NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

HILO BAY MARINA, LLC, and KEAUKAHA MINISTRY LLC Plaintiffs-Appellants, vs. STATE OF HAWAII; BOARD AND NATURAL RESOURCES, STATE OF HAWAII; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE ENTITIES, 1-10, Defendants-Appellees.	NO. CAAP-23-0000310 CIVIL NO. 3CCV-22-0000095 APPEAL FROM: (1) FINAL JUDGMENT FILED ON APRIL 13, 2023, AND (2) DEFENDANT STATE OF HAWAII'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED ON MARCH 21, 2023 CIRCUIT COURT OF THE THIRD CIRCUIT HON. HENRY T. NAKAMOTO

PETITIONERS' APPLICATION FOR TRANSFER TO THE SUPREME COURT

CERTIFICATE OF SERVICE

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PETITIONERS' APPLICATION FOR TRANSFER TO THE SUPREME COURT

I. REQUEST FOR TRANSFER

Pursuant to Rule 40.2 of the Hawai'i Rules of Appellate Procedure (HRAP) and the Hawai'i Revised Statutes (HRS) § 602-58, Petitioners/Appellants HILO BAY MARINA, LLC and KEAUKAHA MINISTRY LLC ("**Petitioners**"), respectfully request transfer of this appeal from the Intermediate Court of Appeals (ICA) to the Supreme Court to avoid further delay.

This case concerns the enforceability of a state-imposed deed restriction requiring landowners to use their property for "church purposes only" and reserving a possibility of reverter in favor of the State of Hawai'i (the "**State**" or "**Respondent**"). Petitioners, as owners of the encumbered property, instituted this lawsuit seeking declaratory judgment that the deed restriction impermissibly violates both state and federal constitutional guarantees protecting the separation of church and state. Petitioners also assert that the deed restriction is statutorily void by operation of HRS § 515-6(b). Petitioners bring this request for transfer, and this case as a whole, to preserve a quintessential aspect of one's freedom of choice — the freedom to engage ***or not to engage*** in religion.

II. STATEMENT OF RELEVANT FACTS

The relevant facts of the case are relatively concise. In 1922, the Governor of the Territory of Hawai'i, pursuant to Land Patent No. 8039 (the "**Land Patent**"), granted Heber J. Grant, Trustee in Trust for the Church of Jesus Christ of Latter-Day Saints (the "**Church**") a church lot of 3.22 acres and a cemetery lot of .077 acres. CC Dkt. 89 at 33–37.[1] The conveyed property can be identified today as Tax Map Key Nos. (3) 2-1-014:25, 29, 30, 31, 60, and 74 (hereinafter, the "**Property**"). Findings of Fact, Conclusions of Law, and Order, CC Dkt. 114 at 3 ¶ 1. The Land Patent purports to have been executed in exchange for $20 paid for by the Church. CC Dkt. 89 at 33; CC Dkt. 114 at 3 ¶ 1. The Land Patent also contains the following restriction:

> **The land covered by this Grant is to be used for Church purposes only. In the event of its being used for other than Church purposes, this Grant shall become void and the land mentioned herein shall immediately revert and revest in the Territory of Hawaii**; further, should any portion of the land herein mentioned be used for Cemetery purposes, same shall at all times be subject to all

[1] All page number citations to the Record on Appeal refer to the **PDF page number** of the electronic document. All citations to "CC Dkt." refer to dockets duly filed in the Circuit Court of the Third Circuit of the State of Hawai'i, case number 3CCV-22-0000095. All citations to "ICA Dkt." refer to dockets duly filed in the Intermediate Court of Appeal of the State of Hawai'i, case number CAAP-23-0000310.

> rules and regulations of the Territorial Board of Health as authorized by law for the interment of the dead, and respecting cemeteries and burying grounds.

CC Dkt. 89 at 34; CC Dkt. 114 at 3 ¶ 2 (emphasis added) (hereinafter, the "**church purposes restriction**", or simply the "**deed restriction**" or "**Restriction**").

In 1988, the Church conveyed the Property to Desert Title Holding Company by Warranty Deed dated December 16, 1988. CC Dkt. 89 at 38–45; CC Dkt. 114 at 3 ¶ 4. In 2000, Property Reserve, Inc., formerly known as Desert Title Holding Company, conveyed the Property to Petitioner Hilo Bay Marina LLC by Quitclaim Deed dated September 1, 2000. CC Dkt. 89 at 46–52; CC Dkt. 114 at 4 ¶ 4. In 2015, Petitioner Hilo Bay Marina LLC conveyed Tax Map Key No. (3) 2-1-014:25, which is a portion of the Property, to Petitioner Keaukaha Ministry by way of Warranty Deed dated April 24, 2015. CC Dkt. 89 at 53–60; CC Dkt. 114 at 4 ¶ 5.

Thus, the Property consists of the following parcels owned by Hilo Bay Marina LLC: Tax Map Key No. (3) 2-1-014:29, 30, 31, 60, and 74, and the following parcel owned by Keaukaha Ministry: Tax Map Key No. (3) 2-1-014:025. CC Dkt. 89 at 11; CC Dkt. 114 at 3–4.

III. STATEMENT OF PRIOR PROCEEDINGS

On April 5, 2022, Petitioners filed their Complaint for Declaratory Relief against the State asserting that the church purposes restriction is void under both HRS § 515-6(b) and the Establishment Clause of the First Amendment of the United States Constitution.[2] CC Dkt. 1 at 5–7. The Complaint also asserted that government enforcement of the church purposes restriction, even by the circuit court, would constitute impermissible state action in violation of *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948). CC Dkt. 1 at 6 ¶ 31. The Complaint therefore sought declaratory judgment that the church purposes restriction is void and unenforceable.

On April 25, 2022, Petitioners filed their First Amended Complaint for Declaratory Relief to clarify the inclusion of doe defendants. CC Dkt. 7 at 2. On August 17, 2022, Petitioners and the State filed a Proposed Stipulation and Order Permitting Plaintiffs to Amend Complaint, agreeing to allow Petitioners to file a Second Amended Complaint. CC Dkt. 34. Said Stipulation and Order was approved by the circuit court and entered on August 22, 2022. CC Dkt. 38.

Accordingly, on August 22, 2022, Petitioners filed their Second Amended Complaint for Declaratory Relief. CC Dkt. 40. In addition to maintaining all counts and claims asserted in the

[2] The First Amendment of the United States Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion[.]" U.S. Const. amend. I (sometimes referred to herein as the "Establishment Clause").

Complaint and First Amended Complaint, the Second Amended Complaint further alleged that the church purposes restriction violates the Constitution of the State of Hawai‘i, specifically article 1, section 4 and article VII, section 4.[3] *Id.* at 6–8. In total, the Second Amended Complaint asserts three counts for declaratory judgment against the State: Count I) the Restriction and possibility of reverter are void pursuant to section 515-6(b) of the Hawai‘i Revised Statutes; Count II) the Restriction and possibility of reverter are void pursuant to article 1, section 4 and article VII, section 4 of the Constitution of the State of Hawai‘i; and Count III) the Restriction and possibility of reverter are void pursuant to the Establishment Clause of the First Amendment of the United States Constitution. *Id.* at 5–10. On September 1, 2022, the State filed its Answer to the Second Amended Complaint, denying the substantive allegations and asserting various affirmative defenses. CC Dkt. 45 at 2–4.

On November 11, 2022, Petitioners and the State each filed their respective cross-motions for summary judgment. CC Dkt. 57; CC Dkt. 89. Petitioners' Motion for Summary Judgment ("Petitioners' MSJ") argued that, under the plain language of the statute, HRS section 515-6(b) voids the church purposes restriction because the statute "voids every condition, restriction, or prohibition on the use or occupancy of real property on the basis of, among other things, religion." CC Dkt. 89 at 13. Moreover, the statute's narrow exception does not apply to the church purposes restriction because the Property is not "held" by a religious institution. *Id.* at 14. In support of Count II, Petitioners' MSJ argued that Hawai‘i's own establishment clause, embedded in article 1, section 4 of the Hawai‘i Constitution, renders the Restriction void because the Restriction impermissibly violates the intended separation of church and state. *Id.* at 6–7. Specifically, Petitioners argued that the appropriate test for Hawai‘i's establishment clause is the three-pronged test outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and that the church purposes restriction failed all three prongs. *Id.* at 16-19.

Finally, in regards to Count III, Petitioners asserted that, without the option to use the Property for secular purposes, the Restriction unconstitutionally forces Petitioners to engage in religious activity in violation of the Establishment Clause. *Id.* at 20–24. Petitioners also noted that *Shelley* prevents the circuit court from enforcing the Restriction under the state action doctrine.

[3] Article 1, section 4 of the Hawai‘i Constitution states, in relevant part, "[n]o law shall be enacted respecting an establishment of religion[.]" Haw. Const. art. 1, § 4 (sometimes referred to herein as Hawai‘i's "establishment clause").

Id. at 25–26. Accordingly, Petitioners argued that they were entitled to summary judgment on all counts and a declaration that the Restriction is void and unenforceable as a matter of law.

Conversely, the State's Motion for Summary Judgement ("State's MSJ") argued that the church purposes restriction was a "primitive form of zoning" and therefore a valid exercise of the State's police powers. CC Dkt. 57 at 9. In support of this claim, the State filed exhibits of seventeen land patents containing use restrictions similar to the church purposes restriction and ten surveys recording these land patents. *See* CC Dkts. 62–85. No other evidence was submitted by the State. The State's MSJ argued that HRS section 515-6(b) did not void religious use restrictions and that anyone, including the State, is allowed to impose such restrictions. In addressing the First Amendment, the State contended that, under the United States Supreme Court's new "historical practices and understandings test" established in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2429 (2022), the Restriction is constitutional because the Territory of Hawai'i's "primitive form of zoning" equates to a historical practice. *Id.* at 10–12. Moreover, the State argued that Hawai'i's establishment clause is co-extensive with the First Amendment's Establishment Clause and that *Kennedy* now governs Hawai'i's establishment clause. *Id.* at 12–13. As a result, the State maintained that the Restriction is valid because it does not violate HRS section 515-6(b), the Hawai'i Constitution, or the United States Constitution.

On December 2, 2022, Petitioners and the State filed their respective Oppositions to the cross-motions for summary judgment. *See* Petitioners' Mem. Opp., CC Dkt. 91; State's Mem. Opp., CC Dkt. 91. The parties then filed their respective Reply Memorandums on December 9, 2022. *See* Petitioners' Reply Mem., CC Dkt. 97; State's Reply Mem., CC Dkt. 95. Neither side submitted additional exhibits beyond those attached to their original motion for summary judgment. The parties' respective cross-motions for summary judgment were heard in-person before the Honorable Henry T. Nakamoto on December 14, 2022. *See generally* ICA Dkt. 17. The court took the matter under advisement at the conclusion of the hearing.

On February 15, 2023, the circuit court issued its Minute Order granting the State's Motion for Summary Judgment and denying Petitioners' Motion for Summary Judgment. Min. Order, CC Dkt. 104 at 2. The circuit court determined that "[a] plain reading of HRS section 515-6(b) provides the state to [sic] power to reserve and enforce a restrictive covenant for religious purposes." *Id.* In turn, the circuit court reasoned that the church purposes restriction is not void because "[i]t does not restrict the type or church purpose or which religion it must follows [sic]." *Id.* The circuit court also held that prior to statehood and before the Hawai'i County Zoning Code,

"it was common practice for the Territorial Government to use restrictions as an early way of 'rough zoning.'" *Id.* Regarding the various Constitutional arguments, the circuit court held that "[t]hese types of restrictions have passed Constitutional muster." *Id.*

The circuit court entered the State's Findings of Fact, Conclusions of Law and Order Granting Defendant's Motion for Summary Judgment (hereinafter, the "**Order**") on March 21, 2023. CC Dkt. 114. The Order, in relevant part, states that "[t]he Territory of Hawai'i engaged in an early form of use-zoning through the sale of land with deed restrictions, including the sale of government lands to religious organizations." *Id.* at 3 ¶ 3. In regards to HRS section 515-6(b), the circuit court held:

> 11. HRS § 515-6(b) provides an exemption that permits any party to reserve a covenant for religious use when transacting with a religious organization.
>
> 12. The deed restriction "for Church purposes only" is included in the exemption clause of HRS § 515-6(b).
>
> 13. HRS § 515-6(b) does not void the deed restriction.

Id. at 5 ¶¶ 11–13. As for the First Amendment, "[t]he Establishment Clause 'must be interpreted by "reference to historical practices and understandings[,]"'" and "[t]he practice of selling government lands with deed restrictions was an early form of use-zoning and is interpreted as a historical practice of zoning." *Id.* at 5 ¶¶ 15, 18.

Turning to the Hawai'i Constitution, the circuit court held that article 1, section 4 "is coextensive with the First Amendment of the United States Constitution" and that the church purposes restriction does not violate the Hawai'i Constitution for the same reasons it does not violate the First Amendment. *Id.* at 20–21. Moreover, the court held that even under *Lemon*, the church purposes restriction passes Constitutional muster because it "had a secular purpose of zoning[,] allows for any religious organization to benefit from the property, so it does not endorse or approve one religion over another[,] and [t]he surveillance and monitoring required to enforce the deed restriction do not present excessive entanglement because they are no different than that of what is required to enforce any other zoning regulation." *Id.* at 6 ¶¶ 23–27.

Thus, the Order concludes that "Plaintiffs have failed to demonstrate that this deed restriction violates any of the laws alleged therein in their Second Amended Complaint [Dkt. 40]." *Id.* at 7. On April 13, 2023, the circuit court entered its Final Judgment pursuant to Rule 58 of the Hawai'i Rules of Civil Procedure, thereby entering judgment in favor of the State on all claims alleged in the Second Amended Complaint. CC Dkt. 118.

Petitioners timely filed their Notice of Appeal on April 24, 2023. ICA Dkt. 1. Petitioners filed their Opening Brief in the ICA on September 1, 2023. ICA Dkt. 25. On November 5, 2023, the State filed its Motion for Extension of Time to File Answering Brief. ICA Dkt. 31. By order dated November 7, 2023, the ICA granted the State's Motion for Extension of Time, thereby extending the State's deadline to file its Answering Brief to December 13, 2023. ICA Dkt. 33. On December 13, 2013, the State filed its Answering Brief. ICA Dkt. 35. As of the filing of this application, Petitioners' Reply Brief deadline is set for January 8, 2024, and remains forthcoming.

IV. STATEMENT OF POINTS OF ERROR

1. The circuit court erred as a matter of law when it held that "[t]he practice of selling government lands with deed restrictions was an early form of use-zoning and is interpreted as a historical practice of zoning." This error occurred in the record at CC Dkt. 104 at 2; CC Dkt. 114 at 5 ¶ 18. Petitioners preserved the objection at CC Dkt. 91 at 15–19, 21–22; CC Dkt. 97 at 8–9; Cross-Mots. Hr'g Tr., ICA Dkt. 17 at 8:24–9:19, 30:10–30:19, 31:25–32:19.

2. The circuit court erred as a matter of law when it concluded that "HRS § 515-6(b) does not void the deed restriction." This error occurred in the record at CC Dkt. 104 at 2; CC Dkt. 114 at 5. Petitioners preserved the objection at CC Dkt. 89 at 12–15; CC Dkt. 91 at 9–14; CC Dkt. 97 at 4–5; ICA Dkt. 17 at 6:8–7:16.

3. The circuit court erred as a matter of law when it concluded that "[t]he deed restriction does not violate Article I, § 4 of the Hawai'i Constitution for the same reasons that it does not violate the Establishment Clause of the First Amendment of the United States Constitution[,]" and "[e]ven if Article I, § 4 of the Hawai'i Constitution is not coextensive with the Establishment Clause of the First Amendment of the United States Constitution, the deed restriction passes Constitutional muster under *Lemon v. Kurtzman*[.]" This error occurred in the record at CC Dkt. 104 at 2; CC Dkt. 114 at 6 ¶¶ 21, 23–27. Petitioners preserved the objection at CC Dkt. 89 at 16–20; CC Dkt. 91 at 19–21; CC Dkt. 97 at 6–8; ICA Dkt. 17 at 7:17– 8:19.

4. The circuit court erred as a matter of law when it concluded that "[t]he deed restriction does not violate the Establishment Clause of the First Amendment of the United States Constitution. CC Dkt. 114 at 5 ¶ 19. Petitioners preserved the objection at CC Dkt. 89 at 20–24; CC Dkt. 91 at 22–24; CC Dkt. 97 at 8–9; ICA Dkt. 17 at 8:20–10:1, 11:6–19.

V. THIS CASE MEETS THE STATUTORY QUALIFICATIONS FOR TRANSFER

Transfer of an appeal from the ICA to this Court is mandatory if the appeal involves "[a] question of imperative or fundamental public importance," or a determination on the

constitutionality of a State or county law, and transfer is discretionary to address "[a] question of first impression or a novel legal question," or to address inconsistencies in appellate decisions. Haw. Rev. Stat. § 602-58; *see County of Hawaii v. C & J Coupe Family Ltd. P'ship,* 119 Hawai'i 352, 357 n. 2, 198 P.3d 615, 619 n. 2 (2008). This case concerns the State's attempt to perpetually dedicate property to religion through the use of a deed restriction. Such "state-dedicated" religious properties jeopardize the public's right to freely determine their religious beliefs or lack thereof. Given the personal nature and sanctity of one's religious beliefs, this case involves questions of fundamental public importance. Similarly, this case also challenges the State's use of deed restrictions as violating and circumventing constitutional zoning requirements outlined in *Euclid*, specifically lacking relation to a comprehensive general plan. Both of these issues present questions of fundamental public importance warranting transfer to this honorable Court.

Furthermore, this case also presents novel questions of constitutional and statutory law. First, this case concerns interpretation of Hawai'i's establishment clause, found in article 1, section 4 of the Hawai'i Constitution. Second, this case potentially requires interpretation of the United States Supreme Court's new "historical practices" test for First Amendment Establishment Clause challenges. Third, this case requires interpretation of HRS § 515-6(b) and the exception clause contained therein. Hawai'i appellate courts have never opined on any of these three issues. For these reasons, Petitioners' application for transfer to should be granted.

A. <u>The State's preservation of "religious use only" properties and its circumvention of constitutional zoning requirements both pose issues of fundamental public importance</u>

The church purposes restriction creates two issues of fundamental public importance. First, by requiring the Property to be used for "church purposes only," the deed restriction effectively creates a <u>state-sponsored religious property</u> and deprives the public of its right to be free of government influences when determining one's religious beliefs. "Under our system [of government] the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice[.]" *Lemon*, 403 U.S. at 625. Just as every individual has the right to choose one religion over another, each person likewise holds the freedom ***not*** to believe in any religion at all. By allowing the church purposes restriction to stand (along with the seventeen similar restrictions on other properties, *see* CC Dkts. 62–85), the State conveys a misguided message that the

government favors religious beliefs over nonsectarian ideals. Such government favoring of religion invades one of the most important aspects of personal free-will and therefore constitutes an issue of fundamental public importance. As further detailed below in subsection B, the United States Supreme Court's recent shift in Establishment Clause jurisprudence accentuates the urgency for this Court to opine on Hawai'i's establishment clause and delineate the religious line that the State may not cross.

Second, if upheld under the State's proffered "zoning" argument, the church purposes restriction provides an avenue for the State to circumvent constitutional zoning requirements simply by incorporating similar use restrictions into future deeds. This "zoning by deed restriction" tactic violates fundamental zoning principles established in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (basing zoning restrictions in comprehensive planning), and directly contradicts the Zoning Enabling Act (HRS § 46-4). For nearly a century, *Euclid* has clearly required "zoning" to be conducted in furtherance of a comprehensive general plans, and the State cannot now argue that the decisions of two individuals (the Territorial Governor and the Commissioner of Public Lands) somehow trump the collective wisdom of county councils. 272 U.S. at 388, 393; *See Kaiser Haw. Kai Dev. Co. v. Honolulu*, 70 Haw. 480, 484, 777 P.2d 244, 247 (1989) (striking down zoning by initiative as inconsistent with long range comprehensive planning). Allowing the Restriction to stand therefore provides a relatively simple mechanism for the State to unconstitutionally spot-zone. As a result, the church purposes restriction presents "questions of fundamental public importance" warranting transfer to this honorable Court.

B. Hawai'i appellate courts have never opined on Hawai'i's establishment clause, leaving uncertainty in the wake of the SCOTUS's abandonment of *Lemon*.

To the best of Petitioners' knowledge, Hawai'i appellate courts have not yet substantively interpreted or applied Hawai'i's establishment clause, embedded in article 1, section 4 of the Hawai'i Constitution. In 2022, the SCOTUS overruled the long-held *Lemon* test in favor of a new, ill-defined "historical practices" test. *See Kennedy*, 142 S. Ct. at 2427–28. However, an examination of the 1978 Constitutional Convention of Hawai'i strongly suggests that such a shift away from *Lemon* ***does not*** align with the delegates' intent when the establishment clause was last addressed. *See* Haw. Constitutional Convention Stud. 1978, CC Dkt. 89 at 67–75. In light of *Kennedy*'s holding, the instant case provides a timely opportunity for the Court to clarify a crucial Hawai'i constitutional provision while its federal counterpart transitions into flux.

For over half a century, federal courts applied a three-pronged test, established in *Lemon v. Kurtzman*, when analyzing challenged government actions under the Establishment Clause of the First Amendment. 403 U.S. 602, 612–13 (1971). Under the *Lemon* test, government actions: 1) must have a secular purpose; 2) must have a primary effect that neither advances nor inhibits religion; and 3) cannot foster excessive entanglement with religion. *Id*. Together, these three prongs represented "the cumulative criteria developed by the Court over many years." *Id*. at 612.

Lemon's influence on the Hawai‘i Constitution's religion clauses is well-documented throughout the Hawai‘i Constitutional Convention Studies 1978 (the "1978 Studies"). The 1978 Studies, compiled by the Legislative Reference Bureau, thoroughly outline all three prongs of the *Lemon* test, stressing that the establishment clause is "intended to effect a complete separation of church and state." CC Dkt. 89 at 73. Moreover, the convention's standing committee reports reflect that the *Lemon* test tangibly influenced the delegates' deliberations for other religion-related provisions, not just the establishment clause. Proceedings of the Constitutional Convention of Haw. of 1978, Vol. I, Standing Committee Report No. 39 (1980) (applying *Lemon*'s entanglement prong in deliberating article X, section 1 pertaining to the use of public funds for sectarian educational institutions). Fully apprised of *Lemon*'s then-existing role in Establishment Clause jurisprudence, the delegates elected not to substantively amend article 1, section 4, signifying tacit approval of the *Lemon* test.

Notwithstanding five decades of *Lemon* precedents, the SCOTUS recently abandoned the *Lemon* test in favor of a "historical practices and understanding" test. *Kennedy*, 142 S. Ct. at 2427–28. Very little is known about the "historical practices" test. *Id.* at 2450 (Sotomayor, J., dissenting) (noting that the *Kennedy* majority "reserve[d] any meaningful explanation of its history-and-tradition test for another day[.]"). It is unclear which time period a practice must have occurred in to be considered "historical" or by whom such practices must have been conducted.

This latter ambiguity, in particular, renders the "historical practices" test difficult to apply to state constitutions, because the historical practices of the Founding Fathers likely played a marginal role, if any, in drafting state establishment clauses. The specific historical practices that may be relevant for First Amendment purposes cannot, and should not, carry the same weight across the states. As the most diverse state in the country, Hawai‘i bears the unique task of balancing many more religions than the Founding Fathers, who mostly dealt with different sects of Christianity, needed to address. Thus, *Kennedy*'s historical practices test appears inapplicable

to state establishment clauses, and Petitioners respectfully request this Court to clarify which test, if any, governs article 1, section 4 of the Hawai‘i Constitution.

To date, the only interpretation of Hawai‘i's establishment clause comes from a *pre-Kennedy* federal district court decision, not a Hawai‘i decision, surmising that "Hawaii courts interpret the Hawaii Constitution [no] differently than the federal courts interpret the United States Constitution in the limited area of Establishment Clause jurisprudence." *Cammack v. Waihee*, 673 F. Supp. 1524, 1528 (D. Haw. 1987). Notably, the court in *Cammack* utilized the *Lemon* test as the basis of its analysis, meaning its interpretation of Hawai‘i's establishment clause was largely inconsequential so long as *Lemon* remained good federal law. However, now that the SCOTUS has shifted away from *Lemon*, the federal interpretation of the First Amendment no longer reflects the intent of Hawai‘i's establishment clause. Contrary to *Cammack*'s holding, the Hawai‘i Constitution does not blindly go as its federal counterpart goes. The instant case thus affords the Court an opportunity to empower Hawai‘i's religious protections independent of the First Amendment and unbound by any previous Hawai‘i court decision.

C. Hawai‘i appellate courts have not yet interpreted HRS § 515-6(b).

Notwithstanding the significant constitutional issues posed by the church purposes restriction, Petitioners maintain that this case may nonetheless be resolved purely on statutory grounds. HRS section 515-6(b) states, in its entirety:

> Every condition, restriction, or prohibition, including a right of entry or possibility of reverter, that directly or indirectly limits the use or occupancy of real property on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection is void except a limitation, on the basis of religion, on the use of real property held by a religious institution or organization or by a religious or charitable organization operated, supervised, or controlled by a religious institution or organization, and used for religious or charitable purposes.

Haw. Rev. Stat. § 515-6(b). Petitioners assert that the church purposes restriction does *not* fall into the "held by a religious institution" exception because Petitioners conduct no religious activity and are *not* religious institutions. Policy-wise, due to the frequency of archaic, discriminatory deed restrictions in Hawai‘i, the public stands to greatly benefit from further clarity on section 515-6(b) as it is one of the few, if not the only, mechanism for landowners to remove these restrictions.

VI. CONCLUSION

For the reasons stated above, Petitioners respectfully request this Honorable Court grant their application to transfer, hear this case, and finally resolve this case in an expeditious manner.

DATED: Honolulu, Hawai‘i, December 15, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document will be duly served upon the following party electronically through JIMS/JEFS on December 6, 2023, addressed as set forth below:

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