

FIRST CIRCUIT COURT  
STATE OF HAWAII  
**FILED**

9-20-18

4:00 o'clock pm

JCH

Clerk, Sixth Division

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

CITY AND COUNTY OF HONOLULU,  
COUNTY OF HAWAI'I, COUNTY OF MAUI,  
COUNTY OF KAUA'I,

Plaintiffs,

vs.

DAVID Y. IGE, GOVERNOR, STATE OF  
HAWAI'I, in his official capacity; DOUGLAS  
S. CHIN, LIEUTENANT GOVERNOR, STATE  
OF HAWAI'I, in his official capacity;  
F.M. SCOTTY ANDERSON, CHAIRPERSON,  
ELECTIONS COMMISSION, in his official  
capacity; and SCOTT T. NAGO, CHIEF  
ELECTION OFFICER, in his official capacity,

Defendants,

and

TAX FOUNDATION OF HAWAI'I,

*Amicus Curiae.*

CIVIL NO. 18-1-1326-08 JPC  
(Declaratory Judgment; Injunctive Relief)

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER DENYING PLAINTIFF  
COUNTIES' MOTION FOR  
PRELIMINARY INJUNCTION,  
FILED ON AUGUST 31, 2018**

Hearing:

Date: September 7, 2018

Time: 1:30 p.m.

Judge: Honorable Jeffrey P. Crabtree

No trial date set

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER DENYING PLAINTIFF COUNTIES' MOTION  
FOR PRELIMINARY INJUNCTION, FILED ON AUGUST 31, 2018**

Plaintiffs CITY AND COUNTY OF HONOLULU ("City"), COUNTY OF HAWAI'I, COUNTY OF MAUI, COUNTY OF KAUA'I's (collectively "Counties") Motion for Preliminary Injunction, Filed on August 31, 2018 (the "Motion") was heard by the Honorable Jeffrey P. Crabtree, Judge, Circuit Court of the First Circuit, State of Hawai'i on September 7, 2018 at 1:30 p.m., with Corporation Counsel Donna Y.L. Leong, Deputies Corporation Counsel Robert M. Kohn and Nicolette Winter appearing on behalf of Plaintiff CITY AND COUNTY OF HONOLULU, Deputy Corporation Counsel John Mukai appearing on behalf of Plaintiff COUNTY OF HAWAI'I, Corporation Counsel Patrick K. Wong and Deputy Corporation Counsel Brian A. Bilberry appearing on behalf of Plaintiff COUNTY OF MAUI, First Deputy County Attorney Matthew M. Bracken appearing on behalf of Plaintiff COUNTY OF KAUA'I (by phone), and Attorney General Russell A. Suzuki and Deputy Attorney General Valri Lei Kunimoto appearing on behalf of Defendants DAVID Y. IGE, DOUGLAS S. CHIN, F.M. SCOTTY ANDERSON, and SCOTT T. NAGO (collectively "State Defendants"). The Court having reviewed the Motion and memoranda, declarations and exhibits attached thereto, the entire record of this proceeding, and having heard the arguments of counsel presented at the hearing on the Motion, being duly apprised of all the premises there, the Court enters the following findings of fact and conclusions of law and order.

### **FINDINGS OF FACT**

#### **Procedural Background**

1. On August 22, 2018, the Complaint was filed, seeking declaratory and injunctive relief to prevent an alleged misleading ballot heading (title) for a proposed constitutional amendment from being placed on the general election ballot.

2. On August 29, 2018, a first Amended Complaint was filed, to prevent an alleged improper ballot question from being placed on the general election ballot and indicating that the remaining counties would join the City in its Second Amended Complaint to be filed. First Amended Complaint for Declaratory and Injunctive Relief, ¶1. The City sought to obtain a court ruling prior to Friday, September 7, 2018, the date it believed the proposed ballot would be sent to the publisher for printing. Id. The City contended that the ballot measure was improper because (a) the ballot title is misleading and deceptive; (b) the ballot question is misleading and deceptive; (c) "investment real property" is not defined and the provision is therefore vague and overbroad; (d) the legislative procedure for adopting SB 2922 was flawed, was not transparent and was improper; and (e) SB 2922 interferes with the "home rule" of the Counties. Id., ¶8. The Counties (sic) sought a declaration that SB 2922 is invalid, the proposed ballot title and ballot question are invalid, and enjoining the Defendants from placing the proposed amendment on the ballot. Id., p. 8, ¶1.

3. Also on August 29, 2018, the Counties filed a Second Amended Complaint for Declaratory and Injunctive Relief.

4. On August 31, 2018, the Counties filed a Motion for Preliminary Injunction.

#### **The Motion for Preliminary Injunction**

5. At issue is the Legislature's ballot question for the proposed constitutional amendment, "Shall the legislature be authorized to establish, as provided by law, a surcharge on investment real property to be used to support public education?"

6. The proposed constitutional amendments are as follows<sup>1</sup>:

Section 2. Article VIII, section 3, of the Constitution of the State of Hawaii is amended to read as follows:

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<sup>1</sup> New material is underscored.

## **"TAXATION AND FINANCE**

**Section 3.** The taxing power shall be reserved to the State, except so much thereof as may be delegated by the legislature to the political subdivisions, and except that all functions, powers and duties relating to the taxation of real property shall be exercised exclusively by the counties, with the exception of the county of Kalawao[-]; provided that the legislature may establish, as provided by law, a surcharge on investment real property. The legislature shall have the power to apportion state revenues among the several political subdivisions."

SECTION 3. Article X, section 1, of the Constitution of the State of Hawaii is amended to read as follows:

## **"PUBLIC EDUCATION**

**Section 1.** The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor. There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry; nor shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution, except that proceeds of special purpose revenue bonds authorized or issued under section 12 of Article VII may be appropriated to finance or assist:

1. Not-for-profit corporations that provide early childhood education and care facilities serving the general public; and
2. Not-for-profit private nonsectarian and sectarian elementary schools, secondary schools, colleges and universities.

Funding of public education shall be determined by the legislature; provided that revenues derived from a surcharge on investment real property pursuant to section 3 of article VIII shall be used to support public education."

7. The Legislature specified the exact constitutional ratification question to be printed on the general election ballot, and pursuant to Hawai'i Revised Statutes ("HRS") § 11-118.5, phrased the question in a manner to enable voters to express their choice on the constitutional amendment with a "yes" or "no" response.
8. The general election is scheduled for November 6, 2018.

9. Plaintiff counties initially challenged the ballot header (title) for the proposed constitutional amendments. Nago Dec. ¶10. The Chief Election Officer removed the header for the ballot question altogether because he could not accept the City's proposed title and did not want to jeopardize the general election because of a dispute over a header. Id., ¶¶16, 18. Headers are not legally required and thus, there is no header or title for the proposed constitutional amendments on the ballot. Id., ¶18.

10. Given the strict deadlines to prepare, print, and distribute the ballots for the forthcoming general election, the State argued that any delay to modify the ballots or delete the question from the ballot may jeopardize the general election. Id., ¶¶23, 25. The State further argued there are 240 ballot types which need to be changed, proofed, printed and coordinated with the counting system, Id., ¶28, and that requiring any modification of the general election ballot at this time might increase the possibility of mistakes being made and cause irreparable harm to the Chief Election Officer as well as to the County Clerks who are responsible for sending the absentee ballots out to the voters. Id., ¶¶25-60. The court notes and finds that these particular issues did not impact the court's decision.

11. Perhaps based on the logistical issues described above in ¶ 10, Plaintiff Counties revised their request to physically remove the question from the ballot, and instead asked this court to issue an order: (1) declaring the proposed ballot question void; and (2) ordering the Chief Election Officer to issue a public proclamation stating that the question regarding the constitutional amendment should not have appeared on the ballot and should be considered stricken from the ballot and any votes for or against the measure will not be counted and have no impact. (*See*, Counties' Reply Re Motion for Preliminary Injunction, filed 9/6/18, p. 3.)

## CONCLUSIONS OF LAW

1. Any conclusion of law that is erroneously designated as a Finding of Fact is deemed to be a Conclusion of Law; any finding of fact that is erroneously designated as a Conclusion of Law is deemed to be a Finding of Fact.

2. HRS § 603-21.5 extends jurisdiction to the circuit courts to consider Plaintiffs' request for declaratory judgment and related injunctive relief regarding proposed constitutional amendments. State ex rel. Bronster v. Yoshina, 84 Haw. 179, 932 P.2d 316 (1997).

3. This motion is limited to a request for injunctive relief under Rule 65 of the Hawai'i Rules of Civil Procedure. The Court is limited to deciding: (1) which side is likely to win, i.e., whether or not the proposed amendment is too vague or is deceptive and therefore cannot go on the ballot; (2) will irreparable injury result if the vote goes forward; and (3) is a public interest involved, and, if so, does it support granting the injunction. Penn v. Transportation Lease Hawaii, Ltd., 2 Haw. App. 272, 276, 630 P.2d 646, 649-50 (1981) (*citing* Life of the Land v. Ariyoshi, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978)).

4. HRS §11-118.5 requires the Legislature to propose the exact ratification question for constitutional amendments as follows:

**[§11-118.5] Constitutional amendments, proposed.** Any constitutional amendment proposed by the legislature shall include in final form the exact constitutional ratification question to be printed on a ballot. The constitutional ratification question shall be phrased in a manner to enable voters to express their choice on the constitutional amendment by providing a "yes" or "no" response. The language and meaning of a constitutional amendment shall be clear and it shall be neither misleading nor deceptive.

(Emphasis added.)

5. The Counties argue that the terms "surcharge," "as provided by law," and "investment real property" used in the ballot question are misleading and deceptive or vague and overbroad.

6. State Defendants argue: (1) the Legislature's use of "surcharge," is used in other legislation and refers to "an additional amount" and refers to an Art. VII surcharge calculated on the investment real property tax; (2) Courts have interpreted the provision, "as provided by law," to mean the constitutional provision is not self-implementing and that it requires further clarification and enactment by the Legislature by subsequent legislation, Board of Education v. Waihee, 70 Haw. 253, 269, fn. 4, 768 P.2d 1279, 1289 (1989); and (3) "investment real property" can be defined in future implementing legislation.

7. The Court does not find the proposed language for the constitutional amendments to be deceptive. HRS § 11-118.5 does not require that the proposed constitutional amendment contain a detailed description of all of the issues and possible effects connected with the proposed amendment. The reality is that many of our most important constitutional rights approved by the voters, such as those approved by the voters following the 1978 Constitutional Convention, are somewhat general or vague. They are often clarified by subsequent legislation or court decision. Here, while the proposed language is not as clear as it could be, the court finds the language is clear enough to satisfy HRS § 11-118.5.

8. The Hawai'i State Constitution reserves the taxing power to the State but allows the Legislature to delegate the State's taxing powers to the counties and to amend such delegation. Art. VIII, Sec. 3, Hawai'i State Constitution, provides as follows:

**Section 3.** The taxing power shall be reserved to the State, except so much thereof as may be delegated by the legislature to the political subdivisions, and except that all functions, powers and duties relating to the taxation of real property shall be exercised

exclusively by the counties, with the exception of the county of Kalawao. The legislature shall have the power to apportion state revenues among the several political subdivisions.

(Emphasis added.)

9. The Counties argue that the constitutional amendments should be proposed by a Constitutional Convention, but this is not supported by Art. XVII, Sec. 3, Hawai'i State Constitution, which grants authority to the Legislature to propose amendments to the Constitution.

10. The Counties contend that the Legislature's procedures, in its committee assignments or making amendments were "irregular" or "improper". The court is not persuaded by this argument. Art. III, Sec. 12, Hawai'i State Constitution, provides in part, "[i]n any event, each house shall ... determine the rules of its proceedings." If the procedures used are alleged to be in violation of the legislature's rules, the Supreme Court has stated, "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." Schwab v. Ariyoshi, 58 Haw. 25, 36, 564 P.2d 135, 143 (1977). The court is not aware and does not find that any of the allegedly irregular procedures resulted in a constitutional violation.

11. Turning to the three key questions this court must answer:

A. Are Plaintiffs likely to win on the merits? The court answers "No." The court's reason is because as stated above, the court does not find the measure deceptive, and does not find the measure otherwise violates HRS § 11-118.5. It is not impossible that the counties could prevail, but the court finds it unlikely.

B. Is there irreparable harm? The court answers "No." This is the most important factor in the court's decision. Even if this court was convinced that the ballot language



was somewhat deceptive or misleading (and again, the court does not make this finding), a high hurdle remains on the irreparable injury issue. The court concludes an irreparable injury would not result if the vote goes forward as currently scheduled. This is not a situation where by letting the vote go forward, damage results which cannot be undone. In fact, most challenges to constitutional amendments occur after the vote, not before.

C. Does the public interest weigh in favor of an injunction? The court answers: "No." There is definitely a public interest in not having a deficient measure on the ballot, and there is definitely a public interest in allowing voters to vote on measures adopted by the State Legislature unless they are clearly deceptive or misleading. This court finds that under the circumstances of this case, the public interest on each side of the question balances evenly, or at least certainly not enough to tip the scale in favor of issuing the injunction.

**ORDER DENYING PLAINTIFF COUNTIES' MOTION FOR  
PRELIMINARY INJUNCTION FILED HEREIN ON AUGUST 31, 2018**

FOR THE ABOVE REASONS, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff Counties' Motion for Preliminary Injunction filed herein on August 31, 2018 is hereby DENIED.

DATED: Honolulu, Hawai'i, 9-20-18

  
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JUDGE OF THE ABOVE-ENTITLED COURT

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City and County of Honolulu, County of Hawai'i, County of Maui, County of Kaua'i vs. David Y. Ige, Governor, State of Hawai'i, et al.; Civil No. 18-1-1326-08 JPC; In the Circuit Court of the First Circuit, Findings of Fact, Conclusions of Law and Order Denying Plaintiff Counties' Motion for Preliminary Injunction, Filed on August 31, 2018