceived state emergency, and the Court held:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state governor, and not the Constitution of the United States,

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[9] The Governor relies upon *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), but that case concerned only vaccines, not lockdowns, and is thus distinguishable. The Governor also relies upon *Armstrong v. Newsom*, 2021 WL 6101260 (9th Cir. Dec. 21, 2021), but that case was unpublished and does not constitute precedence. Simply reading the appellants' brief in that appeal will reveal why it was an unpublished decision.

> would be the supreme law of the land; that the restrictions of the federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

See also *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 442 (1934) ("It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.").

Further, a federal court has the power and right to determine whether a declared emergency such as martial law still exists. See *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), a case from Hawai'i.

D. The Right To Procedural Due Process.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 348 (1976). "[T]he Constitution requires some kind of a hearing before the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418,

425 (1979). After all, "'[t]he right to be free from Government confinement . . . is the very essence of the liberty protected by the Due Process Clause."' *United States v. Strong*, 489 F.3d 1055, 1066 (9th Cir. 2007)(quoting *Reno v. Flores,* 507 U.S. 292, 346 (1993).
gang violence, the County of Orange subjected putative gang members to the terms of a court order without hearing, and in this lengthy opinion, the Ninth Circuit determined that the county had abridged the constitutional rights of such alleged gang members: "Orange [County] violated Plaintiffs' procedural due process rights by failing to provide any form of hearing before subjecting them to the Order."

E. The Liability of the Governor.

The Governor cannot escape liability by claiming that, even though he unquestionably issued the challenged Proclamations, and his signature appears thereon, he is not liable because others were the parties who enforced them. "[T]he requisite causal connection can be established not only by some kind of direct personal participation in the deprivation but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978). "[M]ere indirectness of causation is no barrier to standing, and thus, an injury worked on one party by another through a third-party intermediary may suffice."

National Wildlife Federation v. Hodel, 839 F.2d 694, 705 (D.C. Cir. 1988).[10]

Nonetheless, the complaint alleges involvement by the Governor via the allegation that he ordered others to enforce his proclamations, and this is sufficient to make him liable. But, there are facts known to the court about this matter of which judicial notice can probably be taken. The Governor frequently used the press to spread information about his proclamations, and therein he informed the public about his acts of enforcement. Further, plaintiff Lomma was informed several times by state agents who were enforcing the proclamations against her that they were following the Governor's directives. If the court thinks that the complaint in this case might be deficient in some way about the involvement of the Governor, they stand ready to amend the complaint further to supply the details.

F. The Governor's Proclamations and Implementation of Them Were Executive Actions, Not Legislative, and He Is Not Entitled to Immunity.

The claim of the Governor that he is entitled to absolute immunity similar to that of a legislator is incorrect, and since he is the elected chief executive officer of Hawaiʻi, he can only claim qualified immunity herein. For his implementation of the "lockdowns" and quarantines, he wasn't acting in a "legislative" capacity: legislators

[10] See also Telephone and Data Systems, Inc. v. FCC, 19 F.3d 42, 47 (D.C. Cir. 1994) ("injurious private conduct is fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality"); America's Community Bankers v. FDIC, 200 F.3d 822, 827-28 (D.C. Cir. 2000) ("an agency does not have to be the direct actor in the injurious conduct, but that indirect causation through authorization is sufficient to fulfill the causation requirement for Article III standing."); and Consumer Federation of America v. F.C.C., 348 F.3d 1009, 1012 (D.C. Cir. 2003) ("When an agency order permits a third-party to engage in conduct that allegedly injures a person, the person has satisfied the causation aspect of the standing analysis.")

do not enforce the law as do executives.

The U.S. Supreme Court has made a clear distinction between which class of government officials are entitled to absolute immunity and which are entitled to the more limited qualified immunity. And state governors clearly fall in the latter category. The Court "has refused to extend absolute immunity beyond a very limited class of officials, including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions, 'whose special functions or constitutional status requires complete protection from suit.' State executive officials are not entitled to absolute immunity for their official actions. *Hafer v. Melo et al.*, 502 U.S. 21, 29 (1991) (citing *Harlow* v. *Fitzgerald,* 457 U. S. 800, 807 (1982)).

And specific to Gov. Ige's particular claim in this case, courts have also held that "[e]xecutive officers [are] given only a qualified immunity for their actions varying with 'the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time' in question." *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1365 (9th Cir. 1977). The legislative immunity doctrine does not apply when the nature of the legislator's acts is administrative or executive in nature. *Bogan v. Scott-Harris*, 523 U.S. 44, 54-55 (1998). It is inappropriate for a state governor and his aides to obtain absolute immunity from § 1983 suits. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). See also

Kaahumanu v. County of Maui, 315 F.3d 1215, 1219 (9th Cir. 2003) (citing *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984).

CONCLUSION

The amended complaint in this case clearly alleges a §1983 claim against the Governor for his violation of the federally protected right to procedural due process and the Governor's motion to dismiss should be denied.

Respectfully submitted this the 4th day of November, 2022.

/s/ Sierra Hagg____________
Sierra Häag