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SCAP-19-0000372

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

LEAGUE OF WOMEN VOTERS OF HONOLULU and COMMON CAUSE,

Plaintiffs-Appellants,

vs.

STATE OF HAWAI‘I,

Defendant-Appellee.

CIVIL NO. 18-1-1376-09 (GWBC)

ON APPEAL FROM THE:
A) FINAL JUDGMENT, filed April 3, 2019

CIRCUIT COURT OF THE FIRST CIRCUIT

HON. GARY W.B. CHANG, Judge

STATE OF HAWAI‘I’S RESPONSE TO GRASSROOT INSTITUTE OF HAWAI‘I’S AMICUS BRIEF

CERTIFICATE OF SERVICE

STATE OF HAWAI'I'S RESPONSE TO GRASSROOT INSTITUTE OF HAWAI'I'S AMICUS BRIEF[1]

The Grassroot Institute's amicus brief mischaracterizes the issue before this Court. The issue in this case is whether the Legislature's passage of S.B. No. 2858, 29th Leg. Reg. Sess. (2018), satisfied the "subject-in-title" and "three readings" requirements set forth in Article III, sections 14 and 15 of the State Constitution.[2] It is for the Legislature to pass laws; it is also for the Legislature to adopt rules and procedures that enable it to fulfill its lawmaking function. It is within the Legislature's bailiwick to freely amend bills as long as the process and the enacted legislation satisfy constitutional requirements.

The State is in no way suggesting that bills, such as S.B. No. 2858, are judicially unreviewable. It is of course for this Court to review the constitutionality of a statute. Contrary to amicus' contention, the circuit court below did not apply a "rational basis test." This is not a due process case in which a rational basis analysis would apply. Rather, the circuit court correctly looked at whether S.B. No. 2858 received three readings before each house and satisfied the subject-in-title requirement. It started from the proposition that S.B. No. 2858, like all legislative enactments, is presumed constitutional. *Schwab v. Ariyoshi*, 58 Haw. 25, 31, 564 P.2d 135, 139 (1977). And it correctly concluded that Plaintiffs have failed to meet their burden of establishing its unconstitutionality beyond a reasonable doubt. *Id.*

With that said, the State responds to amicus' three main points as follows:

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[1] This Response is timely filed, pursuant to this Court's Order, dated January 27, 2020, granting the State leave to file a response "not to exceed fifteen pages in length . . . [and] confined to the matters presented in the amicus brief." The Grassroot Institute filed its amicus brief on January 29, and the State's response is thus due for filing on February 10 (February 8 being a Saturday).

[2] The question presented is *not*, as amicus contends, "whether the legislature alone possesses the power to decide if the form and title of the bill are alone determinative, or whether the people – acting through our courts – have any say in whether the substance of the bill matters at all." (Br. at 1-2.)

First, amicus' contention, that the procedure by which S.B. No. 2858 was enacted demonstrates a "lack of transparency," amounts to no more than an attempt at misdirection. Again, this is not a due process case; Plaintiffs are not alleging lack of due process. The question presented in this case is whether a particular bill, S.B. No. 2858, received three readings before each house, and whether its title complied with the constitutional subject-in-title requirement. As explained in the State's Answering Brief, S.B. No. 2858's passage is compliant with the plain language and constitutional history of article III, section 15. (*See* Ans. Br. at 9-14.) It is also compliant with this Court's correct and longstanding interpretation of article III, section 14. (*See* Ans. Br. at 25-27.) There is thus no legal basis for this Court to strike down S.B. No. 2858.

As a practical matter, the Legislature must have latitude to amend bills in order to carry out its constitutionally derived function as the law making branch of government. Indeed, the legislative history of S.B. No. 2858 underscores the importance of S.B. No. 2858, in its hurricane safety form, to furthering the Legislature's policy interests in protecting public safety. As the conference committee articulated in its report, "ensuring that state buildings are capable of withstanding extreme weather-related events and emergencies is essential for maintaining public welfare." (ICA 24 at PDF 95, 96 [Conf. Comm. Rep. No. 93].) Because "public schools are particularly vulnerable to the effects of weather-related events and emergencies," "the State should consider relevant hurricane resistant criteria when designing and constructing new public schools for the capability of providing shelter refuge." *Id.* Clearly, the Legislature is best positioned to weigh the public policy considerations necessitating hurricane safety measures. The Legislature's passage of S.B. No. 2858, in its hurricane safety form, itself reflects the will of the people of Hawai‘i.

Amicus is clearly concerned about "voter apathy" and low "trust in government." But these concerns cannot fairly be attributed to the passage of S.B. No. 2858 (and resulting enactment of 2018 Haw. Sess. Laws Act 84). There is no correlation between amicus' (unfounded and unsupported) assertions of lack of public trust in government and the changes that the Legislature made to the language of S.B. No. 2858 during the legislative process. And, moreover, amicus fails to establish that strictly constraining the Legislature's necessary latitude to amend pending legislation would lead to an uptick in voter turnout. Simply suggesting that something is so, without more, does not make it so.

Second, there is no merit to amicus' contention that the substantive amendment to S.B. No. 2858's content violated the "subject-in-title" requirement and "three readings" requirement, thus rendering it "nugatory." Amicus' reliance on *Schwab v. Ariyoshi* and *Taomae v. Lingle* is misplaced; neither case supports amicus' argument.

Schwab v. Ariyoshi is clearly controlling with respect to the "subject-in-title" requirement, but it unequivocally establishes that each iteration of S.B. No. 2858 satisfied that requirement. In *Schwab*, this Court recognized that the Legislature may title a bill broadly, such that it fully encompasses the subject of the bill's text:

> The term "subject," as used in the constitution is to be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters having a logical or natural connection. . . . All that is necessary is that act should embrace one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.

Schwab, 58 Haw. at 33, 564 P.2d at 140.

As the State explained in its Answering Brief, this Court has already held that there is no constitutional subject-in-title violation as long as a bill's contents retain a connection with its title. "If no portion of the bill is foreign to the subject of the legislation as indicated by the title,

however general the latter may be, it is in harmony with the constitutional mandate." *Id.*, 58 Haw. at 35, 56 P.3d at 141. Moreover, this Court has already contemplated, subsequent to *Schwab*, that the Legislature may sometimes "delete" and "replace" the content of a bill. In this event, the bill's "replacement" language must "continu[e] to bear some relation to [its] title." *Villon v. Marriot Hotel Services, Inc.*, 130 Hawai‘i 130, 141, 306 P.3d 175, 186 (2013).

To be clear, *Schwab's* analysis is limited to the subject-in-title requirement. *Schwab* did not address the three readings requirement set forth by article III, section 15.[3] *Schwab* thus does not say that amending the bill in a way that is "dissimilar or discordant" with the bill's original language "plainly conflicts" with the three readings requirement. The three readings provision is *not* the "higher law" contemplated by *Schwab's* analysis of the subject-in-title provision.

Amicus' reliance on *Taomae v. Lingle*, 108 Hawai‘i 245, 118 P.3d 1188 (2005), is similarly misplaced. The specific issue in *Taomae* was whether a bill to amend the State Constitution must pass three readings in each house in the form of a constitutional amendment. In reaching its holding that the three readings requirement was not met, this Court thus considered an entirely different constitutional provision, i.e., article XVII, section 3.

In *Taomae*, the Court held that S.B. No. 2789, H.D. 1, S.D. 1, failed to satisfy the specific three readings requirement contemplated by article XVII, section 3, because it started out as a bill to enact a statute, then morphed during the legislative process into a bill to pass a

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[3] Amicus' reference to article III, section **15** is misleading. (*See* Br. at 7, n. 5.) *Schwab* was decided in 1977 and, at that time, the "subject-in-title" provision was contained in section **15** of the State Constitution. The "three readings" provision was contained in section **16** of the State Constitution. *Schwab's* reference to section 15 is therefore to the "subject-in-title" provision, and *not* to the "three readings" provision. Both provisions were renumbered in 1978, the year after *Schwab* was decided, as sections **14** (subject-in-title) and **15** (three readings).

Thus, when amicus cites *Schwab* for the proposition that "Article III, Section of 15 of the State Constitution is mandatory and a violation thereof would render an enactment nugatory," the reference is to the *subject-in-title* provision.

constitutional amendment. Indeed, H.B. No. 2789 received three readings in the House and one in the Senate as a bill to enact a statute. H.B. No. 2789 was then converted into a bill to amend article I of the State Constitution, and in this *constitutional amendment* form, it received only two readings in the Senate and one reading in the House. For that reason, H.B. No. 2789 did not, as a bill to *amend the Constitution*, receive the requisite three readings in each house as required pursuant to article XVII, section 3, and article III, section 15.

As this Court explained, there is a distinction between a statutory amendment and constitutional amendment:

> A statutory amendment must be introduced, read three times in each house, and passed by a simple majority. Haw. Const. art. III, §§ 13-15. In contrast, under article XVII, section 3, while the legislature has the authority to propose a constitutional amendment in a single session, the legislature cannot make that amendment law. In the single session process, a constitutional amendment can only be effected if it is proposed as such, given three readings in each house, and meets the other requirements set forth in article XVII. Haw. Const. art. XVII, § 3. The critical distinctions between "enacting" ordinary legislation pursuant to article III, section 14 and "proposing" a constitutional amendment under article XVII are exemplified by the fact that constitutional amendments are governed by a separate article. . . .
> In *Schwab*, this court considered the requirements embodied in article III alone; in this case, 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 (citations omitted).

Taomae thus dealt with a statutory amendment bill that, upon becoming a constitutional amendment bill, acquired a completely different identity and became subject to the requirements set forth in article XVII, section 3. Here, S.B. No. 2858 was a bill to enact a statute that *remained* a bill to enact a statute. Indeed, *Taomae* is so readily distinguishable that Plaintiffs themselves did not try to argue that this case provides dispositive guidance on the issue before this Court.[4]

[4] Plaintiffs cite *Taomae* for general legal propositions only. *See* Open. Br. at 10 and 23.

Third, amicus wrongly, based on its misplaced reliance on *Schwab* and *Taomae*, proposes its own made-up "rules" for guiding this Court's review. Specifically, amicus wrongly contends that:

> 3. A plaintiff satisfies [the "unconstitutional beyond a reasonable doubt"] standard by proof that in the ordinary mind, the "general subject" of the bill as introduced is not generally related to the subject of the bill as adopted. [*Schwab,*] at 31, 564 P.2d at 140; *Taomae*, 108 Haw. at 255, 118 P.3d at 1197. If the original and the amendment are "dissimilar or discordant" and have no "legitimate connection with or relation to each other," readings must begin anew. *Schwab*, 58 Haw. at 33, 564 P.2d at 144; *Taomae*, 108 Haw. at 254, 118 P.3d at 1198.
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> 4. If, instead of rebooting readings, the legislature presses forward and adopts the amended bill without having three distinct readings in each house, a reviewing court must declare the bill "nugatory." *Schwab*, 58 Haw. at 31, 564 P.2d at 139.

(Pet. at 9-10.)

There is no applicable "dissimilar or discordant" standard. And this Court's imposition of such a standard would be contrary to the plain language and constitutional history of art. III, section 15. Indeed, neither the text nor the constitutional history of section 15 require bill amendments that are deemed "dissimilar or discordant" (whatever that may mean[5]) to go back to square one to receive a new round of "three readings" in each house.

Limiting the Legislature's ability to amend its own bills violates separation of powers principles. It is within the Legislature's purview to create statutory law. Legislation is necessarily a messy, complicated process; it is sausage-making. And the Legislature's bill-making authority is meaningless without the necessary latitude to meaningfully amend pending legislation to address the true needs of the people of Hawai‘i.

[5] One problem with adopting a standard that constrains the Legislature's ability to amend bills is that there is no way to establish definitive guidelines. How is "dissimilar or discordant" to be defined, for example, given the practical need for the Legislature to freely amend bills in order to appropriately respond to and address the needs of the people of Hawai‘i?

Legislation must be responsive to ever changing community needs. Although there is a fixed deadline for the introduction of new bills, the needs of the public sometimes change during the months that follow the bill introduction deadline. This happened, for example, when "extraordinary weather events" in April 2018 necessitated appropriations for disaster relief efforts, in the county of Kauai, and other areas of the State, that could only be timely introduced through an existing vehicle bill. The deadline for introducing a new bill had already passed. The conference committee considering S.B. No. 192, "An Act Relating to the State Budget," amended the language of the original bill to include this new disaster relief appropriation in order to respond to a catastrophic event that it recognized has "caused damage, losses, and suffering that affected the health, welfare, and living conditions of a substantial number of persons." (ICA 24 at PDF 116, 117 [Conf. Com. Rep. No. 1].) The rigid standard that amicus urges this Court to adopt would have foreclosed the Legislature from amending S.B. No. 192 to ensure that appropriate, timely relief was made available to the victims of the April 2018 flooding.

At its core, gut and replace is a form of bill amendment. Bill amendment is a critically necessary part of the legislative process. It enables the Legislature to better serve its constituents by timely and appropriately addressing their specific needs. And the legislative history of S.B. No. 2858 demonstrates that it was done through a bill making process that clearly satisfies the subject-in-title requirement of article III, section 14, and the three readings requirement of article III, section 15.

CONCLUSION

For the above reasons, Grassroot Institute's amicus brief fails to add to the argument set forth by Plaintiffs. Rather, it merely proposes an invented "dissimilar or discordant" standard that is both impossible to define and would interfere with the Legislature's ability to carry out its constitutionally derived lawmaking functions.

This Court should affirm the circuit court's Judgment for the reasons set forth here and in the State's Answering Brief.

DATED: Honolulu, Hawai‘i, February 10, 2020.

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CERTIFICATE OF SERVICE

I certify that on February 10, 2020, the attached State of Hawaii's Response to Grassroot Institute of Hawaii's Amicus Brief was served electronically (through the Court's JEFS system), or conventionally (by mailing copies via USPS, first class, postage prepaid), upon the following:

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