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February 4, 2022

TESTIMONY STRONGLY SUGGESTING MODIFICATIONS TO SB 3089

Senate Committee On Public Safety, Intergovernmental, and Military Affairs

Chair: Senator Clarence K. Nishihara

Vice Chair: Senator Lynn DeCoite

Members: Rosalyn H. Baker Kurt Fevella and Gil Riviere

Hearing: SB 3089: Tuesday, February 8, 2022 at 1:00 p.m.

Dear Chairman, Vice Chairman and Committee Members,

My name is Jim Hochberg and I am a civil rights attorney seeking to protect the Constitutional Rights of the people of Hawaii in the federal and state courts in Hawaii. I have practiced law in Hawaii since 1984 (38 years). With respect to SB 3089, I propose amendment to the language in the bill to protect the people of Hawaii from abuse of emergency powers.

I propose that you amend SB 3089 to offer a Constitutional Amendment to add to Article 1, Section 1, new language to state that

any exercise of emergency powers must automatically terminate on the 60th day after the initiation of the first action pursuant to emergency power unless both the executive and legislative branches act to extend the emergency powers for that emergency.

I come to this conclusion as the result of litigating challenges to the exercise of emergency powers since 2020 based on the COVID 19 emergency.

Many people of Hawaii have sued to challenge HRS, Chapter 127A (Emergency Powers) in court numerous times since it was employed in the context of COVID 19, because the many residents believe that Hawaii's political leaders have abused those powers. I have litigated two such cases here since 2020. I offer this testimony based on the understanding I have gained in that process concerning how the courts are forced to analyze the challenges to government power under Chapter 127A.

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SB 3089 states that the “purpose of this Act is to . . . clarify the legal framework governing the extension and termination of states of emergency.”

SB 3089 goes on to make several amendments to HRS Chapter 127A, including to Section 127A-14(d), which currently demands the automatic termination of the emergency powers on the sixtieth day after the proclamation of emergency. Several of the many challenges to the continuation of emergency powers have addressed this point. SB 3089 takes the completely wrong approach by weakening the protections of the people’s political power rather than protecting the political power of the people of Hawaii.

While emergencies can require drastic action, such action must be limited to that period of time absolutely necessary to protect against infringement on our fundamental rights. The political leadership in many other countries around the world (and even many states within our United States of America) determined last year and earlier this year that the emergency from COVID 19 has ended, and these governments have eliminated the drastic emergency actions in their jurisdiction. Hawaii continues to exercise emergency powers concerning COVID 19 when it is unnecessary with 99% of current COVID 19 cases being omicron. SB 3089 takes the wrong approach to re-evaluating the statutory language to end emergency powers.

I agree that Chapter 127A must be amended to ensure that e emergency powers are not abused. However, in order to protect the proper balance between the political power of government and the political power of the people being governed, revising Chapter 127A must give way to revising the Constitution of the State of Hawaii. This is because judges must look at a statute in the context of the entire chapter in which it occurs. In this case, Chapter 127A broadly empowers the governor and mayors to take over the legislative law-making powers when in their discretion some emergency or disaster leads them to the conclusion that it is necessary.

Tinkering with the language within that context leaves the judge determining the legality of a section of that Chapter within that same context.

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In that context, the tension is between the political power of the executive versus the legislative branch. The political power of the people is lost. Judges need to see the tension as between the government and the people since the emergency orders affect the people, not the legislature.

The people of Hawaii have constitutionally protected political power, and limits on the Governor's emergency powers is an important protection for your voters. The Bill of Rights in the Hawaii Constitution provides at Article I, Section 1 that:

“All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.”

Therefore, allowing an unchecked exercise of emergency powers by a governor is contrary to the constitutional protection of the inherent political power held by the people. The limitation on the exercise of emergency powers is necessary to maintain appropriate levels of governmental authority under the Constitution of the State of Hawaii. The separation of powers reserve law-making to the legislative branch (each member being duly elected in small districts by a subset of the population) and, with citizen participation, protects the people from authoritarian rule and ensures that they are properly represented by elected officials. Executive decrees ordering quarantine with criminal penalties, along with various other rules that have been enacted with no public input, are contrary to Hawaii's Constitution. While this may be proper for very limited periods of time, the Legislature must exercise its law-making power to protect the voters from abuse.

In order to arm the judge with the proper perspective for reviewing abuse of emergency powers, the brakes on abuse of emergency powers must be stated where the judge will see the tension properly: between the political power of the people and the political power of the government.

That is why I propose that you amend the Hawaii Constitution.

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Therefore, I suggest that you delete the changes to Section 127A-14 in Section 5 of the bill and instead insert this language in SB 3089:

In order to clarify in the strongest possible terms that abuse of emergency powers occurs beyond the first 60 days after the emergency is proclaimed, the following amendment to the Hawaii Constitution is proposed:

Article I Section 1 shall be amended as follows:

Section 1. All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority. **Any exercise of emergency powers must automatically terminate on the 60th day after the initiation of the first action pursuant to emergency power unless both the executive and legislative branches act to extend the emergency powers for that specific emergency.**

I do not support the language in SB 3089 that seeks to weaken the current limits on the exercise of emergency powers. If you have any questions please feel free to call me.

Sincerely,

JAMES HOCHBERG

JH

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