NO. CAAP-23-0000310

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

HILO BAY MARINA, LLC, and KEAUKAHA MINISTRY LLC Plaintiffs-Appellants, vs. STATE OF HAWAII; BOARD AND NATURAL RESOURCES, STATE OF HAWAII; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE ENTITIES, 1-10, Defendants-Appellees.	) CIVIL NO. 3CCV-22-0000095))) APPEAL FROM:) (1) FINAL JUDGMENT FILED ON) APRIL 13, 2023, AND (2) DEFENDANT) STATE OF HAWAII'S FINDINGS OF FACT,) CONCLUSIONS OF LAW AND ORDER) GRANTING DEFENDANT'S MOTION FOR) SUMMARY JUDGMENT AND DENYING) PLAINTIFF'S MOTION FOR SUMMARY) JUDGMENT FILED ON MARCH 21, 2023)) CIRCUIT COURT OF THE THIRD CIRCUIT)) HON. HENRY T. NAKAMOTO))

HILO BAY MARINA, LLC AND KEAUKAHA MINISTRY LLC'S OPENING BRIEF

APPENDICES 1–2

STATEMENT OF RELATED CASES

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HILO BAY MARINA, LLC AND KEAUKAHA MINISTRY LLC'S OPENING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from an order granting summary judgment on the enforceability of a deed restriction requiring the landowner to use the property for "church purposes only" and reserving a possibility of reverter in favor of the State.[1] Plaintiff-Appellant Hilo Bay Marina, LLC and Plaintiff-Appellant Keaukaha Ministry LLC (collectively, "Appellants") are the fee-simple owners of the encumbered property. After years of attempted negotiations with the State, Appellants instituted this lawsuit asserting multiple grounds for the invalidity and/or unenforceability of the deed restriction. Both Appellants and the State filed cross-motions for summary judgment. The circuit court granted summary judgment in favor of the State, holding that the deed restriction was a legal exercise of the State's police powers to zone and that neither statutory nor constitutional grounds rendered the deed restriction unenforceable. Appellants now appeal the order granting the State's Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment.

A. Nature of the Case

This case poses a novel, yet simple, question: Can the State reserve property solely for religious purposes in perpetuity through a deed restriction? Appellants maintain that the State cannot do so and assert three primary grounds for this conclusion: 1) Hawai‘i Revised Statutes section 515-6(b); 2) article 1, section 4 of the Hawai‘i Constitution; and 3) the Establishment Clause of the First Amendment of the United States Constitution. Oppositely, the State contends that the deed restriction at issue violates none of these three grounds and is, instead, a valid exercise of the State's police powers to zone. The material facts of this case are largely, if not entirely, uncontroverted. Therefore, this case hinges purely on statutory and constitutional interpretation.

B. Statement of Material Facts

In 1922, the Governor of the Territory of Hawai‘i, pursuant to Land Patent No. 8039 (the "**Land Patent**"), granted Heber J. Grant, Trustee in Trust for the Church of Jesus Christ of Latter-Day Saints (the "**Church**") a church lot of 3.22 acres and a cemetery lot of .077 acres.

[1] "State" encompasses both Defendant-Appellee State of Hawai‘i and Defendant-Appellee Board of Land and Natural Resources, State of Hawai‘i.

Pls.' Mot. for Summ. J., CC Dkt. 89 at 33–37.[2] The conveyed property can be identified today as Tax Map Key Nos. (3) 2-1-014:25, 29, 30, 31, 60, and 74 (hereinafter, the "**Property**"). Findings of Fact, Conclusions of Law, and Order, CC Dkt. 114 at 3 ¶ 1. The Land Patent purports to have been executed in exchange for $20 paid for by the Church. CC Dkt. 89 at 33; CC Dkt. 114 at 3 ¶ 1. The Land Patent also contains the following restriction:

> **The land covered by this Grant is to be used for Church purposes only. In the event of its being used for other than Church purposes, this Grant shall become void and the land mentioned herein shall immediately revert and revest in the Territory of Hawaii**; further, should any portion of the land herein mentioned be used for Cemetery purposes, same shall at all times be subject to all rules and regulations of the Territorial Board of Health as authorized by law for the interment of the dead, and respecting cemeteries and burying grounds.

CC Dkt. 89 at 34; CC Dkt. 114 at 3 ¶ 2 (emphasis added) (hereinafter, the "**church purposes restriction**", or simply the "**deed restriction**" or "**Restriction**").

In 1988, the Church conveyed the Property to Desert Title Holding Company by Warranty Deed dated December 16, 1988. CC Dkt. 89 at 38–45; CC Dkt. 114 at 3 ¶ 4. In 2000, Property Reserve, Inc., formerly known as Desert Title Holding Company, conveyed the Property to Hilo Bay Marina LLC by Quitclaim Deed dated September 1, 2000. CC Dkt. 89 at 46–52; CC Dkt. 114 at 4 ¶ 4. In 2015, Hilo Bay Marina LLC conveyed Tax Map Key No. (3) 2-1-014:25, which is a portion of the Property, to Keaukaha Ministry by way of Warranty Deed dated April 24, 2015. CC Dkt. 89 at 53–60; CC Dkt. 114 at 4 ¶ 5.

Thus, the Property consists of the following parcels owned by Appellant Hilo Bay Marina LLC: Tax Map Key No. (3) 2-1-014:29, 30, 31, 60, and 74, and the following parcel owned by Appellant Keaukaha Ministry: Tax Map Key No. (3) 2-1-014:025. CC Dkt. 89 at 11; CC Dkt. 114 at 3–4.

C. Procedural History

On April 5, 2022, Appellants filed their Complaint for Declaratory Relief against the State asserting that the church purposes restriction is void under both Hawai'i Revised Statutes section 515-6(b) and the Establishment Clause of the First Amendment of the United States

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[2] All page number citations to the Record on Appeal refer to the **PDF page number** of the electronic document. All citations to "CC Dkt." refer to dockets duly filed in the Circuit Court of the Third Circuit of the State of Hawaii, case number 3CCV-22-0000095. All citations to "ICA Dkt." refer to dockets duly filed in the Intermediate Court of Appeal of the State of Hawaii, case number CAAP-23-0000310.

Constitution. CC Dkt. 1 at 5–7. The Complaint also asserted that government enforcement, even by the circuit court, of the church purposes restriction would constitute impermissible state action in violation of *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948). CC Dkt. 1 at 6 ¶ 31. The Complaint therefore sought declaratory judgment that the church purposes restriction is void and unenforceable.

On April 25, 2022, Appellants filed their First Amended Complaint for Declaratory Relief to clarify the inclusion of Doe defendants. CC Dkt. 7 at 2. On August 17, 2022, Appellants and the State (collectively, the "parties") filed a Proposed Stipulation and Order Permitting Plaintiffs to Amend Complaint, agreeing to allow Appellants to file a Second Amended Complaint. CC Dkt. 34. Said Stipulation and Order was approved by the circuit court and entered on August 22, 2022. CC Dkt. 38.

Accordingly, on August 22, 2022, Appellants filed their Second Amended Complaint for Declaratory Relief. CC Dkt. 40. In addition to maintaining all counts and claims asserted in the Complaint and First Amended Complaint, the Second Amended Complaint further asserted that the church purposes restriction violates the Constitution of the State of Hawai‘i, specifically article 1, section 4 and article VII, section 4. *Id.* at 6–8. In total, the Second Amended Complaint asserts three counts for declaratory judgment against the State: Count I) the Restriction and possibility of reverter are void pursuant to section 515-6(b) of the Hawai‘i Revised Statutes; Count II) the Restriction and possibility of reverter are void pursuant to article 1, section 4 and article VII, section 4 of the Constitution of the State of Hawai‘i; and Count III) the Restriction and possibility of reverter are void pursuant to the Establishment Clause of the First Amendment of the United States Constitution. *Id.* at 5–10. On September 1, 2022, the State filed its Answer to the Second Amended Complaint, denying the substantive allegations and asserting various affirmative defenses. CC Dkt. 45 at 2–4.

On November 11, 2022, Appellants and the State each filed their respective cross-motions for summary judgment. CC Dkt. 57; CC Dkt. 89. Appellants' Motion for Summary Judgment ("Appellants' MSJ") argued that, under the plain language of the statute, HRS section 515-6(b) voids the church purposes restriction because the statute "voids every condition, restriction, or prohibition on the use or occupancy of real property on the basis of, among other things, religion." CC Dkt. 89 at 13. Moreover, the statute's narrow exception does not apply to the church purposes restriction because the Property is not "held" by a religious institution. *Id.* at 14. Thus, Appellants argued that they were entitled to summary judgment as a matter of law on

Count I. In support of Count II, Appellants' MSJ argued that the State of Hawai'i's own establishment clause, embedded in article 1, section 4 of the Hawai'i Constitution, renders the Restriction void because the Restriction impermissibly violates the intended separation of church and state. *Id.* at 6–7. Specifically, Appellants argued that the appropriate test for Hawai'i's establishment clause is the three-pronged test outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and that the church purposes restriction failed all three prongs. *Id.* at 16-19.

Finally, in regards to Count III, Appellants asserted that, without the option to use the Property for secular purposes, the Restriction unconstitutionally forces and coerces Appellants to engage in religious activity in violation of the Establishment Clause. *Id.* at 20–24. Appellants also noted that *Shelley* prevented the circuit court from enforcing the Restriction under the state action doctrine. *Id.* at 25–26. Accordingly, Appellants argued that they were entitled to summary judgment and a declaration that the church purposes restriction is void and unenforceable as a matter of law.

Conversely, the State's Motion for Summary Judgement ("State's MSJ") argued that the church purposes restriction was a "primitive form of zoning" and therefore constitutes a valid exercise of the State's police powers. CC Dkt. 57 at 9. In support of this claim, the State filed exhibits of seventeen land patents containing use restrictions similar to the church purposes restriction and ten surveys recording these land patents. *See* CC Dkts. 62–85. No other evidence was submitted by the State. Regarding the statute, the State's MSJ argued that HRS section 515-6(b) did not void religious use restrictions and that anyone, including the State, is allowed to be the grantor or imposer of such restrictions. In addressing the First Amendment, the State contended that, under the United States Supreme Court's new "historical practices and understandings test" established in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2429 (2022), the Restriction is constitutional because the Territory of Hawai'i's "primitive form of zoning" equates to a historical practice. *Id.* at 10–12. Moreover, the State argued that Hawai'i's establishment clause is co-extensive with the First Amendment's Establishment Clause and that *Kennedy* thus likewise governs the state constitutional claims. *Id.* at 12–13. As a result, the State maintained that the Restriction is valid because it does not violate HRS section 515-6(b), the Hawai'i Constitution, or the United States Constitution.

On December 2, 2022, Appellants and the State filed their respective Oppositions to the cross-motions for summary judgment. *See* Appellants' Mem. Opp., CC Dkt. 91; State's Mem. Opp., CC Dkt. 91. Appellants and the State then filed their respective Reply Memorandums on

December 9, 2022. *See* Appellants' Reply Mem., CC Dkt. 97; State's Reply Mem., CC Dkt. 95. Neither side submitted additional exhibits beyond those attached to their original motion for summary judgment. Appellants' and the State's respective cross-motions for summary judgment were heard in-person before the Honorable Henry T. Nakamoto on December 14, 2022. *See generally* ICA Dkt. 17. The court took the matter under advisement at the conclusion of the hearing.

On February 15, 2023, the circuit court issued its Minute Order granting the State's Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment. Min. Order, CC Dkt. 104 at 2. The circuit court determined that "[a] plain reading of HRS section 515-6(b) provides the state to [sic] power to reserve and enforce a restrictive covenant for religious purposes." *Id.* In turn, the circuit court reasoned that the church purposes restriction is not void because "[i]t does not restrict the type or church purpose or which religion it must follows [sic]." *Id.* The circuit court also held that prior to statehood and before the Hawai'i County Zoning Code, "it was common practice for the Territorial Government to use restrictions as an early way of 'rough zoning.'" *Id.* Regarding the various Constitutional arguments, the circuit court held that "[t]hese types of restrictions have passed Constitutional muster." *Id.*

The circuit court approved and entered the State's Findings of Fact, Conclusions of Law and Order Granting Defendant's Motion for Summary Judgment (hereinafter, the "**Order**") on March 21, 2023.[3] CC Dkt. 114. The Order, in relevant part, states that "[t]he Territory of Hawai'i engaged in an early form of use-zoning through the sale of land with deed restrictions, including the sale of government lands to religious organizations." *Id.* at 3 ¶ 3. In regards to HRS section 515-6(b), the circuit court held:

> 11. HRS § 515-6(b) provides an exemption that permits any party to reserve a covenant for religious use when transacting with a religious organization.
>
> 12. The deed restriction "for Church purposes only" is included in the exemption clause of HRS § 515-6(b).
>
> 13. HRS § 515-6(b) does not void the deed restriction.

[3] Appellants also filed their own proposed Findings of Fact, Conclusions of Law and Order ("Plaintiffs' Form"). CC Dkt. 112. Pursuant to Rules 21 and 23 of the Rules of the Circuit Courts of the State of Hawaii, Appellants filed a corresponding letter explaining the reasoning for Plaintiffs' Form. CC Dkt. 110. Appellants argued that the State's proposed order included extraneous findings and conclusions that failed to accurately reflect the circuit court's Minute Order or the oral arguments at hearing. *Id.* at 1. Plaintiffs' Form was ultimately denied by the circuit court.

Id. at 5 ¶¶ 11–13. As for the First Amendment, "[t]he Establishment Clause 'must be interpreted by "reference to historical practices and understandings[,]"'" and "[t]he practice of selling government lands with deed restrictions was an early form of use-zoning and is interpreted as a historical practice of zoning. *Id.* at 5 ¶¶ 15, 18.

Turning to the Hawai'i Constitution, the circuit court held that article 1, section 4 "is coextensive with the First Amendment of the United States Constitution" and that the church purposes restriction does not violate the Hawai'i Constitution for the same reasons it does not violate the First Amendment. *Id.* at 20–21. Moreover, the court held that even under *Lemon*, the church purposes restriction passes Constitutional muster because it "had a secular purpose of zoning[,] allows for any religious organization to benefit from the property, so it does not endorse or approve one religion over another[,] and [t]he surveillance and monitoring required to enforce the deed restriction do not present excessive entanglement because they are no different than that of what is required to enforce any other zoning regulation." *Id.* at 6 ¶¶ 23–27.

Thus, the Order concludes that "Plaintiffs have failed to demonstrate that this deed restriction violates any of the laws alleged therein in their Second Amended Complaint [Dkt. 40]." *Id.* at 7.

On April 13, 2023, the circuit court entered its Final Judgment pursuant to Rule 58 of the Hawai'i Rules of Civil Procedure, thereby entering judgment in favor of the State on all claims alleged in the Second Amended Complaint. CC Dkt. 118. Appellants timely filed their Notice of Appeal on April 24, 2023. ICA Dkt. 1.

II. POINTS OF ERROR ON APPEAL

1. The circuit court erred as a matter of law when it held that "[t]he practice of selling government lands with deed restrictions was an early form of use-zoning and is interpreted as a historical practice of zoning." This error occurred in the record at CC Dkt. 104 at 2; CC Dkt. 114 at 5 ¶ 18. Appellants preserved the objection at CC Dkt. 91 at 15–19, 21–22; CC Dkt. 97 at 8–9; Cross-Mots. Hr'g Tr., ICA Dkt. 17 at 8:24–9:19, 30:10–30:19, 31:25–32:19.

2. The circuit court erred as a matter of law when it concluded that "HRS § 515-6(b) does not void the deed restriction." This error occurred in the record at CC Dkt. 104 at 2; CC Dkt. 114 at 5. Appellants preserved the objection at CC Dkt. 89 at 12–15; CC Dkt. 91 at 9–14; CC Dkt. 97 at 4–5; Cross-Mots. Hr'g Tr., ICA Dkt. 17 at 6:8–7:16.

3. The circuit court erred as a matter of law when it concluded that "[t]he deed restriction does not violate Article I, § 4 of the Hawai'i Constitution for the same reasons that it does not violate the Establishment Clause of the First Amendment of the United States Constitution[,]" and "[e]ven if Article I, § 4 of the Hawai'i Constitution is not coextensive with the Establishment Clause of the First Amendment of the United States Constitution, the deed restriction passes Constitutional muster under *Lemon v. Kurtzman*[.]" This error occurred in the record at CC Dkt. 104 at 2; CC Dkt. 114 at 6 ¶¶ 21, 23–27. Appellants preserved the objection at CC Dkt. 89 at 16–20; CC Dkt. 91 at 19–21; CC Dkt. 97 at 6–8; Cross-Mots. Hr'g Tr., ICA Dkt. 17 at 7:17– 8:19.

4. The circuit court erred as a matter of law when it concluded that "[t]he deed restriction does not violate the Establishment Clause of the First Amendment of the United States Constitution. CC Dkt. 114 at 5 ¶ 19. Appellants preserved the objection at CC Dkt. 89 at 20–24; CC Dkt. 91 at 22–24; CC Dkt. 97 at 8–9; Cross-Mots. Hr'g Tr., ICA Dkt. 17 at 8:20–10:1, 11:6–19.

III. STANDARD OF REVIEW

A. Summary Judgment

A circuit court's grant or denial of summary judgment is reviewed de novo, under the same standard applied by the circuit court. *808 Dev., LLC v. Murakami*, 111 Hawai'i 349, 354, 141 P.3d 996, 1001 (2006). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* at 354–55.

B. Findings of Fact and Conclusions of Law

A trial court's findings of fact "are subject to the clearly erroneous standard of review." *Castro v. Melchor*, 142 Haw. 1, 10, 414 P.3d 53, 63 (2018). A finding of fact "is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been committed." *Id.* (internal quotation marks and citation omitted).

A conclusion of law "is not binding upon an appellate court and is freely reviewable for correctness." *Chun v. Bd. Of Trs. Of the Emp. Ret. Sys. Of State of Haw.*, 106 Haw. 416, 430, 106 P.3d 339, 353 (2005). "Hawaii appellate courts review conclusions of law de novo under

the right/wrong standard. *Associates Fin. Services Co. of Haw., Inc. v. Mojo* 87 Haw. 19, 28, 950 P.2d 1219, 1228 (1998). "Under the right/wrong standard, [the appellate court] examines the facts and answers the question without being required to give any weight to the trial court's answer to it." *Estate of Marcos*, 88 Haw. 148, 153, 963 P.2d 1124, 1129 (1998) (internal quotation marks and citation omitted).

C. Statutory Law

The interpretation of a statute is a question of law reviewed under the "right/wrong" standard of review or de novo. *State v. Arceo,* 84 Hawaii 1, 10, 928 P.2d 843, 852 (1996). When construing a statute, the courts' foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. *Silva v. City & Cty. of Honolulu*, 115 Haw. 1, 6, 165 P.3d 247, 252 (2007). Courts must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose. *Id.*

D. Constitutional Law

Whether the church purposes restriction violates the First Amendment of the United States Constitution or article 1, section of the Hawai‘i Constitution presents a question of constitutional law. Courts answer questions of constitutional law "by exercising [its] own independent constitutional judgment based on the facts of the case." *Arceo*, 84 Hawaii at 11, 928 P.2d at 853. Thus, appellate courts review questions of constitutional law under the right/wrong/ standard without being required to give any weight to the trial court's answer to it. *Kelly v. 1250 Oceanside Ptnrs.,* 111 Haw. 205, 221, 140 P.3d 985, 1001 (2006); *Arceo*, 84 Hawaii at 11, 928 P.2d at 853.

IV. ARGUMENT

The circuit court erred as a matter of law when it granted the State's Motion for Summary Judgment and held that the church purposes restriction is a valid, enforceable exercise of the State's police powers. First, no evidence was submitted substantiating the State's claim that the Territory of Hawai‘i used deed restrictions as "early form" zoning. Moreover, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), overruled such primitive methods as unacceptable, and the church purposes restriction, today, amounts to arbitrary spot-zoning. Second, the State of Hawai‘i has expressly voided discriminatory deed restrictions, including the church purposes restriction, through the enactment of Hawai‘i Revised Statutes section 515-6(b). The plain

language of the statute unambiguously voids the Restriction because the Property is not "held by a religious institution." Third, the church purposes restriction violates article 1, section 4 of the Hawai‘i Constitution because *Lemon* remains the applicable test, and the Restriction fails all three prongs of *Lemon*. Alternatively, even if the new "historical practices" test applies to Hawai‘i's establishment clause, the Restriction still violates the Hawai‘i Constitution because zoning for religious purposes was not a historical practice of the State of Hawai‘i during the clause's last amendment. Last, the church purposes restriction also violates the Establishment Clause of the First Amendment of the United States Constitution, because, independent of *Lemon* or *Kennedy*, states may not "set up a church" nor may they "aid all religions." Moreover, the Restriction cannot be justified by "historical practices" because the federal government lacks police powers and therefore lacks any historical practice of zoning for religious purposes. As a result, the church purposes restriction is invalid and unenforceable pursuant to statute, the Hawai‘i Constitution, and the United States Constitution, and the circuit court's order granting summary judgment in favor of the State must be vacated.

A. The Church Purposes Restriction is Not a Valid Exercise of the State's Police Powers, Because No Evidence Was Submitted Supporting It as a Form of "Rough Zoning", and Such Flawed Zoning Violates *Euclid*.

Reserving specific property solely for religious activity is neither the prerogative of the government, nor is the government empowered to do so through its police powers or otherwise. *See Lee v. Weisman*, 505 U.S. 577, 588 (1992) ("The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."). The circuit court erred when it held that the church purposes restriction is a valid exercise of the State's police powers to zone for two primary reasons. *See* CC Dkt. 114 ¶¶ 16–18. First, the record lacks any evidence, let alone substantial evidence, supporting the State's claim that the Territory of Hawai‘i used deed restrictions as a form of "early zoning." At the very least, no evidence was submitted tying Appellants' Land Patent or the church purposes restriction to any type of zoning scheme or general plan. Due to this lack of evidence, the circuit court clearly erred in finding that the church purposes restriction was intended as early zoning. Second, even if the Territory did intend for these deed restrictions to act as "early zoning," such zoning has unequivocally been invalidated by *Euclid*. Absent any general plan, the singling out of the Property amounts to arbitrary spot zoning and must be invalidated. Relatedly, the State

delegated its power to zone to the various counties through Section 46-4 of the Hawai‘i Revised Statutes, and, therefore, the County of Hawai‘i’s zoning designations control. For these reasons, the church purposes restriction cannot be justified as a valid exercise of the State’s police powers, and the circuit court’s Order must be vacated and the case remanded.

i. The Record Lacks Substantial Evidence Supporting the State’s Claim That the Church Purposes Restriction Was “Early Zoning”

In its Motion for Summary Judgment, the State argued that, during the time of the Territory of Hawai‘i, it was common practice for the Territorial Governor to conduct “a form of early zoning” by incorporating use restrictions into the deeds of Territorial land sales. CC Dkt. 57 at 1–2. In support of this claim, the State attached seventeen land patents containing use restrictions for church purposes, cemetery purposes, or school purposes. *See* CC Dkts. 58–74. In addition to the several land patents, the State also submitted ten Territorial surveys purporting to record landowners of various lots and grants. *See* CC Dkts. 75–85. None of the ten surveys pertain to the Property or the Land Patent. *Id.* No other evidence was submitted to the circuit court in support of the State’s argument that the church purposes restriction was “early zoning.”

Neither the State’s briefing nor its oral arguments at the hearing provide any explanatory connection between the submitted surveys and land patents. No records of the Territorial Governor’s or Commissioner of Public Land’s deliberations leading to the creation of these land patents’ use restrictions were introduced. Without such evidence, the State’s exhibit land patents merely evince that the Territory of Hawai‘i sometimes attached use restrictions (at times unconstitutional restrictions) when it sold government property and then recorded these conveyances in subsequent surveys.

Alternatively, the State also argued that section 73(k) of the Hawaiian Organic Act “in and of itself is an example of the fact that the State was exercising this sort of early zoning during the Territory days.” ICA Dkt. 17, 13:17–19. However, the State misinterprets the authority actually granted in section 73(k). In its entirety, section 73(k) states:

> The Commissioner may also, with such approval [from the governor], issue, for a nominal consideration, to any church or religious organization, or person or persons or corporation representing it, a patent for any parcel of public land occupied continuously for not less than five years heretofore and still occupied by it as a church site under the laws of Hawaii.

An Act to Provide a Government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900). Contrary to the State’s argument, section 73(k) encompasses only the Territory’s *conveyance* of

property to religious organizations. It does not contemplate, and certainly does not empower, the Territory's imposition of perpetual use restrictions piggy-backing onto conveyances. The State pointed to no other evidence in support of its zoning argument. The record therefore wholly lacks "credible evidence which is of a sufficient quality and probative value to enable a person of reasonable caution to support [the] conclusion" that the church purposes restriction was used by the Territory as early zoning. *See The 7's Enters. v. Rosario,* 111 Hawai'i 484, 489, 143 P.3d 23, 28 (2006). Due to this absence of substantial evidence, the circuit court's finding that the Restriction constitutes an early form of Territorial zoning is clearly erroneous and must be vacated.

ii. Euclid Ruled Such Attempted Piece-Meal Zoning as Unconstitutional and the State's Singling Out of the Property Amounts to Arbitrary Spot Zoning Under Hawaii Law

Even assuming *arguendo* that the Territory intended the church purposes restriction to accomplish a primitive form of zoning, both *Euclid* and HRS section 46-4 clarify that such practice is *not* legal zoning and is not a valid exercise of police powers. For over a hundred years, the proper process by which the government may regulate use of property by districts or "zones" has been cemented by the principles established in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 393 (1926). Those principles require zoning ordinances to possess a "substantial relation to the public health, safety, morals, or general welfare[,]" as not to be clearly arbitrary and unreasonable. *Id.* at 395 (citing *Thomas Cusack Co. v. Chicago*, 242 U.S. 526, 530–31 (1917)). In determining whether a sufficient substantial relation exists, courts afford local legislatures considerable deference in their judgment of what is or is not in the best interest of the general welfare. *Id.* at 388, 393 ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. . . .We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot — not the courts.").

Echoing this emphasis on municipal wisdom, the State of Hawai'i enacted section 46-4 of the Hawai'i Revised Statutes in 1957, formally entrusting zoning powers to the several counties. Haw. Rev. Stat. § 46-4 ("Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner."). Moreover, "[z]oning in all counties shall be accomplished within the framework of a ***long-range, comprehensive general plan*** prepared or being prepared to guide the overall future development of the county." *Id*. Such long-range

comprehensive general plans must be "(1) formulated with input from the state and county agencies as well as the general public, (2) take into consideration the state functional plans, and (3) be formulated on the basis of sound rationale, data, analyses, and input from state and county agencies and the general public." *Kaiser Haw. Kai Dev. Co. v. Honolulu,* 70 Haw. 480, 484, 777 P.2d 244, 246 (1989). Finally, HRS section 46-4 specifies that the "zoning power granted herein shall be exercised by ordinance[.]" Haw. Rev. Stat. § 46-4.

Nearly every aspect of the church purposes restriction violates these requirements outlined in HRS section 46-4 and *Euclid*. The Restriction was not the result of municipal or local legislative wisdom and deliberation, nor was it created in furtherance of any long-range, comprehensive general plan. *See Euclid*, 272 U.S. at 388, 393. No evidence whatsoever was submitted establishing that "sound rationale, data, analyses" or public input played any role in the Restriction's imposition. *See Kaiser Haw. Kai Dev. Co.,* 70 Haw. at 484, 777 P.2d at 246. If anything, the Land Patent's reference to section 73 of the Hawaiian Organic Act confirms the exact opposite — that the Restriction was imposed at the sole discretion of the Commissioner of Public Lands and Territorial Governor. Regardless of what the Territory attempted to do in 1922, both case law and statute establish that the Restriction was not, and is not, proper zoning.

In direct contrast to the State's "early form" zoning argument, the church purposes restriction, in actuality, equates to spot-zoning. The Hawai'i Supreme Court defines spot zoning as "an arbitrary zoning action by which a small area within a large area is singled out and specially zoned for a use classification different from and inconsistent with the classification of the surrounding area and not in accord with a comprehensive plan." *Save Sunset Beach Coal. v. City & Cty. of Honolulu*, 102 Hawai'i 465, 473, 78 P.3d 1, 9 (2003) (quoting *Life of the Land v. City Council*, 61 Haw. 390 429, 606 P.2d 866, 890 (1980)). Since spot zoning involves relatively small parcels of land, the determination of such use garners minimal community interest and, in turn, produces little to no public debate. *Id*. (citing J.C. Jeurgensmeyer, T.E. Roberts, *Land Use Planning and Control Law* 191 (1998)). Thus, "[t]he usual presumption of validity may not be accorded spot zoning because of the absence of widespread community consideration of the matter." *Id.*

Here, the Property, like its entire surrounding area, is zoned through ordinance as "V, Resort-Hotel District." *See* City of Hilo Zone Map, Section 25-8-3. Yet, while a total of thirty-eight different uses are permitted for other properties located in V districts, only Appellants' Property is constrained to a singular use — church purposes. *See* Haw. Cty. Code § 25-5-92.

Thus, even if the church purposes restriction was once "early zoning", it is now an "arbitrary zoning action by which a small area within a large area is singled out." *Contra Save Sunset Beach Coal.*, 102 Hawai'i at 468, 473, 78 P.3d at 4, 9 (holding that spot zoning did not apply to property 765 acres in size because "the property encompasses a large area and substantial public comment and deliberation took place"). No public debate, community input, or comprehensive plan contributed to the church purposes restriction's drastically different treatment of the Property compared to its surrounding area. Such spot zoning cannot stand.

More importantly, as implored by *Euclid* and HRS section 46-4, the wisdom of the Hawai'i County Council has legislatively spoken to the zoning designation of the Property, and that designation is "V, Resort-Hotel District." *See* City of Hilo Zone Map, Section 25-8-33. Unlike the church purposes restriction, the council's zoning determination was made in accordance with the County of Hawai'i's general plan, which was formally adopted by ordinance. Haw. Cty. Code § 16-1 (adopting the County of Hawai'i's general plan). Thus, the State's attempt to arbitrarily spot zone the Property cannot trump the County of Hawai'i's proper zoning designation.

As a result, the circuit court erred when it upheld the church purposes restriction as a valid exercise of the State's police powers, because no evidence was submitted tying the church purposes restriction to a comprehensive general plan and the County of Hawai'i has properly determined what the Property's allowed uses should be today.

B. <u>The Church Purposes Restriction and Possibility of Reverter are Void Pursuant to Haw. Rev. Stat. § 515-6(b).</u>

The circuit court also erred as a matter of law when it concluded that "HRS § 515-6(b) does not void the deed restriction." *See* CC Dkt. 114 at 5 ¶ 13. First, the plain language of the statute clearly voids the church purposes restriction because the restriction limits the use of real property on the basis of religion, and the Property is not "held by a religious institution." *See* Haw. Rev. Stat. § 515-6(b).[4] Second, even if an ambiguity exists, which one does not, the

[4] Hawaii Revised Statutes section 515-6(b) states, in its entirety:

> Every condition, restriction, or prohibition, including a right of entry or possibility of reverter, that directly or indirectly limits the use or occupancy of real property on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection is void except a limitation, on the

statute's legislative history and laws *in pari materia* confirm that the statute's "held by a religious institution" exception no longer applies once the encumbered property is conveyed to a non-religious institution.

i. The Plain Language of Haw. Rev. Stat. § 515-6(b) Voids the Church Purposes Restriction

The statute's plain language voids the church purposes restriction because the Property is no longer "held by a religious institution." The statute is comprised of two clauses. The first clause (referred to herein as the "general voidance clause") broadly voids every condition, restriction, and prohibition on the use or occupancy of real property on various bases, including religion. The second clause (referred to herein as the "exemption clause") provides a narrow exemption for religious use limitations on real property "held by a religious institution or organization[.]" Since the church purposes restriction limits the use of property on the basis of religion, the Restriction undoubtedly falls within the purview of the general voidance clause and, sans the exemption clause, would be void under the statute. At no point has the State attempted to argue that the church purposes restriction is not a restriction on the basis of religion. Thus, the validity of the church purposes restriction turns on whether the statute's exemption clause applies to and saves the Restriction.

The exemption clause applies only to religious restrictions on property "held by a religious institution." *See* Haw. Rev. Stat. § 515-6(b). "[T]he fundamental starting point for statutory interpretation is the language of the statute itself . . . where the statutory language is plain and unambiguous, [the Court's] sole duty is to give effect to its plain and obvious meaning." *Citizens Against Reckless Dev. v. Zoning Bd. Of Appeals*, 114 Haw. 184, 193, 159 P.3d 143, 152 (2007). It should also be noted that exceptions to remedial statutes must be construed narrowly. Hawai'i Revised Statutes Chapter 515 is a "remedial statute" because it provides remedies for discrimination. *Cervelli v. Aloha Bed & Breakfast*, 142 Hawai'i 177, 187, 415 P.3d 919, 929 (App. 2018); *see Flores v. United Air Lines, Inc.*, 70 Haw. 1, 12 n.8, 757 P.2d 641, 647 n.8 (1988) ("Generally, remedial statutes are those which provide a remedy, or improve

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> basis of religion, on the use of real property held by a religious institution or organization or by a religious or charitable organization operated, supervised, or controlled by a religious institution or organization, and used for religious or charitable purposes.

Haw. Rev. Stat. § 515-6(b).

or facilitate remedies already existing for the enforcement of rights and the redress of injuries." (internal quotation marks and citations omitted)). While "[r]emedial statutes are liberally construed to suppress the perceived evil and advance the enacted remedy . . . *exceptions* to a remedial statute should be *narrowly* construed." *Cervelli*, 142 Hawai'i at 187, 415 P.3d at 929 (emphases added). Therefore, the exemption clause of section 515-6(b) must be narrowly construed, whereas the general voidance clause must be liberally construed. *See* Haw. Rev. Stat. § 515-1 ("This chapter shall be construed according to the fair import of its terms and shall be liberally construed.").

Turning to the plain language of the exemption clause, the term "held" is the past tense of the word "hold," which means "to have possession or ownership of or have at one's disposal."[5] **The exemption clause thus only protects religious use restrictions on property "possess[ed] or owne[d]" by religious institutions.** It follows that once the encumbered property is conveyed to a non-religious institution, the property is no longer "held by a religious institution," and the exemption clause ceases to apply. This plain reading of the statute confirms that religious restrictions are void once the subject property is conveyed to a non-religious institution. Any other plain reading of the statute controverts the statute's apparent goal — which is to liberally void limitations on the use of property based on religion.

Reinforcing this notion, New York enacted an anti-discrimination law, with a mechanically similar exemption clause, mirroring nearly identical language to section 515-6(b). *See* N.Y. Gen. Oblig. Law § 5-331. New York's exemption clause states, "This section shall not apply to conveyances or devises to religious associations or corporations for religious purposes, but, such promise, covenant or restriction shall cease to be enforceable and shall otherwise become subject to the provisions of this section when the real property affected shall cease to be used for such purpose." *Id.*[6] Appellants have found no other anti-discrimination statute

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[5] *Held*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/held (Retrieved 11/28/2022).

[6] New York General Obligation Law section 5-331, states, in full:

> Any promise, covenant or restriction in a contract, mortgage, lease, deed or conveyance or in any other agreement affecting real property, heretofore or hereafter made or entered into, which limits, restrains, prohibits or otherwise provides against the sale, grant, gift, transfer, assignment, conveyance, ownership, lease, rental, use or occupancy of real property to or by any person because of

containing an exemption clause similar to Hawai‘i’s and New York’s. While not binding, New York’s statute provides helpful insight as to how section 515-6(b)’s exemption clause is intended to operate.

Here, section 515-6(b) voids the church purposes restriction, because the church purposes restriction is a restriction that limits the use of real property based on religion, and the Property is simply not “held by a religious institution”. By requiring the Property to be used only for church purposes, the Restriction undoubtedly falls within the purview of the statute’s general voidance clause. Moreover, the Restriction *does not* fall into the exemption clause because neither Plaintiff-Appellant Hilo Bay Marina, LLC nor Plaintiff-Appellant Keaukaha Ministry is a religious institution.[7] Accordingly, the Property is not “held by a religious institution”, and section 515-6(b) voids the church purposes restriction and the possibility of reverter contained therein.

ii. Laws in Pari Materia Reinforce That Religious Use Restrictions Are Void Once the Subject Property is Conveyed to a Non-Religious Institution

Although this Court need not look any further than section 515-6(b)’s plain language, laws *in pari materia* further reinforce that the exemption clause is *not* intended to protect religious restrictions once the subject property is conveyed to a non-religious institution.

> race, creed, color, national origin, or ancestry, is hereby declared to be void as against public policy, wholly unenforceable, and shall not constitute a defense in any action, suit or proceeding. No such promise, covenant or restriction shall be listed as a valid provision affecting such property in public notices concerning such property. The invalidity of any such promise, covenant or restriction in any such instrument or agreement shall not affect the validity of any other provision therein, but no reverter shall occur, no possessory estate shall result, nor any right of entry or right to a penalty or forfeiture shall accrue by reason of the disregard of such promise, covenant or restriction. This section shall not apply to conveyances or devises to religious associations or corporations for religious purposes, but, such promise, covenant or restriction shall cease to be enforceable and shall otherwise become subject to the provisions of this section when the real property affected shall cease to be used for such purpose.

N.Y. Gen. Oblig. Law § 5-331.

[7] “Religious institution” is not a defined term within HRS Chapter 515, nor has any Hawai‘i court opined on its definition. Plaintiff-Appellant Keaukaha Ministry conducts no religious activity and only uses its portion of the Property (i.e., Tax Map Key No. (3) 2-1-014:025) for *cemetery purposes*, not church purposes. It is undisputed that Appellants are not “religious institutions”, and the State has never proffered such an argument.

"[L]aws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear is one statute may be called in aid to explain what is doubtful in another." Haw. Rev. Stat. § 1-16; *State v. Kamanao*, 118 Haw. 210, 218, 188 P.3d 724, 732 (2008). Examination of sections 3, 6, and 8 of HRS Chapter 515 proves instructive.

Section 3 provides a sweeping list of prohibited "discriminatory practices" in relation to real estate transactions based on, *inter alia*, race, sex, gender identity, familial, and notably religion. Haw. Rev. Stat. §§ 515-3(a)(1)–(11). Such discriminatory practices include, but are not limited to, "refus[ing] to engage in a real estate transaction with a person" on any of the above bases. *Id.* § 515-3(a)(1). Similarly, one may not discriminatorily "refuse to make reasonable accommodations . . . to afford a person with a disability equal opportunity to use and enjoy a housing accommodation[.]" *Id.* § 515-3(a)(9). Together, section 3's broad list of "discriminatory practices" functions analogously to section 515-6(b)'s general voidance clause, seeking to liberally eliminate all forms of impermissible discrimination in real estate transactions.

In turn, section 6 and section 8 carve out limited exceptions to section 3 for religious institutions, much like section 515-6(b)'s exemption clause. Section 515-4(b)(1) states, in full, "Nothing in section 515-3 shall be deemed to prohibit refusal because of sex, including gender identity or expression, sexual orientation, or marital status, to rent or lease housing accommodations: (1) ***Owned or operated by a religious institution*** and used for church purposes as that term is used in applying exemptions for real property taxes[.]" *Id.* at 515-4(b)(1) (emphasis added). Section 4(b)(1) therefore provides a narrow exception to section 3 for renting or leasing of housing *owned or operated by a religious institution*. Similarly, section 8 allows "a religious institution . . . to give preference to members of the same religion in a real property transaction[,]" Logically, the religious institution must own or control the real property at issue in order to give preference to its members in an ensuing transaction.

As exceptions to section 3's discriminatory practices, section 6 and 8 both carve out narrow exemptions for the benefit of religious institutions and their religious uses. However, to invoke such exceptions, the religious institution must own the property at issue. The same holds true for section 515-6(b)'s exemption clause. For a discriminatory deed restriction to escape the general voidance clause, the encumbered property must be owned (i.e., held) by a religious institution. If the encumbered property is not owned by a religious institution, the religious restriction, such as the church purposes restriction, must yield to the sweeping general voidance

clause. This is the mechanism employed throughout Chapter 515, and section 515-6(b) is no different.

The Hawai‘i Supreme Court has recognized a "long-standing policy favoring the unrestricted use of property." *Hiner v. Hoffman,* 90 Haw. 188, 195, 977 P.2d 878, 885 (1999). Further, "it is a well-settled rule that in construing deeds and instruments containing restrictions and prohibitions as to the use of property conveyed[,] all doubts should be resolved in favor of the free use thereof for lawful purposes in the hands of the owners of the fee." *Id.* at 195, 977 P.2d at 885. Accordingly, both the plain language of the statute and laws *in pari materia* confirm that the church purposes restriction and the possibility of reverter in favor of the State are void and must be stricken from the Property. The circuit court therefore erred in granting the summary judgment to the State and denying Appellants' Motion for Summary Judgment.

C. The Church Purposes Restriction Violates Article 1, Section 4 of the Hawai‘i Constitution

In addition to misinterpreting the statute, the circuit court also erred when it held that "Article 1, § 4 of the Hawai‘i Constitution is coextensive with the First Amendment of the United States Constitution." CC Dkt. 114 at 6 ¶ 20. As such, the circuit court's conclusion that "[t]he deed restriction does not violate Article I, § 4 of the Hawai‘i Constitution" was also error. *Id.* at 6 ¶ 21. Although the United States Constitution carries discernible influence, the Hawai‘i Constitution does not simply go as the federal constitution goes. The same holds true for Hawai‘i's establishment clause, embodied at article 1, section 4 of the Hawai‘i Constitution. Haw. Constitutional Convention Stud. 1978, CC Dkt. 89 at 74 ("The Hawaii Constitution creates an even more rigid separation between church and state than does the U.S. Constitution."). Regardless of the United States Supreme Court's recent treatment of *Lemon*, the *Lemon* test remains good law under the state constitution. The delegates to the 1978 Constitutional Convention of Hawai‘i, which was the last time the establishment clause was re-examined, recognized and applied *Lemon* as the appropriate test, and Hawai‘i appellate courts have never ruled otherwise. Thus, the three-pronged test set out in *Lemon* remains the controlling test for Hawai‘i's establishment clause.

Under *Lemon*, the church purposes restriction blatantly fails all three prongs. First, by the State's own words, the church purposes restriction was "put in place for the benefit of religious institutions" and wholly lacks any secular purpose. ICA Dkt. 17 at 24:16–17. Second, the church purposes restriction fails the effects prong because advancing religion is the

predominant, if not only, effect the Restriction yields. Third, the Restriction excessively entangles the state with religion due to the surveillance necessary for enforcement and the nature of its possibility of reverter. The circuit court therefore erred when it held that the Restriction passes constitutional muster under *Lemon*.

Alternatively, even if the "historical practices and understanding" test recently adopted by the United States Supreme Court in *Kennedy* applies to Hawai'i's establishment clause, the church purposes restriction continues to nonetheless fail. Although the exact parameters of the historical practices test remain unclear, the Supreme Court's precedents suggest that the "practices" to analyze are the practices that were present around the time that the provision at issue was enacted or last amended. Article 1, section 4 was last amended and re-examined in 1978 by the 1978 Constitutional Convention. During that time, zoning through the use of deed restrictions, for church purposes or otherwise, was *not* a practice of the State. The church purposes restriction therefore fails the historical practices test, if even applicable to article 1, section 4.

i. The Lemon Test is the Appropriate Test for Hawai'i's Establishment Clause, Not the Historical Practices Test

Since its last amendment by the 1978 Constitutional Convention, the establishment clause of article 1, section 4 of the Hawai'i Constitution has reflected, and continues to reflect, the three-pronged test outlined in *Lemon*. The 1978 Constitutional Convention addressed and amended the establishment clause fully apprised of the *Lemon* test through the Hawai'i Constitutional Convention Studies 1978 (the "1978 Studies"). Furthermore, the convention's standing committee reports demonstrate that the delegates expressly considered *Lemon* when analyzing other religion-related provisions of the constitution. The delegates therefore deliberated and examined the Hawai'i Constitution's religious provisions, including the establishment clause, with the intent that *Lemon* control.

Article 1, section 4 states, in full, "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances." Haw. Const. art. 1, § 4. Hawai'i appellate courts "have long recognized that the Hawai'i Constitution must be construed with due regard to ***the intent of the framers and the people adopting it***, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent." *In re Kaheawa Wind Power, LLC v. Cty. of Maui*, 146 Hawai'i 76,

88, 456 P.3d 149, 161 (2020) (emphasis added) (citing *Hanabusa v. Lingle*, 105 Hawai'i 28, 31–32, 93 P.3d 670, 673–74 (2004)). Records documenting the 1978 Constitutional Convention's oral proceedings confirm that the delegates understood *Lemon* to be the establishment clause's then-controlling test. More importantly, by their decision not to substantively amend the clause knowing that *Lemon* applies, the delegates intended *Lemon* to continue as the controlling test.

In preparation for the 1978 Constitutional Convention, delegates were provided legislative summaries of various constitutional issues known as the Hawai'i Constitutional Convention Studies 1978. Created by the Legislative Reference Bureau, the 1978 Studies "were undertaken at the direction of the legislature and are an attempt to present in understandable form many of the possible issues and the arguments on both sides of such issues that the delegates to the Constitutional Convention of 1978 may wish to consider." Haw. Constitutional Convention Stud. 1978, Introduction and Art. Summaries at 1. The 1978 Studies therefore served as a comprehensive legislative aid to delegates and played an integral role throughout the convention's proceedings.

In regards to the establishment clause, the 1978 Studies explained that "this phrase is intended to effect a complete separation of church and state." CC Dkt. 89 at 73. More importantly, the 1978 Studies explicitly outlined the three-prongs of *Lemon* for issues of government aid to religion. *Id.* at 74. Recognizing *Lemon*'s role, the Legislative Reference Bureau explained:

> In its most recent interpretations of the [federal] Establishment Clause, the Court has relied on a 3-part test. To pass constitutional muster, a statute authorizing aid to parochial schools must have a secular legislative purpose, such as protecting the health of school children or providing a fertile educational environment. Secondly, the statute must have a principal or primary effect that neither advances nor inhibits religion. Secular, nonideologial forms of aid such as diagnostic health services are therefore permissible. Lastly, the statute must not foster excessive government entanglement with religion. Funding of field trips is an impermissible form of aid, because the state would have to continually supervise teachers to ensure that they remained religiously neutral for the duration of the trip.

Id. (emphases in original). In turn, this incorporation of the *Lemon* test tangibly affected the 1978 Constitutional Convention's deliberations. For example, in considering another religion-related provision in Article X, Section 1 (formerly Article IX, Section 1), the committee specifically discussed issues of entanglement, the third prong of *Lemon*, in relation to distribution of state funds to sectarian schools. The committee opined:

> In addition, your Committee considered several proposals to delete or weaken the provision in Article IX, Section 1 [(now Article X, Section 1)], which prohibits the use of public funds for the support or benefit of any sectarian or private educational institution. **The application of the federal constitution's prohibition against entanglement of the church and state to the issue was also discussed**. Much of the debate focused on the merits of authorizing the use of State funds to match federal funds available for post-secondary student loan programs. It was argued that, if approved, such State funds would benefit students rather than private educational institutions. It was also noted that private educational institutions provide valuable competition and alternatives to State post-secondary educational institutions.
>
> After much deliberation, your Committee decided against adopting any of the proposals. It was feared that sanctioning such State distributions would decrease the funds available to public schools and would set an undesirable precedent.

Proceedings of the Constitutional Convention of Haw. of 1978, Vol. I, Standing Committee Report No. 39 (1980) (emphasis added). This Standing Committee Report illustrates that fears of entanglement, in violation of *Lemon*, materially influenced the delegates' determination of allowable interaction with religion.

Together, the 1978 Studies and the Standing Committee Report solidify that, at the time article 1, section 4 was last amended, the delegates to the 1978 Constitutional Convention understood *Lemon* to be the controlling test for the establishment clause. Aware of *Lemon*'s role in establishment clause jurisprudence, the convention then elected not to substantively amend the establishment clause and merely renumbered it. Thus, by declining to substantively amend the establishment clause, the delegates approved *Lemon* as the applicable test in 1978. Appellants have not found any Hawai'i appellate case otherwise disavowing *Lemon*. *Lemon*'s three-pronged test therefore remains good law for purposes of the Hawai'i establishment clause and courts should not ignore *Lemon*'s role in the 1978 Constitutional Convention.

ii. *The Church Purposes Restriction Violates Every Prong of the Lemon Test*

In *Lemon*, the United States Supreme Court identified "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Lemon*, 403 U.S. at 612 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). There, the Court outlined a three-part test for government actions to survive Establishment Clause challenges: (1) the government practice must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive entanglement with religion. *Id.* at

612–13. Moreover, if the government action fails to satisfy the first prong of *Lemon*, courts need not analyze the second and third prongs. *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1112, 1149 (9th Cir. 2018).

Here, the church purposes restriction violates all three prongs of the *Lemon* test. "[G]overnment action violates the first prong of *Lemon* when the government's predominant purpose is to advance or favor religion." *Id.* The State repeatedly admits that the predominant, if not sole, purpose of the church purposes restriction is to benefit religious institutions. State's Mem. Opp., CC Dkt. 93 at 6–7 ("Here, the original transaction was at a reduced price for the benefit of the religious institution purchasing it."); State's Reply, CC Dkt. 95 at 9 ("[t]he legislative intent was for the benefit of religious institutions, which this deed restriction does benefit."). At the hearing on the cross-motions for summary judgment, the State reaffirmed that "[i]n terms of going into the legislative history as plaintiffs have done, this [(referring to the Restriction)] was put in place for the benefit of religious institutions. There was a clear benefit here for the religious institution." ICA Dkt. 17 at 24:15–18.

The church purposes restriction therefore completely fails the first prong of *Lemon*, and the circuit court erred in holding that "[t]he deed restriction had a secular purpose of zoning." *See* CC Dkt. 114 at 6. The circuit court's conclusion incorrectly confounds the Restriction's purpose with the State's police powers to zone. The purpose of the church purposes restriction is <u>not</u> to zone. The purpose of the Restriction is to benefit religious institutions, and zoning is merely the mechanism by which the State attempted to achieve this purpose.

Notwithstanding the church purposes restriction's failure to satisfy *Lemon*'s threshold first prong, the Restriction nonetheless fails to satisfy either of the remaining prongs. Regarding the second prong, the Restriction's primary effect, again by the State's own admission, undoubtedly advances religion. State's Mem. Opp., CC Dkt. 93 at 8 ("Here, multiple religious groups have benefited from the property."). The restriction requires the Property to be used solely for religious purposes, and without any secular uses, the restriction can have no other effect than advancing religion. Thus, the church purposes restriction's primary effect advances religion, meaning the restriction fails the second prong.

Regarding the third prong, the State's enforcement of the church purposes restriction excessively entangles the state with religion due to the surveillance necessary and the nature of its purported future interest. In *Lemon*, the Court found that continuing state surveillance would inevitably be required to enforce the state's statutory salary supplement to teachers, because the

supplement was dependent upon private school teachers' conformance with non-religious curriculum. *Lemon*, 403 U.S. at 618. As such, the state would have to meticulously monitor the teachers' lessons for compliance. Similarly, since the salary supplement was also based upon private schools' secular expenditures, the state would have to constantly inspect and evaluate the schools' accountings to determine which expenditures were secular and which were not. The Court characterized this need for surveillance as "pregnant with dangers of excessive government direction of church schools and hence of churches." *Id.* at 620. Thus, the Court held that the teachers' salary supplement was "fraught with the sort of entanglement that the Constitution forbids." *Id.*

Here, the same surveillance by the State would be necessary to determine whether the Property is being used for church purposes in conformance with the church purposes restriction. Proper enforcement would include routine monitoring of the activities held throughout the entire Property. Additionally, inspection of Appellants' expenditures related to the Property would theoretically be needed to ascertain whether funds were being used for non-religious purposes.

In addition to the aforementioned surveillance, the inherent nature of the State's possibility of reverter, as the purported means of ultimate enforcement, excessively entangles the State with religion. In essence, the consequence for Appellants using the Property for secular purposes, in violation of the restriction, is that the State wrestles the Property away from them. Such purported enforcement transforms the State into a warden for religious activity. As a result, the church purposes restriction excessively entangles the State with religion in violation of *Lemon*'s third prong. The Restriction thus fails every prong of *Lemon*.

iii. The Ill-Defined Historical Practices and Understandings Test Is Incompatible With Hawai'i's Establishment Clause.

In addition to the 1978 Constitutional Convention's incorporation and approval of *Lemon*, the historical practices and understandings test adopted in *Kennedy* independently poses various problems that render it incompatible with the State of Hawai'i and article 1, section 4. First, the test facially presumes that all historical practices of the government were and are constitutional — hence their focal role in the test. Second, the applicable setting and time frame for relevant "historical practices" remains largely undefined, especially as applied to state constitutions. As a result, it makes little sense for the actions of the Founding Fathers, who were uniformly Christian, to determine the meaning of the establishment clause in the most diverse state in the country.

In *Kennedy v. Bremerton School District*, the United States Supreme Court recently abandoned the *Lemon* test in favor of a "historical practices and understanding" test for purposes of the First Amendment's Establishment Clause. 142 S. Ct. 2407, 2427–28 (2022). In *Kennedy*, the Court held that a school district could not enjoin a school-employed coach from engaging in prayer on the football field immediately following school football games. *Id.* at 2415–16. Attempting to balance the coach's Free Exercise and Free Speech rights, the Court held that the Establishment Clause does not forbid the coach's post-game prayers, and that the Establishment Clause "must be interpreted by 'reference to historical practices and understanding.'" *Id* at 2428 (citing *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).[8] In disposing of *Lemon*, the Court explained that "[a]n analysis focused on original meaning and history . . . has long represented the rule rather than some exception." *Id.* (quotations omitted).

As noted in Justice Sotomayor's detailed dissent, the majority in *Kennedy* "reserve[d] any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on." 142 S. Ct. at 2450 (Sotomayor, J., dissenting). This complete lack of guidance renders the test nearly impossible for courts to apply, let alone local legislators and policy administrators. Although the test clearly elevates history and tradition over purpose and effect, the exact mechanisms and parameters of the historical practices test remain uncertain. Even in *Kennedy*, the Court points to no specific historical practice directly leading to its holding.

At the very least, the historical practices test's sole prioritization of history and tradition is misplaced and fatally presumes that all historical governmental acts are consistent with constitutional requirements. However, history confirms the exact opposite — that the government often engages in unconstitutional activities. *See* Alex J. Luchenitser & Sarah R. Goetz, *A Hollow History Test: Why Establishment Clause Cases Should Not Be Decided Through Comparisons with Historical Practices*, 68 Cath. U. L. Rev. 653, 666–67 (2019) (hereinafter, "*A Hollow History Test*"). Under the historical practices test, courts will also be forced to "play amateur historian" thereby further increasing the risk of inaccurate application. *See Brown v. Davenport*, 142 S. Ct. 1510, 1535 (2022) (Kagan, J., dissenting).

[8] Unlike the coach's prayer in *Kennedy*, the instant case does not involve any competing claims of Free Exercise or Free Speech of which the Establishment Clause or article 1, section 4 must balance.

It is well-documented that since the time of the ratification of the Bill of Rights in 1789, many state and local governments engaged in conduct that egregiously violated the Establishment Clause. *Id.* at 665. For example, six states directly maintained established churches. *Id.* at 666, n. 109 (citing Daniel O. Conkle, *Toward a General Theory of the Establishment Clause,* 82 Nw. U. L. Rev. 1113, 1132–33, 1132 n. 97–98 (1988)). Many states also required religious declarations or tests for holding public office. *Id.* at n. 111. Maryland's declaration in particular remained in force until 1961, when the United States Supreme Court finally struck it down in *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961).[9]

In addition to state acts, historical federal acts are similarly wrought with questionable constitutionality. Less than a decade after passing the First Amendment, Congress passed the Sedition Act, making it a crime to criticize federal officials or the United States. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). Although the Sedition Act expired in 1801 prior to a court challenge, the Sedition Act's invalidity is a matter "which no one now doubts." *Id.* at 276. Similarly, the Judiciary Act of 1789 required Article III judges to say the words "So help me God" when taking their oath of office, thereby directly violating Article VI of the Constitution, which states "no religious Test shall ever be required as a Qualification to any office or public Trust under the United States." U.S. Const. art. VI; *A Hollow History Test* at 669. In sum, the historical acts of government, both state and federal, fail to warrant the presumption of validity that *Kennedy*'s historical practices test now demands.

In addition to the test's unjustified reliance on history, the historical practices test's practical application to a *state* constitutional provision remains completely unsettled. So far, the United States Supreme Court's few historical analyses of the First Amendment's Establishment Clause all focus on historical religious practices of the *federal* government. *See Am. Legion v. Am. Humanist Ass'n* 139 S. Ct. 2067, 2075 (2019) (referencing the U.S. Army's historical use of white crosses to mark graves); *Marsh v. Chambers,* 463 U.S. 783, 787–88 (1983) (referencing the First Congress's adopted policy of selecting a chaplain to open each session with prayer); *McCreary Cnty. v. ACLU of Ky.,* 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (referencing Congress's passing of resolution that the president proclaim "a day of public thanksgiving and prayer[,]" the day after the First Amendment was proposed); *see also Katcoff v. Marsh*, 755 F.2d

[9] Article 37 of the Declaration of Rights of the Maryland Constitution stated, "No religious test ought ever to be required as a qualification for any office of profit or trust in this State, *other than a declaration of belief in the existence of God*[.]" *Id.* at 489.

223, 225 (2d Cir. 1985) (referencing Congress's authorization of the appointment of a chaplain for the army). Doing so may make sense when analyzing the federal Constitution; however, applying the actions of the Founding Fathers and First Congress in the 1780s to determine the meaning of the Hawai'i Constitution, which was not ratified until nearly two hundred years later, is questionable at best. As the most diverse state in the country, Hawai'i bears the unique task of balancing many more religions than the Founding Fathers, who mostly dealt with different sects within Christianity, needed to address. Pew Research Center estimates that over a fourth of Hawai'i's adult population identifies as "unaffiliated" with any particular religion. "Religious Landscape Study," Pew Research Center, Washington, D.C. (2014) (last accessed on Aug. 21, 2023).[10] "Unaffiliated" is notably the second largest "religious" category (26%) in Hawai'i, after Christianity (63%). *Id.* Accordingly, deference to the federal government's historical practices around the First Amendment's ratification provides little practical or logical assistance in interpreting Hawai'i's establishment clause.

Neither the 1978 Studies nor the Proceedings of the 1978 Constitutional Convention reflect the historical practices and understandings test adopted in *Kennedy*. The proper analysis under article 1, section 4 continues to be examining the purpose and effects of the government action at issue. Unlike the amorphous, ill-defined historical practices test, *Lemon* reflects "the cumulative criteria developed by the Court over many years" of experience "draw[ing] lines" as to when government engagement with religion violates the Establishment Clause. *Lemon*, 403 U.S. at 612; *Kennedy*, 142 S. Ct. at 2449 (Sotomayor, J., dissenting). As a result, this Court should ***not*** abandon the wisdom of the 1978 Constitutional Convention and decades-worth of *Lemon* precedents in favor of an inapplicable, ill-defined "historical practices" test. History has its place, but history has been wrong before. *See Kennedy*, 142 S. Ct. at 2450 (Sotomayor,J., dissenting) (citing *American Legion*, 139 S. Ct. 2067 (2019) (Breyer, J., concurring) (slip op., at 2–3)). Hawai'i's constitution is meant to provide greater separation of church and state than the federal constitution, and by examining the purpose and effects of state action, the *Lemon* test allows Hawai'i to conform to the needs of an ever-diversifying population, without being bound to a distant past. As a result, the *Lemon* test is the applicable test for article 1, section 4 of the Hawai'i Constitution.

[10] https://www.pewresearch.org/religion/religious-landscape-study/state/hawaii/

iv. Even Under The Historical Practices Test, The Church Purposes Restriction Fails Because Zoning Through Deed Restrictions Was Not a Practice When Article 1, Section 4 Was Amended.

Notwithstanding the many inherent pitfalls with applying the United States Supreme Court's historical practices test to the Hawai'i Constitution, the church purposes restriction nonetheless fails the historical practices test because reserving religion-dedicated property through deed restrictions was not a zoning practice of the State of Hawai'i in 1978. As detailed above, the historical practices test attempts to examine government practices around the time the provision at issue was adopted as the keystone for determining whether a current government action is constitutional. For example, the Court has previously examined the practices of the federal government and Founding Fathers in the 1780s when applying the historical practices test to the First Amendment's Establishment Clause. Article 1, section 4 was last addressed and amended in 1978. Thus, if applied to Hawai'i's establishment clause, the historical practices test entails examination of state and local government practices during or around 1978.

It is overwhelmingly apparent that zoning through the use of deed restrictions was *not* a practice of the State of Hawai'i or the various counties by 1978. Moreover, there were no zoning practices whatsoever requiring property to be specifically used solely for religious purposes. By 1957, well before Hawai'i's establishment clause's last amendment, the Territory of Hawai'i itself had already delegated its zoning powers to the various counties through the Zoning Enabling Act, now codified at HRS § 46-4. § 1, Act 234, 1957 Session Laws of Hawai'i; *Kaiser Haw. Kai Dev. Co.*, 70 Haw. at 483, 777 P.2d at 247. In 1968, the County of Hawai'i ratified the Charter of the County of Hawai'i, which states in relevant part, "The county council shall adopt by ordinance a general plan which shall set forth the Council's policy for long-range comprehensive physical development of the County." Charter of the Cty. of Haw. § 3-15. In turn, the Hawai'i County Council formally adopted its first general plan in 1971 through Ordinance No. 439, thereby solidifying all future zoning in the County of Hawai'i. Cty. of Haw. Council Ordinance No. 439 § 1.

Thus, by 1978, the State of Hawai'i and the County of Hawai'i had both long abandoned deed restrictions as a form of zoning, if it had ever been one to begin with. The State failed to submit any evidence that the church purposes restriction was a "form of early zoning," nor did it submit evidence reinforcing such alleged early zoning to be a historical practice. In contrast, the State of Hawai'i and the County of Hawai'i have respectively declared through legislation and

ordinance that deed restrictions are *not* forms of zoning and are *not* historical practices applicable to the *Kennedy* historical practices and understandings test. As a result, the circuit court erred as a matter of law in holding that the church purposes restriction passes constitutional muster under article 1, section 4, regardless of whether *Lemon* or *Kennedy* governs.

D. The Church Purposes Restriction Violates the First Amendment of the United States Constitution Because the Establishment Clause Prohibits the State From "Setting Up a Church" or "Aiding All Religions".

In addition to violating the Hawai‘i Constitution, the church purposes restriction also violates the Establishment Clause of the First Amendment of the United States Constitution, regardless of the U.S. Supreme Court's recent abandonment of the *Lemon* test. It is a long-held tenet of the Establishment Clause that the government may not "set up a church" nor may it "aid all religions." The Establishment Clause recognizes one's freedom to choose any religion, or no religion at all, and has consistently protected non-religion from threats of advancement of religion as a whole. The church purposes restriction, although not favoring any one religion, seeks to "aid all religions" while prescribing any secular use of the Property. Doing so violates the Establishment Clause without any need to apply particular tests. Nonetheless, even under the historical practices test adopted in *Kennedy*, the church purposes restriction cannot pass constitutional muster, because zoning for religious purposes is not, and cannot be, a historical practice of the federal government. *See* U.S. Const. amend. X (reserving police powers, which include the power to zone, to the several states). The circuit court therefore erred as a matter of law when it held that the church purposes restriction does not violate the Establishment Clause of the First Amendment of the United States Constitution.

i. The Establishment Clause Prohibits the State from "Setting up a Church" or "Aiding All Religions", and the Restriction Violates This Prohibition.

The First Amendment, in relevant part, provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I. The First Amendment, along with the Establishment Clause contained therein, is made applicable to the States through the Fourteenth Amendment. U.S. Const. amend. XIV, § 2; *McCreary Cty. v. ACLU*, 545 U.S. 844, 852 n.3 (2005) ("This prohibition of establishment applies to 'the States and their political subdivisions' through the Fourteenth Amendment.") (quoting *Sante Fe Independent School Dist. v. Doe*, 530 U.S. 290, 301 (2000)).

In 1802, President Thomas Jefferson famously described the Establishment Clause as erecting "a wall of separation between church and State." *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Draft Reply to the Danbury Baptist Association, 36 Papers of Thomas Jefferson 254, 255 (B. Oberg ed. 2009)). "This barrier 'protects the integrity of individual conscience in religious matters.'" *Am. Legion*, 139 S. Ct. at 2105 (Ginsburg, J., dissenting) (quoting *McCreary Cty. v. ACLU*, 545 U.S. 844, 876 (2005)). "By demanding neutrality between religious faith and the absence thereof, the Establishment Clause shores up an individual's right to select any religious faith or **none at all**." *Id.* at 2105.

From a practical perspective, "total separation [between church and state] is not possible in an absolute sense" and "[s]ome relationship between government and religious organizations is inevitable." *Lemon*, 403 U.S. at 614. Accordingly, the "wall" between acceptable and unacceptable government interaction with religion is at times "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* To address these close-call relationships, the Court developed several different tests throughout the years. *See generally Kennedy*, 142 S. Ct. 2407 (embracing a "historical practices and understandings" test); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring) (proposing for the first time the "endorsement" test); *Lemon*, 403 U.S. 602 (creating the three-pronged *Lemon* test). However, the severity of the State's interaction with religion, here, *does not* fall into this "close-call" area requiring application of any specific test, and, instead, falls squarely into express scenarios prohibited by the Supreme Court.

From the beginning of its modern-day Establishment Clause jurisprudence, the Supreme Court has unequivocally held that the government specifically cannot "set up a church," nor can it "aid all religions." These prohibitions continue through today. The Court initiated its modern interpretation of the Establishment Clause in the late 1940s, post-World War II, in *Everson v. Board of Education*. 330 U.S. 1 (1947); *see* John C. Jeffries Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 284 (2001) ("The modern Establishment Clause dates from *Everson v. Board of Education*, decided in 1947 . . . [which] set the course of Establishment Clause decisions for two generations.").[11] There, the Court

[11] In *Everson*, the Court considered the constitutionality of a New Jersey statute and resolution that reimbursed students' parents for costs of bus transportation to and from school, including parochial schools. 330 U.S. at 3. The Court held that the statute and resolution were constitutional because the reimbursement program did no more than provide a "general program"

proclaimed that "[t]he 'establishment of religion' clause of the First Amendment means **at least this: Neither a state nor the Federal Government can set up a church**. **Neither can pass laws which** aid one religion, **aid all religions**, or prefer one religion over another." *Everson*, 330 U.S. at 15 (emphases added).[12] Since then, the Court has consistently and repeatedly echoed these core tenets throughout the evolution of its Establishment Clause cases. *Lee*, 505 U.S. at 599 (Blackmun, J., concurring); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 591 (1989); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216 (1963); *Torcaso v. Watkins*, 367 U.S. 488, 492–93 (1961); *McGowan v. Maryland*, 366 U.S. 420, 443 (1961); *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 210 (1948). As recently as *Kennedy* in 2022, the Court reiterated that "[t]he Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious *and nonreligious* views alike." 142 S. Ct. at 2416 (emphasis added). These "paradigmatic practices that the Establishment Clause prohibits" constitute examples that undoubtedly violate the First Amendment, regardless of whether the *Lemon*, endorsement, or historical practices test is used. *See Lee*, 505 U.S. at 600 n.2

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to help parents get their children safely to and from school, regardless of being secular or sectarian. *Id.* at 18 ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.").

[12] The cited paragraph from *Everson* reads, in its entirety:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Everson, 330 U.S. at 15–16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)). In 1992, Justice Blackmun described these six examples as "paradigmatic practices that the Establishment Clause prohibits." *Lee v. Weisman*, 505 U.S. 577, 600 n.2 (1992) (Blackmun, J., concurring).

(Blackmun, J., concurring). Thus, if the government is found to "set up a church" or "aid all religion," analysis under *Lemon*, *Kennedy*, or any other test is unnecessary. *See, e.g.*, *Lee*, 505 U.S. at 586–87 (holding that public schools' inclusion of *nonsectarian* invocations at graduation ceremonies was so pervasive that it violated the Establishment Clause's "central principles" and therefore did not require re-examination of *Lemon*).

Tellingly, the church purposes restriction violates not one, but two of these "paradigmatic practices." By requiring the Property to be used for "church purposes only," the State essentially "set[s] up a church," and, at the very least, "aid[s] all religions." Through the church purposes restriction, the State attempts to reserve and dedicate the Property to only religious uses, at the exclusion of any and all other uses. Secular uses are not just disadvantaged; they are wholly prohibited by the Restriction. While the State may fall short of directly building the chapel doors itself, the church purposes restriction renders anything other than "setting up a church" impossible.

In addition to effectively "setting up a church," the church purposes restriction also impermissibly "aids all religions." Just as the Establishment Clause prohibits the government from favoring one religion over another religion, the Establishment Clause equally prohibits the government from favoring all religions over atheism, or non-religion. In *Wallace v. Jaffree*, the Court scrupulously explained:

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or **none at all**. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects -- or even intolerance among "religions" -- **to encompass intolerance of the disbeliever and the uncertain.**

472 U.S. 38, 52-55 (1985) (emphases added); *see also Sch. Dist. of Abington Twp.*, 374 U.S. at 216 ("[T]his Court has ***rejected unequivocally*** the contention that the Establishment Clause forbids only governmental preference of one religion over another." (emphasis added)).

The Establishment Clause's protection of non-religion against the "aid of all religion" is well-illustrated in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). There, the County of Champaign's board of education adopted a program by which religious instructors of various faiths taught weekly religious classes during regular school hours, in school classrooms, and at no expense to the school or board. *Id.* at 207–08. Students were given the choice to opt out of the religious instruction. *Id.* at 209. If they chose to opt out, they were removed from their normal classrooms to another classroom to continue their secular studies. *Id.* Discontent with the religious teachings, an atheist parent of a student challenged the program as a violation of the Establishment Clause, and the Court agreed. *Id.* at 211, 234.

In striking down the Illinois program, the Court reiterated the prohibited paradigmatic practices set out in *Everson*, confirming their place in First Amendment jurisprudence. *Id.* at 203. Moreover, the Court expressly rejected the board's argument that "the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." *Id.* at 210–11.[13] The Court noted that even the four dissenting justices in *Everson* agreed that all-inclusive aid to every religious sect is just as prohibited as unequal aid to one sect over another. *Id.* at 210, n.6. As such, the Court held that the weekly religious program, although not favoring one sect over another, constituted an "invaluable aid" to sectarian groups that violated the separation of Church and State. *Id.* at 212.

Nearly fifty years later, the Court, in *Lee v. Weisman*, again encountered a similar issue when it struck down a school board's attempt to incorporate nonsectarian prayer into public middle and high school graduation ceremonies. 505 U.S. 577 (1992). In *Lee*, public school principals in Providence, Rhode Island, invited members of the clergy to give nonsectarian

[13] Notably, the Court provides little analysis between its recitation of the *Everson* paradigmatic practices and its conclusion "[r]ecognizing that the Illinois program is barred by the First and Fourteenth Amendments[.]" *Id.* This absence of elaboration strongly implies that the Court deemed the program to be in such plain violation of both the First Amendment and *Everson*'s holding that further explanation was unnecessary.

invocations at graduation ceremonies.[14] *Id.* at 580. In doing so, the principals gave the invited clergy members clear guidelines that the invocations be nonsectarian and be composed with "inclusiveness and sensitivity." *Id.* at 581. Writing for the majority, Justice Kennedy summarized the Court's holding, in relevant part:

> We are asked to recognize the existence of a practice of nonsectarian prayer[.] There may be some support, as an empirical observation, to the statement . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which spire to these ends, neither does it permit the government to undertake that task for itself.
>
> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed **or prescribed** by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere. . .
>
> The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

Id. at 589–90 (emphasis added). The Court rejected the school's defense that the nonsectarian nature of the desired invocations justified the prayers. In the Court's view, any type of religious practice, even those lacking a "specific creed" under the guise of a nonsectarian "civic" religion common to all, continues to violate the Establishment Clause. *Id*. Moreover, the Court expressly noted that its holding in *Lee* did not require examination under *Lemon*, because "[t]he government involvement with religious activity [was] pervasive, to the point of creating a **state-sponsored and state-directed religious exercise**." *Id.* at 586–87 (emphasis added).

As recently as *Kennedy*, the Court again reaffirmed that "[t]he Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and **nonreligious** views alike." 142 S. Ct. at 2416. From the very beginning of its Establishment Clause jurisprudence in *Everson* to its most recent installment in *Kennedy*, the

[14] Despite the instructions that the invocation be nonsectarian, the specific invocation at issue in *Lee* contained several religious references to "God" and "Lord." *Id.* at 581–82. Nonetheless, the invocation's deviation from the instructions did not affect the Court's holding. *Id.* at 589 (analyzing the facts under a "practice of nonsectarian prayer").

Court has repeatedly and clearly held that the First Amendment prohibits the government from favoring all religions against nonreligion as equally as it prohibits the government from favoring one religion over another religion. Under this precept, the church purposes restriction simply cannot withstand Constitutional muster.

By its very terms, the church purposes restriction requires the Property to be used for church (i.e., religious) purposes, *and no other purpose*. Any and every secular use is therefore excluded from the Property in favor of sectarian uses. Like the prayers in *McCollum* and *Lee*, it makes no difference that the church purposes restriction refrains from imposing a specific preference for a particular religious sect. Although such a preference would undoubtedly violate the Establishment Clause, the Restriction's aid to religion over nonreligion, as a whole, renders it unconstitutional. Through its reverter, the State then assumes a watchman-like role, ensuring that only religious activity occurs on the Property. As a result, the State's effective dedication of the Property to religion ultimately amounts to an impermissible "state-sponsored and state-directed religious exercise" in "aid [to] all religions" in violation of the First Amendment. This conclusion derives from the central principles of the Establishment Clause without any need of reaching the *Lemon* test or the historical practices test. *See Lee*, 505 U.S. at 586–87; *Everson*, 330 U.S. at 15.

ii. Even Under Kennedy, the Restriction Violates the Establishment Clause Because the Police Powers are Constitutionally Reserved to the States.

As explained above in Section IV(C)(iii), the historical practices test likely entails examination of the drafters' and government's practices temporally around the Establishment Clause's ratification. At no point in any of its lower court briefing did the State present examples where the Founding Fathers or the federal government engaged in practices of zoning for religious or church purposes. That is because the State cannot, and no such examples exist. The power to "zone," or regulate private land use, is derived directly from police powers. In turn, the Tenth Amendment of the United States Constitution reserves police powers to the states, not the federal government. It is impossible for the State to point to any historical practice of the federal government "zoning" for church purposes because such practice is made constitutionally unavailable to the federal government.

The only alleged historical practice presented by the State is its claim that the seventeen Territorial deed restrictions amounted to "early form zoning." Notwithstanding the lack of evidentiary support for this argument, the historical practices of the Territory of Hawai‘i are

immaterial for purposes of interpreting the First Amendment's Establishment Clause. It is illogical to suppose that the Founding Fathers intended the practices of Hawai'i, which would not become a Territory until a hundred years later, to influence the Establishment Clause in any way. Thus, without any applicable historical practice to justify the church purposes restriction, the Restriction must be held invalid even under the historical practices test of *Kennedy*.

Due to the church purposes restriction's unconstitutionality, neither this Court, nor any state court, may enforce the Restriction. Such judicial enforcement would violate the state action doctrine outlined in *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) ("[T]he actions of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment[.]"). Accordingly, courts are barred from engaging in conduct that would otherwise be deemed unconstitutional if undertaken by a state legislature or agency.

V. CONCLUSION

The State sought to create, and now seeks to maintain, property wholly dedicated to religion. That is not the role of the government, and such action must be struck down. Based on the foregoing, the circuit court committed reversible error when it held the church purposes restriction to be a valid exercise of the State's police powers under HRS section 515-6(b), the Hawai'i Constitution, and the First Amendment. As a result, the circuit court's Findings of Fact, Conclusions of Law, and Order [Dkt. 114] and Final Judgment [Dkt. 118] must be vacated, and the case must be remanded with instructions to enter declaratory judgment invalidating the church purposes restriction and holding it unenforceable.

DATED: Honolulu, Hawaii, September 1, 2023.

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APPENDIX 1

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

HILO BAY MARINA, LLC, and KEAUKAHA MINISTRY LLC,

Plaintiffs,

vs.

STATE OF HAWAII; BOARD AND NATURAL RESOURCES, STATE OF HAWAII; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE ENTITIES 1-10,

Defendants.

CIVIL NO. 3CCV-22-0000095

DEFENDANT STATE OF HAWAI'I'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [Dkt. 57] AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [Dkt. 89]; CERTIFICATE OF SERVICE

Judge: Hon. Henry T. Nakamoto
Hearing: Dec. 14, 2022 at 8:00 a.m.
Trial Week: May 22, 2023

DEFENDANT STATE OF HAWAII'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [Dkt. 57] AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [Dkt. 89]

APPENDIX 1

Defendant Board of Land and Natural Resources, State of Hawaii's (hereinafter "STATE") Motion for Summary Judgment filed under Dkt. No. 57, and Plaintiffs Hilo Bay Marina, LLC's and Keaukaha Ministry LLC's (hereinafter "Plaintiffs") Motion for Summary Judgment filed under Dkt. No. 89, having both come on for hearing with respective counsel, Deputy Attorney General Miranda C. Steed, and Kenneth R. Kupchak, Esq. and Clint K. Hamada, Esq. present on December 14, 2022 at 8:00 a.m., and the Honorable Henry T. Nakamoto having taken into consideration the pleadings, records and files in this case, and having heard and considered argument of counsel, and this Court HEREBY GRANTS Defendant State of Hawaii's Motion for Summary Judgment and DENIES Plaintiffs' Motion for Summary Judgment filed November 11, 2022, based upon the following.

I. INTRODUCTION

This case involves an original complaint for declaratory relief filed in the Third Circuit, in which Plaintiffs request the Court declare void a deed restriction requiring property owned by Plaintiffs be used "for Church purposes only." Plaintiffs allege that the deed restriction is void because: a) Haw. Rev. Stat. ("HRS") § 515-6(b) voids certain conditions, restrictions, and prohibitions on real property that are based on religion; b) Article I, § 4 and Article VII, § 4 of the Hawai'i State Constitution requires the separation of church and state; and c) the First Amendment of the United States Constitution prohibits laws respecting the establishment of religion or the prohibition of the free exercise thereof.

Plaintiffs further allege they are entitled to summary judgment as a matter of law for these same reasons.

Defendant argues that summary judgment is appropriate as a matter of law because:

a) the exception clause in HRS § 515-6(b) allows for religious restrictive covenants as long as the property is held by a religious institution, such as the Plaintiffs; b) the First Amendment of the United States Constitution requires an inquiry into historical practices and understandings and the deed restriction, at the time it was imposed, was a valid exercise of zoning allowed under state police powers; and finally, c) Article I, § 4 of the Hawai'i Constitutional is co-extensive with the First Amendment of the United States Constitution.

If any statement denominated a conclusion of law ("COL") is more properly considered a finding of fact ("FOF"), then it should be treated as a FOF; and conversely, if any statement denominated as a FOF is more properly considered a COL, then it should be treated as a COL.

II. FINDINGS OF FACT

1. In 1922, the Territory of Hawai'i sold the property (present-day TMK Nos. (3) 2-1-014:25, 29, 30, 31, 74, and 60) (hereinafter "subject property") to Heber J. Grant, a trustee for the Church of Jesus Christ of Latter-Day Saints (the "Church"), for $20 with a restriction in the deed ("deed restriction") that required the property be used "for Church purposes only."

2. The deed restriction stated:

> The land covered by this Grant is to be used for Church purposes only. In the event of its being used for other than Church purposes, this Grant shall become void and the land mentioned herein shall immediately revert and revest in the Territory of Hawaii; further, should any portion of the land herein mentioned be used for Cemetery purposes, same shall at all times be subject to all rules and regulations of the Territorial Board of Health as authorized by law for the interment of the dead, and respecting cemeteries and burying grounds.

3. The Territory of Hawai'i engaged in an early form of use-zoning through the sale of land with deed restrictions, including the sale of government lands to religious organizations.

4. In 1988, the Church conveyed the subject property to Deseret Title Holding Company purchased.

4. In 2000, Deseret Title Holding Company conveyed the subject property to Plaintiff Hilo Bay Marina, LLC.

5. In 2015, Plaintiff Hilo Bay Marina, LLC conveyed TMK No. (3) 2-1-014:25 to Plaintiff Keaukaha Ministry LLC.

6. Plaintiffs filed their Complaint for Declaratory Relief on April 5, 2022. JEFS Dkt. 1.

7. Plaintiffs filed their First Amended Complaint for Declaratory Relief on April 25, 2022. JEFS Dkt. 7.

8. Plaintiffs filed their Second Amended Complaint for Declaratory Relief on August 22, 2022. JEFS Dkt. 40.

II. CONCLUSIONS OF LAW

9. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Haw. Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000). A given fact is material "if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005) (citation omitted).

HRS § 515-6(b)

10. HRS § 515-6(b) states:

> Every condition, restriction, or prohibition, including a right of entry or possibility of reverter, that directly or indirectly limits the use or occupancy of real property on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection is void, except a limitation, on the basis of religion, on the use of real property held by a religious institution or organization or by a religious or charitable organization operated, supervised, or

> controlled by a religious institution or organization, and used for religious or charitable purposes.

Id.

11. HRS § 515-6(b) provides an exemption that permits any party to reserve a covenant for religious use when transacting with a religious organization.

12. The deed restriction "for Church purposes only" is included in the exemption clause of HRS § 515-6(b).

13. HRS § 515-6(b) does not void the deed restriction.

First Amendment of the United States Constitution

14. The Establishment Clause of the First Amendment of the United States Constitution does not "'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (internal citations omitted).

15. The Establishment Clause "must be interpreted by 'reference to historical practices and understandings.'" *Id.* at 2428 (internal citations omitted).

16. The State's police powers grant it broad discretion to zone unless a court finds that a policy is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

17. The location of religious institutions is implicated in zoning practices.

18. The practice of selling government lands with deed restrictions was an early form of use-zoning and is interpreted as a historical practice of zoning. *Kennedy*, 142 S. Ct. at 2427.

19. The deed restriction does not violate the Establishment Clause of the First Amendment of the United States Constitution. *Id.*

Article I, § 4 of the Hawai'i Constitution

20. Article I, § 4 of the Hawaii Constitution is coextensive with the First Amendment of the United States Constitution.

21. The deed restriction does not violate Article I, § 4 of the Hawai'i Constitution for the same reasons that it does not violate the Establishment Clause of the First Amendment of the Untied States Constitution.

22. Because the deed restriction does not violate Article I, § 4 of the Hawai'i Constitution, it cannot be construed as a grant in violation of Article I, § 4; thus, there is no violation of Article VII, § 4.

23. Even if Article I, § 4 of the Hawai'i Constitution is not coextensive with the Establishment Clause of the First Amendment of the United States Constitution, the deed restriction passes Constitutional muster under *Lemon v. Kurtzman*, which requires that government policies (1) have a secular purpose; (2) do not endorse or approve of religion; and (3) do not create excessive entanglement with religion. 403 U.S. 602, 620 (1971).

24. The deed restriction had a secular purpose of zoning. *Id.*

25. The deed restriction allows for any religious organization to benefit from the property, so it does not endorse or approve one religion over another. *Id.*

26. Not every form of government surveillance and monitoring reaches this degree, and routine administrative or compliance activities do not constitute impermissible "interference of . . . secular authorities in religious affairs." *Cammack v. Waihee*, 932 F.2d 765, 780 (9th Cir. 1991).

27. The surveillance and monitoring required to enforce the deed restriction do not present excessive entanglement because they are no different than that of what is required to enforce any other zoning regulation.

III. ORDER

Plaintiffs have failed to demonstrate that this deed restriction violates any of the laws alleged therein in their Second Amended Complaint [40]. For this and the reasons stated above, the Court GRANTS the State's Motion for Summary Judgment and DENIES Plaintiff's Motion for Summary Judgment.

DATED: Honolulu, Hawai'i, MAR 21 2023 ~~,2023~~.

JUDGE OF THE ABOVE-ENTITLED COURT

HENRY T. NAKAMOTO Div. 2

APPROVED AS TO FORM:

KENNETH R. KUPCHAK
CLINT K. HAMADA
DAMON KEY LEONG KUPCHAK HASTERT

Attorneys for Plaintiffs
HILO BAY MARINA, LLC and
KEAUKAHA MINISTRY LLC

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

HILO BAY MARINA, LLC, and KEAUKAHA MINISTRY LLC, Plaintiffs, vs. STATE OF HAWAII; BOARD AND NATURAL RESOURCES, STATE OF HAWAII; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE ENTITIES 1-10, Defendants.	CIVIL NO. 3CCV-22-0000095 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing document was duly served upon the person(s) listed below by electronic service via JEFS on March 6, 2023:

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DATED: Honolulu, Hawai'i, March 6, 2023.

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APPENDIX 2

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI‘I

HILO BAY MARINA, LLC, and KEAUKAHA MINISTRY LLC, Plaintiffs, vs. STATE OF HAWAII; BOARD AND NATURAL RESOURCES, STATE OF HAWAII; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE ENTITIES 1-10, Defendants.	CIVIL NO. 3CCV-22-0000095 FINAL JUDGMENT Judge: Hon. Henry T. Nakamoto Hearing: Nov. 14, 2022 at 8:00 a.m. Trial Week: May 22, 2023

FINAL JUDGMENT

On April 5, 2022, Plaintiffs HILO BAY MARINA, LLC and KEAUKAHA MINISTRY LLC ("Plaintiffs") filed their Complaint for Declaratory and Injunctive Relief ("Complaint") against Defendant STATE OF HAWAI‘I and BOARD OF LAND AND NATURAL

APPENDIX 2

RESOURCES, STATE OF HAWAI'I ("State") [Dkt. 1]. On April 25, 2022, Plaintiffs filed their First Amended Complaint for Declaratory and Injunctive Relief against the State [Dkt. 7]. On August 22, 2022, Plaintiffs filed their Second Amended Complaint for Declaratory and Injunctive Relief against the State [Dkt. 40].

On November 11, 2022, the Plaintiffs filed Plaintiffs' Motion for Summary Judgment ("Plaintiffs' MSJ") [Dkt. 89]. On November 11, 2022, the State filed its Motion for Summary Judgment ("State's MSJ") [Dkt. 57]. On December 2, 2022, Plaintiffs filed their opposition to the State's MSJ [Dkt. 91]. On December 2, 2022, the State filed its Opposition to Plaintiffs' MSJ [Dkt. 93]. On December 9, 2022, Plaintiffs filed their Reply in Support of Plaintiffs' MSJ [Dkt. 97]. On December 9, 2022, the State filed its Reply in support of the State's MSJ [Dkt. 95].

On December 14, 2022, the Court held a hearing on the Plaintiffs' MSJ and the State's MSJ cross-motions. On March 21, 2023, the Court issued "Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment" [Dkt. 114].

Pursuant to the "Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment" filed herein on March 21, 2023 under Docket No. 114, the Court resolved all issues raised in the Complaint, and granted Defendant's Motion for Summary Judgment on the basis that Plaintiffs' failed to demonstrate that the deed restriction at issue violated any of the laws alleged therein in their Second Amended Complaint [Dkt. 40]. To the extent that it may be construed that there are any other remaining claims, they are hereby dismissed.

There being no claims or parties remaining in this action, the Court expressly directs that this be entered as a Final Judgment in accordance with Rule 58 of the Hawai'i Rules of Civil

Procedure ("HRCP"). NOW THEREFORE IT IS HEREBY ORDERED AND ADJUDGED, pursuant to HRCP Rule 58, that judgment is entered in favor of Defendant BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I and against Plaintiffs HILO BAY MARINA, LLC and KEAUKAHA MINISTRY LLC.

DATED: Hilo, Hawai'i, APR 1 3 2023.

THE HONORABLE HENRY T. NAKAMOTO
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ Clint K. Hamada
KENNETH R. KUPCHAK
CLINT K. HAMADA
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Attorneys for Plaintiff
HILO BAY MARINA, LLC and
KEAUKAHA MINISTRY LLC

Hilo Bay Marina, LLC and Keaukaha Ministry LLC v. Board of Land and Natural Resources, State of Hawai'i, Civil No. 3CCV-22-0000095, Final Judgment.

NO. CAAP-23-0000310

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

HILO BAY MARINA, LLC, and KEAUKAHA MINISTRY LLC Plaintiffs-Appellants, vs. STATE OF HAWAII; BOARD AND NATURAL RESOURCES, STATE OF HAWAII; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE ENTITIES, 1-10, Defendants-Appellees.	) CIVIL NO. 3CCV-22-0000095))) APPEAL FROM:) (1) FINAL JUDGMENT FILED ON) APRIL 13, 2023, AND (2) DEFENDANT) STATE OF HAWAII'S FINDINGS OF FACT,) CONCLUSIONS OF LAW AND ORDER) GRANTING DEFENDANT'S MOTION FOR) SUMMARY JUDGMENT AND DENYING) PLAINTIFF'S MOTION FOR SUMMARY) JUDGMENT FILED ON MARCH 21, 2023)) CIRCUIT COURT OF THE THIRD CIRCUIT)) HON. HENRY T. NAKAMOTO))

STATEMENT OF RELATED CASES

Plaintiffs-Appellants HILO BAY MARINA, LLC and KEAUKAHA MINISTRY LLC are unaware of any related cases.

DATED: Honolulu, Hawaii, September 1, 2023.

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Clint K. Hamada
KENNETH R. KUPCHAK
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Attorneys for Appellants
HILO BAY MARINA, LLC,
and KEAUKAHA MINISTRY LLC

NO. CAAP-23-0000310

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

HILO BAY MARINA, LLC, and KEAUKAHA MINISTRY LLC Plaintiffs-Appellants, vs. STATE OF HAWAII; BOARD AND NATURAL RESOURCES, STATE OF HAWAII; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE ENTITIES, 1-10, Defendants-Appellees.	) CIVIL NO. 3CCV-22-0000095)) APPEAL FROM:) (1) FINAL JUDGMENT FILED ON) APRIL 13, 2023, AND (2) DEFENDANT) STATE OF HAWAII'S FINDINGS OF FACT,) CONCLUSIONS OF LAW AND ORDER) GRANTING DEFENDANT'S MOTION FOR) SUMMARY JUDGMENT AND DENYING) PLAINTIFF'S MOTION FOR SUMMARY) JUDGMENT FILED ON MARCH 21, 2023)) CIRCUIT COURT OF THE THIRD CIRCUIT)) HON. HENRY T. NAKAMOTO))

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was duly served this day by JEFS electronic mail on the following parties:

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DATED: Honolulu, Hawai'i, September 1, 2023.

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NOTICE OF ELECTRONIC FILING

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Case ID: CAAP-23-0000310
Title: Hilo Bay Marina, LLC, and Keaukaha Ministry LLC , Plaintiffs-Appellants, vs. State of Hawaii, Board and Natural Resources, State of Hawai'i, Defendants-Appellees, John Does 1-10, Jane Does 1-10, Doe Corporations 1-10, Doe Partnerships 1-10, and Doe Entities 1-10, Defendants.
Filing Date / Time: FRIDAY, SEPTEMBER 1, 2023 02:28:25 PM
Filing Parties: HILO BAY MARINA LLC
Keaukaha Ministry LLC
Case Type: Appeal
Lead Document(s):
Supporting Document(s): 25-Opening Brief

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai`i Electronic Filing and Service Rules.

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