NO. CAAP-19-0000372

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-Appelles	CIVIL NO. 18-1-1376-09 GWBC ON APPEAL FROM: FINAL JUDGMENT Filed on APRIL 3, 2019 CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI`I The Honorable Gary Won Bae Chang, Judge

HAWAI`I STATE LEGISLATURE'S MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF OF AMICUS CURIAE

MEMORANDUM IN SUPPORT OF MOTION

DECLARATION OF COLLEEN HANABUSA

EXHIBIT "1"

CERTIFICATE OF SERVICE

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NO. CAAP-19-0000372

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HAWAI`I STATE LEGISLATURE'S MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF OF *AMICUS CURIAE*

The HAWAI`I STATE LEGISLATURE ("Legislature"), by and through its undersigned counsel, respectfully moves for leave from this Court to file a brief of ***Amicus Curiae*** in support of the position of Defendant-Appellee in this appeal.[1]

[1]The Legislature respectfully informs this Court that Appellants-Plaintiffs and Defendant-Appellee have indicated that they have no objection to the Legislature's request to file a brief of *Amicus Curiae.* If this Motion is granted and oral argument is ordered, the Legislature will also seek to share in the time allocated to Defendant-Appellee. The Circuit Court did permit the Legislature, upon the granting of its Motion for Leave to File a Brief in Amicus in Support of the Defendant's Motion for Summary Judgment and In Opposition to Plaintiff's Cross-Motion for

The Legislature seeks leave to file a brief of ***Amicus Curiae*** because it contends it is best suited to apprise this Court of the important legal issues raised in this appeal from its perspective as one of the three co-equal branches of government. In this light, the Legislature must note that it does not concur completely with the Circuit Court's Order; specifically paragraphs 3 and 4 of the Order of the Circuit Court Granting Defendant State of Hawai`i's Motion for Summary Judgment Filed on October 9, 2018 which states as follows:

> 3. The court has no issue regarding Plaintiffs' standing. They are organizations that are dedicated to ensure integrity in the legislative process and that is what this case is about.
>
> 4. Defendant State of Hawaii's separation of powers argument is rejected. The court has the power to adjudicate the constitutional validity of statutory enactments.

The strong interest of the Legislature is to protect its constitutional prerogative of determining its own rules of proceeding to enact laws of the State of Hawai`i. The Hawai`i Constitution also protects the Legislature's rules, authorities, along with its custom and practices.

A copy of the Legislature's proposed Brief of ***Amicus Curiae*** is attached hereto as Exhibit "1."

This Motion is brought pursuant to Rules 27 and 28(g) of the ***Hawai`i Rules of Appellate Procedure*** ("***HRAP***"), the Memorandum in Support of said Motion, the Declaration of Counsel, Exhibit "1," and the records and files herein.

Summary Judgment, to share the time allocated for argument with the State in said motions. (Declaration of Colleen Hanabusa).

The Legislature believes that this Court will find good cause exists and respectfully asks that its motion be granted.

DATED: HONOLULU, HAWAI`I, October 3, 2019.

/s/ COLLEEN HANABUSA
COLLEEN HANABUSA
Attorney for the HAWAI`I STATE LEGISLATURE

NO. CAAP-19-0000372

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.	CIVIL NO. 18-1-1376-09 GWBC ON APPEAL FROM: FINAL JUDGMENT Filed on APRIL 3, 2019 CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI`I The Honorable Gary Won Bae Chang, Judge

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This Memorandum is in support of the HAWAI`I STATE LEGISLATURE'S ("Legislature") motion for leave to file a memorandum on its behalf as *Amicus Curiae* in support of the position of Defendant-Appellee State of Hawai`i. As stated in the Motion, Plaintiffs-Appellants and Defendant-Appellee do not object to the Legislature filing a brief as *Amicus Curiae.*

The Legislature seeks to file as *Amicus Curiae* to apprise this Court of the issues on appeal which are of great public and legal importance, and over which it has the unique insight. From the perspective of the Legislature this case concerns the separation of powers between the legislative and judicial branches of our government, albeit that the circuit court

ultimately rejected the separation of powers argument. The circuit court granted the Legislature's Motion for Leave to File a Memorandum on its behalf as *Amicus Curiae* in Support of Defendant State of Hawai`i's Motion for Summary Judgment filed on October 9, 2018 and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment filed on October 25, 2018 and permitted the Legislature to argue at the motion and cross-motion for summary judgment in the underlying case. (Record on Appeal "ROA" Part 1 or 2 shall be designated by number, 1 at 217-220).

The Legislature's interest as ***Amicus Curiae*** is that Plaintiffs-Appellees sought to have declared void Act 84 of the 2018 Session Laws; because they contend it was adopted by "gut and replace" in violation of the Constitution of the State of Hawai`i. Plaintiffs-Appellants rely specifically on Section 14 article III of the ***Constitution of the State of Hawai`i*** ("***Constitution*** or Haw. Const.") for the proposition that "[e]ach law shall embrace but one subject, which shall be expressed in its title." Plaintiffs' Complaint Count I (ROA 1 at 19-20); and, Section 15 article III of the Haw. Const. for the proposition that "[n]o bill shall become law unless it shall pass three readings in each house on separate days." Plaintiffs' Complaint Count II (ROA 1 at 20-21).

It is the position of the Legislature that it acted within its authority under the ***Constitution***. These issues have been debated in prior Constitutional Conventions; and the Delegates to the respective Constitutional Conventions were clear in their belief that the provisions debated ensured flexibility to the Legislature. By bringing their Complaint, Plaintiffs-Appellants are requesting that the judiciary interfere with the Legislature's rights under the ***Constitution***.

II. THE AUTHORITY TO MOVE TO FILE AS *AMICUS CURIAE.*

Rule 28 (g) of the ***Hawai`i Rules of Appellate Procedure*** ("***HRAP***")[1] provides as follows:

> **(g) Brief of *amicus curiae*.** An *amicus curiae* brief may be filed only by leave of the appellate court. The order granting leave shall fix the time for filing the *amicus curiae* brief and any response thereto. The appellate court may allow or disallow the filing of such brief with or without a hearing. All *amicus curiae* briefs shall comply with the applicable provisions of subsection (b) of this Rule. The attorney general may file an *amicus curiae* brief without order of the court in all cases where the constitutionality of any statute of the State of Hawai'i is drawn into question, provided that the attorney general shall file the brief within 30 days after the filing of the answering brief, or within 30 days after notice was received pursuant to Rule 44 of these Rules, whichever period last expires.

To file an *amicus curiae* brief, the Legislature must seek an order from this Court by way of a motion, in accordance with Rule 27 of the ***HRAP.*** This is the Legislature's motion in compliance with the ***HRAP*** and respectfully request that it be granted for the reasons stated below.

III. THE LEGISLATURE HAS AN INDEPENDENT INTEREST IN THE OUTCOME OF THIS APPEAL.

The Legislature is protecting its right to amend and modify a bill prior to it becoming a law. Under the doctrine of the separation of powers, the enactments of the Legislature are presumed to be constitutional; and Plaintiffs-Appellants have the heavy burden of showing unconstitutionality "beyond a reasonable doubt." ***Schwab v. Ariyoshi,*** 58 Hawai`i, 25, 31, 564 P.2d 135,139 (1977). "The infraction should be plain, clear, manifest and unmistakable.'

[1] Rule 28 of ***HRAP*** is entitled "**BRIEFS.**"

UPW v. Yogi, 101 Hawai`i 46, 50, 62 P.3d 189, 193 (2002) (citing ***State v. Bates,*** 84 Hawai`i 211,220, 933 P.2d48, 57 (1997)). Moreover as a co-equal branches of government, the courts are "not to intrude into areas committed to the other branches of government." ***OHA v. Yamasaki,*** 69 Hawai`i 154, 168, 737 P.2d 446, 455 (1987). Though the circuit court found no constitutional violation in the enactment of Act 84 (2018), it did reject the State of Hawai`i's and the Legislature's arguments pertaining to the doctrine of the separation of powers of government. The Circuit Court found that it can adjudicate the "constitutional validity of statutory enactments." (ROA 2 at 226-228).

The Circuit Court at paragraph 3 in its Order found the Plaintiffs-Appellants have standing. The Legislature takes issue with the criteria adopted by the Circuit Court that "[t]hey are organizations that are dedicated to ensure integrity in the legislature process, and that is what this case is about[]" is contrary to what the Circuit Court said it was ruling on and how the Plaintiffs-Appellants represented this case.[2]

The Legislature's interest is distinct from the interests of the State because it is protecting its right to fulfill its constitutional mandate in sixty (60) days. To accomplish this task, the ***Constitution*** granted to each house of the Legislature, the right to determine its rules of proceedings. Haw. Const. article III § 12.The reference therein to when the public must be

[2] The Plaintiffs-Appellants and the circuit court made it clear that this complaint was only about Act 84 (2018). The Legislature argued that this case who set a precedent and it had to be viewed in light of the consequence of challenging an innocuous bill which does not mandate any action except "consideration." Plaintiffs-Appellants did not allege that they were injured by the contents of the bill. Their standing is tied only to how this passed and became law. Transcript of Proceeding of December 19, 2018 at 30-41, 43 at lines 14-22. Moreover it can be argued that the fact the Governor signed it into law, is also an intrusion into the Executive Branch of government.

permitted to attend is for decision making in committees. Haw. Const. article III. §12.[3] In the 1968 Haw. Const. the provision in Section 16, article III which provided for a Bill in the form to be passed to lay for 24 hours was intended to provide the Legislators and the public with notice of what will be voted on at third or final reading.[4]

What is critical to the Legislature is the separation of powers between all three co-equal branches of government and how it interfaces with the issues of standing and justiciability.[5]

This recent Hawai`i Supreme Court decision in ***Tax Foundation of Hawai`i v. State***, 144 Hawai`i 175, 439 P.3d 127 (2019) ("***Tax Foundation***") which was decided two (2)

---

[3] Though the Hawai`i State Legislature may agree with Plaintiffs statement that government should be "open, transparent, and allows for public input," that is not the issue before this Court. The ***Constitution*** in Article III specifically references that the public be permitted to attend decision making in the committees. It must be noted that even the provision that bills layover for 48 hours is intended to apply to "the members of that house" and the ***Constitution*** does not say that it is for the benefit of the public. Haw. Const. article III § 15.

[4] It is the 1978 ***Constitution*** which amended the 24 hour laying of a bill to 48 hours and renumbered the Section 16 to 15.

[5] The Legislature respectfully asks that this Court affirm the Order of the Circuit Court Granting Defendant State of Hawai`i's Motion for Summary Judgment Filed on October 9, 2018 but must note that it does not concur with paragraphs 3 and 4 which provides as follows:

> 3. The court has no issue regarding Plaintiffs' standing. They are organizations that are dedicated to ensure integrity in the legislative process and that is what this case is about.
>
> 4. Defendant State of Hawaii's separation of powers argument is rejected. The court has the power to adjudicate the constitutional validity of statutory enactments.

ROA 2 at 228.

months **after** the circuit court orally ruled on the motions herein, is instructive on how the issues of standing and separation of powers are intertwined.

Standing in Hawai'i's court was explained by the majority as follows and note the reference to the separation of powers in the three co-equal branches of government as it relates to justiciability.

> In Hawai'i courts, standing is solely an issue of justiciability, arising out of prudential concerns of judicial self-governance. See Life of the Land II, 63 Haw. at 171-72, 623 P.2d at 438. As explained by Justice Nakamura in Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987):
>
> > Unlike the federal judiciary, the courts of Hawaii are not subject to a cases or controversies limitation like that imposed by Article III, § 2 of the United States Constitution. But like the federal government, ours is one in which the sovereign power is divided and allocated among three co-equal branches. Thus, we have taken the teachings of the Supreme Court to heart and adhered to the doctrine that the use of judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context. And, we have admonished our judges that even in the absence of constitutional restrictions, they must still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government.
> >
> > Our guideposts for the application of the rules of judicial self-governance founded in concern about the proper — and properly limited — role of courts in a democratic society reflect the precepts enunciated by the Supreme Court. When confronted with an abstract or hypothetical question, we have addressed the problem in terms of a prohibition against rendering advisory opinions; when asked to decide whether a litigant is asserting legally recognized interests, personal and peculiar to him, we have spoken of standing; when a later decision appeared more appropriate, we have resolved the justiciability question in terms of ripeness; and when the continued vitality of the suit was questionable, we have invoked the mootness bar.
> >
> > We have also followed the teachings of the Supreme Court where political questions" are concerned....
>
> Yamasaki, 69 Haw. at 170-72, 737 P.2d at 455-56 (internal citations, quotation marks, punctuation, and footnotes omitted) (emphases added).

> Thus, Yamasaki recognizes that standing is a prudential concern in Hawai'i state courts, which are not subject to the case and controversy subject matter jurisdiction limitation of federal courts. Yamasaki also noted that standing is a prudential concern "founded in concern about the proper – and properly limited – role of courts in a democratic society." 69 Haw. at 171, 737 P.2d at 456 (citation omitted). Furthermore, our previous pronouncements that "standing principles are governed by 'prudential rules' of judicial self-governance," and that "the touchstone of this court's notion of standing is 'the needs of justice[,]' " see, e.g., Mottl, 95 Hawai'i at 389-90, 23 P.3d at 724-25, reflect our awareness that standing is a prudential issue and not an issue of subject matter jurisdiction, as "the needs of justice" cannot eliminate the requirement of subject matter jurisdiction. In addition, as pointed out earlier, in Hawai'i state courts, standing requirements may be tempered, or even prescribed, by legislative declarations of policy. See Life of the Land II, 63 Haw. at 172, 623 P.2d at 438.

Tax Foundation, 144 Hawai`i at 142-143, 439 P.3d at 190-191 (footnotes are omitted). The Legislature believes that the issue of standing can be raised *sua sponte* in that this Court has stated it is a "jurisdictional issue and can be addressed at any stage of a case." ***Keahole Defense Coalition, Inc. v. Board of Land and Natural Resources,*** 110 Hawai`i 419, 421, 134 P.3d 585, 593 (2006). In a dissenting opinion, the Chief Justice described what is justiciable as follows:

> Giving due consideration to our courts' "proper and properly limited role" in our governmental system, "judicial intervention in a dispute is normally contingent upon the presence of a 'justiciable' controversy." Life of the Land v. Land Use Comm'n (Life of the Land II), 63 Haw. 166, 172, 623 P.2d 431, 438 (1981) (citation omitted). To be justiciable, a controversy must involve "questions capable of judicial resolution and presented in an adversary context." Id. The party seeking a judicial forum must also have standing. See id. ("Standing is that aspect of justiciability focusing on the party seeking a forum rather than on the issues he wants adjudicated."); Sierra Club v. Morton, 405 U.S. 727, 731-32, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) ("[T]he question of standing to sue" refers to "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy").
>
> The "crucial inquiry" in determining standing "is 'whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of ... [the court's] jurisdiction and to justify exercise of the court's remedial powers on his behalf.' " Life of the Land II, 63 Haw. at 172, 623 P.2d at 438 (quoting Warth v. Seldin, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

> We determine whether a plaintiff has alleged a "personal stake in the outcome of the controversy" sufficient to confer standing by asking: "(1) has the plaintiff suffered an actual or threatened injury ...; (2) is the injury fairly traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury."

Corboy v. Louie, 128 Hawai'i 89, 104, 283 P.3d 695, 710 (2011) (quoting Sierra Club v. Dep't of Trans. (Superferry I), 115 Hawai'i 299, 319, 167 P.3d 292, 312 (2007)).

When "assessing whether a plaintiff has standing to sue" under the three-prong test, it is "[o]f critical importance" to identify "the nature of the injury alleged" or "the theory of injury presented by the plaintiff." Superferry I, 115 Hawai'i at 321, 167 P.3d at 314 (citing Cmty. Treatment Ctrs. v. City of Westland, 970 F.Supp. 1197, 1208 (E.D. Mich. 1997) ("[T]he resolution of a standing question often depends on how the court characterizes the alleged injury.")). We have noted that "although a plaintiff may be injured in any number of ways, the injury prong of the standing inquiry requires an assertion of a judicially-cognizable injury, that is, a harm to some legally-protected interest." Id.

Thus, to establish a personal stake in the controversy and its outcome, a plaintiff must assert an injury, or threatened injury, to a judicially cognizable interest. See Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989); Akau v. Olohana Corp., 65 Haw. 383, 390, 652 P.2d 1130, 1135 (1982).[1] The plaintiff's injury, or threat of injury, cannot be "abstract, conjectural or merely hypothetical," but concrete, such that a court may fairly trace its cause and provide the parties an adequate resolution. Life of the Land II, 63 Haw. at 173 n.6, 623 P.2d at 446 n.6.

Courtrooms are not the place "to vindicate individual value preferences," Hawaii's Thousand Friends, 70 Haw. at 284, 768 P.2d at 1299, or to resolve "a difference of opinion between a concerned citizen and his elected representatives in government," Bremner v. City & Cty. of Honolulu, 96 Hawai'i 134, 142, 28 P.3d 350, 358 (App. 2001). A plaintiff must therefore count "himself among the injured," and "not merely air[ ] a political or intellectual grievance." Akau, 65 Haw. at 390, 652 P.2d at 1135.

Tax Foundation, 144 Hawai`i at 158-159, 439 P.3d at 206-207.

The Legislature contends that Plaintiffs-Appellants are at best raising a difference of opinion between a concerned citizen and his elected official, or an intellectual grievance. Alternatively, if an injury is suffered as a result of Act 84 (2018), it is at best abstract,

conjectured or hypothetical. Plaintiffs-Appellants do not raise a justiciable controversy and both the majority and dissent require justiciability to establish standing and the ability to call upon the courts to act.

Justice Edward Nakamura provided sage advice in ***Yamasaki*** when he stated judicial power should not be exercised unless there can be a resolution and there is a controversy. He also warned against intrusion into areas reserved for the co-equal branches of government.

IV. THE LEGISLATURE HAS BEEN ALLOWED TO SUBMIT AN AMICUS BRIEF.

The purpose of this memorandum is to ask this Court to recognize that leave has been granted when the Hawai`i State Legislature have sought to file memoranda as *amicus curiae*.

The most recent example is in the case of ***Nelson v. Hawaiian Homes Commission,*** 141 Hawai`i 411, 412 P.3d 917(2018). This case is referred to as "***Nelson II,***" where the Supreme Court found that the circuit court upon remand in essence addressed "issues . . . that involve political questions." ***Nelson II,*** 141 Hawai`i at 412-413, 412 P.3d at 918-919.

Prior to this time, the State Legislature was granted leave to file amicus briefs before the Hawai`i Supreme Court. One case is ***Taomae v. Lingle,*** 108 Hawai`i 245, 118 P.3d 1188 (2005). The Hawai`i Supreme Court also granted the Legislature leave to file after the Court had issued its decision and in support of the State's requested reconsideration of the Supreme Court's decision in ***Sierra Club v. Dep't of Transportation,*** No. 29035, 2009 WL 1567327 (May 13, 2009).[6]

[6] This case is better known as the "Superferry" decision.

Based upon the fact that the Supreme Court has granted leave to the Legislature to file amicus briefs in prior cases, the Legislature respectfully request that this Court also grants this motion for leave.

V. CONCLUSION

The Hawai`i State Legislature respectfully submits that it can and will contribute as *amicus curiae* and offers a perspective that cannot be presented by the State of Hawai`i. The Hawai`i State Legislature respectfully asks this Court to grant it leave to file a brief of *amicus curiae* generally in a form attached hereto as Exhibit "1." In addition, assuming that oral arguments are permitted in this matter, the Legislature respectfully request that it be permitted to share in the time allocated to the Defendant State of Hawai`i.

DATED: Honolulu, Hawai`i, October 3, 2019.

/s/ COLLEEN HANABUSA
COLLEEN HANABUSA
Attorney for the HAWAI`I STATE LEGISLATURE

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DECLARATION OF COLLEEN HANABUSA

I, COLLEEN HANABUSA, declare under penalty of law the following is true and correct:

1. I am an attorney, duly licensed to practice before this Court, and represents the HAWAI`I STATE LEGISLATURE in the above entitled matter. I am competent to make this declaration and do so based upon my personal knowledge, unless I indicate otherwise.

2. Attached as Exhibit "1" is a true and correct copy of the HAWAI`I STATE LEGISLATURE'S proposed *Amicus Curiae* Brief in this matter.

3. I have contacted Plaintiffs-Appellants' attorney, Robert Brian Black and confirmed that he and his clients do not object to the HAWAI`I STATE LEGISLATURE'S leave to file an *Amicus Curiae* Brief in this matter.

4. I have contacted Defendant-Appellee's attorney, Clyde J. Wadsworth and confirmed that the Attorney General and its client do not object to the HAWAI`I STATE LEGISLATURE'S leave to file an *Amicus Curiae* Brief in this matter.

DATED: HONOLULU, HAWAI`I, October 3, 2019.

/s/ COLLEEN HANABUSA
COLLEEN HANABUSA
Attorney for the HAWAI`I STATE LEGISLATURE

Exhibit “1”

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BRIEF OF THE HAWAI`I STATE LEGISLATURE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE STATE OF HAWAI`I

I. INTRODUCTION

The HAWAI`I STATE LEGISLATURE ("Legislature") files this brief as *Amicus Curiae* in support of the Defendant-Appellee State of Hawai`i and to affirm the primary holding in the circuit court's Order Granting Defendant State of Hawai`i's Motion for Summary Judgment Filed on October 9, 2018; and Order Denying Plaintiff's Cross-Motion for Summary Judgment Filed on October 25, 2018. Record on Appeal ("ROA") Part 2 ("2") at 226-228 and at 229-230. The Legislature contends that to reverse the decision of the circuit court would be to intrude into the constitutional mandate of the Legislature.[1]

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[1] The Legislature's was permitted to file a brief as *Amicus Curiae* in the circuit court and as such was not a party and does not the standing or right to file an appeal from the Order of the Circuit Court. The Legislature respectfully asks that this Court affirm the Order of the Circuit Court Granting Defendant State of Hawai`i's Motion for Summary Judgment Filed on October 9, 2018 but only as to paragraphs 1 and 2 as follows:

> 1. There was no violation of the Hawai`i Constitution with respect to the three readings. Based on sections 617 and 722 of ***Mason's Manual of Legislative Procedure*** (2010 rev. ed.), the procedure of the legislature is such that if a replaced and substituted bill is adopted, then the legislature is not required to conduct three more readings because they have already had the three readings in each House and that suffices to meet the requirements of the constitutional mandate.
>
> 2. On the questions of the title of the bill, the change from recidivism to hurricane preparedness was germane to the title and the subject of the original Senate Bill No. 2858. There was no constitutional violation based on the title. When the legislature in the case at bar changed the topic of the bill or the language of bill from recidivism to hurricane readiness, that was still within the ambit of public safety. The court found no legal authority to overrule that process and conclude that there was an unconstitutional change.

The Legislature does not concur with the Circuit Court's Order as to paragraphs 3 and 4. In that Plaintiffs-Appellants filed their appeal from the Final Judgment, the Legislature as *Amicus*

II. INTEREST OF *AMICUS CURIAE*

Article III of the Constitution of the State of Hawai`i (hereinafter "***Constitution***" or "Haw. Const.") vest the legislative powers of the State in the two houses of the legislature. To exercise this responsibility, the ***Constitution*** empowers each house with rights of self-governance and the determination of its process to adopt legislation.[2] Each house enacts its own rules and procedures and need only agree on deadlines where the ***Constitution*** requires them to do so.[3] Thus the Legislature has a strong interest in protecting its governance and rules and procedures as their respective house have adopted in compliance with the ***Constitution.***

The Legislature's interest as *Amicus Curiae* is that it cannot stand by silently as the Plaintiffs-Appellants call upon a co-equal branch of government, the Judiciary, to interfere with the Legislature's constitutionally empowered self-governance. Plaintiffs-Appellants Complaint filed on September 5, 2018, seeks to have this Court declare void Act 84 of the 2018 Session Laws on the basis that its adoption was unconstitutional. ROA 1 at 21. Specifically Plaintiffs' claim Sections 14 and 15 of article III of the ***Constitution*** were violated in Act 84's enactment.

Curiae contends that it can also ask that this Court take note of paragraphs 3 and 4 as well. The Legislature does ask that this Court affirm the circuit court's Order Denying Plaintiffs Cross-Motion for Summary Judgement.

[2] It is important to note that the Constitution empowers **each house** to "determine the rules of its proceedings." Haw. Const. article III §12. This means and is in fact the case that the House and the Senate may have and do have different rules as to how bills are heard and whether actual testimony must be taken at various steps. ROA 1 at 64-66 (Rules of the Senate), at 73-75 (Rules of the House of Representatives).

[3] The ***Constitution*** requires that the houses provide for dates "by which all bills to be considered in a regular session shall be introduced;" but does not mandate said dates. Therefore, the houses are at liberty to modify or amend whatever dates they may have agreed to. Haw. Const. article III §12.

It is the position of the Legislature that it acted within its authority under the ***Constitution***. This issue is one that has been debated in prior Constitutional Conventions and the Delegates to the respective Constitutional Conventions were clear in their belief that the provisions debated ensured flexibility to the Legislature.

The strong interest of the Legislature is to protect its constitutional prerogative of determining its own rules of proceeding as the only branch of government empowered to enact laws of the State. The ***Constitution*** also protects the Legislature's rules, authorities, along with its custom and practices.

To reverse the judgment of the circuit court would in essence mean that this Court has interpreted Haw. Const. article III § 14 to require that the title of every bill reflect its contents in detail; and/or Haw. Const. article III § 15 to require that only bills which have not been amended or modified can become law, unless the Judiciary finds to the contrary.[4]

The Legislature respectfully submits that to so find will result with the Judiciary acting as the final arbiter as to which bills that have been amended can become law. This is clearly an intrusion upon the legislative branch of government.

III. ARGUMENT

A. The Legislature's Enactments Are Presumptively Constitutional.

The Hawai`i Supreme Court has set a very high standard to successfully challenge any law enacted by the Legislature. The Court has consistently held that "every enactment of the

[4] The Legislature contends that this will be the result when though Plaintiffs-Appellants concede that the Legislature may make "germane" amendments without restarting the three reading requirements, the issue will be when is an amendment "germane" and how "germane" must an amendment be. The arbiter will be the judiciary, arguably for every amendment.

legislature is presumptively constitutional and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt." ***Schwab v. Ariyoshi,*** 58 Hawai`i 25, 31 564 P.2d 135, 139 (1977) ("***Schwab***"). The ***Schwab*** court went on to say that the violation alleged of the "subject-title requirements of the State Constitution" must be "plain, clear, manifest, and unmistakable." ***Id.*** Other authorities referenced are ***State v. Kahalewai,*** 56 Hawai`i 481, 541 P.2d 1020 (1975) and ***Bishop v. Mahiko,*** 35 Hawai`i 608 (1940).

Plaintiffs-Appellants rely heavily upon ***Taomae v. Lingle,*** 108 Hawai`i 245, 118 P.3d 1188 (2005) ("***Taomae***"). They do so irrespective of the fact that the Hawai`i Supreme Court made very clear that ***Schwab*** was distinguishable from the facts of ***Taomae*** because "[i]n *Schwab,* this court considered the requirements embodied in article III alone . . . in this case [***Taomae***], we construe the requirements of article III as incorporated in the specific and separate provisions of article XVII." ***Taomae,*** 108 Hawai`i at 254, 118 P.3d at 1197.[5]

Plaintiffs-Appellants have not proven unconstitutionality beyond a reasonable doubt for their alleged violations of Sections 14 and 15 of article III of the ***Constitution***. The Plaintiffs-Appellants have clearly failed to meet their burden.

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[5] The Hawai`i Supreme Court stated two reasons for why they found a violation of the ***Constitution*** in ***Taomae:***

> First, the proposed amendment was not titled as a constitutional amendment pursuant to article XVII. Second, the proposal to amend the constitution was not subjected to three readings in each house as article XVII, section 3 requires.

Id., 108 Hawai`i at 251, 118 P.2d at1194. The Hawai`i Supreme Court went on to distinguish Section 14 article III Haw. Const. from its holding as follows, "[w]hile the interpretation of article III, section 14 is appropriate when applied to ordinary legislation, it must be remembered that article XVII specifically governs constitutional amendments." ***Id.,*** 108 Hawai`i at 254, 118 P.2d at1197. This Court stated this in response to the ***Taomae*** defendants' argument that all is required is a single subject in the title under Section 14 article III. For ***Taomae*** to apply this case must involve a constitutional amendment which it does not.

B. In Analyzing Section 14, article III of the Constitution, The Governing Word is "law" And Requires That The Law Contain One Subject And It Be Expressed In The Title.

Schwab is the dispositive precedent for this argument in Plaintiffs-Appellants' Complaint. The 1950 Constitutional Convention proposed the language of Section 14 article III Haw. Const. which states, "[n]o law shall be passed except by bill. Each **law** shall embrace but one subject, which shall be **expressed in its title**." (emphasis added). In ***Schwab,*** the Court was faced with the title, "A Bill for an Act Making Appropriations for Salaries and Other Adjustments, Including Cost Items of Collective Bargaining Agreements Covering Public Employees and Officers." The original intent was that it ratify the salary increases negotiated through collective bargaining. ***Schwab,*** 58 Hawai`i at 27, 564 P.2d at 137. When it was enacted, the law contained four parts and covered all employees' and officers' salaries, not merely those that were collectively bargained. ***Id.*** 58 Hawai`i at 27-28, 564 P.2d at 137-138. The Hawai`i Supreme Court in finding no constitutional violation stated:

> We hold that a liberal construction of this constitutional requirement, . . .leads to no other conclusion but that the title to **Act 58** fairly indicates to the ordinary mind the general subject of the act, . . . It is true that the provision of the Organic Act 'that each law shall embrace but one subject, which shall be expressed in its title' should be liberally construed, and that an **act** of the legislature should not be held void on the ground that it conflicts with this provision, except in a clear case.

Id., 58 Hawai`i at 34, 564 P.2d at 141 (emphasis added).[6]

[6] The emphasis was placed in this citation because the ***Schwab's*** Court analysis was as to when the bill became law as Act 58. The Constitutional provision is speaking to the final law and that what is contained therein fits the one subject and expressed in its title. There is no doubt that this is satisfied in Act 84 (2018).

The issue is what is required to have a **law** embraces but one subject which is expressed in its title. The point of contention is whether the title "Relating to Public Safety" covers the subject of this law. The general rule of statutory construction applies to the ***Constitution*** as well. That is to say if the words are clear and unambiguous, they are construed as written. ***Watland v. Lingle,*** 104 Hawai`i 128, 140, 85 P.3d 1079, 1091 (2004). Thus, Section 14 article III is saying that the **law** shall embrace one subject that is expressed in the law's title. It does not say that the bill as originally proposed or amended; but as it is enacted into law. There can be no doubt that the subject of SB 2858 SD2 HD1 CD1 as Act 84 (2018) is covered under Public Safety. The circuit court correctly found as such in paragraph 2 of its Order.

What Plaintiffs-Appellants are attempting to argue is that the title does not have enough detail. There is no such requirement set forth in the ***Constitution.***

Plaintiffs-Appellants have relied upon the Organic Act as authority in many of their briefs. However, the authorities under the Organic Act are also consonant with the Legislature's position.

Section 45 of the Organic Act provides, "[t]hat each law shall embrace but one subject, which shall be expressed in its title." Over the years, this provision has caused the Supreme Court to adopt a very liberal interpretation of the requirement and have consistently erred in favor of an Act (law) not being deemed void due to a violation of this provision. ***Schwab,*** 58 Hawai`i at 34, 564 P.2d at 141. ***Gallas v. Sanchez,*** 48 Hawai`i 370, 376, 405 P.2d 772, 776 (1965) speaks to the clear meaning of "law" or "Act:"

> It is a basic tenant of statutory construction that:
>
> [t]he fundamental principle in construing a constitutional provision is to give effect to the intention of the framers and the people adopting it, This intent is to be found in the instrument itself. When the text of a constitutional provision is

> not ambiguous, the court, in construing it, is not at liberty to search for its meaning beyond the instrument.

State v. Kahlbaun, 64 Hawai`i 197, 201, 638 P.2d 309, 314 (1982); ***Malahoff v. Saito,*** 111 Hawai`i 168, 181, 140 P.3d 401, 414 (2006). As such, the word **law** is unambiguous and its plain meaning is when a bill becomes "law." It does not mean when a bill is making its way through the legislative process.[7] What further supports this argument is that the Section begins with, "[n]o law shall be passed except by bill." Section 14, article III. Clearly if the Framers intended this section to apply to bills and not to the final law, it would have been amended Section 14 to read "[e]ach bill shall embrace but one subject . . ."

The Supreme Court interpreted Sections 45 and 46 of the Organic Act in the case ***Smithies v. Conkling,*** 20 Hawai`i 600 (1911). In response to the challenge under Section 45, the court said:

> Unless the language of the statute is so positive and clear as not to permit of construction, it is our duty in order to save the act from invalidity, to resort to every reasonable view which may be taken on the language used and if it is capable of a restricted construction which would avoid conflict with the Organic Act that construction must be adopted. The presumption is that the legislature intended to do with it had a right do and that it did not intend to do which it could not legally do. . . .
>
> Construing the body of act as we hold it should be construed, there is no variance or inconsistency between body and title. The subject of the act is what the titled expresses.

Id., at 604-605.

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[7] It should be noted that the cases challenging legislative acts under Section 45 of the Organic Act stood for proposition that subject matter and title requirements were to be liberally construed. The case of ***Jensen v. Turner,*** 40 Hawai`i 604, 614 (1954) is an example of the courts belief in legislative discretion and its inability to interfere. In ***Jensen***, the court did not void a law because it contained a subject which was not included in the title, the court simply voided that part of the law and held valid the remainder.

C. Section 12 of Article III of the Constitution Empowers Each House To Enact Its Own Rules of Proceedings And Its Operations.

The heart of Plaintiffs-Appellants' challenge of Act 84 (2018) is whether the Legislature can constitutionally enact its own rules of proceedings in its operations. The Legislature argues that it does.

Section 12 article III of the ***Constitution*** provides in relevant part "[e]ach house shall choose its own officers, **determine the rules of the proceedings** and keep a journal." (emphasis added). The recent case of ***Hussey v. Say,*** 139 Hawai`i 181, 384 P.3d 1282 (2016) addressed the first sentence of Section 12 article III of the ***Constitution***. The Hawai`i Supreme Court sustained the dismissal of the *Quo Warranto* complaint against Representative Say on the basis that it was a "non justiciable issue." Though the circuit court determined that the doctrine of the separation of powers would not prevent it from ruling on whether the statute was constitutional, the holding of this Court is instructive as to recognizing the co-equal branch and how the rules of the Legislature is given deference. The Court stated that "justiciability" was to ensure that the co-equal branches of government do "not intrude into areas committed to the other branches of government." It looks to whether the Constitution committed the issue to another political department. ***Id.***, 139 Hawai`i at 188, 384 P.3d at 1289. The Court stated this principle in ***OHA v. Yamasaki,*** 69 Hawai`i 154, 169, 737 P.2d 446, 455 (1987) as follows, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." In ***Hussey***, the issue was whether Representative Calvin Say was qualified to be seated as a member of the House of Representatives. The Court ruled that due to the language of

Section 12 of article III, it was a non justiciable issue because the ***Constitution*** had committed the issue to the Legislative branch of government.[8]

This should also be the decision of the Court as to the "rules of proceedings" which has been committed to the co-equal branch of government.

The Legislature has complied with the ***Constitution*** and determined and passed its respective rules of proceedings.

The Rules of both houses provide for three readings of the bill. The First readings in both houses are by title only.[9] Likewise, the respective Rules provide that the Second and Third or Final readings of the bill can be by title only.[10]

As with ***Hussey***, the decision here should be that how the co-equal branch of government has complied with its own rules should be determined by the houses.

Schwab is also instructive as to the Legislature's Rules. It concedes that the threshold issue is whether it is "justiciable." ***Id.***, 58 Hawai`i at 37, 564 P.2d at 142-143. The Court reminds itself that:

> As a general rule, the role of the court in supervising the activity of the legislature is confined to seeing that the actions of the legislature do not

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[8] Section12 article III of the ***Constitution*** provides:

> Each house shall be the judge of the elections, returns and qualifications of its own members and shall have, for misconduct, disorderly behavior or neglect of duty of any member, power to punish such member by censure, or upon a two-thirds vote of all the members to which such house is entitled, by suspension or expulsion of such member.

[9] Rule 48 of the Senate (ROA 1 at 65) and Rule 34 of the House of Representative (ROA 1 at 73).

[10] Rules 49 and 50 of the Senate and Rules 35 and 36 of the House of Representatives. State Ex. "A" at 22 and State Ex. "B" at 33-34. Note that for Third or final readings, both houses require the final form to layover for 48 hours. ROA 1 at 64-66 and 73-75.

> violate any constitutional provision. 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.

Id.

It is important to note that the ***Constitution*** provides a period of sixty (60) days in which to conduct legislative business. To accomplish this task, the ***Constitution*** granted to each house of the Legislature, the right to determine its rules of proceedings, Section 12, article III. Article III of the ***Constitution*** is entitled, the Legislature. The reference therein to when the public must be permitted to attend is for decision making in committees, Section 12, article III.[11] In the 1968 ***Constitution***, the provision in Section 16, article III provided:

> No bill shall become law unless it shall pass three readings in each house on separate days. No bill shall pass final reading in each house unless in the form to be passed it shall have been printed and made available to the members of that house for at least twenty-four hours . . .

This provision is now Section 15, article III of the ***Constitution*** and was amended to read forty-eight hours in the 1978 ***Constitution.***

D. The Constitutional Requirement Of Three Readings Was Not Violated And "If A Replaced Or Substituted Bill Is Adopted, Then The Legislature Is Not Required To Conduct Three More Readings."

[11] Though the Hawai`i State Legislature may agree with Plaintiffs' statement that government should be "open, transparent, and allows for public input," that is not the issue before this Court. The ***Constitution*** does not so state in Article III. There is no allegation by Plaintiffs-Appellants that they were not permitted to attend the decision making in the committees. This is therefore not the standard in assessing whether the Legislature complied with the ***Constitution.***

The above statement in quotations is from the circuit court Order, paragraph 1. ROA 2 at 227. The circuit court correctly found that the three reading requirements were satisfied even if a replaced or substituted bill was adopted. The circuit court relied upon the adopted rules of the Legislature.

Both houses, in accordance with Section 12, article III of the ***Constitution*** have adopted their respective Rules of their houses, and in addition, the *Mason's Manual of Legislative Procedure, 2010* for the 2017-2018 Legislative Session, hereinafter "***Mason's.***" [12] The two sections of ***Mason's*** specifically referenced in the circuit court's order are as follows:

Under the provisions ***Mason's*** Sec. 617 entitled **Substitute Bills**, it provides as follows:

> 1. A committee may recommend that every clause in a bill be changed and that entirely new matter be substituted as long as the new matter is relevant to the title and subject of the original bill. A substitute bill is considered as an amendment and not as a new bill.
>
> 2. The proper form of reporting a substitute bill by a committee is to propose amendments to strike out all of the bill following the enacting clause and to substitute a new bill, recommending also any necessary changes in the title.

Under the provisions of ***Mason's*** Sec. 722 entitled **Three Readings of Amended Bills**, it provides in relevant parts as follows:

> 1. **The constitutional requirement that bills be read three times is not generally interpreted to apply to amendments,** so that bills are required to be read the specified number of times after amendment, . . .
>
> 2. When a bill that has been passed by one house has **been materially amended** in the other, and there passed as amended, it has been held that the constitutional provisions with reference to reading three times **does not require the bill as amended to be read three times in the house of origin** before concurring in the amendments of the other house. . . .

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[12] The adoption of ***Mason's*** is found at Rule 88 of the Senate; and Rule 59 of the House of Representatives. ROA 1 at 66 and 75.

> 3. **Where a substituted bill may be considered as an amendment, the rules with reference to reading a bill on three separate days does not require the bill to be read three times after substitution.** One house may substitute an identical bill of its own for the bill of the other house without rereading of the substitute bill being required. . . .
>
> 5. A bill that is **amended or redrafted by a conference committee is not a new bill in the sense that it requires three readings thereafter.**

Mason's at 494-495 (emphasis added).

If this Court reverses the circuit court then it would be adding to the Haw. Const. article III §15 by requiring a "form" that a bill can pass in. Stated another way, if Plaintiffs-Appellants complaint prevails, then a bill to become law must in the final form throughout the three readings in each house; or alternatively, the Judiciary will be called upon to determine whether the bill qualifies to become law. This could not and was not the intent of the framers of the ***Constitution.***

The Legislature contends that the framers of the Constitution intended that it has flexibility.

E. The Constitutional Convention Committee Reports and Debates Clarify That Amendments To A Bill, Including A Substitution Does Not Trigger Three Reading Process To Commence Again.

The Hawai`i Supreme Court has stated that the Constitution must be construed "with due regard to the intent of the framers and the people adopting it." ***Hanabusa v. Lingle,*** 105 Hawai`i 28, 31, 93 P.3d 670, 673 (2004). The intent is found in the "instrument itself." ***Id.*** citing ***Blair v. Harris,*** 98 Hawai`i 176, 178-179, 45 P.3d 800, 800-801 (2002).

The Constitutional Convention of 1968 addressed Section 16 article III Haw. Const. Committee of the Whole Report No. 12 stated that it had fully debated the Standing

Committee Report No. 46 and reports and recommends that Section16 be adopted. The rationale was:

> 1. Requiring that a bill shall have been printed in the form to be passed on final reading and made available to the members of a house for at least twenty-four hours before it shall pass final reading in that house; the phrase "form to be passed" means the form in which a bill is either (a) passed on third reading in each house, (b) concurred to by one house after amendments have been made by the other, or (c) passed by both houses after a conference committee has agreed upon it; . . .

I *Proceedings of the Constitutional Convention of Hawaii of 1968* at 347 (1973).

The Standing Committee on Legislative Powers and Functions Report No. 46 referenced in Committee of the Whole Report No. 12, makes clear that it believed the twenty-four hour rule before the final reading is what assures the members of the Legislature and the public the opportunity for informed action. ***Id.*** at 216. The examples listed as to how the Legislature gets to the "form to be passed" anticipates amendments and changes in the bill's contents and can be made by "one house," or after a conference committee. Act 84 in its final form is a result of a Conference Committee Draft.

The Standing Committee Report is most instruction when it defined the "form to be passed" as one "passed by both houses after a conference committee has agreed upon it." The definitions were set forth by "or" meaning that any one of those conditions would satisfy the definition of the final form of the bill. It is critical to again note that changes were anticipated and was proper for final reading as long as it satisfied one definition. It was not anticipated that the bill had to be the same bill for the three readings in both houses. In fact it is expected that it would not be.

The debates among the delegates to the 1968 Constitutional Convention clarified that it was anticipated amendments and actual substitutions could occur without triggering the need to begin the three reading process. Relevant portions of the debates are:

> **DELEGATE HUNG WO CHING**[13]: . . . **The original intent of a bill having passed one house can be substantially changed in legislative conferences. A bill in final form can then pass third reading in both houses without a reasonable opportunity for members of the legislature and the public for review in its final form. To correct this situation, our proposal will require that a bill be printed in its final form and be made available to the legislators and to the public for at least 24 hours before final passage.** It is the committee's considered judgment that the substantial contribution which can be made by this rule through increasing awareness and understanding of the proposed legislation decisively overrides the possible problems in its adoption might create.
>
> . . .
>
> **DELEGATE KAUHANE**: . . . I understand that the bill must pass three readings before the bill can actually become law, or have the semblance of becoming law with the signature of the governor. My concern here on the passage of the bill on three readings –one, is this, Mr. Chairman, does the reading of the bill by title on the third day constitute the bill have been read completely throughout?
>
> . . .
>
> **DELEGATE MIYAKE:** The constitutional provision as proposed by the committee on Section 16 does not state that the bill has to be read throughout. Therefore, it would be permissive for the legislative bodies [to] provide the requirements as to how final readings will be interpreted in its own house or senate rules.
>
> . . .
>
> **DELEGATE DONALD CHING**: . . . [T]he committee discussed this procedure at length and what would happen if the passage of this amendment to the Constitution would mean to legislative processes would be that **the bulk of the amendments would come at the time of the second reading. In fact, all of the amendments should come at the time of the second reading on the bill. Then after the bill has been fully discussed on second reading by either house it shall then be printed up in the final amended form; be printed, be**

[13] Mr. Hung Wo Ching was the Chair of the Committee on Legislative Powers and Functions.

> **distributed to the members of that house and to the public, and then 24 hours shall elapse before final reading shall be taken. . . . Now, if it comes back from conference we have no problem there. This is only on third reading in either house.**
>
> . . .
>
> **DELEGATE KAUHANE**: I just heard the statement when we go to conference, well, we'll have no problem there. This is where the problem exists, when we go to conference.
>
> My next questions, Mr. Chairman, where a bill has been substituted for the original bill, the original bill having been read once, have passed first and second reading, and possibly third reading, and the bill is referred to conference because of a disagreement, **it becomes a conference-substituted** bill for the original bill in some instances; **will the substituted bill be required to pass three readings** because of a complete change of the substance of the bill?
>
> . . .
>
> **DELEGATE DONALD CHING**: . . . **The proposed amendment will not change the manner in which a bill is handled as under the present Constitution and the present legislative procedures as far as the conference committee draft is concerned.** What it will mean is that the only change that will be brought about is that after the conference committee has deliberated and come up with its conference draft, **that draft will have to be printed and on the table for 24 hours or made available to the public for 24 hours before either house can act on it. That's the only change.**

II *Proceedings of the Constitutional Convention of Hawaii of 1968, Committee of the Whole Debates* (1973) at 145-146 (emphasis added).

The debates made clear that the intent of the framers of the Constitution was to reaffirm that the practice of the Legislature that if a new bill is substituted, it will not trigger a requirement that the three readings commence again.[14]

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[14] The following debate is included to show that the framers did address the issue of how a bill can change from that which is originally introduced and discussed how it complies with the three reading requirements.

> **DELEGATE KAUHANE**: . . .As a compromise to all the objections that I would raise on the matter of third reading of bills, what I am about to say is familiar to all members that served in the legislature. In the first instance, a bill

having been introduced by a sponsor, it is the practice on first reading that the bill be read by title, be ordered to print so it conforms with the first act of passing on first reading. Later, after the bill having been printed, lay before all of the legislators. Next, on second reading it would be referred to committee. The bill is still in its original form as when it was introduced . . . The committee handling the action having been approved to pass the bill on second reading goes to the committee for its consideration and any amendments that they can make to the particular bill.

. . . **The most important thing comes to third reading of the bill. When the bill comes out of the committee, we send an elephant into the committee in the first instance. The committee reports the bill entirely new in concept, not the changing of one figure when appropriation of dollars are needed, but a whole complete change with the contents in which the bill was originally introduced may contain one page. That bill comes out either 14 or 10 pages, different than the original. The committee recommends that the bill pass third reading in its amended form. You may have intended to request consideration of the matter of the caring of elephants. This bill comes out with the caring of the elephants, dogs, pigeons and what not and then we are voting on third reading for the passage of a completely new bill.** I dare ask whether this has passed the required procedures of the bill having passed three readings on three separate days. . . .

. . . Did the bill really pass and meet the criteria that the bill has been read in three different days? And because of this consultation that I had during –early in the recess . . . we entered into an agreement that extended – extended the 24-hour waiting period to 48 hours. There has been before the committee other jurisdiction which carries over to 72 hours . . . .

[M]y question to you . . . does the reading of a bill by title after it has come out from the committee recommending passage on third reading, does this constitute that the bill has had three readings?

. . .

DELEGATE MIYAKE: . . . [I]t has been the procedure in the legislature that the motion for the passage on third reading includes the words "bill having been read throughout pass third reading." Now the words, or the phrase "having been read throughout" is used since we have now the modern technique of photostating our bills . . . Because of modern technical machinery, each bill on final reading, on third reading is on the desk of each legislator. Therefore, we go through the form of using the words "the bill having been read throughout pass third reading" or "pass final reading." And according to the interpretation of the Attorney General in the past, the inclusions of these words, "having been read throughout" is sufficient to meet the requirement of having the bill read.

. . .

Plaintiffs-Appellants also argue the Organic Act as precedent for their interpretation of Haw. Const. article III § 15. Section 46 of the Organic act provides, "[t]hat a bill in order to become a law shall, except as herein provided, pass three readings in each house,

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> **DELEGATE KAUHANE**: . . . The bill having been read throughout passes third reading and yet the bill having been read throughout at the command, having been read throughout pass third reading is not the bill that was originally introduced and then came back on the floor on second reading, on second reading and asked that it be recommitted to the committee having been voted upon on passage on second reading .
>
> . . .
>
> **DELEGATE UEOKA**: I believe that the committee has reported our stating that there shall be three readings, and I don't believe that it's for this body at this time to determine as to how the legislature will comply with the mandates of the Constitution, assuming that it's adopted. I think it's clear that it calls for three readings. And I don't think we should at this point argue about what the legislature will do.
>
> . . .
>
> **DELEGATE KAUHANE**: -- the way the bill has gone through the procedure, Mr. Chairman. After the bill has come out in a disguised form from the original intent and purposes that this bill has met the requirements of the amended bill in the disguised form has passed three readings from three separate days. There is a legal question, I think, involved in here, but I am willing to accept the practices today that have been continuing as the format. Lo and behold, that in the event this is questioned later, I can safely say that I had an opportunity to provide the loophole through a constitutional provision as provided before by other jurisdiction that face the same kind of problem that I am raising.

II Proceedings of the Constitutional Convention of Hawaii of 1968, Committee of the Whole Debates at 168-171 (1973) (emphases added).

Delegate Kauhane was convinced that three readings of a bill that was worded differently at each reading could not possibly satisfy the "three readings" requirement because the final contents of the bill that ultimately passed had only been read or printed once. The other delegates who participated in the debate disagreed, believing instead that a "reading" consisted simply of making the contents of a bill available to legislators and the public, either by reading it aloud or printing it, before it was passed.

on separate days, . . ." The Organic Act did not contain the laying over provision of Section 15; and Plaintiffs-Appellants chose to ignore the lengthy Constitutional Convention Debates of 1968 cited by the Legislature to explain how the Framers of the Constitution explained the requirement to conduct three readings of a bill and discussed at length how the legislative process operates. Plaintiffs-Appellants refuse to recognize that the amendments to and substitutions of the contents of a bill do not give rise to the requirement to again comply with three readings. Instead, Plaintiffs argue that the Framers did not change the language of requiring three reading. There was no need to change the language because the Framers understood the process and what the practice was[15] During the period of the Organic Act, the Legislature also changed titles during the Session. The ***Smithies, supra,*** court said the following on three reading requirements.

> The next point urged is that act in question did not pass three readings in each branch of the legislature. This point is based on the contention that the original bill having passed the house of representatives, the title was amended in the senate without vote or action by the senate itself, and that after its amendment it was not read three times in house upon its return there. . . . After the amendment of the bill and its return to the house, the amendments have been concurred in, it was not necessary to read the bill as so amended three times.

Id., at 605-606. The position of the Supreme Court in 1911 is almost identical to the delegates of the 1968 Constitutional Convention. The case of ***In re Tom Pong,*** 17 Hawai`i 566 (1906) addressed the constitutionality of enacting "Revised Laws" by reference and not with its contents in the bill. The Supreme Court found that the Organic Act was complied with and stated:

> [o]ne attack made upon the adopting act is that it does not contain in its body any of the various provisions of the law which it seeks to declare of force, and that

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[15] Plaintiffs-Appellants did reference Delegate Kauhane's statements but he was clearly in the minority and out voted by his fellow delegates. More importantly, the issue was raised, debated and the interpretation of the majority stands.

> under the constitutional provision above cited it was necessary that these provisions should have been embodied in the act and should have been read three times before their passage. If this contention be correct, then a large body of our laws, many of which have been enforced for a century, are unconstitutional and void.

Id., at 572.

F. The Mandate That Bills In Its Final Form Be Printed and Lay For 48 Hours Is To Ensure The Legislators and the Public Know What Is Being Voted On.[16]

The then 24 (now 48) hour rule is what provides the Legislators and the public the opportunity to know what the bill contains. Plaintiffs-Appellants do not allege the houses failed to comply with the "printed copies" of the bill in its final form for at least "forty-eight hours"[17] prior to the final reading.

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[16] Standing Committee Report No. 46 reported:

> Your Committee has included the twenty-four hour rule as a requirement for the passage of bills. The purpose of this rule is to assure members of the legislature an opportunity to take informed action on **the final contents** of proposed legislation. This is accomplished by requiring the printing and availability of each bill in the "form to be passed" to the members of a house and a twenty-four hour delay between such printing and availability before final reading in each house. "Form to be passed" means the form in which a bill is passed on third reading in each house, concurrence of one house to amendments made by the other, and the form in which a bill is passed by both houses after conference on a bill. The twenty-four hour rule not only aids the legislator but also gives the public additional time and opportunity to inform itself of bills facing imminent passage.

I *Proceedings of the Constitutional Convention of Hawaii of 1968* at 216 (1973) (emphasis added). The underlined portion of the report shows that the delegates appreciated that bills could undergo substantial revisions before becoming law.

[17] It was the 1978 Constitutional Convention which increased the period before the final vote can be taken to 48 hours. Though Plaintiffs-Appellants do not concede that technological changes and the ability to track bills on the internet has changed the ability of both Legislators and the general public to be aware what is transpiring, the fact is, it does. The description of the bills'

From the above referenced Constitutional Convention Debates, it is clear that the intent was not to change the practice of amending bills which could include its total substitution and three readings will not be required. Thus, the notification requirement was enacted for purposes of providing Legislators and the Public the opportunity to know what the final form of the bill contains.[18]

G. The Legislature Enacted Processes Which Keeps Itself and Public Informed.

The Legislature does not disagree with Plaintiffs-Appellants' position that provisions were added to the ***Constitution*** to give the legislators and the public the opportunity to know what is being voted upon. The major amendments to Section 15, article III in 1968 and 1978 was to include the printing of the bill in the form to be passed and to lay it for 24 (then 48 in 1978) hours before the vote on third or final reading can take place. Notwithstanding the provision of the ***Constitution*** at issue here is Article III which is entitled the Legislature. This article does contain limited requirements as to public notification, however it is primarily focused on how the Legislature is to function, including the qualifications of its membership.

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contents changes as amendments are made. It is a better informed constituency due to the changes made by the Legislature on the use of the internet.

[18] Also, Plaintiffs-Appellants' authorities in support of their arguments that Section 14, article III was violated, predated the 1968 Constitutional Convention which required the printing of the bill in its final form and laying it over for 24 hours. In that Section 14 addresses the subject matter and the expressed title of the law, the concerns of the Plaintiffs should be alleviated because the 1968 amendment requires the provision of the bill in final form and laying it over. ***Schwab*** was decided in 1977 and it stands for the proposition that to sustain the violation of a subject-title requirements of the State Constitution" it must be "plain, clear, manifest, and unmistakable." ***Id.,*** 58 Hawai`i at 31 564 P.2d at 139. The burden was not met.

Plaintiffs-Appellants have at various points in their arguments, diminished the significance of the role of technology and how it assists the public in its participation and in transparency in the process. Attached to the Reply Memorandum is the December 7, 2007, Memo to Senators and staff on the Senate Paperless Initiative. Of relevance is the "Increased Public Access to the Legislative Process" found at 3-4 of Exhibit "B."[19] ROA 2 at 209-213. The Public is made aware of how to access documents and information on matters, including bills before the Legislature. Plaintiffs-Appellants' arguments as to the significance of the title in tracking a bill pales in comparison to the use of the website, registering for notification and the ability to do keyword searches. Note that Exhibit "C" and "D" to Defendant State of Hawai`i's Motion for Summary Judgment, contain descriptions of the Bill. ROA 1 at 77-83 and 84-86. It clearly states and informs the public that the bill has been amended. With the electronic technology available, this information would be immediately known to those who are interested, especially if they have availed themselves of the Real Simple Syndication ("RSS") which is attached the Legislature's Reply Memo as Exhibit "C."[20] ROA 2 at 214-215.

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[19] This Memo is available on the Legislature's Website, by clicking on to the Senate and the Archives at the bottom of the page. All steps of the initiative are accessible. The House of Representatives followed the Senate a few years later. The practice which the Senate established in 2007 is now common practice and most individuals who follow bills in the Legislature are able to receive notices of when the bills will be heard. The website is interactive and members of the public are able to do keyword searches, etc.

[20] The Legislature incorporates Delegate Miyake's statement found at 11 in their *Amicus* Brief. It is very clear that "modern technology" which included "photostating" of bills affected how the Framers looked to the requirements of the ***Constitution.*** This is why Section 12 of article III leaves to the Legislature the establishment of its owns rules and procedures.

H. Standing Is A Jurisdictional Issue And Can Be Raised At Anytime.

The issue of standing can be raised *sua sponte* in that this Court has stated it is a "jurisdictional issue and can be addressed at any stage of a case." ***Keahole Defense Coalition, Inc. v. Board of Land and Natural Resources,*** 110 Hawai`i 419, 42l, 134 P.3d 585, 593 (2006) ("***Keahole***"). This Court has stated that it will determine standing "even if the determination ultimately precludes jurisdiction over the merits." ***Keahole***, 110 Hawai`i at 427-428, 134 P.3d at 598-594. The majority of this Court in the recent case of ***Tax Foundation of Hawai`i v. State***, 144 Hawai`i 175, 439 P.3d 127 (2019) ("***Tax Foundation***") (which was decided two (2) months **after** the circuit court orally ruled on the motions which disposed of this case), spoke to "prudential concerns." Specifically the majority stated:

> Therefore, we preliminarily clarify that, in Hawai`i state courts, standing is not an issue of subject matter jurisdiction, but arises solely out of justiciability concerns based on prudential concerns of judicial self-governance, and is based on 'concern about the proper-and properly limited-role of courts in a democratic society."

Tax Foundation, 144 Hawai`i at 192, 439 P.3d at 144. The Chief Justice also stated:

> Because an "actual controversy" must be justiciable, each of these prudential rules, including standing, apply. As the Majority acknowledges, this provision "does not set out any actual standing requirements." Opinion by McKenna, J. at 144 Hawai`i at 201, 439 P.3d at 153. Thus, it is up to the courts to determine whether prudential requisites, including standing, have been met, such that the matter constitutes an "actual controversy" in which declaratory relief among other forms of relief may be awarded. Determining whether a plaintiff has "a personal stake in the outcome of the controversy." See Reliable Collection Agency, Ltd. v. Cole, 59 Haw. 503, 510-11, 584 P.2d 107, 111 (1978) ("While we are not subject to the 'case or controversy' requirements of Article III of the United States Constitution, the prudential considerations which haven suggested in the federal cases on standing persuade us that a party should not be permitted . .. to enforce public law without a personal interest which will be measurably affected by the outcome of the case.")

Tax Foundation, 144 Hawai`i 1at 212, 439 P.3d at 164.

This concept or prudential concern was discussed in the U.S. Supreme Court case of ***Warth v. Seldin,*** 422 U.S. 490, 500-501, 95 S.Ct. 2197, 2206, 45 L.Ed. 343 (1975) as follows:

> Moreover, the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties. See United States v. Raines, 362 U.S., at 22—23, 80 S.Ct., at 523—524.In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff. See Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237, 90 S.Ct. 400, 404, 24 L.Ed.2d 386 (1969). See generally Part IV, infra.
>
> Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III' s requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. E.g., United States v. SCRAP, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. E.g., Sierra Club v. Morton, supra, 405 U.S., at 737, 92 S.Ct., at 1367; FCC v. Sanders Radio Station, 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869 (1940).

What is the critical point in the concept of standing is its interrelationship with justiciability and the appropriate role of the Judiciary as a co-equal branch of government.

> In Hawai'i courts, standing is solely an issue of justiciability, arising out of prudential concerns of judicial self-governance. See Life of the Land II, 63 Haw. at 171-72, 623 P.2d at 438. As explained by Justice Nakamura in Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987):

> Unlike the federal judiciary, the courts of Hawaii are not subject to a cases or controversies limitation like that imposed by Article III, § 2 of the United States Constitution. But like the federal government, ours is one in which the sovereign power is divided and allocated among three co-equal branches. Thus, we have taken the teachings of the Supreme Court to heart and adhered to the doctrine that the use of judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context. And, we have admonished our judges that even in the absence of constitutional restrictions, they must still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government.
>
> Our guideposts for the application of the rules of judicial self-governance founded in concern about the proper — and properly limited — role of courts in a democratic society reflect the precepts enunciated by the Supreme Court. When confronted with an abstract or hypothetical question, we have addressed the problem in terms of a prohibition against rendering advisory opinions; when asked to decide whether a litigant is asserting legally recognized interests, personal and peculiar to him, we have spoken of standing; when a later decision appeared more appropriate, we have resolved the justiciability question in terms of ripeness; and when the continued vitality of the suit was questionable, we have invoked the mootness bar.
>
> We have also followed the teachings of the Supreme Court where political questions" are concerned....

Yamasaki, 69 Haw. at 170-72, 737 P.2d at 455-56 (internal citations, quotation marks, punctuation, and footnotes omitted) (emphases added).

Thus, Yamasaki recognizes that standing is a prudential concern in Hawai'i state courts, which are not subject to the case and controversy subject matter jurisdiction limitation of federal courts. Yamasaki also noted that standing is a prudential concern "founded in concern about the proper – and properly limited – role of courts in a democratic society." 69 Haw. at 171, 737 P.2d at 456 (citation omitted). Furthermore, our previous pronouncements that "standing principles are governed by 'prudential rules' of judicial self-governance," and that "the touchstone of this court's notion of standing is 'the needs of justice[,]' " see, e.g., Mottl, 95 Hawai'i at 389-90, 23 P.3d at 724-25, reflect our awareness that standing is a prudential issue and not an issue of subject matter jurisdiction, as "the needs of justice" cannot eliminate the requirement of subject matter jurisdiction. In addition, as pointed out earlier, in Hawai'i state courts, standing requirements may be tempered, or even prescribed, by legislative declarations of policy. See Life of the Land II, 63 Haw. at 172, 623 P.2d at 438.

Tax Foundation, 144 Hawai`i at 142-143, 439 P.3d at 190-191. (footnotes omitted).

Justice Nakamura could not emphasize enough the appropriate roles of the courts and how it should not render "advisory opinions." He also emphasized that the courts have a proper and properly limited role in the democratic society and warned the courts against intruding into areas reserved to the other branches of government.

To have ruled that Plaintiffs-Appellants have standing and rejected the separation of powers argument which went to the threshold issue of justiciability, the circuit court could have rendered, at best, an "advisory opinion." Plaintiffs-Appellants have no injury as a result of Act 84 (2018). In fact there is no action which resulted from Act 84 becoming law that Plaintiffs-Appellants claim except that they do not approve as to how Act 84 became law. That is clearly not a question of judicial resolution in that there is no case in controversy as to the law. In the ***Tax Foundation*** matter, it did involve the collection of taxes which was on going. In this case, there is no action other than how the law was allegedly created in violation of the ***Constitution.*** It is important to note that when a law becomes law as Act 84 (2018) did, it involves actions of the Legislative and Executive branches of government. The Judiciary is intruding into its co-equal **branches** of government.

I. Baker v. Carr Is The Dispositive Authority As To Political Question.

The Legislature as *Amicus Curiae* requests leeway and permission to raise this argument. This is due to the fact that if the three reading decision of the circuit court is not affirmed, the issue of who determines when and if three reading has been satisfied will be a political question which should not be addressed by this Court.

The discussion on what is a political question requires that, as in almost all courts, the adoption of the standard set forth in ***Baker v. Carr,*** 369 U.S. 186, 217, 82 S.Ct. 691, 710 (1962), as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; **or** a lack of judicially discoverable and manageable standards for resolving it**; or** the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; **or** the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; **or** an unusual need for unquestioning adherence to a political decision already made; **or** the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.

(emphasis added). Any one of the six criteria listed above would require dismissal because the complaint is non-justiciable. It is the Legislature's contention that its process is being challenged which the ***Constitution*** mandates that it adopts and enacts. The debates of the constitutional conventions require an adherence to the political decisions made by the Framers and the voters.

It is also noted that the circuit court stated that it is making its decision on only this case, the Legislature respectfully ask that this Court consider that a decision in favor of Plaintiffs-Appellants' Complaint would impact other Acts of the 2018 Legislature which this Court is without discoverable or manageable standards for their resolution.

J. Germaneness Is Not Required Under the Constitution.

For almost half of their opening brief, Plaintiffs-Appellants make the argument on germaneness. It is important to note that the ***Constitution*** does not set forth in Article III the

requirement that amendments be "germane." Plaintiffs-Appellants from pages 8-21 of their Opening Brief discuss germaneness but cannot point to any case on point. They cite to treatises but not to holdings of this Court on the issue. What complicates their argument is that Plaintiffs-Appellants concede that "[t]he State does not need to restart the readings every time there is any amendment." They then go on to say that if the substituted text is not germane to the text of the original bill, then the requisite three readings begin again. If their arguments are adopted, this means the courts will be called upon to determine germaneness of bills. Plaintiffs-Appellants are relying on treatises and not the ***Constitution*** or authorities of this Court.

It is established law that the ***Constitution*** should be given its plain and ordinary reading. That is to say if the words are clear and unambiguous, they are construed as written. ***Watland v. Lingle, supra.*** Section 15 address three readings on separate days in each House. It does not state a requirement for germaneness, merely that it be read. This Court made clear in ***Taomae, supra***, that the decision was made based upon Haw. Const. article XVII and not article III. Thus it is not an authority upon which Plaintiffs-Appellants can rely.

Again, the debates of the Constitutional Conventions referenced above, shows that the delegates debated the issue of the three readings and believed it could be completely changed and not require the three readings to begin again. All that would be required, for example, a bill amended and changed in the conference committee would be that it be printed and lay over for 48 hours before the final reading. This is the clear language of the ***Constitution.***

IV. CONCLUSION

The *Amicus Curiae* contends that what should be evident from the Constitutional Convention Debates and the reference in the ***Constitution*** to the words "law" and "reading" are what constitutes and satisfies these requirements before Act 84 (2018) was passed. The intent of the Framers was to leave it up to each chamber of the legislature. With technology as it was in 1968, the reference is to "photostating" was a statement by a Delegate that times were changing and the original need to "read" the bills so that the members knew what they were voting on is no longer required. In other words that fact that a printed version was available mooted whether it needed to be read throughout. This is why the requirement of Section 15, article III of the ***Constitution*** is as to "the form to be passed it shall have been printed and made available to the members of that house for at least forty-eight hours." There is no other requirement which states the bill to be read must be in the "form to be passed." As well, there is no requirement under Section 14 article III of the ***Constitution*** that the "law" must have a more detailed title. All that is required is that the bill law contain one subject and be covered by the title.

For the foregoing reasons, the Hawai`i State Legislature respectfully request that this Court affirm the Circuit Court's decision in favor of Defendant-Appellee State of Hawai`i. Alternatively, the Hawai`i State Legislature respectfully request that this Court find the circuit court improperly rejected that separation of powers argument and that Plaintiffs-Appellants lacked standing to bring their action.

DATED: Honolulu, Hawaii, _____.

_____
COLLEEN HANABUSA
Attorney for the HAWAI`I STATE LEGISLATURE

NO. CAAP-19-0000372

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.	CIVIL NO. 18-1-1376-09 GWBC APPEAL FROM: FINAL JUDGMENT FILED ON APRIL 3, 2019 CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII HONORABLE GARY WON BAE CHANG

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a true and correct copy of the foregoing document was served on the following party(ies) electronically through JEFS:

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