No. CAAP-19-0000372

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAIʻI

LEAGUE OF WOMEN VOTERS OF HONOLULU and COMMON CAUSE,

Plaintiffs-Appellants,

Vs.

STATE OF HAWAIʻI,

Defendant-Appellee.

Civil No. 18-1-1376-09 GWBC

CIRCUIT COURT OF THE FIRST CIRCUIT

HONORABLE GARY W.B. CHANG

TAX FOUNDATION OF HAWAIʻI'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

CERTIFICATE OF SERVICE

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TAX FOUNDATION OF HAWAIʻI'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

Pursuant to this Court's Order Granting Tax Foundation of Hawaiʻi's Motion for Leave to File *Amicus Curiae* Brief in Support of Appellants, and Rule 28(g) of the Hawaiʻi Rules of Appellate Procedure, the Tax Foundation of Hawaiʻi ("Foundation") submits this brief in support of Appellants, respectfully urging this Court to reverse the judgment below.

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Foundation is a non-partisan, non-political IRC § 501(c)(3) organization whose mission is to educate taxpayers and lawmakers on taxation and public finance. We educate and encourage the efficient and effective use of public funds (our tax dollars) to operate government and deliver public services. To do that, we track changes in tax law and how taxpayer dollars are used. Our work is published and distributed as widely as possible and free of charge. A well-informed public (and this includes lawmakers) that understands the impact of our tax system can more effectively participate in pressing for greater government efficiency and accountability.

Over the years, the Foundation has also functioned as a taxpayer watchdog organization, on many occasions scrutinizing and then calling out the government's legislative proposals to make its own job easier at the expense of taxpayer rights and protections. This case, to the Foundation, is an example of constitutional protections of the public's right to be informed that appear to be treated as rules of convenience rather than necessity.

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. Plaintiffs' "Rusty Scalpel Award" recognizes bills, often subjected to techniques worthy of Dr. Frankenstein, that leave the Legislature in a form completely different from that in which they were introduced. In the six years of the award's existence, fully half of the winners have been tax bills.

II. STATEMENT OF THE CASE

This brief relies on, and incorporates by reference, the Statement of the Case in Appellants' Opening Brief.

To give this Court a clearer understanding of the legislative practices used in recent years, the Foundation offers three examples of tax bills, each of which have been recognized with the Plaintiffs' "Rusty Scalpel Award."

A. Act 214, SLH 2017: Tax Bill Morphs into Homeless Appropriation

As introduced, HB 375 (2017), entitled "Relating to Taxation," proposed amending income tax rates to negate any income tax liability for those at or below poverty thresholds. The Senate Ways and Means Committee was the first to drastically amend the bill, gutting its contents and replacing it with provisions to repeal the sunset date for the refundable food/excise tax credit in HRS § 235-55.85. HB 375, SD 1 (2017). In its report, the Senate committee noted that the new provisions appeared in HB 209, HD 1 (2017) and

SB 648 (2017), both of which were heard by that committee. S. Stand. Comm. Rep. No. 1288 (2017). But the Conference Committee to which the bill was then referred drastically altered it again, this time to appropriate $1 million, subject to certain conditions, for projects to address homelessness in tourist and resort areas. HB 375, CD 1 (2017). The Conference Committee's report failed to explain why this bill was changed to one that was not even about taxation any more. Conf. Comm. Rep. No. 145 (2017).

Here, the bill violates the single subject rule.[1]

B. Act 258, SLH 2016: Energy Credit Bill Gutted and Replaced with New Organic Foods Credit

In 2016, the Legislature was busy working on a bill to replace the ethanol fuel production credit, which no one had taken advantage of, with a more broadly applicable tax credit to produce renewable fuels. Bills on this subject included SB 2652 (2016) and HB 1689 (2016), both entitled "Relating to Taxation." When the House Bill went over to the Senate and vice versa, both bills contained language to accomplish this objective and had no extraneous matter. HB 1689, HD 2 (2016); SB 2652, SD 2 (2016).

When the House Committee on Energy and Environmental Protection got the Senate bill, however, it snuck in an "organic foods production credit." This new credit was contained in a proposed draft of SB 2652 that was posted on March 18, Friday, for a committee hearing on the

[1] The bill might pass the three readings requirement because HB 317 (2017) and SB 1085 (2017) proposed allocating $2 million of TAT revenues toward homeless relief in resort areas. Both bills passed out of their subject matter committee(s) but were not heard in the money committees, and thus passed two readings.

following Tuesday, March 22.[2] The proposed draft was adopted. SB 2652, HD 1 (2016). The House Finance Committee got the bill next and passed it out with minor amendments.

Both SB 2652, HD 2 (2016) and HB 1689, SD 2 (2016) went into conference. The Senate was seeing the organic foods production credit for the first time, as no other tax bill with that content had been introduced in either the House or the Senate. Lawmakers deleted the organic foods production credit language from SB 2652 and passed it out as an energy credit bill. They then deleted everything in HB 1689 and replaced its contents with the organic foods production credit. HB 1689, CD 1 (2014); Conf. Comm. Rep. No. 102 (2014). Both bills were later signed into law.

Here, a bill with the organic foods production credit had only one reading in the Senate, upon final passage of the conference draft.

C. Act 81, SLH 2014: Technical TAT Bill Scrubbed and Replaced with Turtle Bay Financing

In Kahuku on the north shore of Oahu stands the Turtle Bay Hotel. The owner of it and its surrounding environs was locked in a battle with area residents over how much new development the owner would be able to construct. After much negotiation, a deal was reached: the hotel's owner, Replay Resort, would retain ownership of the property and be responsible for maintaining it, but would sell a "conservation easement," meaning that neither

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[2] Notice of Hearing, Committee on Energy & Environmental Protection (Mar. 22, 2016), available at https://www.capitol.hawaii.gov/session2016/hearingnotices/–HEARING_EEP_03-22-16_.HTM.

the current nor any future owners would be allowed to develop most of the land. The conservation easement would include two public parks, wetlands, a trail system and oceanfront access. The area also includes an existing golf course that the public would need permission to enter. The owner would be paid roughly $48.5 million. The state's share would be $40 million, the City and County of Honolulu would contribute $5 million, and the Trust for Public Land would add another $3.5 million.

HB 2434 (2014), titled "Relating to the Transient Accommodations Tax," was supposed to tweak an existing $3 million earmark on the TAT, specifically in HRS § 237D-6.5, to divide it among special funds controlled by the Hawaii Tourism Authority and the Board of Land and Natural Resources instead of paying it over to the general fund. The bill wound its way through both the House and the Senate in substantially that form. *See, e.g.,* HB 2434, SD 2 (2014). In conference committee, however, the bill was gutted and then transformed into one that required refinancing of the convention center debt and using the savings to come up with the $40 million for the Turtle Bay conservation easement and to provide $3.5 million of additional revenue to the general fund. Conf. Comm. Rep. No. 144 (2014). Specifically, the $40 million was to be raised by selling revenue bonds tied to a new earmark on the TAT, giving the bill's contents at least a colorable connection with its title.

The idea of revenue bonds, however, was unworkable on the bond market. Investors didn't like bonds where only one tax was pledged to ensure bond repayment as opposed to the full faith and credit of the State. Thus, the

funding mechanism was replaced the very next year with general obligation bonds. Act 121, SLH 2015 (SB 284).

In 2014, therefore, HB 2434's contents were tossed aside and replaced, literally in the eleventh hour, with a bill that was heard by neither the House nor the Senate. The sketchy funding mechanism enacted through that bill, which perhaps was tied to the TAT only because the bill's title required it, was substantially replaced the very next year. Why? To be sure, this deal meant a lot to many people. Some went so far as to say that the end justifies the means. "My idea with any piece of legislation," then-Governor Abercrombie was quoted as saying at the time, "is to keep your eye on the prize, and not on the process."[3]

This bill seems to have had only one reading in the House and the Senate in 2014.

III. ARGUMENT

The Foundation agrees with Appellants that the three readings requirement[4] and the subject in title requirement[5] are in the Hawaii Constitution for good reasons, namely, to allow for meaningful public awareness of the ideas embodied in a legislative bill and the opportunity for thoughtful public input. Over the years, the Foundation has attempted to

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[3] West Hawaii Today, "Legislature approves major land deal at Turtle Bay" (May 2, 2014), available at https://www.westhawaiitoday.com/2014/05/02/hawaii-news/legislature-approves-major-land-deal-at-turtle-bay/.

[4] "No bill shall become law unless it shall pass three readings in each house on separate days." Haw. Const. art. III, sec. 15

[5] "Each law shall embrace but one subject, which shall be expressed in its title." Haw. Const. art. III, sec. 14.

track thousands of bills and has tried to give meaningful feedback on them. The Foundation recognizes that for the most part, legislators do try to hear from the public. Unfortunately, there are always those who think the ends justify the means, or that the precepts in our constitution are rules of convenience that are made to be broken in the name of political exigency.

The Foundation has seen instances, such as the ones mentioned here, of bills whose contents are gutted and replaced after the time for public testimony has long passed, and those where the connection between the bill titles and their ultimate contents are tenuous at best. The Foundation has also seen non-tax bills suddenly sprout tax provisions, to everyone's surprise.[6] The Foundation finds those notoriously hard to follow. It is difficult enough to track just the tax bills and does not have enough resources to track all bills coming out of all committees. (And if the Foundation, which does this kind of tracking every year, has problems, woe be to the average citizen or company trying to keep tabs on one or a few bills that threaten to affect their activities or business.) 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.

The Foundation recognizes that our constitution generally has empowered our Legislature to determine the rules of its own proceedings. Haw.

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[6] Tax Foundation of Hawaii, "The Magical Appearing Tax" (Apr. 27, 2015), available at https://www.tfhawaii.org/wordpress/blog/2015/04/the-magical-appearing-tax/. This phenomenon was also covered on Hawaii News Now on April 22, 2015.

Const. art. III, sec. 12. But the processes by which the subject bill was adopted, as well as those used on the tax bills earlier mentioned, impact the ability of the public, from which the Legislature derives its power in the first place, to follow the Legislature's proceedings and to contribute toward its work product. This curtailment of the public's right to participate in the process needs to be addressed.

The legislative houses generally recognize their obligations toward the public, as can be seen in their rules. Senate Rule 23(4) (2019-2020), for example, provides:

> If a bill:
>
> (A) Has been referred to more than one standing committee and at least one committee hearing is required for passage of the bill out of the Senate;
>
> (B) Contains any significant or substantial amendment made by a committee other than the last standing committee to which the bill has been referred; and
>
> (C) The public has not been provided with an opportunity to submit testimony on the significant or substantial amendment;
>
> then, prior to reporting the bill out of the last standing committee, the last standing committee to which the bill was referred shall hold a public hearing to provide the public with the opportunity to testify on the bill.

The House has no comparable rule.

Although the Senate rule sounds like it would cover the evils at which the three hearings requirement is addressed, the rule does not at all restrict the ability of the *last* standing committee to which a bill has been referred from making a significant or substantial amendment without public notice. It also does not apply to conference committees, which do not take public testimony at all.

About conference committees, the legislatively agreed Committees on Conference Procedures specify:

> The authority of the Conference Committee shall be limited to resolving differences between the Senate and House drafts of a measure. Accordingly:
>
> a. With the exception of the Executive Budget, the Judiciary Budget, and the Budget of the Office of Hawaiian Affairs, a Conference Committee shall not amend a measure by inserting any unrelated or new subject matter.
>
> b. To assure the integrity of individual measures, the merging of two or more distinct but related measures into one encompassing measure shall not be allowed.

30th Legislature, Committees on Conference Procedures § 2 (2019).[7] However, exceptions to any of the procedures may be made with approval of the Senate President and the House Speaker. *Id.* § 13.

IV. CONCLUSION

For the reasons set forth above, reasonable rules should be adopted to address the evils that the three readings requirement and the single subject requirement in our constitution are designed to prevent. If the Legislature is unwilling or unable to do so itself, the Judiciary must step in to safeguard the rights of the public. Because the learned trial court declined to do so, we respectfully urge reversal.

DATED: Honolulu, Hawai‘i, September 27, 2019.

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[7] Available at http://www.capitol.hawaii.gov/session2019/docs/2019_Joint_Committees–_on_Conference_Procedures.pdf

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document will be served on counsel of record indicated below through JEFS upon the filing hereof:

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