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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; SCOTT NAGO, CHIEF ELECTION OFFICER, in his official capacity,

Defendants.

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

CITY AND COUNTY OF HONOLULU'S **REPLY** TO STATE DEFENDANTS' OPPOSITION TO EX PARTE MOTION FOR PRELIMINARY INJUNCTION, FILED ON AUGUST 31, 2018; CERTIFICATE OF SERVICE

CITY AND COUNTY OF HONOLULU'S REPLY TO STATE DEFENDANTS' OPPOSITION TO EX PARTE MOTION FOR PRELIMINARY INJUNCTION, FILED ON AUGUST 31, 2018

A "flurry of litigation precedes the printing of the voter information guide and sample ballot each election cycle," and "the cases are almost always specially set for hearing via ex parte application."[1] "In an era where many civil litigants wait for years to get to trial, most pre-election cases are heard by the trial court in a matter of days."

The State Defendants ("State") argue against the present motion to shorten time, but none of their three arguments speak to the present motion, namely whether the hearing on the motion for preliminary injunction *must* be heard eighteen days after the filing of the motion on August 31, 2018, in accordance with Rule 7(a) of the Hawai'i Rules of the Circuit Courts, rather than upon shortened time on September 7, 2018, the hearing date tentatively suggested by the Court at the status conference with all counsel on August 31, 2018. *See* States' Memorandum in Opposition to City's Ex Parte Motion to Shorten Time ("Opp."), at 1.

I. The State's Laches Argument Is Not Factually Correct.

The complaint in the present case was filed two days after the Office of Elections notified the County of Hawai'i on August 20, 2018, of the language of the header and ballot question that formed the basis of the original complaint filed on August 22, 2018. *See* Complaint filed on August 20, 2018; Exhibit 1 and Declaration of Counsel ¶ 4, attached to the City's motion for preliminary injunction.

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[1] All quotations in this paragraph are taken from Bradley W. Hertz, *"The Somewhat Secret World of Pre-Election Litigation,"* p.1, ¶¶ 1, 6, available at: http://campaignlawyers.com/2016/11/08/secret-world-pre-election-litigation/.

The State's position that "a challenge to the Constitutional question could have been filed at any time from the end of the 2018 regular legislative session in May [2018]" (Opp. at 1) ignores the fact that the Counties had no notice of the proposed header and ballot question at any time before August 20, 2018. This seems to be a form of laches argument, but it contradicts another State position that "Plaintiffs have ample opportunity to file an election challenge if and when the voters approve the question." *Id.* at 1. In other words, the State argument appears to be: "The Counties should have filed suit earlier, or they should have waited until after the general election on November 6, 2018, but the suit cannot proceed between those two times periods." There is no authority to support such a blackout during which adjudication of a ballot question cannot proceed.

In any case, the laches argument is not relevant to the present motion to shorten time.

II. The State's "Wait-Until-After-The-Election" Argument Is Not Relevant to the Present Motion to Shorten Time.

The State argues that the Counties should wait until "if and when the votes approve the question" before bringing their challenge. *See* Opp. at 1. The State suggests there is a general principle to this effect: "Courts do not generally interfere with an election that is already in progress." *Id.*

As authority for this supposed principle, the State cites *Guntert v. Richardson*, 47 Haw. 662 (1964). Opp. at 1. There the plaintiffs asked for a judgment declaring that the composition and apportionment of both the Senate and House of Representatives violated the equal protection clause. *Id.* at 669. The plaintiffs argued that even if a constitutional amendment is the means of accomplishing a permanent reapportionment, once the court declares invalid the existing apportionment provisions of the state constitution, the

legislature is authorized to institute a temporary reapportionment plan. *Id.* at 670. Under general equitable principles, the court held that it would not render a decree it could not enforce. It also held that it would not enjoin the 1964 elections under the existing apportionment unless the court was prepared to supply a temporary reapportionment plan if the legislature should not do so, and supply it in time. *Id.* at 671. But election processes are not to be disrupted altogether. *Id.* at 671.

Here the Counties are not trying to disrupt a legislative process. Rather, the basis for their challenge is the wording of a ballot question in violation of Hawai'i Revised Statutes § 11-118.5, which requires that the "language and meaning of a constitutional amendment shall be clear and it shall be neither misleading nor deceptive."

III. The Presumptive Constitutionality of Legislative Enactments Is Not Relevant to This Motion or Any Issue in This Case.

The State's final argument is that "Legislative enactments are presumptively constitutional and the Plaintiffs have the extreme burden of establish its unconstitutionality beyond a reasonable doubt." Opp. at 1, citing *Schwab v. Ariyoshi*, 58 Haw. 25, 31 (1997), and *Blair v. Cayetano*, 73 Haw. 536, 542 (1992).

This misses the mark because the City is not challenging the constitutionality of SB 2922, but rather their challenge is based on other grounds, including that it is misleading and vague and overbroad.

Schwab is not relevant. The plaintiffs in that case brought suit as taxpayers seeking to halt the implementation of a legislative act on the grounds that it had been invalidly enacted in violation of the state constitution and rules established by the senate and House of Representatives of the legislature. *See* 58 Haw. at 137. The Court held that there had been no violation of article III, section 15 of the constitution, which requires

that each law embrace but one subject, which shall be expressed in its title. *Id.* at 139. The Court went on to hold that alleged violations of the legislature's own rules falls within the province of the legislature and should not be interfered with. *Id.* at 144.

In *Blair*, Senator Blair sued to enjoin Lieutenant Governor Cayetano from placing on the ballot two proposed constitutional amendments purportedly adopted as Act 294 by the legislature in 1992. *Id.* at 538. The court held that there was no indication that the legislature specifically adopted each alternative as a proposed amendment as mandated by article XVII, section 3. The court agreed with Blair that the Act 294 procedure constituted an unlawful voter referendum because leaving to the primary election voters the decision as to which of the two alternative proposals would survive and be placed on the general election ballot was an impermissible delegation of the legislative authority to the electorate. *See id.* at 548.

Schwab and Blair are thus irrelevant because the Counties are not seeking to prevent a ballot from reaching the electorate on the basis that there is a violation of the constitution. In addition, even if the Counties had an "extreme burden of establishing [] unconstitutionality"—as the State contends but the City denies—such a burden has nothing to do with the present motion to shorten time.

In any event, *Blair did* enjoin constitutional amendments from being placed on the ballot despite the "beyond a reasonable doubt" burden. More recent cases suggest that, even with respect to cases where plaintiffs seek an injunction based upon violation of the constitution, the standard only applies to cases in which the electorate has already ratified the constitutional amendment. *See Kahalekai v. Doi*, 60 Haw. 324, 331 (Haw. 1979) ("In considering the merits of the issues raised by plaintiffs, we are to be guided by

the cardinal principle of judicial review that constitutional amendments *ratified by the electorate* will be upheld unless they are invalid beyond a reasonable doubt.") (citations omitted, emphasis added); *Taomae*, at 151 ("This court has stated that constitutional amendments that have been *approved by the voters* 'will be upheld unless they can be shown to be invalid beyond a reasonable doubt.'") (citations omitted, emphasis added).

More importantly, Hawai'i case law makes clear that lawsuits to prevent constitutional amendments from being placed on the ballot are properly brought prior to the election, so long as they are not brought too long after the suing party gets notice of the ballot question and title. For example, in *Thirty Voters ex rel. County of Kauai v. Doi*, 61 Haw. 179 (1979), the Court held that where there is an opportunity to correct irregularities in the election process or in the ballot prior to the election, plaintiffs will not be heard to complain afterward, absent fraud or misconduct. *Id.* at 181. When considering the issue of laches, the Court held that plaintiffs' conduct and their failure to bring the action in a timely manner barred them from suit. *Id.* Similarly, in *Watland v. Lingle*, 104 Haw. 128 (2004), a case in which plaintiffs contested the validity of constitutional amendments because they were not submitted to the electorate in the form required by law, the Court rejected the argument that plaintiffs would be barred by laches because the suit was filed within 10 days of being put on constructed notice, which was the first publication date of voter education material. *Id.* at 138. The initial complaint in the present case was filed two days after the County of Hawai'i received notice of the header and ballot question: there was no delay.

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CONCLUSION

The City respectfully requests that the motion to shorten time be granted.

DATED: Honolulu, Hawai'i, September 4, 2018.

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By 
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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; SCOTT NAGO, CHIEF ELECTION OFFICER, in his official capacity, Defendants.	CIVIL NO. 18-1-1326-08 DEO (Declaratory Judgment; Injunctive Relief) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 30, 2018 and by the method of service noted below, a true and correct copy of the foregoing was served upon the following at their last known address as show below:

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