NO. CAAP-19-0000372

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-Appelles	CIVIL NO. 18-1-1376-09 GWBC ON APPEAL FROM: FINAL JUDGMENT Filed on APRIL 3, 2019 CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI`I The Honorable Gary Won Bae Chang, Judge

BRIEF OF THE HAWAI`I STATE LEGISLATURE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE STATE OF HAWAI`I

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BRIEF OF THE HAWAI`I STATE LEGISLATURE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE STATE OF HAWAI`I

I. INTRODUCTION

The HAWAI`I STATE LEGISLATURE ("Legislature") files this brief as *Amicus Curiae* in support of the Defendant-Appellee State of Hawai`i and to affirm the primary holding in the circuit court's Order Granting Defendant State of Hawai`i's Motion for Summary Judgment Filed on October 9, 2018; and Order Denying Plaintiff's Cross-Motion for Summary Judgment Filed on October 25, 2018. Record on Appeal ("ROA") Part 2 ("2") at 226-228 and at 229-230. The Legislature contends that to reverse the decision of the circuit court would be to intrude into the constitutional mandate of the Legislature.

II. INTEREST OF *AMICUS CURIAE*

Article III of the Constitution of the State of Hawai`i (hereinafter "***Constitution***" or "Haw. Const.") vest the legislative powers of the State in the two houses of the legislature. To exercise this responsibility, the ***Constitution*** empowers each house with rights of self-governance and the determination of its process to adopt legislation. Each house enacts its own rules and procedures and need only agree on deadlines where the ***Constitution*** requires them to do so. Thus the Legislature has a strong interest in protecting its governance and rules and procedures as their respective house have adopted in compliance with the ***Constitution.***

The Legislature's interest as *Amicus Curiae* is that it cannot stand silently by as the Plaintiffs-Appellants call upon a co-equal branch of government, the Judiciary, to interfere with the Legislature's constitutionally empowered self-governance.

III. ARGUMENT

A. The Legislature's Enactments Are Presumptively Constitutional.

The Hawai`i Supreme Court has set a very high standard to successfully challenge any law enacted by the Legislature. The Court has consistently held that "every enactment of the legislature is presumptively constitutional and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt." ***Schwab v. Ariyoshi,*** 58 Hawai`i 25, 31 564 P.2d 135, 139 (1977) ("***Schwab***"). The ***Schwab*** court went on to say that the violation alleged of the "subject-title requirements of the State Constitution" must be "plain, clear,

manifest, and unmistakable." ***Id.*** Other authorities referenced are ***State v. Kahalewai,*** 56 Hawai`i 481, 541 P.2d 1020 (1975) and ***Bishop v. Mahiko,*** 35 Hawai`i 608 (1940).

Plaintiffs-Appellants rely heavily upon ***Taomae v. Lingle,*** 108 Hawai`i 245, 118 P.3d 1188 (2005) ("***Taomae***"). They do so irrespective of the fact that the Hawai`i Supreme Court made very clear that ***Schwab*** was distinguishable from the facts of ***Taomae*** because "[i]n *Schwab,* this court considered the requirements embodied in article III alone . . . in this case [***Taomae***], we construe the requirements of article III as incorporated in the specific and separate provisions of article XVII." ***Taomae,*** 108 Hawai`i at 254, 118 P.3d at 1197.[1]

B. <u>In Analyzing Section 14, article III of the Constitution, The Governing Word is "law" And Requires That The Law Contain One Subject And It Be Expressed In The Title.</u>

Schwab is the dispositive precedent for this argument in Plaintiffs-Appellants' Complaint. The 1950 Constitutional Convention proposed the language of Section 14 article III Haw. Const. which states, "[n]o law shall be passed except by bill. Each **law** shall embrace but one subject, which shall be **expressed in its title**." (emphasis added). In ***Schwab,*** the Court was faced with the title, "A Bill for an Act Making Appropriations for Salaries and Other Adjustments, Including Cost Items of Collective Bargaining Agreements Covering Public Employees and Officers." The original intent was that it ratify the salary increases negotiated through collective bargaining. ***Schwab,*** 58 Hawai`i at 27, 564 P.2d at 137. When it was

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[1] The Hawai`i Supreme Court stated two reasons for why they found a violation of the ***Constitution*** in ***Taomae:***

> First, the proposed amendment was not titled as a constitutional amendment pursuant to article XVII. Second, the proposal to amend the constitution was not subjected to three readings in each house as article XVII, section 3 requires.

Id., 108 Hawai`i at 251, 118 P.2d at1194. The Hawai`i Supreme Court went on to distinguish Section 14 article III Haw. Const. from its holding as follows, "[w]hile the interpretation of article III, section 14 is appropriate when applied to ordinary legislation, it must be remembered that article XVII specifically governs constitutional amendments." ***Id.,*** 108 Hawai`i at 254, 118 P.2d at1197. This Court stated this in response to the ***Taomae*** defendants' argument that all is required is a single subject in the title under Section 14 article III. For ***Taomae*** to apply this case must involve a constitutional amendment which it does not.

enacted, the law contained four parts and covered all employees' and officers' salaries, not merely those that were collectively bargained. ***Id.*** 58 Hawai`i at 27-28, 564 P.2d at 137-138.

The issue is what is required to have a **law** embrace but one subject which is expressed in its title. The point of contention is whether the title "Relating to Public Safety" covers the subject of this law. The general rule of statutory construction applies to the ***Constitution*** as well. That is to say if the words are clear and unambiguous, they are construed as written. ***Watland v. Lingle,*** 104 Hawai`i 128, 140, 85 P.3d 1079, 1091 (2004). Thus, Section 14 article III is saying that the **law** shall embrace one subject that is expressed in the law's title. It does not say that the bill as originally proposed or amended; but as it is enacted into law. There can be no doubt that the subject of SB 2858 SD2 HD1 CD1 as Act 84 (2018) is covered under Public Safety. The circuit court correctly found as such in paragraph 2 of its Order.

What Plaintiffs-Appellants are attempting to argue is that the title does not have enough detail. There is no such requirement set forth in the ***Constitution.***

Plaintiffs-Appellants have relied upon the Organic Act as authority in many of their briefs. However, the authorities under the Organic Act are also consonant with the Legislature's position.

Section 45 of the Organic Act provides, "[t]hat each law shall embrace but one subject, which shall be expressed in its title." Over the years, this provision has caused the Supreme Court to adopt a very liberal interpretation of the requirement and have consistently erred in favor of an Act (law) not being deemed void due to a violation of this provision. ***Schwab,*** 58 Hawai`i at 34, 564 P.2d at 141. ***Gallas v. Sanchez,*** 48 Hawai`i 370, 376, 405 P.2d 772, 776 (1965) speaks to the clear meaning of "law" or "Act." See also, ***State v. Kahlbaun,*** 64 Hawai`i 197, 201, 638 P.2d 309, 314 (1982); ***Malahoff v. Saito,*** 111 Hawai`i 168, 181, 140 P.3d 401, 414 (2006). As such, the word **law** is unambiguous and its plain meaning is when a bill becomes "law." It does not mean when a bill is making its way through the legislative process. What further supports this argument is that the Section begins with, "[n]o law shall be passed except by bill." Section 14, article III. Clearly if the Framers intended this section to apply to bills and not to the final law, it would have been amended Section 14 to read "[e]ach bill shall embrace but one subject . . ."

C. Section 12 of Article III of the Constitution Empowers Each House To Enact Its Own Rules of Proceedings And Its Operations.

The heart of Plaintiffs-Appellants' challenge of Act 84 (2018) is whether the Legislature can constitutionally enact its own rules of proceedings in its operations. The Legislature argues that it does.

Section 12 article III of the ***Constitution*** provides in relevant part "[e]ach house shall choose its own officers, **determine the rules of the proceedings** and keep a journal." (emphasis added). The recent case of ***Hussey v. Say,*** 139 Hawai`i 181, 384 P.3d 1282 (2016) addressed the first sentence of Section 12 article III of the ***Constitution***. The Hawai`i Supreme Court sustained the dismissal of the *Quo Warranto* complaint against Representative Say on the basis that it was a "non justiciable issue." Though the circuit court in this action determined that the doctrine of the separation of powers would not prevent it from ruling on whether the statute was constitutional, the holding of this Court is instructive as to recognizing the co-equal branch and how the rules of the Legislature is given deference. The Court stated that "justiciability" was to ensure that the co-equal branches of government do "not intrude into areas committed to the other branches of government." It looks to whether the Constitution committed the issue to another political department. ***Id.***, 139 Hawai`i at 188, 384 P.3d at 1289. The Court stated this principle in ***OHA v. Yamasaki,*** 69 Hawai`i 154, 169, 737 P.2d 446, 455 (1987) as follows, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." In ***Hussey***, the issue was whether Representative Calvin Say was qualified to be seated as a member of the House of Representatives. The Court ruled that due to the language of Section 12 of article III, it was a non justiciable issue because the ***Constitution*** had committed the issue to the Legislative branch of government.[2]

This should also be the decision of the Court as to the "rules of proceedings" which has been committed to the co-equal branch of government.

The Legislature has complied with the ***Constitution*** and determined and passed its respective rules of proceedings.

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[2] Section12 article III of the ***Constitution*** provides:

> Each house shall be the judge of the elections, returns and qualifications of its own members and shall have, for misconduct, disorderly behavior or neglect of duty of any member, power to punish such member by censure, or upon a two-thirds vote of all the members to which such house is entitled, by suspension or expulsion of such member.

The Rules of both houses provide for three readings of the bill. The First readings in both houses are by title only.[3] Likewise, the respective Rules provide that the Second and Third or Final readings of the bill can be by title only.[4]

As with ***Hussey***, the decision here should be that how the co-equal branch of government has complied with its own rules should be determined by the houses.

Schwab is also instructive as to the Legislature's Rules. It concedes that the threshold issue is whether it is "justiciable." ***Id.***, 58 Hawai`i at 37, 564 P.2d at 142-143. The Court reminds itself that:

> As a general rule, 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. We will not interfere with the conduct of legislative affairs in absence of a constitutional mandate to do so, or unless the procedure or result constitutes a deprivation of constitutionally guaranteed rights.

Id.

It is important to note that the ***Constitution*** provides a period of sixty (60) days in which to conduct legislative business. To accomplish this task, the ***Constitution*** granted to each house of the Legislature, the right to determine its rules of proceedings, Section 12, article III. Article III of the ***Constitution*** is entitled, the Legislature. The reference therein to when the public must be permitted to attend is for decision making in committees, Section 12, article III.[5] In the 1968 ***Constitution***, the provision in Section 16, article III provided:

> No bill shall become law unless it shall pass three readings in each house on separate days. No bill shall pass final reading in each house unless in the form to

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[3] Rule 48 of the Senate (ROA 1 at 65) and Rule 34 of the House of Representative (ROA 1 at 73).

[4] Rules 49 and 50 of the Senate and Rules 35 and 36 of the House of Representatives. State Ex. "A" at 22 and State Ex. "B" at 33-34. Note that for Third or final readings, both houses require the final form to layover for 48 hours. ROA 1 at 64-66 and 73-75.

[5] Though the Hawai`i State Legislature may agree with Plaintiffs' statement that government should be "open, transparent, and allows for public input," that is not the issue before this Court. The ***Constitution*** does not so state in Article III. There is no allegation by Plaintiffs-Appellants that they were not permitted to attend the decision making in the committees. This is therefore not the standard in assessing whether the Legislature complied with the ***Constitution.***

be passed it shall have been printed and made available to the members of that house for at least twenty-four hours . . .

This provision is now Section 15, article III of the ***Constitution*** and was amended to read forty-eight hours in the 1978 ***Constitution.***[6]

D. The Constitutional Requirement Of Three Readings Was Not Violated And "If A Replaced Or Substituted Bill Is Adopted, Then The Legislature Is Not Required To Conduct Three More Readings."

The above statement in quotations is from the circuit court Order, paragraph 1. ROA 2 at 227. The circuit court correctly found that the three reading requirements were satisfied even if a replaced or substituted bill was adopted. The circuit court relied upon the adopted rules of the Legislature.

Both houses, in accordance with Section 12, article III of the ***Constitution*** have adopted their respective Rules of their houses, and in addition, the *Mason's Manual of Legislative Procedure, 2010* for the 2017-2018 Legislative Session, hereinafter "***Mason's.***"[7]

If this Court reverses the circuit court then it would be adding to the Haw. Const. article III §15 by requiring a "form" that a bill can pass in. Stated another way, if Plaintiffs-Appellants complaint prevails, then a bill to become law must in the final form throughout the three readings in each house; or alternatively, the Judiciary will be called upon to determine whether the bill qualifies to become law. This could not and was not the intent of the Framers of the ***Constitution.***

The Legislature contends that the Framers of the Constitution intended that it has flexibility.

E. The Constitutional Convention Committee Reports and Debates Clarify That Amendments To A Bill, Including A Substitution Does Not Trigger Three Reading Process To Commence Again.

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[6] Note that the Framers of the ***Constitution*** used the words "form to be passed" which should indicate that it is expected that the bill during the three readings in each house will not be in the form to be passed. That requirement of the form to be passed is for the final reading.

[7] The adoption of ***Mason's*** is found at Rule 88 of the Senate; and Rule 59 of the House of Representatives. ROA 1 at 66 and 75.

The Hawai`i Supreme Court has stated that the Constitution must be construed "with due regard to the intent of the Framers and the people adopting it." ***Hanabusa v. Lingle,*** 105 Hawai`i 28, 31, 93 P.3d 670, 673 (2004). The intent is found in the "instrument itself." ***Id.*** citing ***Blair v. Harris,*** 98 Hawai`i 176, 178-179, 45 P.3d 800, 800-801 (2002).

The Constitutional Convention of 1968 addressed Section 16 article III Haw. Const. Committee of the Whole Report No. 12 stated that it had fully debated the Standing Committee Report No. 46 and reports and recommends that Section16 be adopted. The rationale was:

> 1. Requiring that a bill shall have been printed in the form to be passed on final reading and made available to the members of a house for at least twenty-four hours before it shall pass final reading in that house; the phrase "form to be passed" means the form in which a bill is either (a) passed on third reading in each house, (b) concurred to by one house after amendments have been made by the other, or (c) passed by both houses after a conference committee has agreed upon it; . . .

I *Proceedings of the Constitutional Convention of Hawaii of 1968* at 347 (1973).

Plaintiffs-Appellants also argue the Organic Act as precedent for their interpretation of Haw. Const. article III § 15. Section 46 of the Organic act provides, "[t]hat a bill in order to become a law shall, except as herein provided, pass three readings in each house, on separate days, . . ." The Organic Act did not contain the laying over provision of Section 15; and Plaintiffs-Appellants chose to ignore the lengthy Constitutional Convention Debates of 1968 cited by the Legislature to explain how the Framers of the Constitution explained the requirement to conduct three readings of a bill and discussed at length how the legislative process operates. Plaintiffs-Appellants refuse to recognize that the amendments to and substitutions of the contents of a bill do not give rise to the requirement to again comply with three readings. Instead, Plaintiffs argue that the Framers did not change the language of requiring three reading. There was no need to change the language because the Framers understood the process and what the practice was.

F. The Mandate That Bills In Its Final Form Be Printed and Lay For 48 Hours Is To Ensure The Legislators Know What Is Being Voted On.[8]

[8] Standing Committee Report No. 46 reported:

> Your Committee has included the twenty-four hour rule as a requirement for the passage of bills. The purpose of this rule is to assure members of the

The then 24 (now 48) hour rule is what provides the Legislators the opportunity to know what the bill contains. Plaintiffs-Appellants do not allege the houses failed to comply with the "printed copies" of the bill in its final form; or that it failed to lay over for at least "forty-eight hours"[9] prior to the final reading.

From the above referenced Constitutional Convention Debates, it is clear that the intent was not to change the practice of amending bills which could include its total substitution, without requiring that three readings begin again. Thus, the notification requirement was enacted for purposes of providing Legislators the opportunity to know what the final form of the bill contained. [10]

G. Standing Is A Jurisdictional Issue And Can Be Raised At Anytime.

The issue of standing can be raised *sua sponte* in that this Court has stated it is a "jurisdictional issue and can be addressed at any stage of a case." ***Keahole Defense Coalition,***

> legislature an opportunity to take informed action on **the final contents** of proposed legislation. This is accomplished by requiring the printing and availability of each bill in the "form to be passed" to the members of a house and a twenty-four hour delay between such printing and availability before final reading in each house. "Form to be passed" means the form in which a bill is passed on third reading in each house, concurrence of one house to amendments made by the other, and the form in which a bill is passed by both houses after conference on a bill. The twenty-four hour rule not only aids the legislator but also gives the public additional time and opportunity to inform itself of bills facing imminent passage.

I *Proceedings of the Constitutional Convention of Hawaii of 1968* at 216 (1973) (emphasis added). The underlined portion of the report shows that the delegates appreciated that bills could undergo substantial revisions before becoming law.

[9] It was the 1978 Constitutional Convention which increased the period before the final vote can be taken to 48 hours. Though Plaintiffs-Appellants do not concede that technological changes and the ability to track bills on the internet has changed the ability of both Legislators and the general public to be aware what is transpiring, the fact is, it does. The description of the bills' contents changes as amendments are made. It is a better informed constituency due to the changes made by the Legislature on the use of the internet.

[10] See specifically the debates found at *II Proceedings of the Constitutional Convention of Hawaii of 1968, Committee of the Whole Debates* at 168-171 (1973).

Inc. v. Board of Land and Natural Resources, 110 Hawai`i 419, 42l, 134 P.3d 585, 593 (2006) ("***Keahole***"). This Court has stated that it will determine standing "even if the determination ultimately precludes jurisdiction over the merits." ***Keahole***, 110 Hawai`i at 427-428, 134 P.3d at 598-594. The majority of this Court in the recent case of ***Tax Foundation of Hawai`i v. State***, 144 Hawai`i 175, 439 P.3d 127 (2019) ("***Tax Foundation***") (which was decided two (2) months **after** the circuit court orally ruled on the motions which disposed of this case), spoke to "prudential concerns." Specifically the majority stated:

> Therefore, we preliminarily clarify that, in Hawai`i state courts, standing is not an issue of subject matter jurisdiction, but arises solely out of justiciability concerns based on prudential concerns of judicial self-governance, and is based on 'concern about the proper-and properly limited-role of courts in a democratic society."

Tax Foundation, 144 Hawai`i at 192, 439 P.3d at 144.

H. Baker v. Carr Is The Dispositive Authority As To Political Question.

The Legislature as *Amicus Curiae* requests leeway and permission to raise this argument. This is due to the fact that if the three reading decision of the circuit court is not affirmed, the issue of who determines when and if three reading has been satisfied will be a political question which should not be addressed by this Court.

The discussion on what is a political question requires that, as in almost all courts, the adoption of the standard set forth in ***Baker v. Carr,*** 369 U.S. 186, 217, 82 S.Ct. 691, 710 (1962), as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; **or** a lack of judicially discoverable and manageable standards for resolving it**; or** the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; **or** the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; **or** an unusual need for unquestioning adherence to a political decision already made; **or** the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.

(emphasis added). Any one of the six criteria listed above would require dismissal because the complaint is non-justiciable. It is the Legislature's contention that its process is being challenged which the ***Constitution*** mandates that it adopts and enacts. The debates of the constitutional conventions require an adherence to the political decisions made by the Framers and the voters.

IV. CONCLUSION

The *Amicus Curiae* contends that what should be evident from the Constitutional Convention Debates and the reference in the ***Constitution*** to the words "law" and "reading" are what constitutes and satisfies these requirements before Act 84 (2018) was passed. The intent of the Framers was to leave it up to each chamber of the legislature. With technology as it was in 1968, the reference is to "photostating" was a statement by a Delegate that times were changing and the original need to "read" the bills so that the members knew what they were voting on is no longer required. In other words that fact that a printed version was available mooted whether it needed to be read throughout. This is why the requirement of Section 15, article III of the ***Constitution*** is as to "the form to be passed it shall have been printed and made available to the members of that house for at least forty-eight hours." There is no other requirement which states the bill to be read must be in the "form to be passed." As well, there is no requirement under Section 14 article III of the ***Constitution*** that the "law" must have a more detailed title. All that is required is that the law contain one subject and be covered by the title.

Moreover, Plaintiffs-Appellants have not proven unconstitutionality beyond a reasonable doubt for their alleged violations of Sections 14 and 15 of article III of the ***Constitution***. The Plaintiffs-Appellants have clearly failed to meet their burden under ***Schwab.***

For the foregoing reasons, the Hawai`i State Legislature respectfully request that this Court affirm the Circuit Court's decision in favor of Defendant-Appellee State of Hawai`i. Alternatively, the Hawai`i State Legislature respectfully request that this Court find the circuit court improperly rejected that separation of powers argument and that Plaintiffs-Appellants lacked standing to bring their action.

DATED: Honolulu, Hawaii, November 5, 2019.

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CERTIFICATE OF SERVICE

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