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NO. CAAP-19-000372

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI`I

LEAGUE OF WOMEN VOTERS OF HONOLULU and COMMON CAUSE,

Plaintiffs-Appellants,

vs.

STATE OF HAWAI`I,

Defendant-Appellee.

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

CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI`I

The Honorable Gary Won Bae Chang, Circuit Court of the First Circuit, State of Hawai`i

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES ii

I. THE STATE VIOLATED THE THREE READINGS REQUIREMENT. 2

A. Hurricane Shelters Are Not Germane to Prison Reports.....2

B. Emergencies Are Not an Exception to the Three Readings Mandate.....4

C. The State's Plain Language Construction Is Fatally Flawed. 6

D. The State's Historical Analysis Is Fatally Flawed. 7

E. The State Does Not Identify Any Jurisdiction with a Three Readings Mandate that Permits Non-Germane Amendments. 8

II. THE STATE VIOLATED THE SUBJECT-IN-TITLE REQUIREMENT. 9

III. THE STATE'S STANDING ARGUMENTS ARE UNFOUNDED. 10

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Bevin v. Commonw. ex rel. Beshear, 563 S.W.3d 74 (Ky. 2018) 2, 8
D.M.C. Corp. v. Shriver, 461 S.W.2d 389 (Tenn. 1970) 6
Geja's Café v. Metro. Pier & Exposition Auth., 606 N.E.2d 1212 (Ill. 1992) 9
Giebelhausen v. Daley, 95 N.E.2d 84 (Ill. 1950) 8
Hoover v. Bd. of County Comm'rs, 482 N.E.2d 575 (Ohio 1985) 8
In re Goddard, 35 Haw. 203 (Terr. 1939) 10
Jensen v. Turner, 40 Haw. 604 (Terr. 1954) 10
Magee v. Boyd, 175 So. 3d 79 (Ala. 2015) 9
Moeller v. Bd. of Wayne County Supervisors, 272 N.W. 886 (Mich. 1937) 7
Morita v. Gorak, No. SCAP-16-686, 2019 WL 6110796 (Haw. Nov. 18, 2019) 5
Schwab v. Ariyoshi, 58 Haw. 25, 564 P.2d 135 (1977) ..... passim
Schwartz v. State, 136 Hawai`i 258, 361 P.3d 1161 (2015) 2
Taomae v. Lingle, 108 Hawai`i 245, 118 P.3d 1188 (2005) 10
*Tax Foundation of Hawai`i v. State*, 144 Hawai`i 175, 439 P.3d 127 (2019) 10
Territory v. Dondero, 21 Haw. 19 (Terr. 1912) 3, 10
Van Brunt v. State, 653 P.2d 343 (Alaska App. 1982) 9
Washington v. Dep't of Public Welfare, 188 A.3d 1135 (Pa. 2018) 6, 8

Constitutional Provisions

Haw. Const. art. I, § 1 1
Haw. Const. art. III, § 1 2
Haw. Const. art. III, § 14 2
Haw. Const. art. III, § 15 2
Ill. Const. art. IV, § 8 8

Constitutional History

2 Proceedings of the Constitutional Convention of Hawai`i of 1950 ..... 4, 5, 9

Other Authorities

Black's Law Dictionary (11th ed. 2019) 6, 9
Haw. A.G. Op. 03-06, 2003 WL 24094307 9

"All political power of this State is inherent in the people; and the responsibility for the exercise thereof rests with the people. All government is founded on this authority." Haw. Const. art. I, § 1. Contrary to assertions by Defendant-Appellee State of Hawai`i, Act 84 (2018) does not reflect "the will of the people of Hawai`i" simply because the Legislature voted and the Governor signed it. Dkt. 80 at 30. Elected officials are not vested with unfettered authority to pass whatever laws they choose until voted out of office. Legislative bills must follow a minimum process to become law. The State has no independent authority to bind the people of Hawai`i if it fails to abide by this agreed process.

By defining the minimum constitutional process for the enactment of laws, the Hawai`i Constitution specifies what laws carry the weight of the *people's* political power. A bill title cannot be so broad that it fails to fairly apprise the public of the interests impacted; otherwise, all bills may be titled "relating to government" and ignored as meaningless. A bill must hold true to its subject when amended or it is a new bill; otherwise, all bills are moving targets in which prior public debate of the bill is meaningless because tomorrow it could be something completely different. These limits are not a matter of the State's grace, largesse, or whim. The Hawai`i Constitution mandates these protections to preserve the right of the people to understand and participate in the legislative process.

The State mischaracterizes this case as affecting other legislation and gut-and-replace practices more generally. *E.g.*, *id.* at 23-24. This case concerns Act 84 and Act 84 only.[1] Plaintiffs-Appellants League of Women Voters of Honolulu and Common Cause (Appellants) have not claimed that all instances of gut-and-replace are unconstitutional.

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[1] The record includes unrelated legislation only at the insistence of the State (Dkt. 24 at 52-54) and Legislature (Dkt. 26 at 73 n.5, 82 n.16) and because the State challenged Appellants' standing, requiring reference to their long-standing objections to broader gut-and-replace practices at the Legislature (Dkt. 26 at 96-97, 99, 102-31). Appellants have consistently emphasized that this case concerns only Act 84. Dkt. 24 at 177 ("The examples of other legislative enactments cited by the State have no bearing on the constitutionality of Act 84 . . . ."); Dkt. 26 at 157-58 ("Other Laws Are Not in Dispute.").

E.g., Dkt. 41 at 13 n.4; Dkt. 20 [1/24/19 Tr.] at 42. Each legislative enactment has unique circumstances, and broader gut-and-replace practices are not the constitutional question here.[2] This case concerns the proper interpretation of article III, sections 14 (subject in title)[3] and 15 (three readings)[4] of the Hawai`i Constitution as applied to Act 84.

Appellants respectfully request that this Court reverse the circuit court's grant of summary judgment to the State and declare that Act 84 is void as unconstitutional.

I. THE STATE VIOLATED THE THREE READINGS REQUIREMENT.

The three readings mandate is intended to prevent hasty legislation by providing opportunity for informed and meaningful debate of proposals. Dkt. 41 at 13-15. Radical bill amendments require three new readings in some circumstances because the law recognizes that the amended bill is no longer the bill as previously read for constitutional purposes. *Id.* at 15-17. The constitutional standard for determining whether bill amendments require three new readings is germaneness. *Id.*

A. Hurricane Shelters Are Not Germane to Prison Reports.

Hawai`i courts consistently have rejected State claims—as raised here—that alleged violations of constitutional mandates concerning the legislative process are non-justiciable political questions. *E.g.*, *Schwab v. Ariyoshi*, 58 Haw. 25, 30-39, 564 P.2d 135, 139-44 (1977) (addressing constitutionality of legislation under subject-in-title and three readings mandates); *accord* Haw. Const. art. III, § 1 (Legislature has no power "inconsistent with this constitution"); *see also* Dkt. 90 at 7-10 (addressing justiciability in response to Legislature's *amicus* brief). The germaneness standard has existed in constitutional jurisprudence for well over a century and can be applied by this Court

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[2] The extent to which a decision in Appellants' favor would impact previously unchallenged legislation is not an issue in this appeal. *See, e.g.*, *Schwartz v. State*, 136 Hawai`i 258, 272-74, 361 P.3d 1161, 1175-77 (2015) (discussing retroactivity principles for judicial decisions); *see also Bevin v. Commonw. ex rel. Beshear*, 563 S.W.3d 74, 91 (Ky. 2018) ("Any infirmities that might have been raised in timely fashion to challenge the enactment of now well-established laws are beyond the purview of this opinion.").

[3] "Each law shall embrace but one subject, which shall be expressed in its title."

[4] "No bill shall become law unless it shall pass three readings in each house on separate days."

without violating the separation of powers doctrine. The State does not claim that hurricane shelters are germane to prison reports.[5] In the end, that is dispositive.

Seeking a separation of powers concern, the State concocts its own nightmare hypothetical that has no basis in precedent (or Appellants' arguments). The State claims that germaneness is so ill-defined that legislation will grind to a halt because any bill amendment will trigger a challenge, opening a "floodgate of litigation." Dkt. 80 at 28-29. As an example, according to the State under the germaneness standard, amending the recidivism reporting bill to require quarterly departmental reports instead of an annual report would require three new readings. *Id.* That is silly.

First, Appellants conceded that the Senate amendments to the recidivism reporting bill were germane. Dkt. 41 at 7-8 (recognizing three proper readings in the Senate despite substantive amendments). The State's hypothetical amendment falls squarely within amendments that Appellants conceded are germane. Second, the floodgates—as well as legitimate separation of powers concerns—are protected by the standard of review for voiding legislation. Courts presume laws are valid and only void laws if proven unconstitutional beyond a reasonable doubt by a violation that is plain, clear, manifest, and unmistakable. *Schwab*, 58 Haw. at 31, 564 P.2d at 139. Nothing would require judicial intervention in close calls—assuming that changing the reporting period were a close call under the germaneness standard, which it is not.

Lastly, courts have ably applied the germaneness standard in Hawai`i and elsewhere for over a century. Dkt. 41 at 15-17. In *Territory v. Dondero*, applying the single subject analysis, the court held that provisions for registration of motor vehicles and provisions specifying rate of speed for such vehicles were both germane to "regulating moving travel and traffic." 21 Haw. 19, 24-30 (Terr. 1912). Applying the

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[5] The State only claims that the hurricane shelter amendment was germane to public safety. *E.g.*, Dkt. 80 at 28. The State considers an unlimited number of discordant subjects germane to public safety. Dkt. 41 at 28-31 (fireworks, medical marijuana, residential sprinklers, contracting without a license, seawalls, rockfall liability). Thus, according to the State, S.B. 2858 could have been amended at any time—or every time it was heard—to any topic conceivably within the broad ambit of public safety.

germaneness standard to a single subject challenge, the *Schwab* court observed, "these parts are so connected and related to each other, either logically or in popular understanding, as to be parts of or germane to that general subject. These parts are not and cannot be held to be dissimilar or discordant subjects which would render the act unconstitutional." 58 Haw. at 32, 564 P.2d at 140. Germaneness is a well-established judicially enforceable standard.

And under that standard, this is not a close case. Hurricane shelters and recidivism reports are not akin, closely allied, logically connected, or popularly understood as related subjects. Amending the frequency of reports is a world of difference from the amendments here. If the State enacted a Frankenstein bill with both the hurricane shelter provisions and the recidivism reporting provisions (or fireworks, medical marijuana, or seawalls), it would have a single subject problem. That same germane analysis applies in examining amendments under the three readings mandate.

Non-germane bill substitutions render all prior discussion of the bill worthless. A non-germane substitution is a new bill that needs three readings to "facilitate informed and meaningful deliberation on legislative proposals" and "prevent hasty and improvident legislation." Dkt. 41 at 13-15. Hurricane shelters in schools are not germane to the Department of Public Safety's recidivism reports.

B. Emergencies Are Not an Exception to the Three Readings Mandate.

In 1950—in the aftermath of World War II and at the onset of the Cold War—the Constitutional Convention debated whether to provide an emergency exception for three readings. 2 Proceedings of the Constitutional Convention of Hawai`i of 1950 at 154 [Dkt. 26 at 175-78] (remarks of Delegate Tavares) ("I can imagine a case where, if we were at war and wanted to mobilize quickly, that there would be a little advantage in being able to pass a bill in one day to raise a national guard or state guard or something a little higher."). Chair of the Committee on Legislative Powers and Functions William Heen responded: "It would seem to me that if you have a very important measure, that

measure should at least require three days' deliberation and not less."[6] Dkt. 26 at 176. The delegates adopted the provision without an emergency carve-out or exception that would permit the Legislature to waive three readings by a supermajority. *Id.* at 191.

Appellants did not address this issue in its opening brief because the State told the circuit court that emergency concerns were not at issue in this case.

> [THE COURT]: But I was wondering because of this argument of the necessity to have flexibility to deal with changing priorities and unanticipated emergencies, do we have any changing priorities or unanticipated emergencies in connection with Senate Bill 2858? I'll say I didn't see any in the record but I was wondering because that argument was continuously made, I was wondering am I missing something?
>
> MS. CHUN: No, Your Honor, I don't believe you are missing anything. We made that statement not specifically with regard to 2858, but with regard to the specific bills and examples that we listed in our brief.

Dkt. 20 [1/24/19 Tr.] at 36-37. The State has not explained why it now claims that the non-germane hurricane shelter amendments were necessary to "secure the timely passage of critically important public safety legislation." Dkt. 80 at 8, 30.

In any event, no circumstances required that the State violate the three readings requirement to enact Act 84. If there were urgency to the legislation, the Legislature had the option to convene a special session. Dkt. 20 [1/24/19 Tr.] at 39; *accord Morita v. Gorak*, No. SCAP-16-686, 2019 WL 6110796, at *9 (Haw. Nov. 18, 2019) ("the legislature maintains the option of holding a special session"). More simply, the Legislature could have given two additional readings in the Senate for H.B. 2452—a separate bill about

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[6] Contrary to the State's implication, Dkt. 80 at 17, the 1950 framers discussed the purpose of the three reading requirement at several points and incorporated by reference the historical understanding of that mandate despite rewording the language. Dkt. 26 at 172 (three readings ensures "the purposes of the measures, and their meaning, scope, and probable effect, and the validity of the alleged facts and arguments given in their support can be fully examined, and if false or unsound, can be exposed, *before* any action of consequence is taken"), 174 ("Section 17 sets forth the requirement of passage on three readings in each house on separate days for any bill to become law, as is provided in section 46 of the Organic Act."), 175-78 (*e.g.*, "I think the intention of this section is quite clear. The purpose is to see to it that no legislation is passed hurriedly and without due and careful consideration by the legislature.").

hurricane shelters. Dkt. 24 at 106-09; Dkt. 26 at 94 n.4. H.B. 2452 had three readings in the House and one reading in the Senate. Nothing in the Hawai`i Constitution precluded the State from two additional readings of H.B. 2452 in the Senate.[7]

C. The State's Plain Language Construction Is Fatally Flawed.

The critical constitutional question here is whether a bill is still the same bill previously read after a non-germane substitution. Dkt. 41 at 6. Courts must consider the history and intent of three readings to address that question because the plain meaning of "bill" does not provide a clear answer. *E.g.*, Black's Law Dictionary (11th ed. 2019) (defining "bill" as a "legislative proposal offered for debate before its enactment"). Thus, any plain language analysis will be flawed.

The State argues that a bill number and title define a bill for constitutional purposes. *E.g.*, Dkt. 80 at 16. Appellants explained why the State's "bill number" analysis contradicts the three readings mandate. Dkt. 41 at 11-22. But it also is contrary to the *D.M.C. Corp.* case that the State cited with approval. Dkt. 80 at 27. There, the Tennessee Supreme Court struck down a law under three readings. *D.M.C. Corp. v. Shriver*, 461 S.W.2d 389, 392 (Tenn. 1970). The court held that proposed legislation consisting only of a bill number and title is not a "bill" for purposes of three readings because it did not have "other language designated as the 'body' by which language a legislator or the public generally could be informed on just what the law relating to the subject matter would be if this bill should be finally enacted as a statute." *Id.*

The Pennsylvania Supreme Court also rejected a simplistic bill number analysis under three readings. *Washington v. Dep't of Public Welfare*, 188 A.3d 1135, 1149-50 & n.32 (Pa. 2018) ("we initially reject any contention that, merely because a bill designated 'H.B. 1261' was considered by each House on three separate days, [the three readings requirement] was necessarily satisfied."). The State criticizes Appellants' citation to

[7] By rule, the Senate may have had a deadline that required a vote for additional readings of H.B. 2452. *E.g.*, 2019-2020 Rules of the Senate Rule 3(15), 87(2), *at* https://capitol.hawaii.gov/docs/SenateRules.pdf. But that deadline is not mandated by the Hawai`i Constitution, and the State should not be permitted to engage in unconstitutional conduct just to avoid the inconvenience of self-imposed rules.

Washington, claiming that the court relied on a separate constitutional provision specifically about bill amendments.[8] Dkt. 80 at 25-26. To the contrary, the Pennsylvania Supreme Court held that non-germane amendments violated the three readings requirement and declined to consider other asserted violations of the Pennsylvania constitution.[9] *Washington*, 188 A.3d at 1139 & n.5 ("Because of this ruling [on three readings], we need not address Appellants' additional claims that the manner of passage of Act 80 also violated Article III, Sections 1 [bill amendments] and 3 [single subject and subject-in-title] of the Pennsylvania Constitution.").

D. The State's Historical Analysis Is Fatally Flawed.

As explained in the opening brief, in response to the Legislature's *amicus curiae* brief, and in subsection II.B. above, the State incorrectly implies that there is no relevant history about three readings before 1968. Dkt. 41 at 13-15; Dkt. 90 at 10 n.4. And the State's discussion of the 1968 Constitutional Convention misstates the nature of the debates that it references concerning the final printing requirement. Dkt. 90 at 10-13. Rather than view subsequent framers in 1968 and 1978 as building on the existing constitutional protections, as supported by the framers' reports, the State seeks to turn the Hawai`i Constitution on its head by claiming that the new final printing requirement and the bill introduction deadline were intended to eviscerate the purpose of three readings. *E.g.*, Dkt. 80 at 17-22 & n.10 ("the additional [final printing] notice requirement modifies the three readings requirement"). That is wrong.

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[8] The State also claims that Appellants quote other sources out of context, but fails to explain how. Dkt. 80 at 26 n.17. Appellants encourage full review of the sources. None endorse such radically non-germane amendments as occurred with Act 84.

[9] The State similarly cites to a Michigan Constitution provision about bill amendments. But, as does Pennsylvania, Michigan analyzes violations of the bill amendment provision separately from violations of the three readings mandate. *Moeller v. Bd. of Wayne County Supervisors*, 272 N.W. 886, 889-90 (Mich. 1937). "This court has repeatedly held that a substitute is not a new bill . . . if it is germane of the subject covered by the first bill." *Id.* at 890. Similar to the analysis that Appellants seek here, the Michigan Supreme Court held that, for the three readings analysis, "the [Michigan] Constitution is not violated if the amendments are germane to the purpose of the original bill, even though not read three times . . . ." *Id.*

The final printing requirement served a specific purpose. Concerned about the nature of modern legislation and "the difficulty of following the many bills through the legislature in the closing days of the session," the constitutional framers sought to ensure that last-minute technical amendments could be vetted by interested groups who were already tracking the proposal. *See* Dkt. 41 at 20-22 (quoting relevant convention proceedings). The framers' intent presupposes a robust three readings mandate to ensure that bills stay germane to an original purpose. Otherwise, interested individuals would not be tracking the proposal nor in a position to evaluate final highly technical amendments in only 48 hours.

Similarly, the bill introduction deadline specifically sought to ensure that the public could "review every bill that will ever be introduced in that legislative session." *Id.* at 18-19 (quoting relevant convention proceedings). Without the three readings requirement, the bill cutoff is irrelevant. If there is no bill about fireworks introduced before the deadline, the State could substitute a new fireworks bill for one about seawalls. The public cannot "actively follow and participate in the legislative process" as intended by the bill introduction deadline if proposals can change at any minute.

All of these requirements work together to avoid a legislative shell game. Three readings is a foundational support to achieve the intent of the later protections.

E. The State Does Not Identify Any Jurisdiction with a Three Readings Mandate that Permits Non-Germane Amendments.

Few jurisdictions have dared egregiously non-germane amendments similar to the State here. Courts in those jurisdictions have struck down such efforts as unconstitutional. *Bevin v. Commonw. ex rel. Beshear*, 563 S.W.3d 74, 91-94 (Ky. 2018); *Washington*, 188 A.3d at 1154 & n.36; *Hoover v. Bd. of County Comm'rs*, 482 N.E.2d 575, 579-80 (Ohio 1985); *Giebelhausen v. Daley*, 95 N.E.2d 84, 94-95 (Ill. 1950)[10]; *cf. Magee v.*

[10] In 1970, Illinois amended its constitution to add the enrolled bill doctrine, which requires the legislature's presiding officers to certify compliance with constitutional procedures and generally does not permit challenges to that certification. *E.g.*, Ill. Const. art. IV, § 8(d) ("The Speaker of the House of Representatives and the President of the Senate shall sign each bill that passes both houses to certify that the procedural requirements for passage have been met."); *Geja's Café v. Metro. Pier & Exposition Auth.*,

Boyd, 175 So. 3d 79, 114 (Ala. 2015) ("an amended bill or a substitute bill, if germane to and not inconsistent with the general purpose of the original bill, does not have to be read three times on three different days to comply with § 63."); *Van Brunt v. State*, 653 P.2d 343, 345 (Alaska App. 1982) ("There is a limitation upon this exception to the three readings rule: if the amendments change the subject of the bill, the three readings requirement applies."); *see generally* Black's Law Dictionary (explaining in definition of "amendment" that "[a] nongermane amendment is out of order in most ordinary assemblies and many legislative bodies. But some legislative bodies, in jurisdictions where legislation may embrace more than one subject, allow nongermane amendments to a bill"). The State asserts that non-germane amendments are an accepted legislative practice in other jurisdictions.[11] Dkt. 80 at 23-25. That is not true.

II. THE STATE VIOLATED THE SUBJECT-IN-TITLE REQUIREMENT.

As Appellants explained in the opening brief, misleadingly vague titles such as "public safety" obscure the subject of proposed legislation contrary to the intent of the subject-in-title requirement. Dkt. 41 at 26-31. And it appears that the parties agree on the relevant standards for review. *Compare* Dkt. 41 at 27-28, *with* Dkt. 80 at 31-32. For example, the State favorably cites *In re Goddard*—which holds that the "title must be

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606 N.E.2d 1212, 1220-21 (Ill. 1992) (acknowledging the enrolled bill doctrine, but reserving the right to enforce the three readings mandate because "the General Assembly has shown remarkably poor self-discipline in policing itself"). Hawai`i does not follow the enrolled bill doctrine. The Hawai`i Constitution does not require certification of the procedural requirements, the framers understood that the constitutional procedures were judicially enforceable, and Hawai`i courts have traditionally enforced the constitutional procedures. *E.g.*, 2 Proceedings of the Constitutional Convention of Hawai`i of 1950 at 190-91 [Dkt. 26 at 177-78] (discussing lawsuits challenging compliance with the three readings requirement); *Schwab v. Ariyoshi*, 58 Haw. 25, 564 P.2d 135 (1977) (examining the merits of challenges to constitutional procedure); *accord* Haw. A.G. Op. 03-06, 2003 WL 24094307, at *3 (Aug. 22, 2003) ("[I]n our Opinion No. 81-7 we espoused the view that permitting courts to look behind the enrolled bill was the better view, because the enrolled bill doctrine was conducive to fraud, corruption, or wrongdoing.").

[11] The State uses Obamacare as an example. The U.S. Constitution does not provide a three readings mandate. The State cannot ignore limits imposed by the Hawai`i Constitution simply because Congress is not bound by similar restrictions.

such as to reasonably apprise the public of the interests that are or may be affected by the statute." 35 Haw. 203, 208 (Terr. 1939). Inexplicably, the State argues that a title that can be used interchangeably for an infinite number of disparate subjects (*e.g.*, fireworks, seawalls, medical marijuana, hurricane shelters) meets this standard.

Hawai`i courts have never dealt with a legislative title as broad and amorphous as "public safety". Thus, contrary to the State's argument, stare decisis is not a concern. Dkt. 80 at 33-34. Appellants do not ask the Court to overrule any prior case. Rather, Appellants ask the Court to apply the *Dondero/Goddard/Jensen/Schwab/Taomae* standard to a situation not previously litigated, but anticipated in precedent. For example, in *Jensen v. Turner*, the court flagged a concern in dicta about whether a hypothetical title "relating to elections" would permit legislation that concerned adding both voting machines and write-in ballots to elections. 40 Haw. 604, 607-08 (Terr. 1954). The court explained that the constitutional requirement

> is satisfied if provisions of the Act are naturally connected and expressed in a general way in the title—nor need all the provisions be referred to in the title—yet a sweeping change such as contended for, which would make radical changes in both the primary and election laws, should be included in the title to give proper notice to legislators and to the electorate at large.

Id. at 608. If the Hawai`i Supreme Court had a concern about "elections" in that context, there is no question that "public safety" fails to meet constitutional muster.

III. THE STATE'S STANDING ARGUMENTS ARE UNFOUNDED.

For the reasons stated in response to the Legislature's *amicus* brief, Appellants have standing to bring these claims under *Tax Foundation of Hawai`i v. State*, and the State waived any such concerns when it failed to cross-appeal the circuit court's decision that Appellants have standing. Dkt. 90 at 5-7.

CONCLUSION

Appellants respectfully request that this Court reverse the judgment below.

DATED: Honolulu, Hawai`i, December 9, 2019.

/s/ Robert Brian Black
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