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IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

LEAGUE OF WOMEN VOTERS OF
HONOLULU and COMMON CAUSE,

Plaintiffs-Appellants,

vs.

STATE OF HAWAII,

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 HAWAII'S RESPONSE TO
TAX FOUNDATION'S AMICUS BRIEF**

CERTIFICATE OF SERVICE

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**STATE OF HAWAII'S RESPONSE
TO TAX FOUNDATION'S AMICUS BRIEF**

The State's Answering Brief (ICA 80) responds to the Tax Foundation's legal arguments, many of which are largely duplicative of Plaintiffs-Appellants' own arguments. The practice of "gut and replace" complies with article III, sections 14 and 15 of the State Constitution for all of the reasons set forth in the State's Answering Brief. The State submits this brief Response in order to specifically address any unique points raised by, or relating to, the Tax Foundation's Amicus Brief.¹

First, the Tax Foundation fundamentally misconstrues the issue before this Court. The issue is whether S.B. No. 2858 (2018), which was enacted into law as 2018 Haw. Sess. L. Act 84, is in constitutional compliance with article III, sections 14 and 15 of the State Constitution. The Tax Foundation asks this Court to look beyond that constitutional inquiry, to more broadly set limits on the Legislature's ability to amend bills (particularly the tax bills that are of specific interest to the Tax Foundation). Speaking in broad, hyperbolic terms, the Tax Foundation contends that "there are always those who think the ends justify the means," and who think that "precepts in our constitution are rules of convenience that are made to be broken." (Br. at 7.) In other words, based on its own subjective (and legally unsupported) determination of legislative overstep, the Tax Foundation asks this Court to ignore separation of powers principles, and to improperly constrain the Legislature's inherent and necessary discretion to create law: "The public needs to rely on the Judiciary to require the Legislature to hew to the dictates of our constitution, as the Legislature appears unwilling to do so on its own." *Id.* The Tax Foundation points to *no* legal authority that supports its position. Nor can it; the weight of legal authority supports the State's argument that S.B. No. 2858 is constitutional (*see* State's Ans. Br. at 9-27).

The Tax Foundation, in fact, frequently undercuts its own argument by acknowledging that: (1) "for the most part, legislators do try to hear from the public," (2) "[t]he Foundation recognizes that our constitution generally has empowered our Legislature to determine the rules of its own proceedings," and (3) "[t]he legislative houses generally recognize their obligations toward the public, as can be seen in their rules." (Br. at 7-8.) It argues, however, that this is not

¹ This Court gave the parties leave to file a 10-page response to the Tax Foundation's amicus brief within 30 days of the amicus brief filing date. (ICA 47.) And it subsequently granted the State's motion to extend this deadline to November 13, 2019, the State's current deadline for filing its answering brief. (ICA 74.)

enough, and that this Court should look beyond the question presented to this Court – i.e., whether Act 84 (2018) is constitutional as enacted -- in order to broadly constrain the Legislature's discretion to amend bills.

As the State explained in its Answering Brief, separation of powers principles "preclude a commingling of . . . essentially different powers of government in the same hands and thereby prevent a situation where one department would be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments." *Pray v. Judicial Selection Comm'n of State*, 75 Haw. 333, 353, 861 P.2d 723, 732 (1993)(citation omitted); *see also*, State's Ans. Br. at 8-9. This Court's jurisdiction is clearly limited to its review of whether S.B. No. 2858's passage was constitutionally compliant with article III, sections 14 and 15 of the State Constitution. For this Court to do more, through its setting of arbitrary limits on the Legislature's ability to amend the bills being considering for passage, would amount to a "coercive influence" on the Hawai'i Legislature's political branch powers.

Limiting "how much" or "how substantively" the Legislative Branch can amend a bill would directly interfere with and constrain its policy-making authority. It would limit the Legislature's ability to timely address public needs that arise later in a legislative session. It would mean that the Legislature could not amend bills to address emergency situations, such as the extraordinarily destructive flooding that affected various parts of the State in April 2018. (ICA 24 at PDF 110, 112 [S.B. No. 192, S.D. 1, H.D. 1, C.D. 1 (2018)].) The Hawai'i courts cannot limit legislative policy-making authority in this way, without violating the separation of powers doctrine. *Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City, Mo.*, 742 F.3d 807, 809 (8th Cir. 2013) ("the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines")(citation omitted).

Second, the Tax Foundation wrongly suggests, again without citing to any supporting legal authority, that the public has a constitutional right to formally testify on the final form of a bill that is amended in conference committee. (*See* Br. at 8-9.) As explained in the State's answering brief, article III of the State Constitution sets no limits on the Legislature's ability to freely amend its bills. Moreover, the longstanding legislative practice demonstrates that our Legislature *must* have free reign to change the language of the bills prior to passage, even where

it is not possible to solicit formal public testimony on these changes. The safety and welfare of the public are often dependent upon our Legislature's ability to make these critical changes.

None of this is to suggest, of course, that the public cannot comment on particular bills at every stage of a legislative proceeding. In our representative democracy, our Legislature is accountable to the people of Hawai'i. Formal House and Senate hearings do not provide the only opportunity for individuals to vocalize their support or opposition for particular legislative measures. Constituents are free to express their views, at any time and on any given bill, to any member of the House or Senate. The legislative bill enactment process is transparent; information about a bill's current status, current drafts of bills, committee reports, and testimony are available via the Legislature's Internet website. *See* <https://www.capitol.hawaii.gov/> (last visited Nov. 13, 2019). Public notice is given of all changes to a bill's language, and the people of Hawai'i are generally not reticent about voicing their views.

Moreover, as explained in the State's answering brief, in this case there *was* a public hearing on S.B. No. 2858 (on the House side) after the bill first acquired its specific hurricane safety-focus. (ICA 24 at PDF 87-88 [Measure Status Rpt.].) Several entities, including OHA, testified with respect to the amended language. As this case addresses the specific constitutionality of *S.B. No. 2858*, and the record clearly reflects that the public had the opportunity to testify on S.B. No. 2858, this Court must not speculate as to whether the public was heard. Clearly it was.²

Third, the three tax bills that the Tax Foundation cites demonstrate why it is imperative that our Legislature retain the flexibility to replace the contents of bills. Many legislative bills are significantly amended. Some are amended to clarify, refine, or alter the underlying intent of the original bill. Others, however, are amended to significantly change the content of a bill, consistent with the bill's subject-in-title, in order to address a specific statutory need that may become apparent later in a legislative session. With respect to the latter form of amendment, "gut and replace" enables the legislature to timely and meaningfully pass critically important legislation. Each of the bills that the Tax Foundation cites evolved from its original form into an amended measure that was undeniably important to the Hawai'i public. In its final form:

² Plaintiffs in this case do not raise any due process claims, or otherwise claim that they were denied an opportunity to be heard as to the hurricane safety language of S.B. No. 2858.

- H.B. No. 375, 29th Leg., Reg. Sess. (2017), relating to taxation, appropriated moneys for the Hawai‘i tourism authority, working in conjunction with the Hawai‘i lodging and tourism association, to implement projects addressing homelessness in tourist and resort areas. Homelessness is a staggering problem for the State. The Legislature must have the flexibility to provide necessary funding for programs that provide potential solutions to homelessness-related concerns that are identified during the legislative session.
- H.B. No. 1689, 28th Leg., Reg. Sess. (2016), relating to taxation, established a five-year organic foods production credit. As the conference committee on H.B. No. 1689 explained: "providing additional support to Hawaii's agricultural industry could help to reduce reliance on agricultural imports and to foster job growth in the State. Your Committee on Conference believes that reducing the burden on the emerging number of small farmers seeking costly, but necessary, certifications and inspections will help to promote the production of locally grown food." Conf. Com. Rep. No. 102-16, in 2016 House Journal, at 1381, 2016 Senate Journal, at 807.
- H.B. No. 2434, 27th Leg., Reg. Sess. (2014), relating to the transient accommodations tax authorized the Hawai‘i Tourism Authority, among other things, to issue \$40 million in revenue bonds, and to use the proceeds to acquire a conservation easement for lands at Turtle Bay, on the island of Oahu. It also established a continually applicable financing mechanism, whereby \$3.5 million of transient accommodations tax revenue would be annually transferred to the general fund. As the Tax Foundation itself acknowledges, this conservation "deal" "meant a lot to many people." (Br. at 6.) As the conference committee that heard H.B. No. 2434 explained, "a historic opportunity exists to acquire a conservation easement on lands at Turtle Bay on Oahu that would preserve in perpetuity public access to pristine oceanfront land that represent one of the finest examples of our State's natural beauty." Conf. Com. Rep. No. 144-14, in 2014 House Journal, at 1537, 2014 Senate Journal, at 754.

Each of the above three bills received a "final form" reading in both the House and Senate prior to final passage. Both the House and Senate also received, pursuant to article III, section 15, forty-eight hours notice of each bill's final form prior to that final reading. *See* https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumb

er=375&year=2017 [H.B. No. 375 HD1 SD1 CD1, Measure Status Rpt.] (last visited Nov. 13, 2019); https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=1689&year=2016 [H.B. No. 1689 HD2 SD2 CD1, Measure Status Rpt.] (last visited Nov. 13, 2019); https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=2434&year=2014 [H.B. No. 2434 HD2 SD2 CD1, Measure Status Rpt.] (last visited Nov. 13, 2019). This satisfied the Framers' concerns that each house, and the public, must be given adequate notice of any amendments made prior to a measure's passage. (See State's Ans. Br. at 11-14.) Both legislative houses and the public received the constitutionally required notice prior to each bill's passage.

In sum, the three bills cited by the Tax Foundation evolved, throughout their respective legislative sessions, to address issues of unquestionable importance to the State: i.e., homelessness, State agricultural independence, and the conservation of Turtle Bay lands. Rather than serving as examples of legislative overreach, these bills illustrate why the Hawai'i Legislature must continue to have discretion to amend its bills in order to address Hawaii's specific needs.

Fourth, as explained in the State's Answering Brief, a hundred years of Hawai'i Supreme Court case law establishes that a bill's subject-in-title can be broad. Indeed, it must be broad enough to encompass the amendments and changes that the Framers contemplated could occur during the evolution of a bill. Pursuant to this Court's longstanding precedent, "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." *Schwab v. Ariyoshi*, 58 Haw. 25, 35, 564 P.2d 135, 141 (quoting *Schnack v. City and County of Honolulu*, 41 Haw. 219 (1955)).

Moreover, the Tax Foundation has not demonstrated that "broad" bill titles have prevented it from monitoring those tax-related bills that are of particular interest to it. In its amicus brief, the Tax Foundation complains of three bills – two of which were titled "relating to taxation," and one which was titled "relating to transient accommodations taxes." All three were clearly labeled as "tax" bills. As the self-appointed "taxpayer watchdog organization" (Br. at 1), the Tax Foundation was cognizant of these "tax" bills, as was, presumably, anyone else with an interest in "taxation" or the "transient accommodations tax." It is thus difficult to understand

how these examples support the Tax Foundation's contention that changes to a bill's content are "notoriously hard to follow." (Br. at 7.)

Fifth, like Plaintiffs, the Tax Foundation lacks standing to challenge the constitutionality of S.B. No. 2858. As the Tax Foundation candidly admits: "The Act involved in this case was never a tax bill and the Foundation takes no position regarding the wisdom of this Act. The problem is the process by which the Act came to be. The Foundation is concerned that the precedent set by this case will be applicable to tax bills." (Br. at 2.) But again, the problem is that this case is specifically about whether S.B. No. 2858 is constitutional, and the Tax Foundation has blithely disavowed any substantive interest in S.B. No. 2858's enactment into law. That is, even if the Tax Foundation has concerns with the process by which S.B. No. 2858 was enacted, it has no quarrel with the important hurricane safety purpose underlying this bill. For this reason, the Tax Foundation clearly lacks a "concrete interest" in challenging the constitutionality of S.B. No. 2858, and its arguments thus lend little support to Plaintiffs' arguments. *See* State's Ans. Br at 28-29 (citing *Tax Foundation of Hawai'i v. State*, 144 Hawai'i 175, 439 P.3d 127 (2019)).

* * *

For all of the above reasons, and for the reasons set forth in the State's Answering Brief, this Court should affirm the circuit court's judgment below.

DATED: Honolulu, Hawai'i, November 13, 2019.

Respectfully Submitted,

/s/ Kimberly Tsumoto Guidry

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CERTIFICATE OF SERVICE

I certify that on November 13, 2019, the attached State of Hawaii's Response to Tax Foundation'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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