NO. CAAP-19-000372

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI`I

LEAGUE OF WOMEN VOTERS OF HONOLULU and COMMON CAUSE, Plaintiffs-Appellants, vs. STATE OF HAWAI`I, Defendant-Appellee.	ORIGINAL PROCEEDING CIVIL NO. 18-1-1376-09 (GWBC) CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI`I  The Honorable Gary Won Bae Chang, Circuit Court of the First Circuit, State of Hawai`i

REPLY TO BRIEF OF *AMICUS CURIAE* HAWAI`I STATE LEGISLATURE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Constitutional History

Statutes

Other Authorities

Amicus curiae Hawai`i State Legislature—careful to avoid even a mention of the word "germane"—dances around the dispositive question here: whether the framers of the Hawai`i Constitution adopted the three readings and title provisions with the intention of permitting non-germane substitutions of bills so long as the title is vague. As Appellants outlined in the opening brief, every source of relevant constitutional history and guidance explains that the purpose of the title and three readings provisions are to provide public notice of proposed legislation and protect the public's ability to participate in an orderly legislative process. This can only happen if amendments remain germane to the bill as introduced. But the Legislature does not attempt to explain how enactment of S.B. 2858 satisfied the constitutional intent, nor does it credibly address the 1950 constitutional history or earlier well-established constitutional traditions.

Instead, the Legislature seeks to muddy the waters with meritless arguments. Appellants here explain the procedural and substantive defects with the Legislature's standing and justiciability arguments and address why claims about the 1968 convention and the wording of the title mandate are irrelevant.

I. The State Waived Any Challenge to Appellants' Standing.

In Hawai`i, standing is "solely an issue of justiciability," not an issue of subject matter jurisdiction as it is in federal court. *Tax Foundation of Hawai`i v. State* [*Tax Foundation*], 144 Hawai`i 175, 190, 439 P.3d 127, 142 (2019). The Legislature's argument to the contrary relies on a case expressly overruled by *Tax Foundation*. Dkt. 78 at 12-13; *Tax Foundation*, 144 Hawai`i at 192 n.22, 439 P.3d at 144 n.22 (*Keahole Defense Coalition* "erroneously suggest[ed] that standing is a matter of subject matter jurisdiction"). Thus—unlike issues involving subject matter jurisdiction—litigants must formally challenge an adverse standing decision on appeal.

Generally, an appellee cannot claim that the circuit court erred without filing a cross-appeal. *First Ins. Co. v. A&B Properties*, 126 Hawai`i 406, 413 n.12, 271 P.3d 1165, 1172 n.12 (2012) ("Absent a cross-appeal, A&B cannot raise these points of error, and accordingly, they will not be addressed further."). Without a cross-appeal, appellate courts lack jurisdiction to review a party's assertions of error. *Id.* ("[A]n appellant's

failure to file a timely notice of appeal is a jurisdictional defect that can neither be waived by the parties nor disregarded by the court in the exercise of judicial discretion."). Here, the circuit court held that Appellants had standing. Dkt. 26 at 228; Dkt. 20 [1/24/19 Tr.] at 49. The State's failure to cross-appeal from the circuit court's judgment waived the ability to contest standing now.[1] *Clark v. Wodehouse*, 4 Haw. App. 507, 511, 669 P.2d 170, 173 (1983) ("Defendants failed to file a proper notice of appeal as required by Rule 73, Hawaii Rules of Civil Procedure (1981), to challenge the trial court's conclusion of law that plaintiffs had standing. Therefore, we do not consider defendants' contention on this point.").

And the Legislature, as *amicus curiae*, is not permitted to introduce issues on appeal that the State waived. It is well-settled that where a party waives its right to appeal an issue, *amicus curiae* cannot step into its place to raise the argument. *E.g.*, *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("An amicus curiae generally cannot raise new arguments on appeal, and arguments not raised by a party in an opening brief are waived."). Thus, both the State and the Legislature are procedurally barred from challenging standing in this appeal.

Even if the issue of standing had been cross-appealed, no viable argument exists to question Appellants' standing under HRS § 632-1. *See Ching v. Case*, 145 Hawai`i 148, 173 n.41, 449 P.3d 1146, 1171 n.41 (2019) ("[S]uits seeking retrospective declaratory relief based on an alleged constitutional violation that has already occurred are governed by HRS § 632-1."). In *Tax Foundation*, the Hawai`i Supreme Court clarified that plaintiffs need not satisfy the injury-in-fact test to demonstrate standing. 144 Hawai`i at 175, 439 P.3d at 127.

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[1] In *McDermott v. Ige*, the Hawai`i Supreme Court held that standing was not waived by failure to file a cross-appeal because standing is jurisdictional. 135 Hawai`i 275, 283, 349 P.3d 382, 390 (2015). As explained above, the Court subsequently held in *Tax Foundation* that standing is not jurisdictional, expressly noting that standing may be waived. 144 Hawai`i 175, 191 n.21, 439 P.3d at 143 n.21 ("a claim of lack of standing can be waived"). After the March 21, 2019 *Tax Foundation* decision, the State knew it could no longer rely on *McDermott* when it chose not to cross-appeal by May 16, 2019.

> [A] party has standing to seek declaratory relief in a civil case brought pursuant to HRS § 632-1(1) where antagonistic claims exist between the parties (a) that indicate imminent and inevitable litigation, or (b) where the party seeking declaratory relief has a concrete interest in a legal relation, status, right, or privilege that is challenged or denied by the other party, who has or asserts a concrete interest in the same legal relation, status, right, or privilege; and (2) a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.

Id. at 202, 439 P.3d at 154; *accord Ching*, 145 Hawai`i at 173, 449 P.3d at 1171. Notably, in *Tax Foundation*, the plaintiff had a concrete interest to bring suit to challenge the disbursement of taxes "based on its historical purpose as a government financial accountability watchdog." *Tax Foundation*, 144 Hawai`i at 202-03, 439 P.3d at 154-55. Appellants Common Cause and League of Women Voters of Honolulu are community groups dedicated to enhancing public participation in government. Dkt. 26 at 96-134. Appellants have a well-documented interest in legislative procedure and governance and consistently have communicated their concerns about the Legislature's circumvention of constitutionally-mandated procedure. *Id.*[2]

The Court should dismiss standing arguments based on the State's waiver. But, in any event, Appellants have standing to seek declaratory relief under *Tax Foundation*.

II. History and Precedent Demonstrate a Clear Intent for Courts to Adjudicate this Dispute.

As with standing, the State similarly neglected to cross-appeal from the circuit court's decision on justiciability, yet the Legislature now asks for "leeway and permission" to revive the argument. Dkt. 78 at 13. The Court should dismiss the issue for the same procedural defect as above and because, on the merits, it is contrary to decades of precedent.

All sources of Hawai`i constitutional history as well as Hawai`i courts have treated these constitutionally mandated legislative restrictions as justiciable. *E.g.*,

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[2] The State asserts that Appellants "lack a concrete interest in in challenging this particular legislative measure." Dkt. 80 at 34-35. That is not the standard set by *Tax Foundation*. Nonetheless, Appellants raised concerns about S.B. 2858 before it was enacted. *E.g.*, Dkt. 26 at 131 (letter from Common Cause to the Governor).

Schwab v. Ariyoshi, 58 Haw. 25, 31, 564 P.2d 135, 139 (1977) ("[The subject in title provision] of the State Constitution is mandatory and a violation thereof would render an enactment nugatory."); *accord Taomae v. Lingle*, 108 Hawai`i 245, 256, 118 P.3d 1188, 1199 (2005) (rejecting argument that the court would "intrude upon the province of the legislature" by reviewing a challenge to the validity of a constitutional amendment); 2 Proceedings of the Constitutional Convention of Hawai`i of 1950 at 190-91 [Dkt. 26 at 177-78] (anticipating potential lawsuits over the three readings requirement). It is the Court's constitutional duty within the separation of powers framework to interpret the meaning of provisions that define the Legislature's powers and duties. "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137, 176 (1803); *see also Bevin v. Commonw. ex rel. Beshear*, 563 S.W.3d 74, 81-85 (Ky. 2018) (rejecting nearly identical justiciability arguments to Kentucky's constitutional three readings provision). The Legislature has not proffered any relevant authority supporting its argument that compliance with constitutional provisions is a non-justiciable issue.

The Legislature relies heavily on *Hussey v. Say*. Dkt. 78 at 8-9. *Hussey* concerned a challenge to a state legislator's qualifications for office. 139 Hawai`i 181, 184, 384 P.3d 1282, 1285 (2016). The relevant constitutional provision reads: "Each house shall be the judge of the . . . qualifications of its own members." Haw. Const. art. III, § 6. The issue was nonjusticiable because the plain text of the constitution, and its history, expressly provided that the Legislature is the *exclusive authority* to determine qualifications for its members. *Hussey*, 139 Hawai`i at 187, 384 P.3d at 1288; 2 Proceedings of the Constitutional Convention of Hawai`i of 1950 at 190-91 [Dkt. 26 at 177] ("Whether or not a person is qualified to sit in the legislature each house determines; it's a political question with which the courts cannot interfere."). No similar language provides that the Legislature is its own judge of compliance with the three readings and title mandates, nor are there any remarks from convention delegates that the matter is a political question.

Likewise, *Schwab* does not support the Legislature's position on justiciability. In *Schwab*, the "alleged violations of its own legislative rules" concerned an effort to

enforce legislative rules requiring public committee meetings, not constitutional standards. Defendants-Appellees' Answering Brief, *Schwab v. Ariyoshi*, No. 6179, at 2 (Haw.). The *Schwab* court still reviewed the Legislature's compliance with constitutional requirements about legislative procedure, while recognizing that any legislative rules of procedure not contained in the constitution remain the Legislature's own province. *Schwab*, 58 Haw. at 37-39, 564 P.2d at 143-144.

There is no "textually demonstrable constitutional commitment" of the three readings and title mandates to the Legislature here. The Legislature's general rule-making authority under article III, section 12 does not give the Legislature the power to ignore sections 14 and 15. *E.g.*, Haw. Const. art. III, § 1 (the Legislature's power includes "all rightful subjects of legislation *not inconsistent with this constitution*" (emphasis added)); 1 Norman J. Singer & Shambie Singer, Sutherland on Statutes and Statutory Construction [Sutherland] § 7:4 (7th rev. ed. 2014) ("The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints . . . ."); Dkt. 41 at 24 (quoting provisions of *Mason's Manual*—the Legislature's adopted parliamentary manual—that prohibit legislative rules from violating constitutional mandates, including specifically the three readings requirement). In keeping with this understanding of the interplay between section 12 and the constitutional mandates imposed on the Legislature, "the role of the court in supervising the activity of the legislature is confined to seeing that the actions of the legislature do not violate any constitutional provision." *Schwab*, 58 Haw. at 39, 564 P.2d at 143-144.

Moreover, to accept the Legislature's interpretation would significantly enlarge the Legislature's power contrary to basic principles of constitutional interpretation. *See Morita v. Gorak*, SCAP-16-686, 2019 WL 6110796, at *25-26 (Haw. Nov 18, 2019) ("Under longstanding canons of statutory construction, if one construction would make it possible for a branch of government substantially to enhance its power in relation to another, while the opposite construction would not have such an effect, the principle of checks and balances would be better served by a choice of the latter interpretation."). The Legislature improperly seeks to expand its authority by sacrificing protections for

the people of Hawai`i that are at the heart of the people's political power and the foundation for State government. Haw. Const. art. I, § 1 ("All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.").

It is clear from both the plain text of constitutional provisions at issue here, and the history of their adoption, that the purpose was to serve as a check on the Legislature. This dispute is justiciable, and the Legislature must abide by the constitutional restrictions regulating its procedure.

III. The 1968 Constitutional Convention Did Not Amend the Three Readings Requirement.

Contrary to the Legislature's assertions, the 1968 debates concerning 24-hour [now 48-hour] final printing mandate did not change the intent of the three readings requirement. *See* Dkt. 78 at 10-12. The 1968 Constitutional Convention removed a comma from the three readings mandate with no explanation or other indication that the change was intended to be substantive. Stand. Comm. Rep. No. 46 *in* 1 Proceedings of the Constitutional Convention of Hawai`i of 1968 at 215-17 [Dkt. 26 at 180-82];[3] *accord* 2 Proceedings of the Constitutional Convention of Hawai`i of 1968 at 146 [Dkt. 26 at 184] (remarks of Chair of the Committee on Legislative Powers and Functions Hung Wo Ching) ("The proposed amendment [adding the final printing mandate] will not change the manner in which a bill is handled as under the present Constitution and the present legislative procedures as far as the conference committee draft is concerned."). For several reasons, the 1968 debates are not relevant to this case.

First, as a matter of interpretation, the Hawai`i Supreme Court has explained that the understanding of subsequent legislators does not change the meaning of existing law absent a substantive amendment to the law.[4] *See Peer News*, 138 Hawai`i at 73, 376

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[3] *Peer News LLC v. City & County of Honolulu*, 138 Hawai`i 53, 71, 376 P.3d 1, 19 (2016) ("[I]t is the official committee reports that provide the authoritative expression of legislative intent.").

[4] The State seeks to circumvent this principle of interpretation by asserting that the 1968 delegates decided "to adopt the three readings provision, substantively intact from the 1950 Constitution"; in essence, *by doing nothing*, the 1968 convention made a substantive

P.3d at 21; *accord* 2A Sutherland § 48:20 ("[C]ourts generally give little or no weight to the views of members of subsequent legislatures about the meaning of acts passed by previous legislatures").[5]

Second, the Legislature misrepresents the nature of the discussion about three readings in 1968. During the debates, Delegate Kauhane expressed a concern about the constitutionality of significant amendments on final reading that do not receive adequate consideration, *but are still germane to the original subject*. *E.g.*, 2 Proceedings of the Constitutional Convention of Hawai`i of 1968 at 169 [Dkt. 26 at 186] ("You may have intended to request consideration of the matter of caring of elephants. This bill comes out with the caring of the elephants, dogs, pigeons and what not and then we are voting on third reading for the passage of a completely new bill."). Such germane amendments were the concern underlying the 24-hour final printing mandate. Dkt. 41 at 20-22 (describing the delegates' concerns about highly technical last-minute changes to legislation). By treating Delegate Kauhane's remarks as relevant to the issue presented here, the State and the Legislature incorrectly elide the distinction between germane and non-germane amendments when the difference is constitutionally significant. The dispute now before this Court concerns non-germane amendments.

Third, the 1968 Convention rejected Delegate Kauhane's concerns. Delegate Kauhane noted that application of the three readings mandate was not settled and that he was concerned about a constitutional challenge to the practice he described. Dkt. 26 at 188 (repeating advice of a convention attorney that "[t]here is a question, he says, that this legal question has never been raised yet"). Before the Constitutional Convention rejected Delegate Kauhane's proposal, Committee Chair Ching explained that the issue

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decision that makes the 1968 debates relevant. Dkt. 80 at 17. No constitutional history reflects that the 1968 delegates understood that they were changing the intent of three readings. And there is no evidence that the voters who ratified the 1968 amendments understood that adding the 24-hour printing rule (or removing the comma from the three readings mandate) would substantively change the three readings provision.

[5] For similar reasons, technological advances do not change constitutional intent. *E.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 532 (2009) ("The original meaning of the Constitution cannot turn on modern necessity.").

of late-session significant amendments to legislation was not the current practice in the Legislature and that Delegate Kauhane's suggestion—to change the 24-hour printing rule to 48 hours—would not cure the practice even if it existed. *Id.* at 187 ("[T]he practice that has been mentioned here has not prevailed in the legislature since the advent of Statehood. And secondly, that this amendment, even if this practice were prevailing in the legislature at the present time, the amendment that is suggested here would not cure the practice."). Obviously, if changing the deadline from 24 to 48 hours would not address issues with the three readings mandate, the adoption of the 24-hour deadline in 1968 did not change three readings as the State and Legislature argue. Moreover, contrary to the Legislature's argument, the 1968 Constitutional Convention did not broadly endorse gut-and-replace practices as described by Delegate Kauhane; rather, the delegates took no action because such practices were not presently occurring. *Id.* at 183-88.

Lastly, as a further matter of interpretation, the clarifying statements made by Committee Chair Ching carry more weight than Delegate Kauhane's remarks. "Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill." *Peer News*, 138 Haw. at 71, 376 P.3d at 19; *accord* 2A Sutherland § 48:13 ("[Statements by individual legislators] are not dispositive on the issue of legislative intent, and, more generally, have limited value to clarify the intent of an entire legislative body."). Individual delegates do not always agree on the intent of a proposed law, and it should not be assumed that each delegate is an authority on the subject. The committee chair, however, is considered to have more expertise:

> When a bill is reported out of a standing committee, the member in charge of the bill, normally the chairman, explains its meaning to the house, and in the ensuing debate answers questions about the meaning of particular sections or phrases. The committeeman in charge has the duty to defend the bill, and has familiarized himself with the situation sought to be remedied by the bill. Consequently, his statements reflect the committee's opinion about the meaning of the bill.
>
> Courts take a realistic view of legislative procedure and except the statements of the committeeman in charge of a bill from the general rule excluding or restricting the use of statements by individual legislators about the

> meaning of the bill. Courts do consider the committeeman's remarks upon presenting the bill to the house, and his answers to questions asked by members, to construe the bill as subsequently enacted. These statements resemble supplemental committee reports, and have the same interpretive weight as formal committee reports.

2A Sutherland § 48:14 (footnotes omitted). Thus, to whatever extent Delegate Kauhane's comments confuse the issue, Chair Ching's statements dismissing Delegate Kauhane's concerns as unfounded and irrelevant are more reliable history.

The discussions of the 1968 Constitutional Convention about the 24-hour final printing mandate do not vary the well-established purpose and meaning of the three readings requirement. Delegates did not discuss amending the existing provisions in any manner. Rather, they added a new restraint on legislative procedure to *bolster* the overarching purpose of protecting public transparency and participation in the legislative process. Dkt. 41 at 17-22 (detailing the constitutional history and purpose for various provisions of Article III); Dkt. 26 at 148-154 (same).

IV. No Distinction Exists Between "Law" vs. "Bill" in the Title Provision

The Legislature argues that the title requirement only matters once the "law" is enacted, not during the legislative process while the law is only a "bill". Dkt. 78 at 6-7; Haw. Const. art. III, § 14 ("Each law shall embrace but one subject, which shall be expressed in its title."). In the end, the distinction is irrelevant to this case because "public safety"—as law or bill—is too broad and amorphous to fairly apprise interested members of the public that it concerns hurricane shelters. But more fundamentally, the Legislature's position ignores the well-established purpose of the title provision to provide notice to the public concerning proposed legislation *before* it is enacted. Dkt. 41 at 26-28; *Jensen v. Turner*, 40 Haw. 604, 608 (Terr. 1954) ("to apprise the people of *proposed* matters of legislation" (emphasis added)); *United Pub. Workers v. Yogi*, 101 Hawai`i 46, 53, 62 P.3d 189, 196 (2002) ("A constitutional provision must be construed 'to avoid an absurd result' and to recognize the mischief the framers intended to remedy.").

Again, the constitutional tradition expressly undermines the Legislature's position:

> Whether the constitutional provision uses the word "act" or "bill," it is generally understood that the requirement applies to a bill during the enacting process as well as to the enacted statute. [I]t would violate the letter and spirit of the constitutional safeguard against stealthy legislation to hold that the subject of a bill must be clearly expressed in its title during the progress of the measure through the legislature, but that any misleading or delusive title may be attached to it when it is presented to the governor for approval.

1A Sutherland § 18:1 at 45.

The Legislature's purported distinction between "law" and "bill" in the title mandate is meritless.

CONCLUSION

Appellants League of Women Voters of Honolulu and Common Cause respectfully request that this Court reverse the circuit court's grant of summary judgment to the State and declare that Act 84 is void as unconstitutional for violating the three readings and subject in title requirements of article III, sections 14 and 15 of the Hawai`i Constitution.

DATED: Honolulu, Hawai`i, December 5, 2019.

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