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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

RICHARD PARTAL II, KRISTINE MARIE
PARTAL, AND ELLEN PARTAL

Plaintiffs,

v.

DAVID Y. IGE, in his official capacity as
Governor of the State of Hawaii; STATE OF
HAWAII; MAYOR HARRY KIM, in his
official capacity as the Mayor of Hawaii
County; and John and/or Jane Does 1-10, in
either official or individual capacities

Defendants.

CIVIL NO. 3CCV-20-0000277
Other Civil Action

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANT
GOVERNOR IGE'S MOTION TO
DISMISS FILED AUGUST 10, 2020 AND
DEFENDANT MAYOR KIM'S MOTION
TO DISMISS FIRST AMENDED
COMPLAINT FILED AUGUST 11, 2020;
DECLARATION OF JAMES
HOCHBERG; EXHIBITS 1-5;
CERTIFICATE OF SERVICE**

Judge: Hon. Wendy DeWeese
Hearing:
Date: September 1, 2020
Time: 9:00 a.m.
No Trial Date

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INTRODUCTION

Plaintiffs file this Memorandum in Opposition (“Memo in Opp”) to both Defendant Governor Ige’s and Defendant Mayor Kim’s respective Motion to Dismiss First Amended Complaint filed August 10, 2020 and August 11, 2020 respectively (together, the “Motions”). Plaintiffs oppose the Motions and also ask that this Court grant Plaintiffs Cross-Motion for Partial Summary Judgment filed on August 14, 2020 (“Cross-MSJ”) to be heard concurrently herewith. For the reasons stated below, the Motions should be denied.

Defendant Governor Ige (“Gov. Ige”), throughout his Motion, mischaracterize Plaintiffs position.¹ Gov. Ige accuses Plaintiffs of seeking to shut down the ability of the State of Hawaii to deal with COVID-19 Gov. Ige Memo. at 2,8,14,15; he distorts HRS Section 127A-14(d) to misconstrue its meaning, with illogical interpretation Gov. Ige Memo. at 8-11, 16, 18, 19; he misrepresents the legal principles of cases he cites Gov. Ige Memo. at 15; and he generally complains about facts that are not present in this case - that Gov. Ige’s continuing, supplementary emergency powers are lawful.² Gov. Ige disagrees with the legislative scheme created by the Hawaii legislature when enacting Act 111 in 2014 (HB849 CD1), the act that eventually led to the current statute, and seeks to avoid at all costs a return to constitutional government. In the Mayor Kim Memo, Mayor Kim expressly concurs with Gov. Ige’s arguments. Mayor Kim Memo. at 5.

I. Hawaii’s Lawmaking Abilities Should Return to Its Proper Place – the Legislature

Constitutional government is the government that protects the political power of the citizens from abuse of power by government officials *See generally*, Haw. Const. Article I, *et seq.* The legislative scheme of Chapter 127A protects all Hawaiian citizens, including Plaintiffs, from the overreach of power, which Gov. Ige seeks to continue, by establishing a time limit on broad, emergency executive power. The legislative scheme of Chapter 127A provides the

¹ Gov. Ige’s Memorandum in Support of his Motion to Dismiss is referred to as Gov. Ige. Memo; Mayor Kim’s Memorandum in Support of his Motion to Dismiss is referred to as Mayor Kim Memo. Each of their respective Motions to Dismiss is referred to as Gov. Ige MTD, or Mayor Kim MTD, respectively.

² Plaintiffs attached to the Cross-MSJ as Exhibits 3-14, the 12 proclamations filed by Gov. Ige. Each and every one of them was approved by the signature of Clare E. Connors, Attorney General of the State of Hawaii by her signature beneath the signature of Gov. Ige. Clare Connors also signed the Motion and submitted her Declaration in Support of the Motion.

Governor, in an emergency situation only, with limited legislative power for just 59 days. The time-limitation on such emergency power was both thoughtful and deliberate by the Hawaiian legislature. See Decl. of James Hochberg; see also HB849 attached hereto as Exhibit 1 and HB849 HD2, attached hereto as Exhibit 2 . Unfortunately, using this limited power, Gov. Ige has made himself the Ruler without any public input or participation, or legislative act.

Gov. Ige misrepresents the goal of the Plaintiffs in this case. Plaintiffs do not seek to:

- “dramatically limit the scope of the State’s emergency powers and hobble the efforts of State and local governments to respond to the ongoing COVID-19 emergency.”

Gov. Ige’s Memo. at 2;

- Make the Governor and mayors “utterly powerless to respond to an ongoing emergency” Gov. Ige’s Memo. at 2; or

- “cause extraordinary chaos and legal uncertainty.” Gov. Ige’s Memo at

Gov. Ige is arguing against a position that Plaintiffs do not take.

II. The Court Can Best Protect the Public by Denying Defendant’s 12(b) Motion to Dismiss

The State of Hawaii should be protecting the citizens against COVID-19 via the legislative law-making branch rather than through unlawful executive branch actions after emergency-delegated law-making power has statutorily and automatically terminated. Complaint at ¶¶ 67-69. While protecting the health and safety of the public during an emergency is critical to everyone—including Plaintiffs—the Governor may not abuse the limits placed on his executive office. Once the governor’s emergency powers terminate, it is the duty of the legislature to resume its rightful law-making powers, honoring appropriate rights of the public to participate in, and be advised of, the process. Defendants actions, which ignore the legal limitations on proper exercise of executive emergency powers, infringe on the rights of Plaintiffs and others similarly situated in Hawaii. If the Court grants Defendants Motion to Dismiss, the rightful assumption of power by the legislature will be thwarted.

While Defendants detail the history and reasoning for the Governor’s multiple emergency proclamations Gov. Ige. Memo. at 3-5, this case centers around proper emergency delegation of powers, and does not turn on any potential peril of COVID-19, current statistics, or doomsday predictions, and the Court should not be swayed by such arguments. Defendants expressly state they accept Plaintiffs allegations as true concerning the events giving rise to an alleged violation

of Gov. Ige’s emergency proclamations. Gov. Ige’s Memo., fn. 9 at 5. The issue for the court to consider, then, is one of statutory interpretation of HRS § 127A-14(d). Plaintiffs assert serious claims concerning a question of law for the court to consider. Complaint at ¶¶ 59-85. Plaintiffs’ claims are not meritless and are brought in good faith.

A claim should not be dismissed under Haw. R. Civ. P. 12 unless there is no doubt that the plaintiff can prove “no set” of facts in support of relief, and in addition to viewing facts in a light most favorable to plaintiff, facts shown in such favorable light should be viewed to determine if the facts “could warrant relief under any alternative theory.” *Keohala v. Machado* 131 Hawaii 62,75, 315 P.2d 213, 225 (2013). Motions to dismiss “should rarely be granted.” *Au v. Au*, 63 Haw. 210, 221, 626 P.2d 173, 221 (1981). *Machado*, although appropriate for reciting the standard for a motion to dismiss, turns on a statutory interpretation of the word “solely” and the court noted did not have much legislative history to review -such is not the case at hand, where the legislative history shows the automatic time-expiry for emergency executive power was purposefully included in the final draft that was passed. See also *Malabe v. Ass’n of Apartment Owners of Executive Centre*, 147 Hawai’i 330, 465 P.3d 777 (Haw. June 17, 2020)(discussing statutory interpretation and Rule12(b)(6) standards; vacating lower court’s granting of dismissal); *Ah Mook Sang v. Clark*, 130 Haw. 282, 308 P. 3d 911 (Haw. Sep. 3. 2013); vacating lower court’s dismissal).

ARGUMENT

I. THE TEXT OF HRS § 127A-14(D) SUPPORTS PLAINTIFFS POSITION

Throughout Gov. Ige’s memo, the meaning of HRS §127A-14(d) is distorted. The statute declares that any “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.” HRS § 127A-14(d) (emphasis added). There are several aspects of this sentence that refute Gov. Ige’s and Mayor Kim’s arguments. First, HRS 127A-14(d) refers to a singular state of emergency not 12 separate states of emergency related to the same COVID-19 virus. Second, HRS § 127A-14(d) states that from that singular state of emergency proclaimed by Gov. Ige based on the COVID-19 virus, the state of emergency shall terminate automatically, without any intervening act, sixty days after the issuance of the

proclamation of the singular state of emergency; there is no language for any option for Gov. Ige to extend the state of emergency beyond that automatic termination date on the 60th day.

Contrary to Gov. Ige's argument that he has the power to issue multiple, supplementary proclamations, HRS §127A-14(d) contemplates only two emergency proclamations by a governor or mayor. Those two emergency proclamations consist of a first proclamation to activate the provisions of Chapter 127A, which abate for 60 days the constitutional separation of powers, and the second proclamation contemplated by the plain language of § 127A-14(d) is a proclamation terminating the state of emergency prior to the end of the 60th day, if the Governor so chooses. Language that would provide for multiple, supplemental proclamations extending the state of emergency beyond the maximum 60 day term is absent.

As argued by Gov. Ige in his Motion, the Canon of statutory interpretation *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another) applies here, and it supports Plaintiff's argument- the mention of the automatic time limit on an emergency power proclamation implies the exclusion of an extension of that time limit. *See International Sav. And Loan Ass'n, Ltd. V. Wiig*, 82 Hawaii 197, 201 (1996). ("The maxim, *expressio unius est exclusio alterius*, exists only as an aid to statutory interpretation and its application should be limited to ascertaining legislative intent which is not otherwise apparent."); "The inclusion of a specific matter in a statute implies the exclusion of another "only where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended to be included within the statute.") (citations omitted). "In Hawai'i, the principle of *expressio unius est exclusio alterius* is applicable "where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended to be included within the statute." *Adams v. CDM Media USA, Inc.*, 346 P.3d 70,88 (Haw. 2015) (citing *Int'l Sav. & Loan Ass'n, Ltd. V. Wiig*, 82 Hawai'i 197, 201, 921 P.2d 117, 121 (1996)).

There are well-established principles when reviewing questions of statutory interpretation. It is fundamental to start with the text of the language itself. *Malabe* at 786, citing *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals*, 114 Hawai'i 184, 193, 159 P.3d 143, 152 (2007). The language of the text itself is reviewed to best ascertain and give effect to the intention of the legislature. Statutory language is read in the context of the entire statute, mindful

of its purpose. An ambiguity exists only if there is doubt, indistinctiveness or uncertainty of expression. The courts may use legislative history. *Justice v. Fuddy*, 125 Haw. 104, 108, 253 P. 3d 665,669 (Haw. Ct. App. April 7, 2011), citing *Lingle v. Hawaii Gov't Emps. Ass'n, AFSCME, Local 152, AFL-CIO*, 107 Haw. 178, 183, 111 P.3d 587, 592 (2005); see also *Malabe* at 786 (“the courts may resort to extrinsic aids in determining legislative intent, such as legislative history, or the reason and spirit of the law.”)(citations omitted).

127A-14(d) places a time-limit on the Governor’s power. The text is not unclear, indistinctive, unambiguous, or leads to uncertainty; in short, the statute should be given its plain meaning and effect. See *State v. Sylva*, 61 Hawaii 385, 605 P. 2d 496 (1980); see also *Hawaii Government Employees Ass'n, AFSCME Local 152, AFL-CIO v. Lingle*, 124 Haw. 197, 239P.3d (Haw. Sep. 8, 2010), citing *Awakuni v. Awana*, 115 Haw. 126, 133, 165 P.3d 1027, 1034 (2007) (citation omitted).

The time-limit should be upheld, as there is no justification for departure from the plain-meaning; indeed, not sustaining the time limit could lead to overreach and abuse of power. The termination of Governor Ige’s emergency powers does not leave the state of Hawaii without power to act; the termination of Gov. Ige’s emergency powers only affects the Governor’s sole ability to act with broad emergency powers, which are only present during the first 59 days of a declared state of emergency. On the 60th day, the Governor’s powers return to the rightful constitutional state of affairs. On the 60th day, Gov. Ige, together with the legislature, mayors and county councils return to their appropriate relationship to one another under the Hawaii Constitution - this is the result Plaintiffs seek.

Defendants cite to cases arguing that Defendant’s supplementary proclamations re separate documents. Gov. Ige Memo at 9-10. *Alford v. City & Cty. of Honolulu*, 109 Hawai‘i 14, 20, 122 P.3d 809, 815 (2005) (citing HRCP Rule 58; *Jenkins v. Cades Schutte Fleming & Wright*, 76 Hawai‘i 115, 119, 869 P.2d 1334, 1338 (1994)). These cases concern appealability of a final judgment and the analogy does not apply in the context of this case. Whether Gov. Ige characterizes his COVID-19 executive orders as supplementary or separate does not save him from the automatic termination of his emergency powers. The effect of each of the orders terminated on or after May 3, 2020 (the 60th day). After that 60th day, all are void.

II. THE LEGISLATIVE HISTORY AND PURPOSE OF CHAPTER 127A SUPPORTS PLAINTIFFS ARGUMENT THAT THERE IS AN AUTOMATIC TIME LIMIT ON THE GOVERNOR’S COMPREHENSIVE EMERGENCY POWERS

The Hawaii legislature worked carefully and diligently in crafting Chapter 127A. During the nearly 18-month process by which HB 849 became law, the bill was reviewed in three committees in 2013 and seven committees in 2014. See Exhibit 3 Decl. of James Hochberg. Chapter 127A was enacted in 2014 as Act 111, which started out as HB849 (Exhibit 1),³ As originally written, HB849 (which used section number 15) provided that:

Section 15(d) A period of emergency shall terminate by proclamation of the governor or mayor. If no date is set by the governor or mayor, no application for any state-level disaster-related programs shall be received six months after the issuance of the governor’s or mayor’s proclamation declaring an emergency.⁴

As originally written, there was no time-limitation. The initial proposed language - which was rejected in the third version HD2 - reflects the argument being pressed by Gov. Ige - that the Governor has no time-limit on emergency powers and does not have to abdicate his broad, emergency power. Defendants assert that if the legislature had intended to make a broad change in the law, it would be explicit. Gov. Ige. Memo. at 15, citing *Chisom v. Roemer*. But see *Franks v. City and County of Honolulu* 74 Haw. 328, 843 P.2d 668, 674 (1993) (subsequent legislative history or amendments can confirm interpretation of an earlier statutory provision)(citations omitted). As reflected in HRS Chapter 127A’s legislative history, the removal of an unlimited time limit for executive emergency power was explicit and purposeful. Indeed, the removal of the time limit is not a mere “minor administrative accommodation” as asserted by Defendants. Gov. Ige. Memo. at 17.

In the process of refining the emergency power legislation, the legislature, changed the language in HD2 of HB849 (Exhibit 2) to include the current limitation of 60 days. That amended section of HD2 then read (the section number changed from 15 to 14):

³ See

https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=849&year=2014 (last accessed on August 21, 2020).

⁴ See https://www.capitol.hawaii.gov/session2014/bills/HB849_.HTM (last accessed August 21, 2020).

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.⁵

In 2014, the legislature reviewed and amended HB849 five times, from HB849 through HB849 CD1.⁶ (See Exhibit 4) The final version which passed and was signed into law as ACT 111 in 2014 was HB849 HB2 SB2 CD1 (Exhibit 4) contained the following language at section 14 which became HRS Section 127A-14(d):

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.

It is beyond refute that the legislature, in passing HB849 in 2014 flatly rejected Gov. Ige's argument that he can continue his emergency powers beyond the 60th day. Simply, the legislature edited the emergency powers statute to expressly include a sixty-day time limitation, as reflected in the legislative history of the emergency powers statute.

Gov. Ige recognizes the legislative history of the emergency powers act, evidenced by his references to HB849 CD1 Conference Committee Report No. 129-14 dated April 25, 2014. Gov. Ige's Motion at 16, Ex. 4. Nonetheless, Gov. Ige fails to recognize that the quotes he uses to support his position for broad powers actually was in the bill from the beginning. See Exhibit 1 page 2 In other words, the Court should take note that this general language was carried throughout each version of the statute formulation, from the first draft with no time limit, into the third version (HD2 see Exhibit 2) until the final (CD1 see Exhibit 4), passed with the 60-day time limit. The argument made by Gov. Ige does not provide support for the Governor's reading of Chapter 127A.

Gov. Ige falsely assert that Plaintiffs seek to make "it impossible for any set of executive responses to an emergency to ever last longer than 60 days." However, the change in the HD2

⁵ See https://www.capitol.hawaii.gov/session2014/bills/HB849_HD2_PROPOSED_.HTM (last accessed August 21, 2020).

⁶ Charts available at https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=849&year=2014 (last accessed August 21, 2020; charts located at upper right hand side of page)

version of HB849 actually made the “radical” change Gov. Ige seeks to avoid. See HD2 Exhibit 2, CD1, Exhibit 4 and Section 127A-14(d). As explained above, the legislature expressly drafted a 60-day automatic termination to the Governor’s emergency powers, which resides today in §127A-14(d). This is not radical – it is the intention of the legislature to limit the concentration of power in one person.

The elephant that Gov. Ige is attempting to hide in a mousehole is his usurpation of legislative authority which he automatically loses on the 60th day. Under Gov. Ige’s interpretation, his office, and his office alone is empowered to wield both executive and legislative power for as long as he declares an emergency, without participation by the legislature or the people. Chapter 127A is a deviation from the constitutional scheme for the state government in Hawaii, and such deviation was limited in time by the legislature. Gov. Ige must be ordered to adhere to those provisions for terminating that deviation. Gov. Ige repeatedly argues that the language of Section 127A-14(d) somehow provides for the issuance of other emergency proclamations. The statute provides for one emergency proclamation and one proclamation terminating the emergency sooner than 60 days from the first- that is it.

III. DEFENDANTS’ CITATION TO EXTRATERRITORIAL AUTHORITIES LEND SUPPORT PLAINTIFFS’ POSITION

Gov. Ige cites to the statutes in 15 states (out of 50 plus the U.S. Territories) that have specific language that a state of emergency can be extended with legislative agreement. Gov. Ige Memo. at 12. He argues that because Hawaii did not address that need for legislative agreement to extend the emergency powers, Gov. Ige is somehow entitled to do so even though the legislature provided an automatic termination after sixty days.

How those other state statutes support Gov. Ige’s contention requires a new maxim in law: “legislative silence on a topic indicates approval of the existence of the power.” This has no bases in law or fact. Taken to its extreme, this maxim, in the current setting under Chapter 127A means that all of the pages of definitions, permissions, restrictions, and requirements that are therein contained are actually meaningless because in addition to those stated provisions, Gov. Ige is also empowered in the silence to do whatever the legislature left out of the statute. Under Gov. Ige’s view there is no real need for the legislative branch at all. To Gov. Ige, it certainly matters not what the legislature writes in its laws. What they don’t write apparently opens the door for Gov. Ige to act with abandon.

To examine just one of Gov. Ige’s extra-territorial statutes that permit the governor to continually extend an emergency proclamation, see New Hampshire Revised Statutes § 4:45. The New Hampshire legislature provided specifically in its emergency power statute for the option argued for by Gov. Ige:

N.H. Rev. Stat. §4:45 State of Emergency Declaration; Powers.

II. (a) A state of emergency shall terminate automatically 21 days after its declaration unless it is renewed under the same procedures set forth in paragraph I of this section. The governor may, by executive order, renew a declaration of a state of emergency as *many times as the governor finds is necessary* to protect the safety and welfare of the inhabitants of this state. (emphasis added).

Although Hawaii could have chosen to include such extension of powers in Chapter 127A, the Hawaii legislature did not. The legislative history of HB849 from 2014 establishes that fact.

Recently, the Governor of Michigan was found to have violated the 28-day limit on exercise of emergency powers in connection with COVID-19 emergency orders. The State of Michigan Court of Claims ruled that the 28-day time limit on the governor’s exercise of emergency powers is a limit on the amount of time the governor can act independently of the legislature in responding to the emergency is precisely the issue in this case. *See Michigan House of Representatives and Michigan Senate v Governor Gretchen Whitmer*, No. 20-000079- MZ, (Mich. 2020). That full opinion is attached as Exhibit 15 to the Cross-MSJ. Though not identical in language or procedural posture, this Michigan case is instructive.⁷ Faced with the same issue of a time limitation on emergency power, Michigan Judge Stephens properly answered the issue in this case with respect to Haw. Rev. Stat. § 127A-14(d), which provides that every one of Governor Ige’s COVID Orders “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 comes first.”

⁷ The Whitmer case involves two competing statutes. One statute contained a time limitation on the governor’s emergency power, and the other statute at issue did not contain a time limit. The court looked at the text of the statute and found that the emergency orders violated the statute that contained the time-limit, but did not violate the statute that had no time-limit. The Whitmer case presents questions of which is the operative statute, and is currently certified to the Michigan Supreme Court. In contrast, here, Hawaii does not have two competing statutes- Hawaii has one emergency statute that contains a time-limitation.

In a recent case out of Wisconsin, the state supreme court questioned emergency orders, delegation, and extensions of time in light of the state’s statutory scheme for emergency power delegation and the legislative authority.

“[T]he Governor’s emergency powers are premised on the inability to secure legislative approval given the nature of the emergency. For example, if a forest fire breaks out, there is no time for debate. Action is needed. The Governor could declare an emergency and respond accordingly. *But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.*” *Wisconsin Legislature v Palm*, 942 NW 2d 900, 914 (Wis. 2020) (emphasis added). “Indeed, Wis. Stat. § 323.10 authorizes the Governor to invoke special emergency powers for 60 days when the Governor declares an emergency, which Governor Evers did here. We note that 60 days is more than enough time to follow rulemaking procedures pursuant to [statute].” *Palm* at n.14.

Like *Palm*, Hawaii provides a sixty-day limit, and is enough time for the legislature to resume its proper seat.

Continuous emergency declarations are troubling, and “antithetical to our system of checks and balances” which can “present a serious threat to the concept of limited executive power.” *United States v Bishop*, 555 F2d 771, 776 (CA 10, 1977). “Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions upon power granted or reserved.” *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 425, 54 S.Ct. 231, 235, 78 L.Ed. 413 (1934). In 1993, the New Jersey Supreme Court ordered the end to the twelve-year, continued exercise of emergency powers begun by the governor in 1981. *County of Gloucester v. State*, 623 A.2d 763 (N.J. 1993). In New Jersey, unlike in Hawaii, the emergency powers statute did not have an automatic termination date. Due that lack of automatic termination in New Jersey, three successive New Jersey governors issued sixteen consecutive orders over 12 years declaring the continued state of emergency over the same issue and extending all the previous orders back to the first order in 1981. In judicially declaring the end to the governor’s exercise of emergency powers, the New Jersey Supreme Court noted that “unquestionably” the issue continued as a “pervasive problem” from the 1981 condition that led to the initial emergency proclamation, which required combined legislative and executive efforts for a solution, rather than an executive order. While the New Jersey legislature could pass a statute conferring powers different from the existing statute, the New Jersey Supreme Court declined to infer such a legislative intent from mere legislative inaction in the face of the continued exercise of emergency power by the governor. This extreme case in New Jersey

should provide caution and this court need not wait any longer to enforce the 60-day limit on Governor Ige's powers under Chapter 127A.

In *Worthington v Fauver*, the Court allowed emergency executive orders extensions to combat problems in state prison overcrowding. The statute in play at the time in New Jersey did not contain a statutory time limit. While the court upheld the emergency orders, it cautioned that the ruling was not to imply that permanent emergency authority was authorized or should operate as a "vehicle for permanent wholesale takeover" by the agency that power was delegated to by emergency powers. 440 A.2d, 1128, . 1138 (N.J. 1982). "It is well established that the executive's power to issue an emergency order must stem from an act of the Legislature or from executive authority under the Constitution. "Emergency" executive power can be an unconstitutional usurpation of legislative authority either when the executive acts contrary to the expressed or implied will of the Legislature or when the Legislature has failed to act." *Id.* at 1140. (citations omitted).

Defendants cite to prior emergency executive orders issued in response to a 2018 lava flow emergency. Gov. Ige Memo. at 17-18. But the fact that Governor Ige has superseded his powers before, without challenge, is inapposite- Governor Ige is being challenged here.

Defendants cite to the Model State Emergency Health Powers Act (MSEHPA), seemingly in support that the Hawaii statute is based on this (it is not). Gov. Ige. Memo. at 12. The MSEHPA has been widely criticized as allowing a concentration of too much power in one, or a small group, of individuals.⁸

Defendants also cite to *Cassell v. Snyders* to support their argument for successive proclamation from the same disaster. No. 3:20-cv-50153, 2020 WL 211374 (N.D. Ill. May 3, 2020). *Cassell's* procedural posture was a request for injunctive relief and is currently on appeal. *Hagen v. Investments, Inc. v. SEC*, 460 F. 2d 1034 (10th Cir. 1972) is not entirely on point either,

⁸ See https://biotech.law.lsu.edu/blaw/bt/MSEHPA_review.htm (last accessed August 21, 2020) (MSEHPA "cuts across all these interlocking laws and traditions and will have unpredictable consequences, including generating state and federal constitutional law problems which may ultimately disrupt public health law practice. It is especially troubling that the Act attempts to specify where the ultimate state authority should lie for specific public safety concerns, which will encourage conflicts in authority, rather than clarify it. The MSEHPA also abolishes the long-term checks and balances developed by state courts and political institutions that serve to keep public health agencies from abusing their broad powers." The article ultimately concludes that "[t]here is no need for any state to enact the Model State Emergency Health Powers Act")

as the Hagen case concerns by-law activity of plaintiff, that was overseen by the Securities and Exchange Commission (SEC), thus providing continued oversight.

Defendant asserts that the legislature may not be able to meet to resume its lawmaking function. Gov. Ige. Memo. at 15. This is not true. Indeed, the legislature is ready to resume their roles in formulating laws. For example, at the end of June 2020, the Hawaii State Senate returned to work.⁹ Upon returning, the State Senate found a bill, HB2502, which had been introduced in the House of Representatives and passed over to the Senate prior to COVID-19 arrival in Hawaii. The Hawaii Senate took that bill and completely gutted its content and replaced the content with different provisions to address COVID-19 issues.

Hawaii's citizens were even prepared to resume participation in the legislative process, seeking to rein in Gov. Ige's abusive exercise of emergency powers; , thousands of citizens submitted testimony at the June 25, 2020 hearing of the Senate Committee on Consumer Protection and Health.¹⁰

IV. GOV. IGE'S SUPPLEMENTARY PROCLAMATIONS ARE UNLAWFUL

Gov Ige tries to compare his issuance of twelve COVID-19 civil liberty damaging proclamations over more than five months, to the relationship between a judgment and the order that underlies the judgment. The comparison completely fails for the following reasons. First, a judgment is a separate document by court rule, but it adds and takes away nothing from the terms of the order. In a sense it simply restates the portion of the order that needs to be in the form of a judgment. A change in the format is not a change in the content. On the other hand, each one of Gov. Ige's eleven supplemental proclamations actually changed the legal relationship between the State of Hawaii and its citizens, and visitors to Hawaii. Therefore, a more apt comparison of Gov. Ige's Supplemental Proclamations would be to a judge sentencing a convicted criminal in a case, and the sentence and case ending after the appeal period expires without an appeal taken. But then subsequently, the government issues supplementary orders extending the term of the

⁹ See:

https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=2502&year=2020

¹⁰

https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=2502&year=2020 See also Exhibit 5 attached showing that the June 25, 2020 hearing included 2,946 pages of testimony on HG 2502 after it became a COVID-19 bill.

sentence or conditions of incarceration with no due process whatsoever for the detainee to even refute the actions or bases therefore.

Second, the eleven supplementary proclamations issued by Gov. Ige are not free standing, separate, serial proclamations of a state of emergency equivalent to the March 4, 2020 Proclamation. Chapter 127A does not provide for that in its scheme to temporarily shift the legislative power to the executive for 60 days. To the contrary, each one of the eleven supplementary proclamations expressly relates back to the March 4, 2020 initial proclamation and through all the preceding supplementary proclamations. Each of the prior proclamations are incorporated by reference in the next. Gov. Ige was not intending the Supplementary Proclamations to be “separate” from the prior ones when he issued them. He cannot be permitted at this point to argue otherwise simply to avoid the automatic termination of the state of emergency established for COVID-19 by Gov. Ige’s March 4, 2020 Proclamation. Again, the ability of the state and local government to handle the COVID-19 virus is not terminated by the automatic termination of the state of emergency.

V. HRS 127A IS NOT AMBIGUOUS AND SUPPORTS PLAINTIFFS CLAIMS

Chapter 127A-14(d) is not ambiguous and the court needs no assistance in understanding the requirements and limitations it places on Gov. Ige. The Legislature in 2014 passed Act 111 which provided for the limited 59-day period before the automatic termination of those powers on the 60th day. Whether or not COVID-19 is as dangerous as Gov. Ige argues is beside the point. Plaintiffs are not quarrelling with Gov. Ige’s description of what he is dealing with for the last six months. Judge Otake, in cases cited by Defendant, has been tasked in the cases she has before her in the USDC Hawaii with addressing litigation that asks her to weigh the compelling state interest concerning COVID-19 under constitutional analyses to determine whether or not they complained of acts of the State of Hawaii meet constitutional muster under the circumstances. *See Bannister v. Ige*, No. CV-20-00305-JAO-RT, 2020 WL 4209225(D. Haw. July 22, 2020); *Carmichael v. Ige*, No. CV 20-00273 JAO-WRP, 2020 WL 3630738 (D. Haw. July 2, 2020). That is not the focus of this litigation.

This litigation assumes that whatever the States compelling interest is concerning COVID-19, the state as a whole – legislature, citizenry, executive and judiciary – must use the confines of Chapter 127A to guide their responses. Gov. Ige has not done so before Plaintiffs filed this case. Since this case has been filed, Gov. Ige not only continued to unlawfully exercise

emergency powers, but in his Motion, Gov. Ige actually seeks to protect his unlawful actions with legal arguments that stretch the text of Section 127A-14(d) out of all context considering the legislative history, and makes arguments that provide him with absolutely unlimited executive authority under a system of government that intentionally established separation of powers between the three branches of government in order to protect the ultimate political power which Article I, Section 1 of the Hawaii Constitution announces is held by the people. The 3000 pages of testimony submitted by thousands of citizens in June 2020 (See Exhibit 5) concerning the COVID-19 legislation in HB2502 proves the interest of the citizenry in participating in the law-making process concerning COVID-19.

This case centers on one question: Whether as a matter of law the automatic termination of emergency orders as stated in Haw. Rev. Stat. § 127A-14(d) means that Governor Ige's COVID-19 Emergency Proclamations and orders pursuant thereto ("COVID Orders") automatically terminated on the 60th day after Defendant Governor Ige issued his first COVID-19 Emergency Proclamation on March 4, 2020. Plaintiffs urge that since May 3, 2020 is the 60th day after March 4, 2020, any proclamations issued on or after May 3, 2020 are void. Because Governor Ige's initial COVID-19 Proclamation automatically terminated on May 3, 2020, Governor Ige's continued exercise of purported emergency powers was, and continues to be, unlawful.

VI. TIME-LIMITS ON THE EXECUTIVE'S EMERGENCY POWERS IS APPROPRIATE UNDER CHAPTER 127A AND IN LIGHT OF HAWAII'S OVERALL CONSTITUTIONAL SCHEME

Chapter 127A, passed by the Hawaii Legislature as a new chapter in 2014, created the framework under which Gov. Ige must act. If a state of emergency is anticipated or exists, Chapter 127A modifies the otherwise static constitutional relationships between 1) the citizens and government in Hawaii, and 2) between the various branches of government in Hawaii. Without the activation of the provisions of Chapter 127A, the legislature performs the law-making function in both permissive and restrictive ordinances as well as determining what money the state will be spending. At the same time, the people have rights to participate in that process. Once the people and the legislature reach the end of the legislative process and a bill becomes law, the executive branch then fulfills the law requirements on behalf of the state. It is the same on the county level.

This constitutional framework is interrupted for 60 days under Chapter 127A such that the executive branch assumes the legislative branch's lawmaking duty and simply proclaims new obligations for the citizens, new prohibitions, new penalties for violations and other infringements on civil rights without any citizen participation. In this case, Plaintiffs' rights have become subject to criminal penalties including imprisonment and fines. The "rules" providing for that were ordained by Gov. Ige with no public, citizen participation whatsoever. This cannot continue

VII. PRIVATE ATTORNEY GENERAL DOCTRINE IS NOT BARRED BY SOVEREIGN IMMUNITY

The Governor asserts that Count III—the private attorney general doctrine—is barred for two reasons. Because Plaintiffs seek relief under HRS § 661-1, their case is not barred by Sovereign Immunity. First, the Governor claims that Count III is a derivative of Counts I and II and since Counts I and II allegedly fail, so does Count III. Gov. Ige Memo at page 20. As addressed above, the Governor is mistaken. Counts I and II do not fail and as such, Count III is not barred.

The Governor then, without any meaningful analysis, contends that sovereign immunity bars Count III. Gov. Ige MTD 20. The Governor is incorrect.

Arguing for sovereign immunity, the Governor oddly cites to *Nelson v. Hawaiian Homes Comm'n*. However, this case does not help the Governor's argument; *Nelson* is largely inapplicable to the instant case.

As a general rule, the State "is immune from suit except as it consents to be sued." *Nelson v. Hawaiian Homes Comm'n*, 307 P.3d 142, 148 (Haw. 2013) (citing *Figueroa v. State*, 61 Haw. 369, 381, 604 P.2d 1198 (1979)). The Governor claims that because plaintiffs seek "declaratory and/or injunctive relief," that "sovereign immunity 'bars an award of appellate attorneys' fees.'" Gov. Ige MTD 20. However, the Governor misinterprets and erroneously applies *Nelson* in reaching his conclusion.

The Court in *Nelson* ruled against plaintiffs' request for attorneys' fees under the private attorney general doctrine because the case involved "claims for declaratory and injunctive relief based on alleged constitutional violations." *Nelson v. Hawaiian Homes Comm'n*, 307 P.3d 142, 149 (Haw. 2013).

The *Nelson* Court distinguished *Nelson* from *Fought & Co, Inc. v. Steel Engineering and Erection, Inc*, 87 Hawai‘i 37, 51, 951 P.2d 487, 501 (1998) and *Sierra Club v. Dep't of Transp.*, 120 Hawai‘i 181, 218, 202 P.3d 1226, 1263 (2009)—two cases where the private attorney general doctrine applied—in that the underlying claim in *Nelson*, unlike the claims asserted in *Fought* and *Sierra Club*, was of a constitutional nature, not arising out of HRS § 661-1. *Id.* at 150. And as such, the State had not waived sovereign immunity.

The instant case is parallel to *Fought* and *Sierra Club*, not *Nelson*. Unlike the claims in *Nelson*, but similar to the claims in *Fought* and *Sierra Club*, in the instant case, plaintiffs’ claims arise out of HRS § 661-1; plaintiffs do not assert a constitutional claim.

The Hawaii Supreme Court “concluded that HRS § 661–1 waived sovereign immunity on all claims founded upon any statute.” *Id.* at 149. HRS § 661–1 extends to “all claims against the State founded upon any statute of the State.” Haw. Rev. Stat. Ann. § 661-1 (West).

Here, plaintiffs seek declaratory and injunctive relief pursuant to Hawaii Revised Statutes Sections §603-21.5, 632-1. Because plaintiffs seek relief “founded upon any statute,” jurisdiction under HRS § 661–1 applies. Therefore, the State has waived sovereignty immunity to the instant case and plaintiffs are entitled to attorney’s fees under the private attorney general doctrine.

VIII. PLAINTIFF’S CLAIMS ARE NOT FRIVOLOUS

Finally, contrary to the position taken in Mayor Kim’s Memo which differ from those of Gov. Ige’s Memo, Plaintiffs respond as follows.

First, Plaintiffs’ claims are not are not frivolous or without legal or factual merit pursuant to Haw. Rev. Stat. Section 607-14(a). This issue was the subject of the holding in a Hawaii case filed June 29, 2020, *Morris v. Seidl*, 2020 Haw. App. LEXIS 261, 2020 WL 3498442 (Haw. Ct. App. June 29, 2020). There the court laid out the standard as follows:

“Pursuant to *HRS § 607-14.5(a)* and *(b)*, to award attorney’s *fees* for a *frivolous claim*, the court must make a specific finding in writing that all or a portion of the *claims* made by the party are *frivolous* and are not reasonably supported by the facts and law in the civil action.” *Tagupa v. VIPDesk*, 135 Hawai'i 468, 479, 353 P.3d 1010, 1021 (2015) (internal quotation marks and ellipses omitted). “A *frivolous claim* is a ‘*claim* so manifestly and palpably without merit, so as to indicate bad faith on the pleader's part such that argument to the court was not required.” *Id.* (internal brackets omitted) (quoting *Coll*, 72 Haw. at 29, 804 P.2d at 887). “A finding of frivolousness is a high bar; it is not enough that a *claim* be without merit, there must be a showing of bad faith.” *Id.*

(citing *Canalez v. Bob's Appliance Serv. Ctr., Inc.*, 89 Hawai'i 292, 300, 972 P.2d 295, 303 (1999)).

Plaintiffs' claims are clearly not frivolous and made in bad faith. Plaintiff Ellen Partal and Plaintiff Richard Partal have been charged with crimes for which they will appear in criminal court on September 15, 2020. They each face a maximum one year of imprisonment and up to \$5,000.00 in fines. What did they allegedly do? Defendant Mayor Kim has charged them with violating the unlawful orders of Governor Ige and Mayor Kim. Clearly seeking judicial review of the unlawful acts of the Defendants to raise the issue of the prior automatic termination of the emergency powers months before those powers were used to cite Plaintiffs, is not frivolous. Plaintiffs' seek an order declaring that HRS Section 127A-14(d) absolutely limits the executive branch to a mere 60 days to enjoy authority to exercise legislative branch law-making powers when the executive branch declares a state of emergency under Chapter 127A. The single sentence language of the termination provision includes the words "shall" and "automatic". There is no other option.

Second, Plaintiffs have not admitted and therefore have not waived any challenge or contest to any of the facts alleged in the Motion. Plaintiffs reserve all their positions for argument in any criminal proceeding that may occur as a result of the criminal citations Mayor Kim caused to be issued to them (see Exhibits 1 and 2 attached to the Cross-MSJ, which is for partial, not full summary judgment.) Therefore, anything not resolved by an order which grants the Cross-MSJ remains for determination if still disputed by Defendants subsequently

CONCLUSION

Plaintiffs' Complaint survives the attack by Defendants Motions, and Defendants Motions should be denied. In addition, this Court should grant Plaintiffs' pending Motion for Partial Summary Judgment set for hearing on this same day.

Date: August 24, 2020

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