

JAMES HOCHBERG, AAL, LLLC #3638
James Hochberg, Esq.
700 Bishop Street, Suite 2100
Honolulu, Hawaii 96813
Telephone: (808) 256-7382
E-mail: Jim@JamesHochbergLaw.com

Electronically Filed
THIRD CIRCUIT
3CCV-20-0000277
27-AUG-2020
02:26 PM

Harmeet K. Dhillon, Esq.*
Dhillon Law Group Inc.
177 Post Street, Suite 700
San Francisco, CA 94108
Telephone: (415) 433-1700
E-mail: harmeet@dhillonlaw.com

Attorneys for Plaintiffs Richard Partal, II
Kristine Marie Partal, Ellen Partal

* *pro hac vice* 062362

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' REPLY MEMORANDUM
IN SUPPORT OF PLAINTIFFS' CROSS-
MOTION FOR PARTIAL SUMMARY
JUDGMENT FILED AUGUST 14, 2020;
DECLARATION OF JAMES
HOCHBERG; EXHIBITS 17 - 26;
CERTIFICATE OF SERVICE**

Judge: Hon. Wendy DeWeese

Hearing: via Zoom

Date: September 1, 2020

Time: 9:00 a.m.

Plaintiffs, by and through their undersigned counsel file this Plaintiffs’ Reply Memorandum in Support of Plaintiffs’ Cross-Motion for Partial Summary Judgment Filed August 14, 2020 (“Reply”). In this case, Defendants’ continued description of the medical aspects of COVID-19 are irrelevant. Unlike the issues and claims reviewed by Judge Otake in the USDC Hawaii cases *Bannister* and *Carmichael*, the test in this case does not involve the compelling state interest test for constitutional violations.¹ In *Bannister* and *Carmichael*, the plaintiffs asked Judge Otake to view various constitutional violations during COVID-19 through the compelling state interest test, which required an analysis of the dangers and level of intrusion by Gov. Ige. That is not the test in this case, and COVID-19 particulars are irrelevant to the meaning of the language of the statute at issue here. The sole issue here is whether the Hawaii legislature, in enacting HRS Chapter 127A in 2014, limited the executive (governor and mayors) emergency legal power to solely conduct law-making power for more than sixty days; and, whether after the automatic termination on the law-making authority, the power rightfully reverts to the legislature and the people. Defendants quarrel with Plaintiffs when their quarrel is with the Legislature, who was the author of the statute. It was neither irrational, non-sensible, or impractical for the legislature to limit the executive to sixty days of unbridled law-making power. As Gov. Ige’s arbitrary COVID-19 law-making actions show², the legislature was correct. This Court is being asked to enforce the express language and meaning of HRS § 127A-

¹ *Bannister v. Ige*, No. CV 20-00305 JAO0RT, 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).

² Exhibit 16 to Plaintiffs’ Cross-Motion for Partial Summary Judgment Filed August 14, 2020, Gov. Ige issues wide-ranging restrictive orders ostensibly to protect the general public from COVID-19 but issues blanket exemptions from those orders for homeless, “critical infrastructure workers” who travel from and to Hawaii, and others. If the COVID-19 problem is as bad as Gov Ige argues, these exemptions appear to be completely arbitrary. Also, in the face of the September 1, 2020 hearing on these motions, Gov. Ige issues a new lockdown in Hawaii for the day of filing this memorandum but arbitrarily exempts public schools. See Exhibit 17. <https://www.khon2.com/coronavirus/how-will-the-stay-at-home-order-affect-public-schools-and-the-university-of-hawaii/> (last accessed August 26, 2020); also attached as Exhibit 18 is a memorandum received August 26, 2020 by local counsel from the management of the law firm where his office is located indicating that without explanation, Gov. Ige’s latest lockdown order arbitrarily removes attorneys from the critical exempt occupations so the firm is closing the office. Plaintiffs will be represented by counsel at the hearing from home. Indeed, the overreach is broad.

14(d). Sixty-days is certainly enough time for the legislature to resume its proper seat, as proved by its ability to legislate COVID-19 issues between June 25 and July 8, 2020.

1. Plaintiffs Can Properly Seek Summary Judgment or Declaratory Relief on The Unlawful Abuse of Power by Gov. Ige In This Case

Defendants misstate the crux of Plaintiffs' claims Defendants wrongly assume this action was initiated by Plaintiffs to thwart their pending criminal matter. Def. Opp. Memo. at 7, 8. To be clear, Plaintiffs have instituted this action as a challenge to the Governor's repeated misuse of statutory emergency powers. Complaint at ¶¶ 9, 64-92, A-E. Governor Ige's abuse of the emergency powers statute has subjected Plaintiffs to a myriad of consequences that include unlawful quarantine, loss to freely travel, lost wages, and criminal citations. The overreach even includes civil defense officers telling Plaintiffs, a married couple, that they cannot share a bed together in their own home. FAC at ¶ 55.

Defendants' reliance on *Kahaikupuna v. State*, 109 Hawaii, 230, 124 P.3d 982 is misplaced. First, unlike *Kahaikupuna*, this case contains a set of exceptional circumstances, during an exceptional time, focusing on a statutory interpretation challenge – not a sole challenge to a criminal cockfighting statute. Also, unlike *Kahaikupuna*, this is not a case focusing only on criminal consequences to a sole plaintiff seeking declaratory relief in civil court over his constitutionally protected cultural rights to cockfighting; this case centers on a statutory challenge to Governor Ige's emergency powers that presently affects all Hawaii residents, with an unfortunate byproduct of such unlawful action including a criminal citation to Plaintiffs.³

The court in *Kahaikupuna* applied the “Missouri rule” taken from Missouri Supreme Court case, *Liberty Mutual Ins. Co. v. Jones*, 344 Mo. 932, 125 A.L.R. 1149 (1939). *Id.* at 236. *Jones* sets forth several factors analyzing a declaratory judgment claim in a civil proceeding that involves a civil and a criminal statute⁴. As taken from *Jones*:

³ Even if the criminal violations were the sole issue – which they are not- criminal consequences from the Governor's abuse of emergency powers are far-reaching. More than 10,000 citations have been issued to people in Hawaii for allegedly violating Gov. Ige's unlawful COVID-19 orders, including thousands of citations issued to homeless people. See Ex. 16 to Plaintiff's Cross-Motion for Partial Summary Judgment Filed August 14, 2020 (“Cross-MSJ”).

⁴ It must be pointed out that Governor Ige's emergency orders are civil in nature, with a criminal penalty-they are not a “criminal statute” being challenged civilly, as was the posture underlying *Kahaikupuna*.

[T]he use of a declaratory judgment rests in the sound judicial discretion of the court, depending on the circumstances; that that form of relief is usually unnecessary where a full and adequate remedy is provided by another well-known form of action; that the purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations; that ordinarily it cannot be utilized as a device to circumvent the general rule that equity will not enjoin the enforcement of a valid criminal statute; neither will it be used to determine in advance the precise rights existing between the public and law violators on particular facts where no special circumstances require it....

But in this case we are confronted with questions of business conduct affecting the interests of a large part of the public. The criminal aspects of the case are unimportant as compared with its general import.

Liberty Mutual Ins. Co. v. Jones, 344 Mo. 932, 953, 125 A.L.R. 1149 (1939) (emphasis added); see also Ex. 26 attached.

Like the Respondents in *Jones*, Defendants assert that Plaintiffs are attempting by a declaratory judgment action, to become exempt from criminal prosecution. Def. Opp. Memo. at 7, 8; see also *Jones* at 953. In rejecting this argument, the *Jones* court concluded, “there are numerous cases in which the courts by declaratory judgment have construed or determined the validity of a statute although it imposed a punishment or penalty....” *Id.* In the present case, the emergency orders, and ensuing executive orders, are civil in nature and belong in civil court-civil court, therefore, ensures a “full and adequate remedy” in the instant case.

Pacific Meat also does not wholly support Defendants’ assertion that Plaintiffs cannot bring their present claim in civil court. *Pacific Meat* involved a challenge to the labelling of poultry and challenged a statute that was penal in nature; the statute was *malim prohibitum* and affected a continuing course of business. *Id.* at 620. *Pacific Meat* approved the Missouri Rule as set forth in *Jones*, analyzed the exceptional circumstances of the case, and expressly stated that the trial court properly ruled on the underlying declaratory relief requested by Plaintiffs. *Pacific Meat Co. v Otagaki*, 47 Haw. 652, 655, 394 P. 2d 618, 620 (1964).

As mentioned above, Plaintiffs’ civil rights were also violated by the orders aside from unlawful quarantine, lost wages, and criminal citations. Even though Plaintiff Rick Partal and Plaintiff Kristine Partal are a married couple with a child, incredulously, civil defense officials, under Mayor Kim’s direction, ordered that they not sleep together during Kristine’s quarantine. FAC at ¶ 55. As stated by the U.S. Supreme Court, the marital relationship between a husband and wife inherently involves a “right of privacy older than the Bill of Rights – older than our

political parties...” *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 516 (1965). This is yet another egregious result of a Governor who thinks he has unfettered power over residents of Hawaii. Gov. Ige’s orders after May 3, 2020 unlawfully violated several of Plaintiff Rick Partal and Plaintiff Kristine Partal’s rights, which redress is properly sought to challenge the interpretation of the civil statute by filing the instant suit in civil court.

2. This Court is Empowered to Hear and Rule on the Plaintiffs’ Cross-Motion for Partial Summary Judgment

This court is not restricted by HRS § 127A-27 from hearing and ruling on Plaintiffs’ Cross-Motion for Partial Summary Judgment Filed August 14, 2020 (“Cross-MSJ”) without two other judges. Section 127A-27 requires the three-judge panel when the relief sought is “preliminary or interlocutory injunction, or temporary restraining order.” Plaintiffs are not seeking a preliminary or interlocutory injunction under HRCF Rule 65(a) nor a temporary restraining order under HRCF Rule 65(b). Instead, the Cross-MSJ has been filed pursuant to HRCF Rule 56. The language of HRS Section 127A-27 was contained in the first version of HB849 which resulted in the creation of Chapter 127A in 2014 (see Exhibit 19). In all versions of HB849 (see Exhibits 19 - 24) the language was largely the same and no changes ultimately made were substantive or in any manner affected the final reading of Section 127A-27. The entire section in the statute expressly applies only to motions seeking temporary restraining orders or preliminary injunctions. In those types of motions, which this one is not, the final hearing on such cases also requires the three-judge panel that heard the original motion for interlocutory injunction; it makes sense from a continuity standpoint to have the same three-judge panel throughout the case. However, Plaintiffs in this case are not seeking relief that would require a three-judge panel, but are seeking relief in the form of summary judgment motion on its statutory interpretation claim.

In addition, in interpreting Section 127A-27, it may be helpful to apply the Canon of statutory interpretation *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another). This Canon applies here, and it supports Plaintiff’s argument- the title and subject of the entire statute section refers solely to interlocutory relief. This implies the exclusion of its application to cases in which such relief is not sought. *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 is no other evidence to suggest the legislature intended the three-judge panel requirement apply to cases where parties request relief other than interlocutory relief.

3. Plaintiffs Have Met Their Burden for Partial Summary Judgment

Gov. Ige repeatedly argues that he is empowered to continue to usurp the legislative law-making prerogative under Chapter 127A because the statute contains no specific restriction on the executive branch power to issue extra or supplementary extensions of emergency orders. Def. Opp. Memo. at 11-17. The illogic of Gov. Ige’s argument is revealed within the statute itself. At § 127A-14(d), the legislature permits the executive branch to issue only two proclamations. One to proclaim the emergency and the second to end the emergency earlier than its automatic termination on the 60th day after the first proclamation is issued. However, Gov. Ige’s argument assumes a nonexistent maxim exists in the law: “legislative silence on a topic indicates approval of the existence of the power.” This has no basis in law or fact. Taken to its extreme, this maxim, in the current setting under Chapter 127A makes meaningless the 105 pages of definitions, permissions, restrictions, and requirements that are contained in the final version of the HB849 HD2 SD2 CD1; if Defendants’ argument is followed then, in addition to such carefully stated provisions, Gov. Ige would also be empowered in the silence to do whatever the legislature left out of the statute- this would lead to an absurd result that undercuts the legislative purpose of including an automatic termination provision in the plain text of the statute. Under Gov. Ige’s view, there is no real need for the legislative branch to resume its function then. To Gov. Ige, it certainly matters not what the legislature writes in its laws and

what they don't write apparently opens the door for Gov. Ige to fill in the blanks and act with executive abandon.

As discussed more fully in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, the legislative history of Chapter 127A indicates clearly that in 2014, the first draft of HB849 (which became Act 111 codified as Chapter 127A) in fact contained such unlimited powers for the governor *but the legislature expressly amended the bill to remove those unlimited powers and replaced such language with the sixty-day limitation*. The legislative history is simple: As originally written, HB849 contained no time-limitation for the governor's emergency executive powers. See Exhibit 19 attached hereto. Then, the initial proposed language was rejected in the third version HD2 (see Exhibit 21 attached hereto). This legislative history clearly rejects the argument being pressed by Gov. Ige - that the Governor has no time-limit on emergency powers. *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.

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.

Defendants ask this court to follow an Illinois trial court order in *Cassell v. Snyders*, No. 3:20-cv-50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020). However, not only is that order currently on appeal, but Hawaii law, in HRS 127A-14(d) expressly provides, unlike the Illinois law, "[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." The Illinois court's conclusion in *Cassell* is not based on language or automatic termination like Hawaii law.

Chapter 127A unquestionably prescribes a sixty-day period between Gov. Ige's proclaiming of the COVID-19 emergency on March 4, 2020 and the automatic termination of the emergency. None of the other state statutes references by Defendant have an automatic termination limit like Hawaii. Gov. Ige Memo. at 12 and 13 (Motion to Dismiss). While Gov. Ige can urge the court to adopt the statutes of other states, the appropriate power to amend laws

would be the Hawaii legislature. This court must determine the meaning of “[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.” Since Gov. Ige chose not to issue the only other proclamation Chapter 127A provides for, to terminate the emergency in advance of the sixtieth day, after the sixtieth day his COVID-19 emergency powers ended.

Defendants misstate the outcome that would occur under the proper reading of Chapter 127A. Defendants urge that Gov. Ige can be the only (and proper) authority to respond during emergency times. This is simply not true, in either the text of the statute or in the legislative history of Chapter 127A. After 59 days, the legislature, and the people of Hawaii, properly resume their political role in law-making, and the executive branch would return to its proper role. Gov. Ige is not “saving Hawaii” from imminent disaster by unlawfully continuing to exercise legislative powers after their automatic termination on May 3, 2020. As proved over the course of two weeks in late June and early July 2020, the political power of the legislature and people in Hawaii are ready, and can timely and properly pass legislation to deal with COVID-19—they were able to do so in less than two weeks. See Exhibit 25 (concerning HB2502 in the 2020 legislative session).⁵ Any argument that the emergency executive powers must remain, indefinitely it seems, with the executive power since the legislature may not be able to convene is false; the Hawaii Senate crafted a comprehensive 43-page set of COVID-19 regulations in about one week, with input from thousands of citizens, and passed the bill to the Hawaii House for review and approval.

For purposes of HRCF Rule 56 summary judgment, this motion 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

⁵ https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=2502&year=2020

emergency powers was, and continues to be, unlawful. There are no genuine issues of material fact and summary judgment is the proper process to answer that question.

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 by the legislative branch’s law-making powers under Chapter 127A. Rather, it is the duty of the legislature to resume the exercise of their law-making powers, honoring appropriate rights of the public to participate in, and be advised of, the process. Gov. Ige’s actions, which ignore the legal limitations on his exercise of emergency powers, infringe on the rights of Plaintiffs and others similarly situated in Hawaii.

CONCLUSION

Plaintiffs respectfully request that this Court grant Plaintiffs’ Motion for Partial Summary Judgment and enter all orders and relief requested by Plaintiffs.

Date: August 27, 2020

/s/ JAMES HOCHBERG, ESQ.

James Hochberg, Esq.

DHILLON LAW GROUP, INC.

Harmeet K. Dhillon, Esq.

Attorneys for Plaintiffs