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No. CAAP-19-0000372

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.	ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT Hon. Gary W.B. Chang Final Judgment: Apr. 3, 2019

MOTION OF GRASSROOT INSTITUTE OF HAWAII FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

APPENDIX "1" [PROPOSED AMICUS BRIEF]

CERTIFICATE OF SERVICE

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Grassroot Institute of Hawaii (GRIH) respectfully moves this court for leave to file a brief amicus curiae in support of Plaintiffs-Appellants under Hawaii Rules of Appellate Procedure 27, 28(g), and 34. The proposed brief is attached as Appendix "1."

I. IDENTITY AND INTEREST OF AMICUS

GRIH is a nonprofit, public policy think tank that seeks to educate people about the values of individual liberty, economic freedom and accountable government. Through the publication of accurate and timely research and commentaries, as well as by organizing events, conferences and seminars, GRIH informs Hawaii's policymakers, news media and the public at large about key public policy issues. Since its founding in 2001, it has helped provide the intellectual foundations for many public policy debates. While GRIH functions as a thought leader, it is just as committed to promoting action through practical change. In the spirit of "E Hana Kakou / Let's work together!," GRIH strives to bring Hawaii's people together to work for a better economy, better government and better society. To maintain its role as an independent voice and watchdog, GRIH refuses to accept funding from the local, state or federal governments. As an IRS 501(c)3 organization, GRIH is nonpartisan and does not

endorse political candidates or parties.

II. REASONS FOR GRANTING THE MOTION

This case and the question presented are of great importance to the people of Hawaii. Understanding if there are any limits on the legislature's ability to "gut-and-replace" the substance of a proposed bill is critically important to GRIH's members and the public at large. GRIH has participated as amicus curiae in selected cases in Hawaii's appellate courts and the federal courts, and believes the attached brief and GRIH's viewpoint will be helpful to the court here. GRIH's experience and national perspective will aid the court in resolution of the issue presented by the appeal.

The proposed amicus brief makes three main points. First, we provide the necessary context for the legal analysis—how "We, the People of Hawaii" appear to have lost faith in our government, in part because of things like gut-and-replace. Second, how two Hawaii Supreme Court decisions set out the burden of proof and provide the roadmap the circuit court should have followed here. Finally, how and why the plaintiffs should be allowed to prove their case on remand. The brief urges this court to vacate the judgment and remand the case.

For these reasons, amicus curiae respectfully requests this court grant this motion, permit it to appear as amicus curiae, and allow it to file the brief.

DATED: Los Angles, California, December 12, 2019.

Respectfully submitted.

DAMON KEY LEONG KUPCHAK HASTERT

/s/ *Robert H. Thomas*
ROBERT H. THOMAS

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BRIEF AMICUS CURIAE OF GRASSROOT INSTITUTE OF HAWAII IN SUPPORT OF PLAINTIFFS-APPELLANTS

SUMMARY OF ARGUMENT

"*Eternal vigilance is the price of liberty*."

The inscription on the National Archives in Washington reminds us that We the People govern ourselves, and have the corresponding responsibility to monitor those whom we entrust to represent us. A well-functioning republic presumes that those tasked with vigilance have the opportunity to understand what they are monitoring.[1] The Hawaii Constitution's requirement that "[n]o bill shall become law unless it shall pass three readings in each house on separate days," is thus an essential foundation of healthy democratic governance. Haw. Const. art. III, § 15. But "gut-and-replace"—the sleight of hand by which the legislature completely alters the substance of a bill, often at the last minute—renders impossible the public deliberations required by the Constitution.

The present dispute is based on two competing, but equally true, propositions. First, there is no question this bill—if *form* alone measures its constitutional validity—was adopted after three readings: a bill was introduced, subject to a public reading three times, and was then adopted. The title never changed. Equally plain, however, is that the actual subject of the bill—the *substance* of what the legislature put out to the public for consideration—radically changed between introduction and adoption (the practice isn't so much gut-and-replace, but more like bait-and-switch). The issue presented is whether the legislature alone possesses the power to decide if the form and title of the bill are alone determinative, or whether the people—acting through our courts—have any say in whether the substance of the bill matters at all.

At first blush, this question might seem to be one of separation of powers, asking whether the judiciary must defer to the legislature's internal procedures. That is

[1] *See Taomae v. Lingle*, 108 Haw. 245, 254, 118 P.3d 1188, 1197 (2005) (the purpose of the three readings requirement is to afford the public the opportunity to participate); *Jensen v. Turner*, 40 Haw. 604, 607-08 (Terr. 1954) (the purpose of the Organic Act's "one subject" rule is "to apprise the people of proposed matters of legislation").

certainly the position staked out by the State, and its amicus. However, in *Schwab v. Ariyoshi*, 58 Haw. 25, 564 P.2d 135 (1977) and *Taomae v. Lingle*, 108 Haw. 245, 118 P.3d 1188 (2005), the Supreme Court struck a more appropriate balance between the branches of government (and the people) by concluding that the legislature does not have unfettered control, even on matters involving its own procedures. We the People have the final word, as expressed in the Hawaii Constitution. And when a dispute arises about what the Constitution requires, the courts have an essential role.

While a court will not lightly intrude on the legislature's prerogative to establish its own internal working rules (and consequently, challengers are subject to a high burden of proof), the plain words and meaning of the Constitution govern, and the courts have a central part in ensuring the Constitution's substantive requirements are followed. Thus, if a bill is amended so that the original and the amendment are "dissimilar and discordant" with no "legitimate connection with or relation to each other," the Constitution requires that the public readings process be restarted. If it is not, a reviewing court must invalidate the adopted act. The circuit court concluded otherwise, however, and applied a "rational basis" test that required deference to the legislature if recidivism and hurricane preparedness could be conceivably related to "public safety." The court's error was in comparing each version of the bill to the title, when it should have compared the substance of each version of the bill. In short, under *Schwab* and *Taomae*, appropriate deference to the legislature does not require the courts take a hands-off approach and examine only the title of the bill and ask if it is conceivably related to the substance of the bill in any of its iterations.

The judgment should be vacated and the case remanded to the trial court for a determination of whether the plaintiffs have proven beyond a reasonable doubt that the content and essential purpose of the bill changed so that the original and amended versions are "dissimilar and discordant."

QUESTION PRESENTED

> What burden of proof governs the trial court's review of a claim that the legislature did not adopt a bill in conformity with the three readings requirement of Article III, section 15 of the Hawaii Constitution?

ARGUMENT

This brief makes three main points. First, we provide the context for the legal analysis—how "We, the people of Hawaii"[2] appear to have lost faith in our government, in part because of cynical procedures like gut-and-replace. Second, how *Schwab* and *Taomae* set out the burden of proof and the test to evaluate an Article III, section 15 claim, and provide the roadmap the circuit court should have followed here. Finally, we argue that the plaintiffs should be allowed to prove their case on remand.

I. "Somewhere along the way, enthusiasm died."

There may not be a one-to-one correlation between the sad fact that trust in government is at an all-time low both locally and nationally[3] and the gut-and-replace procedure by which the legislature has rendered the three readings requirement an empty shell, but surely the legislature's lack of transparency is a large contributing factor to the public's belief the system has failed. *See* Nancy Cook Lauer, *Hawaii Gets A D+ Grade in 2015 State Integrity Investigation*, The Center for Public Integrity (Nov. 9, 2015) https://publicintegrity.org/federal-politics/state-politics/hawaii-gets-d-grade-in-2015-state-integrity-investigation/ ("Most at issue for two public interest groups are so-called "logrolling"—or the trading of political favors—and "Frankenstein" bills that come out of legislative committees or conference sessions bearing very little resemblance to the bills that went in. Lawmakers ultimately pass legislation that the public hasn't had a chance to review and respond to, involving issues the public may have had no idea were under consideration.").[4]

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[2] *See* Haw. Const. preamble ("We, the people of Hawaii . . . reaffirm our belief in a government of the people, by the people and for the people . . . do hereby ordain and establish this constitution for the State of Hawaii.").

[3] *See*, *e.g.*, Nathan Eagle, *In Hawaii, People Like Trump Better Than They Like The Legislature*, Honolulu Civil Beat (Sep. 26, 2019) ("In deep blue Hawaii, Republican President Donald Trump has a higher approval rating than the state's almost entirely Democratic Legislature, according to a new survey by the University of Hawaii's Public Policy Center.") https://www.civilbeat.org/2018/09/in-hawaii-people-like-trump-better-than-they-like-the-legislature/.

[4] *See also* Ron Elving, *Poll: 1 In 5 Americans Trusts The Government*, Nat. Pub. Radio (Nov. 23, 2015) ("Only 19 percent of Americans—about 1 in 5—say they trust the government 'always or most of the time,' according to a study released by the Pew Research Center on Monday.")

Voter apathy in Hawaii is also at an all-time high. As the headlines constantly remind us, Hawaii possesses the embarrassing distinction of having one of the nation's most dismal voter registration statistics. For example, in 2010 only 48.3% of our voting-age population even bothered to register. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2012 Table 400: Persons Reported Registered and Voted by State: 2010*. The decline since statehood has been precipitous, when Hawaii possessed the nation's *highest* political participation rates, with voter registration upwards of 90%. *See* John D. Sutter, *Hawaii: The state that doesn't vote*, CNN (Oct. 24, 2012) ("No matter how little you care for politics, it seems unhealthy—criminal, some people in Hawaii told me—that such a small slice of the electorate makes decisions that affect the quality of life for everyone in the state, including the majority that doesn't vote. This is all the more shocking when you consider that more than 90% of registered voters in Hawaii participated in elections for several years after statehood in 1959. People cared about what their newborn state would turn into. Somewhere along the way, enthusiasm died.") http://www.cnn.com/2012/10/21/opinion/change-the-list-voter-turnout-hawaii/index.html.

Not only is registration low, actual voting is also suffering. *See* Gregg K. Kakesako, *Hawaii sinks to record low voter turnout*, Honolulu Star-Advertiser (Aug. 13, 2016) ("With the final results of the night released, it's official: Hawaii set a record low for voter apathy in a primary election on Saturday, when only 34.7 percent of registered voters bothered to cast ballots. In all, 251,959 people voted. The previous low for a primary election was set in 2008, when 36.9 percent of registered voters cast ballots. Some 246,070 people voted in the 2008 primary.") https://www.staradvertiser.com/2016/08/13/breaking-news/no-major-problems-reported-as-polls-open-across-state/. As the history regarding the 1990 amendments to the elections code noted, even the

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https://www.npr.org/2015/11/23/457063796/poll-only-1-in-5-americans-say-they-trust-the-government; James Palmer, *Poll Shows Shrinking Trust in Government and Each Other*, Courthouse News Service (July 22, 2019) ("In a Pew Research Center survey of 10,618 adults late last year, 75% of respondents felt that Americans' trust in the federal government is declining, and 64% said the same about trust in each other.") https://www.courthousenews.com/poll-shows-shrinking-trust-in-government-and-each-other/.

legislature is alarmed by these facts: "[y]our Committee believes that declining voter participation is unhealthy." H. Stand. Comm. Rep. No. 627-90, in 1990 House J. at 1075. The legislature was "committed to increasing public participation in the political life of our state," because "the strength of our democratic form of government depends on the fullest voter participation possible." *Id.*

If the legislature wanted to restore public's trust in its governance, a good place to have started would for it to have abandoned gut-and-replace and conformed to the requirements the people of Hawaii adopted in the Constitution. But the legislature hasn't. Instead it doubled down, arguing its own internal procedures take precedence over Article III, section 15, the words and meaning of which the Hawaii Supreme Court held are "clear and unambiguous." *Taomae*, 108 Haw. at 251, 118 P.3d at 1194.

II. When A Bill Is Amended So That The Original And The Amendment Are "Dissimilar And Discordant," The Bill Is "Nugatory"

This case turns on the meaning of the words "bill" (and "it") in the Constitution:

> No *bill* shall become law unless *it* shall pass three readings in each house on separate days. No bill shall pass third or final reading in either house unless printed copies of the bill in the form to be passed shall have been made available to the members of that house for at least forty-eight hours.

Haw. Const. art. III, § 15 (emphasis added). On one hand, the State argues the term "bill" means whatever the legislature says *in the title*, and even if the legislature radically alters the bill's actual subject, text, intent, and purpose, the requirements of the Constitution are satisfied as long as the substance of the original and gutted bill can conceivably be related *to the title*. On the other, if the plain and ordinary meaning of the term "bill" isn't completely determined by its title alone and its substance matters, then the judgment should be vacated and the case remanded to apply the standards which the Supreme Court established to review a claim that a bill did not undergo the required number of readings because the legislature materially changed its actual subject before adoption.

1. *Schwab v. Ariyoshi*, 58 Haw. 25, 564 P.2d 135 (1977). In *Schwab*, the

Supreme Court considered whether the legislature improperly adopted a bill by procedures that were alleged to have violated the Constitution's requirement that a bill "embrace but one subject." *Id.* at 33, 564 P.2d at 137. The bill—entitled "A Bill for an Act Making Appropriations for Salaries and Other Adjustments, Including Cost Items of Collective Bargaining Agreements Covering Public Employees and Officers"—was intended to "ratify the salary increases" that certain unionized public employees had achieved by collective bargaining with the State. *Id.* The court noted that "various amendments were made" along the way, but that "the title of the bill was not touched or amended." *Id.* The "various amendments" included broadening the scope of the bill to nonunion government employees who were not covered by the collective bargaining agreements. *Id.* at 27, 564 P.2d at 140. Thus, the plaintiffs argued that the bill "embraced" two subjects: the salaries of unionized government employees, *and* the salaries of nonunion government employees. *Id.* at 30, 564 P.2d at 141.

The court concluded that the bill was not contrary to the "one subject" requirement in Article III because "[a]ll parts of the bill embrace one general subject, to wit: salaries." *Id.* Yes, the particular classes of employees covered by the bill had been expanded between introduction and enactment, but government employee salaries "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." *Id.* at 32, 564 P.2d at 140. The court held that applying a "liberal construction" of the constitutional requirement meant that as long as the initial title of the bill—making appropriations for salaries "including" union employees—was "in the ordinary mind the general subject of the act," and thus generally related to the subsequent amendments (which simply also included nonunion employees), the bill was constitutionally adopted. The court declined to delve too deeply into whether the bill "could have been composed in language which would have been clearer and more precise," *id.* at 34, 564 P.2d at 141, and concluded that "[t]he power of the legislature should not be interfered with unless it is exercised in a manner *which plainly conflicts with some higher law*." *Id.* at 34, 564 P.2d at 144 (emphasis added). Thus, the legislature's power to determine the content

of a bill and the legislature's discretion to amend proposals after introduction, is limited by "some higher law" (the three readings requirement), which requires that if a measure is revised so that the amendment is "dissimilar or discordant" with the original, the readings must reboot. *Id*. ("These parts are not and cannot be held to be *dissimilar or discordant subjects which would render the act unconstitutional*.") (emphasis added) (citing *Johnson v. Harrison*, 50 N.W. 923, 924 (Minn. 1894) ("To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subject that by no fair intendment can be considered as having any legitimate connection with or relation to each other.")).[5]

Critically for the case here, the court did not simply defer to the legislature's claim that the subject of the bill (in its different iterations) could conceivably be related to the title, but reserved the question for judicial resolution, although with appropriate deference to the legislature's judgment. The court noted that a finding that the title of a bill embraced more than one subject would empower the court to strike it down as unconstitutional if the challenger proves "unconstitutionality beyond a reasonable doubt" by showing that the constitutional infirmity is "plain, clear, manifest, and unmistakable." *Schwab*, 58 Haw. at 31, 564 P.2d at 139.

2. *Taomae v. Lingle*, 108 Haw. 245, 118 P.3d 1188 (2005). There, the court confirmed the essential role of the judiciary in the constitutional order, concluding that to give life to the three readings requirement—and more importantly to the vital public participation which the requirement serves—courts must review carefully claims that the legislature failed to follow the required process.

Understanding that case's timeline is critical to resolution here. Taomae asserted that an amendment to the Constitution proposed by the legislature was not validly adopted because the amendment had not been read three times by each house of the legislature. *Id*. at 254, 118 P.3d at 1197 (noting that constitutional amendments proposed by the legislature must "be passed 'in the manner required for legislation'")

[5] "Article III, Section 15 of the State Constitution is mandatory and a violation thereof would render an enactment nugatory." *Schwab*, 58 Haw. at 31, 564 P.2d at 139.

(citing Haw. Const. art. III, § 15). The State argued the bill had been read three times in both the Senate and the House (indeed, it had been read *four* times in the House).

A review of the facts the court laid out reveals that yes, the House introduced the bill ("A Bill for an Act Relating to Sexual Assault"), and over the course of the next month, amended the bill and held readings three times. *Id*. at 249, 118 P.3d at 189. The bill then moved to the Senate. But after the first reading there, the Attorney General opined that a statutory amendment alone would not accomplish the goal (to overturn a criminal law ruling by the Hawaii Supreme Court), and the Constitution also needed to be amended to empower the legislature to define certain terms. *Id*. at 249, 118 P. 3d at 1192. In response, the Senate amended the bill to "add a constitutional amendment" that accomplished that. *Id*. The amended bill then was read two more times in the Senate, and after being sent back to the House was read there an additional time (what the court terms a "final" reading), after which it was placed on the ballot. *Id*. The State argued the bill was valid under article III, section 15, because the total of seven readings of the bill more than met the "three readings in each house" requirement. The Supreme Court rejected the argument:

> [T]he legislature failed to satisfy the requirement set forth in article XVII, section 3, that a proposed constitutional amendment be passed "in the manner required for legislation" because the constitutional amendment, *see* §§ 1 and 2 of the bill, did not receive three readings in each house as required by article III, section 15. The plain reading of article XVII, section 3 requires that a proposed constitutional amendment advance though the processes set forth in article III, section 15, including the requirement that "[n]o bill shall become law unless it shall pass *three reading in each house* on separate days."

Taomae, 108 Haw. at 254, 118 P.3d at 1197 (citing Haw. Const. art. III, § 15). The court held "[i]n this instance, the constitutional amendment included in H.B. 2789, H.D. 1, S.D. 1 received only three readings *in total*." *Id*. The court emphasized the "critical purpose" of the three readings requirement: "full debate," and "that each house of the legislature has given sufficient consideration to the effect of the bill." *Taomae*, 108 Haw. at 255, 118 P.3d at 1198 (citing *Schwegmann Bros. v. Calvert Distillers Corp*., 341 U.S. 384, 396 (1951) (Jackson, J., concurring)). The court noted that

"the bill in its final form, including the constitutional amendment" was read only twice in the Senate and once in the House, and "[t]his was a patent violation of article III, section 15." *Id.* Because the Supreme Court exercised original jurisdiction in *Taomae*, it applied *Schwab*'s burden of proof, and concluded:

> In light of the foregoing reasons, we also conclude that the failure to give the proposed constitutional amendment three readings in each house on separate days was a plain, clear, unmistakable violation of the constitution beyond a reasonable doubt.

Taomae, 108 Haw. at 255, 118 P.3d at 1198. In short, the substantial change in the substance of the bill rendered all prior readings ineffective, and the Constitution required a reboot.

III. Although Both Recidivism And Hurricane Preparedness Are Conceivably Related To "Public Safety," They Are Plainly "Dissimilar And Discordant" With No "Legitimate Connection With Or Relation To Each Other"

Reading *Schwab* and *Taomae* together reveals the rules governing judicial review of claims under Article III, section 15:

1. A court presumes a bill was adopted in accordance with the Constitution. *Schwab*, 58 Haw. at 31, 564 P.2d at 139.

2. A challenger must show "unconstitutionality beyond a reasonable doubt" by showing the infirmity is "plain, clear, manifest, and unmistakable." *Id.*

3. A plaintiff satisfies this standard by proof that in the ordinary mind, the "general subject" of the bill as introduced is not generally related to the subject of the bill as adopted. *Id.* at 31, 564 P.2d at 140; *Taomae*, 108 Haw. at 255, 118 P.3d at 1197. If the original and the amendment are "dissimilar or discordant" and have no "legitimate connection with or relation to each other," readings must begin anew. *Schwab*, 58 Haw. at 33, 564 P.2d at 144; *Taomae*, 108 Haw. at 254, 118 P.3d at 1198.

4. If, instead of rebooting readings, the legislature presses forward and adopts the amended bill without having three distinct readings in each house, a reviewing court must declare the bill "nugatory." *Schwab*, 58 Haw. at 31, 564 P.2d at 139.

Unfortunately, however, it seems the legislature views the lesson of these cases

that if it gives a bill a generic-enough title (here, "A Bill for an Act Relating to Public Safety"), it has, as a practical matter, unreviewable latitude to switch out the actual subject of the bill from being about criminal recidivism reporting, to being about the design of state buildings in hurricanes, as long as these subjects can conceivably be related to public safety. The circuit court accepted the argument wholesale: "[w]hen the legislature in the case at bar changed the topic of the bill or the language of the bill from recidivism to hurricane readiness, that was still *within the ambit* of public safety." Dkt. 26 at 227.[6] The Supreme Court, however, requires more, and a reviewing court must look beyond the title and analyze the substance of the various forms of the bill and determine whether they are at least in the same ballpark. After all, pretty much *everything* the legislature does might conceivably be related to "public safety." Accepting the State's logic renders hollow the Constitution's plain requirements.

CONCLUSION

The judgment should be vacated and the case remanded for a determination whether the plaintiffs have proven that the essential purpose of the bill changed so much that the original and amended versions are "dissimilar and discordant."

DATED: _____.

Respectfully submitted.

DAMON KEY LEONG KUPCHAK HASTERT

_____

ROBERT H. THOMAS

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[6] The Hawaii Supreme Court has never approved of such a complete judicial abdication to another branch. *See*, *e.g.*, *Silva v. City & Cnty. of Honolulu*, 115 Haw. 1, 13, 165 P.3d 247, 259 (2007) (even under "rational basis" review of an equal protection claim, the court must examine the factual record for "any difference between" the classifications "that would constitute a rational basis"); *Cnty. of Hawaii v. C & J Coupe Fam. Ltd. P'ship*, 119 Haw. 352, 357, 198 P.3d 615, 620 (2008) (even under a deferential standard of review, courts do not simply accept the legislature's statements about whether a taking of property is for public use, but have an obligation to consider evidence from the factual record about the government's actual purpose).

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CERTIFICATE OF SERVICE

I certify that the foregoing documents were served upon the parties noted below by the JEFS system:

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