NO. CAAP-17-0000594

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI`I

JOHN RADCLIFFE,
CHARLES MILLER, M.D., and
COMPASSION & CHOICES

Plaintiffs-Appellants,

vs.

STATE OF HAWAI`I;
DOUGLAS CHIN, Attorney General; and
KEITH M. KANESHIRO, Prosecuting Attorney for the City and County of Honolulu,

Defendants-Appellees.

Civil No. 17-1-0053-01 KKH

APPEAL FROM THE:

A) ORDER GRANTING ATTORNEY GENERAL'S MOTION TO DISMISS AND PROSECUTING ATTORNEY'S JOINDER, AND DENYING PROSECUTING ATTORNEY'S MOTION TO DISMISS AS MOOT; NOTICE OF ENTRY, FILED AND ENTERED ON JULY 14, 2017; and

B) JUDGMENT FILED AUGUST 15, 2017

FIRST CIRCUIT COURT

HONORABLE KEITH K. HIRAOKA

PLAINTIFFS-APPELLANTS JOHN RADCLIFFE, CHARLES MILLER, M.D., and COMPASSION & CHOICES' OPENING BRIEF

APPENDICES "A" and "B"

CERTIFICATE OF SERVICE

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Of Counsel:
PAUL ALSTON 1126-0
DIANNE WINTER BROOKINS 5944-0
JOHN-ANDERSON L. MEYER 8541-0
AGLAË VAN DEN BERGH 10624-0
1001 Bishop Street, Suite 1800
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
E-mail: palston@ahfi.com
dbrookins@ahfi.com
ameyer@ahfi.com
avandenbergh@ahfi.com

KEVIN DÍAZ (*pro hac vice*)
COMPASSION & CHOICES
4224 NE Halsey Street, Suite 335
Portland, Oregon 97213
Telephone (503) 943-6532
Email: kdiaz@compassionandchoices.org

Attorneys for Plaintiffs-Appellants
JOHN RADCLIFFE, CHARLES MILLER, M.D., and COMPASSION & CHOICES

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PLAINTIFFS-APPELLANTS JOHN RADCLIFFE, CHARLES MILLER, M.D., and COMPASSION & CHOICES' OPENING BRIEF

I. PRELIMINARY STATEMENT

Although there is no statute in this State that specifically prohibits medical aid in dying, the Attorney General has opined that a physician providing medical aid in dying could be prosecuted under the State's criminal statutes prohibiting manslaughter and second degree murder. Appellants filed a declaratory judgment action regarding the Attorney General's interpretation of those criminal statutes. Appellants sought a declaratory judgment that the criminal statutes did not apply to the practice of medical aid in dying. In the event the Circuit Court determined that the operative criminal statutes applied to medical aid in dying, Appellants requested a declaratory judgment that the criminal statutes were unconstitutional as so applied.

The Circuit Court dismissed Appellants' Complaint under Rule 12(b)(6) of the Hawai`i Rules of Civil Procedure for failure to state a claim. The Circuit Court reasoned: (1) the holding in *Pacific Meat Co. v. Otagaki*, 47 Haw. 652 (1964) prohibited it from "grant[ing] declaratory relief on any criminal statutes"; (2) a declaratory judgment would interfere with the function and primary jurisdiction of the governmental entities charged with regulation and enforcement under HRS Chapter 453; (3) "equity will not enjoin the enforcement of a [presumptively] valid criminal statute;" and (4) the issues raised in Appellants' Complaint should be addressed by the political branches of government, not the courts. ROA at 282-294.[*]

The Order entered by the Circuit Court does not reference Appellants' claim that the criminal statutes do not apply to medical aid in dying, or justify the dismissal of the entire Complaint, notwithstanding the failure to address that claim. However, based on the transcript of the hearing, the Circuit Court appears to have rejected Appellants' statutory interpretation—impermissibly reaching the substantive merits of Appellants' claim on a Rule 12(b)(6) motion. On this basis alone, whatever this Court decides on the issues actually addressed by the Circuit Court, this case must be remanded for further proceedings.

The Circuit Court also erred in the rulings expressly made, including but not limited to dismissing Appellants' Complaint on the ground that *Pacific Meat Co. v. Otagaki*, 47 Haw. 652 (1964) prohibited it from "grant[ing] declaratory relief on any criminal statutes." For

[*] ROA refers to the Record on Appeal, available at Docket No. 15.

the reasons stated herein, dismissal of the Complaint was improper. The decision of the Circuit Court must be vacated and remanded for further proceedings.

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellants brought a declaratory judgment action pursuant to HRS § 632–1 *et seq*., Hawaii's Declaratory Judgment Act, and Rule 57 of the Hawai`i Rules of Civil Procedure ("HRCP"). The parties' dispute arises from the Attorney General's interpretation of the state criminal statutes prohibiting manslaughter and second degree murder as applied to medical aid in dying. Appellants also sought injunctive relief.

B. Procedural and Factual Background

Appellant John Radcliffe has an incurable form of colon cancer that has metastasized to his liver. ROA at 16 (Compl.), ¶ 2. Recent tests indicate that the cancer lesions have grown and, as a result, he must continue chemotherapy. *Id.* When originally diagnosed in June 2014, Mr. Radcliffe had a six to twenty-four month prognosis. *Id.* As his disease progresses, he wants to obtain a prescription pursuant to the practice known as medical aid in dying so that he may have an option of self-administering medication if and when the suffering at the end of his life becomes unbearable. *Id.* If Mr. Radcliffe had access to a prescription pursuant to the practice of medical aid in dying it would give him great comfort knowing he would not have to suffer needlessly at the end of life.

Appellant Charles Miller, M.D. ("Dr. Miller") is a physician who is licensed to practice medicine in Hawai`i. *Id. at* ¶ 3. He is an oncologist and is board certified in internal medicine, medical oncology, and hematology. *Id.* Dr. Miller regularly advises patients who suffer from cancer. *Id.* If medical aid in dying were not subject to criminal prosecution, Dr. Miller would be willing to write Mr. Radcliffe a prescription pursuant to the medical standard of care for medical aid in dying. *Id.*

Appellant Compassion & Choices is a national non-profit organization dedicated to improving care and expanding choice at the end of life. *Id.* at ¶ 4. It is the oldest and largest non-profit organization dedicated to such advocacy and has more than 4,850 active volunteers throughout the Unites States, including Hawai`i. *Id.* Compassion & Choices is the national leader in advocating for the rights of terminally ill patients and provides free information and education to the public through its End-of-Life Information Center and End-of-Life Consultation Service. *Id.*

There is no statute in this State that specifically prohibits medical aid in dying. Nevertheless, the Attorney General has opined that a physician providing medical aid in dying could be prosecuted under State criminal statutes. In 2011, then-Attorney General David Louie approved a letter opinion that suggested that criminal prosecutions may be brought against physicians who provide medical aid in dying. ROA at 28. In 2015, Defendant Chin approved another opinion letter that also suggests that criminal prosecutions would be brought against physicians who provide medical aid in dying. ROA at 35.

Medical aid in dying—the practice whereby a physician, in conformance with the applicable standard of care, provides a mentally-competent, terminally-ill patient with a prescription for medication that the patient can ingest to achieve a peaceful death—falls within the practice of medicine. ROA at 193. However, based on the public pronouncements of the Attorney General that medical aid in dying could be prosecuted under State criminal statutes, it is reasonable to assume that Dr. Miller—or any other physician—would be prosecuted should he or she provide counseling or a prescription to Mr. Radcliffe or any other mentally-competent, terminally-ill adult patient who sought a prescription for medical aid in dying for self-administration. ROA at 3, 23. Due to the fear of potential prosecution—based on the prior pronouncements of the Attorney General—Dr. Miller and other similarly situated physicians are deterred from providing medical aid in dying to Mr. Radcliffe. *Id.*

In January 2017, Appellants filed a Complaint for declaratory and injunctive relief to determine Mr. Radcliffe's and Dr. Miller's respective abilities to receive and to provide medical aid in dying. *See* ROA at 16 (Compl.). Appellants sought two alternative forms of relief from the court. First, Appellants sought a declaratory judgment that the criminal statutes prohibiting manslaughter and murder in the second degree, HRS §§ 707-701.5 and 707-702, do not apply to medical aid in dying. ROA at 25 (Compl.). This declaratory judgment claim is essentially a request for interpretation of the criminal statutes. Second, only to the extent the Court found that HRS §§ 707-701.5 and/or 707-702 applied to medical aid in dying, Appellants sought a declaratory judgment that the statutes were unconstitutional as so applied, and sought an injunction against their enforcement. *Id.*

On March 9, 2017, Douglas S. Chin, Attorney General, and the State of Hawai`i moved to dismiss Appellants' Complaint. *See* ROA at 67 (Douglas Chin and the State of Hawaii's Motion to Dismiss). The Attorney General and the State argued: (1) that an action for a

declaratory judgment is not available to challenge the constitutionality of a criminal statute; and (2) that there are other adequate remedies available, such as defending a criminal prosecution. ROA at 70-75.

On March 10, 2017, Appellee Keith M. Kaneshiro, Prosecuting Attorney for the City and County of Honolulu, also moved to dismiss Appellants' Complaint under Hawai`i Rule of Civil Procedure 12(b)(6), arguing that: (1) there is no constitutional right to medical aid in dying; (2) the criminal statutes, as applied to medical aid in dying, are not unconstitutional; and (3) the Hawai`i legislature, not the courts, should address the legal, medical, and ethical issues related to medical aid in dying. ROA at 78-103 (Appellee Keith M. Kaneshiro's Motion to Dismiss). In a minute order dated June 29, 2017, the trial court *sua sponte* raised the issue of standing. ROA at 8-9. Although the Appellees did not raise this issue in their motions to dismiss, the trial court requested that Appellants brief the issue of standing, and that the Appellees address standing in their reply briefs. *Id.*

On July 13, 2017, the trial court heard arguments on the Appellees' motions to dismiss. ROA at 8 (Court Minutes). The following day, the trial court entered an *Order Granting Attorney General's Motion to Dismiss and Prosecuting Attorney's Joinder, and Denying Prosecuting Attorney's Motion to Dismiss as Moot* (the "Order," attached hereto as Appendix "A"). ROA at 8 (Minute Order); 282 (Order). The trial court reasoned that although Appellants had standing, it could not exercise jurisdiction over the dispute because: (1) the holding in *Pacific Meat Co. v. Otagaki*, 47 Haw. 652 (1964) prohibits it from "grant[ing] declaratory relief on any criminal statutes;" (2) a declaratory judgment would interfere with the function and primary jurisdiction of the governmental entities charged with regulation and enforcement under HRS Chapter 453; (3) "equity will not enjoin the enforcement of a [presumptively] valid criminal statute;" and (4) the issues raised in Appellants' Complaint should be addressed by the political branches of government, not the courts. ROA at 282-294. Shortly thereafter, on August 15, 2017, the trial court reduced its July 15 Order to a Judgment (the "Judgment," attached hereto as Appendix "B"). ROA at 297 (Judgment).

The Order and the Judgment from which this appeal has been taken were entered on July 14, 2017 and August 15, 2017, respectively. *See* ROA at 282, 297. Appellants electronically filed and served their Notice of Appeal within thirty days of the Order, on August 9, 2017 and their Amended Notice of Appeal within thirty days of the Judgment, on August 17,

2017. *See* JEFS Dkt. # 1; JEFS Dkt. # 11. On October 6, 2017, Appellants electronically filed and served their Statement of Jurisdiction. *See* JEFS Dkt. # 19.

On October 26, 2017, Defendant-Appellee Keith M. Kaneshiro filed a Statement Contesting Jurisdiction ("Statement"), in which he contested this Court's jurisdiction based on his disagreement with the Circuit Court's finding and conclusion that Plaintiffs-Appellants have standing. *See* JEFS Dkt. # 21. As discussed in Plaintiffs-Appellants' Response to Defendant-Appellee Keith M. Kaneshiro's Statement Contesting Jurisdiction, the Statement is improper in that it seeks to raise an issue in this appeal that Defendant-Appellee Kaneshiro failed to raise within the time frame allotted by the rules. Defendant-Appellee Kaneshiro failed to file a cross-appeal to seek review of the Circuit Court's decision on the issue of standing—in fact, he did not file any cross-appeal in this case. Therefore, his argument is procedurally improper and should be disregarded. Nevertheless, Appellants' standing to bring their claims is discussed below, in Part V.B.1.b.

C. Material Facts Underlying This Appeal

Mr. Radcliffe is a terminally ill, mentally-competent adult who is nearing the end of his life and wishes to have the option of medical aid in dying should his suffering become unbearable. Dr. Miller is a physician who is willing to prescribe the medication in accordance with the medical standard of care for medical aid in dying. ROA at 18 (Compl. ¶ 2). Knowing that this option would be available should his suffering become unbearable would give Mr. Radcliffe great comfort in his final days. *Id.* at 20-21 (Compl. ¶ 14).

The Attorney General's office has issued two opinion letters in recent years, concluding that medical aid in dying can be prosecuted as manslaughter under HRS § 707-702(1)(b). ROA at 28-40. HRS § 707-702(1)(b) states that a person commits the offense of manslaughter if the person "intentionally **causes** another person to commit suicide." (emphasis added). The 2011 Attorney General opinion acknowledges that "[t]here is no published Hawai`i case on the application of HRS § 707-702(1)(b) [as applied to medical aid in dying], and the legislative history sheds no light on how [HRS § 707-702(1)(b)] should be interpreted." ROA at 30, n. 1. Despite this lack of clarity, the Attorney General opined on both occasions that the provision of medical aid in dying could be prosecuted as manslaughter under HRS § 707-702. Both opinions conclude that the patient's death is "caused" by writing the prescription, and both ignore the patient's autonomy in deciding whether to take the medication, and that the patient is already terminally ill.

The threat of having to face a criminal prosecution, and all of the consequences that come with it, deter Dr. Miller—and other physicians in Hawai`i—from providing medical aid in dying to mentally-competent, terminally ill patients. ROA at 18 (Compl. ¶ 3). Given the great importance of the personal liberty rights involved, and given the Circuit Court's failure to consider Appellants' first request—a declaration that the criminal statutes *do not apply* to medical aid in dying—this Court should vacate the Order and remand this case to the Circuit Court and give Mr. Radcliffe and Dr. Miller the opportunity to be heard on the substance of their claims.

III. POINTS OF ERROR

This appeal raises five principal points of error:

1. Whether the Circuit Court erred in reaching the merits of Appellants' position that the practice of medical aid in dying is not prohibited by any Hawai`i statute by concluding that the manslaughter statute "clearly prohibits medical aid in dying," where the effect of that conclusion was to deprive Appellants of their ability to present their argument on that issue for decision on the merits. *See* JEFS Dkt. # 9 (Motion to Dismiss Hr'g Tr., July 13, 2017) at p. 14, ll. 5-7;

2. Whether the Circuit Court erred in holding that *Pacific Meat Co. v. Otagaki*, 47 Haw. 652 (1964) prohibited the court from "grant[ing] declaratory relief on any criminal statutes" when Appellants' Complaint alleged unique facts and special circumstances that would justify declaratory relief under the Hawai`i Supreme Court decision in *Pacific Meat* and its later decision in *Kahaikupuna v. State*, 109 Hawai`i 230 (2005). *See* ROA at 292 (Order);[1]

3. Whether the Circuit Court erred in concluding that the requested declaratory judgment would interfere with the jurisdiction and functioning of the agency(ies) charged with regulation and enforcement under HRS Chapter 453, where the Hawai`i Supreme Court has held that courts have discretion to "intervene" if "the need for equitable relief is clear, not remote or speculative" in *Application of Air Terminal Services, Inc.*, 47 Haw. 499, 531, 393 P.2d 60, 78 (1964). *See* ROA at 292 (Order);

4. Whether the Circuit Court erred in refusing to exercise its jurisdiction on the mere basis that Medical Aid in Dying has been considered by the

[1] Appellants also submit that the Circuit Court erred in concluding that it "cannot issue the injunction requested by the plaintiffs" based on the premise that "equity will not enjoin the enforcement of a [presumptively] valid criminal statute" (citing to *Kahaikupuna* and quoting *Pacific Meat*). ROA at 292-293. Appellants' argument with respect to this ruling is incorporated within Appellants' second point of error on appeal.

Legislature, which has to date failed to pass any legislation on the subject, and absent any express prohibition against the court exercising jurisdiction over claims and issues that happen to also be debated by the legislature at the same time. *See* ROA at 293 (Order); and

5. Whether the Circuit Court abused its discretion in denying Plaintiffs' request to amend their complaint, where requests to amend should be freely granted, and where such amendment would not have been futile, dilatory, or unduly prejudicial to Defendants in any other manner. *See* JEFS Dkt. # 9 (Motion to Dismiss Hr'g Tr., July 13, 2017) at p. 12, ll. 7-14, p. 17 ll. 9-16.

IV. STANDARD OF REVIEW

A. HRCP Rule 12(b)(6) Motion to Dismiss

Appellate courts review a Circuit Court's rulings on a motion to dismiss *de novo. Bremner v. City & County of Honolulu*, 96 Hawai`i 134, 138, 28 P.3d 350, 354 (Ct. App. 2001). It is well-settled that the court must accept plaintiff's allegations as true and view them in the light most favorable to the plaintiff, and that dismissal is proper only if it "appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief." *Wong v. Cayetano*, 111 Hawai`i 462, 476, 143 P.3d 1, 15 (2006), *as corrected* (Aug. 29, 2006) (*overruled on other grounds by Young v. Allstate Ins. Co.*, 119 Hawai`i 403, 406, 198 P.3d 666, 669 (2008)).

Rule 8(a) of the Hawai`i Rules of Civil Procedure states that a complaint must "contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." HRCP Rule 8(a). A pleading that fails to satisfy HRCP Rule 8(a) may be dismissed pursuant to HRCP Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *See* HRCP Rule 12(b)(6). The purpose of a motion to dismiss under HRCP Rule 12(b)(6) is to test the formal sufficiency of the complaint. "The test for the sufficiency of a complaint for declaratory judgment is not whether the plaintiff will succeed in obtaining the decree he seeks favoring his position, but whether he is entitled to a declaration of rights at all." *Wilson v. County of Orange*, 881 So.2d 625, 631 (Fla. Dist. Ct. App. 2004) (quoting *X Corp. v. Y Person,* 622 So.2d 1098, 1101 (Fla. 2d DCA 1993).

Although a court can dismiss a complaint under HRCP Rule 12(b)(6) that fails to satisfy the requirements set forth in HRCP Rule 8(a), a "motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Marsland v. Pang*, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985).

In reviewing a Circuit Court's order dismissing a complaint, this Court's inquiry is limited to the content of the complaint, and it "must deem those allegations to be true." *See Blair v. Ing*, 95 Hawai`i 247, 252, 21 P.3d 452, 457 (2001) (stating that in reviewing a Circuit Court's order dismissing a complaint, this Court's "consideration is strictly limited to the allegations of the complaint, and [it] must deem those allegations to be true."). "Pleadings must be construed liberally." *Genesys Data Technologies, Inc. v. Genesys Pac. Technologies, Inc.*, 95 Hawai`i 33, 41, 18 P.3d 895, 903 (2001) (citations omitted).

B. Statutory Interpretation

"Questions of statutory interpretation are questions of law to be reviewed *de novo* under the right/wrong standard." *Lingle v. Hawaii Gov't Employees Ass'n, AFSCME, Local 152, AFL-CIO*, 107 Hawai`i 178, 183, 111 P.3d 587, 592 (2005). This Court adheres to the following principles when interpreting statutes:

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation 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. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

Hawaii Gov't Employees Ass'n, AFSCME Local 152, AFL-CIO v. Lingle, 124 Hawai`i 197, 202, 239 P.3d 1, 6 (2010) (quoting *Awakuni v. Awana*, 115 Hawai`i 126, 133, 165 P.3d 1027, 1034 (2007)). In construing an ambiguous statute, this Court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2); *Guth v. Freeland*, 96 Hawai`i 147, 150, 28 P.3d 982, 985 (2001) (quoting HRS § 1-15(2)).

C. Motion for Leave to Amend the Complaint

"Orders denying motions for leave to amend a complaint are reviewed for an abuse of discretion." *Kealoha v. Machado*, 131 Hawai`i 62, 74, 315 P.3d 213, 225 (2013) (quoting *Office of Hawaiian Affairs v. State*, 110 Hawai`i 338, 351, 133 P.3d 767, 780 (2006). "The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly

erroneous assessment of the evidence. Stated differently, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." 110 Hawai`i 338, 351, 133 P.3d 767, 780 (quoting *Ranger Ins. Co. v. Hinshaw,* 103 Hawai`i 26, 30, 79 P.3d 119, 123 (2003)) (citation omitted).

HRCP Rule 15(a) permits pleadings to be amended by leave of court and expressly states that "leave shall be freely given when justice so requires." HRCP Rule 15(a). Where there is no "apparent or declared reason" to deny a motion to amend, "the leave should, as the rules require, be 'freely given.'" *Hirasa v. Burtner,* 68 Haw. 22, 26, 702 P.2d 772, 775 (1985) (quoting *Bishop Trust Co. v. Kamokila Development Corp.,* 57 Haw. 330, 337, 555 P.2d 1193, 1198 (1976)). There is "a presumption in favor of granting leave to amend." *Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir. 2003). The Hawai`i Supreme Court has explained that a motion for leave to amend should be granted where the proposed amendment "would do no more than state an alternative theory for relief." *Dejetley v. Kaho`ohalahala,* 122 Hawai`i 251, 270, 226 P.3d 421, 440 (2010) (quoting *Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 231 (1982)). The Hawai`i Supreme Court has also stated that a motion to amend should be freely granted unless substantial reasons exist to deny amendment:

> In the absence of any apparent or declared reason … such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc. … relief should, as the rules require, be "freely given." … [A] motion to amend should be granted unless there are substantial reasons to deny the motion.

Hirasa, supra. See also Johnson v. Mammoth Recreations, Inc., 975 F.2d 60, 607 (9th Cir. 1992) ("leave to amend should be granted unless amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay"). "**A request for leave to amend may be made at any time** and is addressed to the sound discretion of the court." *Fisher v. Grove Farm Co., Inc.*, 123 Hawai`i 82, 109, 230 P.3d 382, 409 (Ct. App. 2009) (quoting *Kahalepauole v. Assocs. Four*, 8 Haw.App. 7, 14, 791 P.2d 720, 724 (1990)) (emphasis added). Leave should be freely granted in the absence of bad faith or dilatory actions, or undue prejudice to the opposing party." *Id.*

V. ARGUMENT

A. The Circuit erred in reaching the merits of Appellants' position that the practice of medical aid in dying is not prohibited by any Hawai`i statute by concluding that the manslaughter statute "clearly prohibits medical aid in dying" in ruling on the Motion to Dismiss.

1. The Circuit Court deprived Appellants of the opportunity to brief the issue of statutory interpretation by pre-judging the issue on a motion to dismiss.

At the July 13, 2017 hearing on Defendants' Motions to Dismiss, the Circuit Court stated that it disagreed with Appellants' reading of the criminal statutes, that "the language of the statutes does not, on its face, prohibit [medical aid in dying]." JEFS Dkt. # 9 (Motion to Dismiss Hr'g Tr., July 13, 2017) at p. 14, ll. 1-2. The Court stated: **"I think that the current wording of the manslaughter statute clearly prohibits medical aid in dying."** *Id.* at ll. 5-7 (emphasis added). That issue had not been briefed or argued, and was not properly before the Circuit Court on the Rule 12(b)(6) motion. The Circuit Court erred in reaching the merits of that issue.

Critically, the availability of the injunctive relief sought by Appellants turned on whether HRS §§ 707-701.5 and/or 707-702 even applied to medical aid in dying. Having apparently concluded that they did, the Circuit Court proceeded to determine that it could not entertain a challenge to the validity of the statute. Because the Circuit Court jumped to the question of enjoining enforcement of the criminal statutes, Appellants have been denied an opportunity to have their principal claim heard—that the statutes *simply do not apply* to the practice of medical aid in dying in the first place. *See* ROA at 24-25 (Compl. ¶¶ 25-26); ROA at 192 (MIO to AG's Motion to Dismiss).

Despite the emphasis Appellants placed on their argument that the criminal statutes simply do not apply to medical aid in dying, the Circuit Court summarily concluded that they prohibit the practice—apparently deciding that issue against the Appellants on the merits, on a Rule 12(b)(6) motion.

2. The Circuit Court erroneously deferred the issue of statutory interpretation to the criminal courts.

To the extent the Circuit Court had not already made up its mind that Appellants' position on the issue of statutory interpretation was incorrect, the Court improperly declined to exercise jurisdiction over that issue. In response to the assertion by the Court that "the current wording of the manslaughter statute clearly prohibits medical aid in dying," Appellants' counsel

argued that the criminal statutes provide that one cannot "cause" another to commit suicide, and that there is a clear distinction between "causing" and "aiding" or "assisting." JEFS Dkt. # 9 (Motion to Dismiss Hr'g Tr., July 13, 2017) at p. 15, ll. 2-5. While **the Circuit Court agreed that this is an important distinction,** it refused to exercise jurisdiction over Appellants' claim, deferring even the interpretation of the statutes to the criminal courts:

> [That distinction] is an important point that the Court also wanted to discuss. The difference between intending or causing and aiding or assisting and – or however you would like to articulate the difference, isn't that best left as a factual determination for the defendant to argue in defense of a criminal case where the case can be decided based on specific facts?

Id. at p. 15, ll. 14-20. Appellants submit that the answer to that question is "no." Whether a criminal statute prohibits a category of behavior should not be relegated to individual criminal prosecutions.

The Circuit Court could and should have retained jurisdiction to interpret the statutes at issue, which should have only been undertaken after full briefing and argument on the merits.[2] For this reason alone, and even if this Court affirms the Circuit Court on the issues expressly addressed by the Order, the Circuit Court's Order and Judgment must be vacated, and this matter remanded for further proceedings and consideration of Appellants' claim that the criminal statutes do not apply to medical aid in dying.

[2] The Circuit Court also expressed concerns regarding factual issues that, in its view, should be decided by a criminal court: (a) at what point a person is considered "terminally ill;" (b) whether the person seeking medical aid in dying is competent at the time the request is made; (c) whether the person needs to be competent when he or she makes the decision to take the prescribed medication. *Id.* at pp. 15, ll. 20 – p. 16, ll. 7. The Court noted that it is "not supposed to make blanket decisions that aren't supported by specific uncontroverted facts in any given case." *Id.* at p. 16, ll. 11-13. In any event, answers to such questions would be subject to the professional judgment of the attending physician and their duty to meet the applicable standard of care, not unlike when other treatment decisions are made that also have life and death consequences. While these may be valid concerns, Appellants pointed out that those factual issues should be addressed at a later stage in the Circuit Court proceedings—not on a motion to dismiss, where all factual allegations should be deemed to be true. *Id.* at p. 16, ll. 14-24.

B. The Circuit Court erred in holding that *Pacific Meat Co. v. Otagaki*, 47 Haw. 652 (1964) prohibited the court from "grant[ing] declaratory relief on any criminal statutes," where Appellants' Complaint alleged unique facts and special circumstances that would justify declaratory relief under HRS § 632-1, *Pacific Meat* and *Kahaikupuna v. State*, 109 Hawai`i 230 (2005).

1. The Circuit Court had jurisdiction to interpret the criminal statutes prohibiting manslaughter and murder in the second degree pursuant to HRS § 632, *Pacific Meat,* and *Kahaikupuna.*

a. Hawaii's Declaratory Judgment Act.

Hawaii's Declaratory Judgment Act, Chapter 632 of the Hawai`i Revised Statutes, grants courts the power to make binding adjudications of rights in three types of situations:

> [1] where an actual controversy exists between contending parties, [2] where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or [3] where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein[.]

HRS § 632–1(b); *Bremner v. City & County of Honolulu*, 96 Hawai`i 134, 140, 28 P.3d 350, 356 (Ct. App. 2001) (delineating the types of cases under HRS Chapter 632 that are "amenable to judicial resolution by means of a declaratory judgment"). The purpose of the Declaratory Judgment Act "is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle the party to maintain an ordinary action therefor." HRS § 632-6. To that end, "[i]t is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people." *Id.* This is in line with the well-established principle that the requirements for standing are relaxed when a complaint seeks declaratory or injunctive relief, as discussed below.

Here, declaratory relief is warranted because criminal prosecution is at least threatened, if not imminent, based on the prior pronouncements of the Attorney General for the State of Hawai`i in 2011 and 2015, as discussed above. *See* ROA at 28-40 (Attorney General Opinions). As the Circuit Court noted, "Mr. Radcliffe has alleged an actual injury-in-fact fairly traceable to the defendant Attorney General's allegedly wrongful legal opinion for which a favorable court decision would likely provide relief." ROA at 286 (Order).

b. Appellants have standing.

As the Circuit Court agreed, Appellants have standing to bring their claims for declaratory judgment. The requirements for standing are relaxed when a complaint seeks declaratory or injunctive relief. *See e.g., Citizens for Prot. Of N. Kohala Coastline v. County of Hawai`i,* 91 Hawai`i 94, 100, 979 P.2d 1120, 1126 (1999) ("[F]or the purposes of establishing standing in an action for declaratory relief, HRS § 632-1 interposes less stringent requirements for access and participation in the court."). To establish standing in a declaratory relief action, Plaintiffs must satisfy the statutory requirements set forth in HRS § 632-1. *See e.g., Dalton v. City & County of Honolulu,* 51 Haw. 400, 402, 462 P.2d 199, 202 (1969) (stating that "[t]he standing necessary to pursue a declaratory judgment is described in HRS § 632-1" and applying the same principles on standing to plaintiffs claim for injunctive relief).

Plaintiffs meet the statutory requirements for standing under HRS§ 632-1. As was the case in *Dalton,* so too here: "Clearly this is a 'concrete interest' in a 'legal relation'. Clearly, too, this is an 'actual controversy', not merely a hypothetical problem." *Dalton,* 51 Haw. at 403,462 P.2d at 202 (internal citations omitted). The Circuit Court agreed with Appellants, stating that "Mr. Radcliffe has alleged an actual injury-in-fact fairly traceable to the defendant Attorney General's allegedly wrongful legal opinion for which a favorable court decision would likely provide relief." ROA at 286 (Order). As demonstrated throughout the record on appeal, Mr. Radcliffe and Dr. Miller have suffered actual and threatened harm. Mr. Radcliffe suffers from a disease that causes him to feel certain that he does not want to bear the final ravages of his disease; he wants the comfort of knowing that he has the option of medical aid in dying. Although Dr. Miller is willing to provide Mr. Radcliffe with medical aid in dying, he refrains from doing so due to a substantial risk of prosecution. ROA at 18-19, 20 (Compl. ¶¶ 2-3, 14). As a result, Mr. Radcliffe cannot receive appropriate medical care. *Id*. Plaintiffs' inability to receive and provide medical aid in dying is more than sufficient to establish standing.

Further, Dr. Miller has standing to sue not only on his own behalf but also on behalf of Mr. Radcliffe and other similarly situated mentally-competent, terminally-ill adult patients. *See e.g., Singleton v. Wulff,* 428 U.S. 106, 96 S.Ct. 2868 (1976) (holding that doctors had standing to challenge—on behalf of women patients in general—a Missouri law banning Medicaid reimbursement for abortions that were not medically required); *see also Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739 (1973) (holding that physicians, asserting the rights of their patients, have standing to challenge the constitutionality of a criminal abortion statute even though "the record

does not disclose that any of them has been prosecuted, or threatened with prosecution for violation of the State's abortion statutes"); *Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52, 62, 96 S.Ct. 2831, 2841 (1976) (same).

Finally, as multiple courts have held, in an action where multiple plaintiffs seek identical injunctive or declaratory relief, once the court determines that *one* of the plaintiffs has standing, it need not decide the standing of the others in order to determine that the action is justiciable. The reason for this is simple: if one plaintiff prevails on the merits, the same prospective relief will issue regardless of the standing of the other plaintiffs. *See, e.g., Patel v. Texas Dep't of Licensing & Regulation,* 469 S.W.3d 69, 77-78 (Tex. 2015); and *Stewart v. Heineman,* 296 Neb. 262, 295, 892 N.W.2d 542, 563 (2017) (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006); *Melendres v. Arpaio,* 695 F.3d 990 (9th Cir. 2012); *New Jersey Physicians, Inc. v. President of US.,* 653 F.3d 234 (3d Cir. 2011); *Parker v. Scrap Metal Processors, Inc.,* 386 F.3d 993 (11th Cir. 2004); *Save Our Heritage, Inc. v. F.A.A.,* 269 F.3d 49 (1st Cir. 2001); *Mountain States Legal Foundation v. Glickman,* 92 F.3d 1228 (D.C. Cir. 1996); *Kelley v. Selin,* 42 F.3d 1501 (6th Cir. 1995); *Heckman v. Williamson County,* 369 S.W.3d 137 (Tex. 2012); *MacPherson v. DAS,* 340 Or. 117, 130 P.3d 308 (2006); and *Cohen v. Zoning Bd. of Appeals,* 35 Mass.App.Ct. 619, 624 N.E.2d 119 (1993)). As the Circuit Court agreed, Appellants have standing on at least this basis alone. ROA at 286-7 ("Having determined that Mr. Radcliffe has legal standing, the court can proceed to a decision on the merits of the case and need not determine whether the other plaintiffs also have standing.").

c. The Circuit Court misapplied the Hawai`i Supreme Court decisions in *Pacific Meat* and *Kahaikupuna*.

One of the principal issues on appeal is the Circuit Court's misreading of *Pacific Meat Co. v. Otagaki*, 47 Haw. 652, 394 P.2d 618 (1964) as prohibiting Circuit Courts from "grant[ing] declaratory relief on any criminal statutes." ROA at 292 (Order).

In *Pacific Meat*, the plaintiff was a wholesaler of food products who sought a declaratory judgment determining that a poultry labeling statute that required uncooked poultry to be labeled with its geographic origin was unconstitutional and void. Our Supreme Court adopted the "Missouri rule" that a declaratory judgment action "cannot be utilized to circumvent the general rule that equity will not enjoin the enforcement of a valid criminal statute; neither will it be used to determine in advance the precise rights existing between the public and law

violators on particular facts where no special circumstances require it." *Id.* at 655, 394 P.2d 620. The "special circumstances" present in *Pacific Meat* were (1) the criminal statute at issue was *malum prohibitum,*[3] (2) the statute affected the plaintiff's property rights in a continuing course of business, and (3) a method of testing the statute was not available in criminal court because the defendants refused to initiate criminal proceedings against plaintiff for violating the statute. *Id.* While *Pacific Meat* is restrictive in allowing declaratory relief on criminal statutes, the Circuit Court here failed to acknowledge the important clarification expressed in the Supreme Court's subsequent decision, *Kahaikupuna v. State*, where the Supreme Court noted that there may be other circumstances, in addition to the three specific circumstances present in *Pacific Meat,* in which declaratory relief with respect to criminal statutes **would be justified**. 109 Hawai`i 230, 236, n.13, 124 P.3d at 981 n.13 (2005).

In *Kahaikupuna,* purported practitioners of native Hawaiian cultural practices filed a declaratory judgment action against the State and the County of Maui seeking a determination that cockfighting, which both State and County laws expressly prohibited, was a protected native Hawaiian right under article XII, section 7 of the State Constitution and HRS § 7-1. The *Kahaikupuna* Court, relying on *Pacific Meat,* declined to grant declaratory relief and held that (1) the "request for declaratory relief d[id] not involve a continuing course of business" and

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[3] The Circuit Court here also erred in concluding that "none of the *Pacific Meat Co.* factors are present in this case," stating that the "murder and manslaughter statutes at issue here are *malum in se*, not *malum prohibitum.*" ROA at 289 (Order). While the Circuit Court accurately explained that *malum in se* describes an act that is "inherently and essentially evil, that is, immoral in its nature and injurious in its consequences" (citing *State v. Torres,* 66 Haw. 281, 287 n. 7 (1983), and that *malum prohibitum* describes "[a]n act that is a crime merely because it is prohibited by statutes, although the act itself is not necessarily immoral" (citing *Kahaikupuna*), the Circuit Court misapplied those legal concepts in considering the application of the criminal statutes to medical aid in dying. Although the criminal statutes at issue here on their face address acts (murder and manslaughter) typically described as *malum in se*, the practice of medical aid in dying (*i.e.,* the practice whereby a physician, in conformance with the applicable standard of care, provides a mentally-competent, terminally-ill patient with a prescription for medication that the patient can ingest to achieve a peaceful death)—which is permitted in other jurisdictions (*e.g.,* Oregon, Washington, Vermont, California, Montana, Colorado, and Washington D.C.) and not expressly and unambiguously prohibited in Hawai`i—**cannot fairly be described as *malum in se***. Consequently, as (mis)applied to medical aid in dying, the criminal statutes at issue here would be applying *malum in se* statutes to what is, at worst, *malum prohibitum* activity. The Circuit Court's reliance on the *malum in se*/*malum prohibitum* distinction in its Order was erroneous.

(2) the "[p]laintiffs d[id] not argue or demonstrate facts indicating that" the defendants refused to bring criminal proceedings. 109 Hawai`i at 236, 124 P.3d 981. Importantly, however, the *Kahaikupuna* Court stated that its decision was limited to these two sets of circumstances simply because the plaintiffs had not suggested any ***other circumstances*** as grounds for departing from the ordinary rule against declaratory relief for criminal laws. Based on the specific limited facts and arguments before it in that case, the *Kahaikupuna* Court stated in footnote thirteen that it did not need to decide **"what other circumstances would justify declaratory relief**." *Id.* at 236, n.13, 124 P.3d at 981 n.13 (emphasis added). This footnote is the majority's direct response to Justice Levinson's dissent, in which he expressed his concerns regarding the "majority's implication that the freedom to risk prosecution in the future constitutes an adequate alternative" to declaratory relief. *Id.* at 237, 124 P.3d 975, 982 (Levinson, J., concurring and dissenting).

Justice Levinson wrote that, "on the contrary, . . . the threat of prosecution . . . may justify a declaratory judgment action." *Id.* Justice Levinson dissented from a ruling that he felt would "force these plaintiffs to risk punishment to determine the statutes' applicability themselves:"

> By holding that the mere possibility of prosecution should deafen the Circuit Court to the appellants' prayer for declaratory relief, the **majority leaves the appellants no opportunity to test the applicability of the statutes to their particular circumstances** other than by incurring the risk, cost, and embarrassment of prosecution, thereby putting the appellants in such a position that "the only way to determine whether the suspect is a mushroom or a toadstool [would be] to eat it," Edwin M. Borchard, *The Constitutionality of Declaratory Judgments,* 31 Colum. L.Rev. 561, 589 (1931). **This "remedy" is not merely "inconvenient and costly" as the majority concedes**, majority opinion at 237, 124 P.3d at 982; **it is no remedy at all.**

Kahaikupuna v. State, 109 Hawai`i 230, 237–38, 124 P.3d 975, 982–83 (2005) (Levinson, J., concurring and dissenting) (emphasis added; footnote omitted).

Based on the clear language in footnote thirteen, the *Kahaikupuna* Court expressly contemplated that there could be other circumstances in which a declaratory action may proceed, to evaluate whether criminal statutes apply to particular circumstances, and whether those statutes are unconstitutional as so applied. The facts and circumstances alleged by Appellants here are such that the Circuit Court should have exercised jurisdiction to consider the constitutionality of the statutes at issue as applied to the practice of medical aid in dying.

2. The Complaint alleged unique facts and special circumstances that justify granting declaratory relief on the statutes at issue.

This case presents the type of special circumstances that justify declaratory relief under *Kahaikupuna* and *Pacific Meat.* The unique facts and special circumstances of this case are distinguishable from the factual circumstances in *Kahaikupuna* in at least three significant respects.

First, it is undisputed that the criminal statutes at issue in *Kahaikupuna* specifically prohibited the act of cockfighting, which plaintiffs argued was a protected native Hawaiian right under article XII, section 7 of the State Constitution and HRS § 7-1. In contrast, Appellants' principal claim in this case is that there is no law that specifically prohibits medical aid in dying. In response, the Defendants argue that medical aid in dying is, or should be prohibited under HRS § 707-702(1)(b). As noted above, the 2011 Attorney General opinion acknowledges that "[t]here is no published Hawai`i case on the application of HRS § 707-702(1)(b) [as applied to medical aid in dying], and the legislative history sheds no light on how [HRS § 707-702(1)(b)] should be interpreted." ROA at 30, n.1.

Second, the *Kahaikupuna* plaintiffs sought a declaratory judgment based on the argument that they, as descendants of native Hawaiians, had the right to raise and fight roosters as a "traditional native Hawaiian cultural practice," notwithstanding the State and Maui county criminal laws that specifically prohibited cockfighting. 109 Hawai`i at 232. In this case, Appellants seek a declaratory judgment that writing a prescription pursuant to the standard of care applicable to the practice of medical aid in dying does not violate HRS §§ 707-701.5 and 707-702, so that Mr. Radcliffe can exercise his constitutionally protected privacy right to make end-of-life healthcare decisions consistent with his wishes, *without exposing Dr. Miller* to the risk of possibly needing to withstand a criminal prosecution for providing such care to Mr. Radcliffe. The practice at issue here involves a terminally ill person's liberty right to make his own end-of-life medical decisions without undue government interaction or interference. The U.S. Supreme Court has specifically left open the ability of the States to determine the applicability of assisted suicide statues to medical aid in dying under their own statutes and Constitutions. *See Washington v. Glucksberg,* 521 U.S. 702, 735 S.Ct. 2258, 2291 (1997) ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."). Moreover, the U.S. Supreme Court expressly

acknowledged the possibility that it might in the future find that a prohibition on medical aid in dying violated the Due Process Clause and Equal Protection clause of the federal Constitution. *See Vacco v. Quill,* 521 U.S. 793, 809 n.13 (1997) ("Justice Stevens observes that our holding today 'does not foreclose the possibility that some application of the New York statute may impose an intolerable intrusion on the patient's freedom.' This is true[.]").[4]

Third, in both *Pacific Meat* and *Kahaikupuna*, the plaintiffs had a direct and concrete interest in the declaratory relief sought on the criminal statutes, and it was clear that those plaintiffs could be prosecuted under the criminal statutes that were challenged. That is not the case here because not only is there no Hawai`i statute that specifically and expressly criminalizes medical aid in dying (*cf.* Ala. Code § 22-8B-4[5]), there is also no statute that specifically criminalizes assisted suicide. Despite this, the Attorney General has opined that the practice of medical aid in dying could subject the healthcare provider to criminal prosecution. This case presents unique and unprecedented circumstances because the person who would be exposed to criminal prosecution for engaging in the practice of medical aid in dying would be Dr. Miller—*not* Mr. Radcliffe. These circumstances are factually and legally different in kind from the circumstances before the courts in either *Pacific Meat* or *Kahaikupuna*. This case presents precisely the kind of "**other circumstances [that] would justify declaratory relief**"

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[4] Notably, Both Washington and New York (relevant to *Glucksberg* and *Vacco*, respectively) have statutes that make "[p]romoting a suicide attempt" a felony, and provide that "[a] person is guilty of [that crime] when he knowingly causes or aids another person to attempt suicide.'" *See, Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 2259 (1997); *Vacco v. Quill*, 521 U.S. 793, 796, n.1, 117 S.Ct. 2293, 2296, n.1 (1997). As set forth in detail in both cases, the statutory scheme at issue expressly made it a crime to "aid another" to commit or attempt suicide. The Court's analysis and holdings in both cases was dependent on the language of the statutes being applied.

Hawai`i, by contrast, has no statute with comparable "aiding" language. Instead, Hawaii's manslaughter statute provides, in relevant part, only that "[a] person commits the offense of manslaughter if: . . . The person *intentionally causes another person to commit suicide*." HRS § 707-702(1)(b) (emphasis added). The requirement of ***intentional* causation** distinguishes Hawaii's statute from the statutes at issue in *Vacco* and *Glucksberg,* and almost all of the statutes in the other States upon which Defendant Kaneshiro relied in his Motion to Dismiss.

[5] "(a) Any person who deliberately assists another person to commit suicide or provides aid in dying is guilty of a Class C felony. (b) Any physician or health care provider who prescribes any drug, compound, or substance to a patient deliberately to aid in dying or assists or performs any medical procedure deliberately to aid in dying is guilty of a Class C felony." Ala. Code § 22-8B-4 (Act 2017-231, § 4).

that the Hawai`i Supreme Court contemplated in footnote thirteen in *Kahaikupuna.* The Circuit Court ought to have exercised its jurisdiction to consider the Appellants' claims; its failure to do so constitutes reversible error.

3. The risk of facing criminal prosecution is not an "adequate remedy."

The Circuit Court noted that the question of whether any of the allegations in the Complaint constitute "'other circumstances [as] would justify declaratory relief' in the absence of any of the three *Pacific Meat* circumstances, *Kahaikupuna,* 109 Hawai`i at 237, n.13, **is for the appellate courts to decide**." ROA at 290 (emphasis added). Based on the mistaken premise that it could not rule on this issue, the Circuit Court deferred to the factually dissimilar *Kahaikupuna* decision, quoting: "[w]hile criminal proceedings may be inconvenient and costly . . . it is the best forum to resolve all of the factual, statutory and constitutional questions that may arise in this case." *Id.* However, the Circuit Court failed to determine whether criminal proceedings would be the "best forum to resolve" such issues. Just because that may have been the case in *Kahaikupuna*—where State and Maui County laws unambiguously prohibited the plaintiffs from engaging in cock-fighting—does not mean the criminal court is the appropriate forum in the instant case, where there is no Hawai`i law that expressly or unambiguously prohibits medical aid in dying.

The Circuit Court's ruling that the possibility of facing criminal prosecution to test the applicability of the statutes at issue is an adequate remedy in this case cannot be sustained. Risking criminal prosecution under the circumstances in this case is not an adequate remedy—in fact, as Justice Levinson pointed out, it is "no a remedy at all." 109 Hawai`i 230, 237–38, 124 P.3d 975, 982–83 (Levinson, J., concurring and dissenting). The U.S. Supreme Court has repeatedly clarified that plaintiffs shall not be required to potentially violate the law and face the risk of being criminally prosecuted in order to secure an adjudication of their rights. *See e.g., Terrace v. Thompson,* 263 U.S. 197, 216, 44 S.Ct. 15, 34 (1923) (explicitly stating that plaintiffs are not obligated to violate the law and "risk of prosecution, fines and imprisonment[,] and loss of property ... to secure an adjudication of their rights."); *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 1216 (1974) ("[I]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Babbit v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979) ("When the plaintiff has an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [law], and there exists a credible threat of

prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" (quoting *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 748 (1973)).

The Circuit Court's decision to dismiss the Complaint here based on the purported availability of another form of relief (*i.e.* asking Dr. Miller to assume the risk of facing criminal prosecution) violates long-standing U.S. Supreme Court precedent, and should be reversed. However, even if the alternative "remedy" of facing criminal prosecution were an *adequate* remedy (which it is *not*), dismissal of the Complaint here was still in violation of *Dejetley v. Kaho'ohalahala* and the express language and the spirit of HRS § 632-1, as discussed below.

4. The Circuit Court's dismissal of the Complaint in this case violated the express language and spirit of HRS § 632-1.

By refusing to exercise its jurisdiction over Appellants' declaratory judgment action on the erroneous ground that *Pacific Meat Co. v. Otagaki*, 47 Haw. 652 (1964) prohibited it from "grant[ing] declaratory relief on any criminal statutes," the Circuit Court set an insurmountable standard to obtain a declaratory judgment in unique cases such as this one, involving first, the *applicability*, and secondarily, the constitutionality of a state criminal statute, as applied to medical aid in dying. The Circuit Court based its decision on a misapplication of the relevant legal principles. The Declaratory Judgment Act does not forbid Appellant's declaratory judgment claims; indeed, their claims embody the spirit and purpose of the law. And their ability to seek a declaratory judgment regarding the interpretation and constitutionality of State criminal statutes as applied in this unique context is supported by relevant case law. Although there is no absolute right to a declaratory judgment, the standard set by the Circuit Court here vitiates a person's opportunity to gain access to the courts and obtain a declaratory judgment regarding the applicability of a criminal statute to a specific set of facts, and the constitutionality of the statute, as so applied.

It is undisputed that Chapter 632 is remedial in nature; "[i]ts purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle the party to maintain an ordinary action therefor. It is to be liberally interpreted and administered, with a view to **making the courts more serviceable to the people**." HRS § 632-6 (emphasis added).

The Hawai`i Supreme Court has previously determined that, even where other forms of relief are available, petitioners are allowed to bring declaratory judgment actions. *Dejetley v. Kaho'ohalahala*, 122 Hawai`i 251, 226 P.3d 421 (2010). In *Dejetley*, plaintiffs sought a declaratory judgment that the County Council representative was not a resident of Lana`i, had therefore forfeited his office, and that the Lana`i council seat was vacant. *Id.* at 251, 254, 226 P.3d 421, 424. The *Dejetley* Court considered, *inter alia*, whether plaintiffs were precluded from bringing a declaratory relief action under the current version of HRS § 632-1, where other forms of relief were available, such as impeachment or recall under the county charter. Noting that the language of HRS § 632-1 was unclear, the *Dejetley* Court reviewed the legislative history of the declaratory relief statute. In doing so, the Court determined that the legislature, in amending section 9976 of the Revised Laws of Hawai`i 1945, "intended to 'afford [citizens] greater relief," and, therefore, a petitioner was not precluded "from bringing a declaratory judgment action under the current HRS § 632-1, even though [relief through another right of action was] available provided that 'the other essentials to such relief [were] present." *Dejetley,* 122 Hawai`i at 268, 226 P.3d at 438 (quoting HRS § 632–1). Allowing Plaintiffs-Appellants here to seek declaratory relief would limit the additional costs of unnecessary litigation, and result in a more efficient and appropriate proceeding, given the unique circumstances of this case. Because the Circuit Court relied on the ostensible availability of an alternative remedy in refusing to exercise jurisdiction, the Court dismissed this declaratory judgment action in direct violation of *Dejetley* and both the letter and spirit of HRS § 632-1.

The Circuit Court's reliance on *Pacific Meat,* and its failure to determine whether the facts and circumstances presented are of the type that would justify declaratory relief pursuant to *Kahaikupuna,* was erroneous. The Circuit Court also erred in considering criminal prosecution as an alternative remedy. Even if it had not erred in these ways, the Circuit Court's misapplication of the case law cited in its order violated *Dejetley,* which stands for the proposition that the availability of an alternative remedy does not preclude plaintiffs from bringing a declaratory relief action under the current version of HRS § 632-1 to seek adjudication of their rights. Finally, the Circuit Court's refusal to grant declaratory relief contradicts the express language and spirit of HRS § 632-1, which is remedial in nature and is intended to afford citizens greater relief. *Dejetley,* 122 Hawai`i at 268, 226 P.3d at 438; HRS

§§ 632-1 and -6. These errors have denied Appellants the opportunity to have their claims considered on their merits, and mandate reversal and remand for further proceedings.

C. The Circuit Court erred in concluding that the requested declaratory judgment would interfere with the jurisdiction and functioning of the agencies charged with regulation and enforcement of HRS Chapter 453.

This ruling applied to a single aspect of the relief requested by Appellants—*i.e.*, a declaration that HRS § 453-1 permits medical aid in dying. The mere fact that HRS Chapter 453 is enforced by the Hawai`i Medical Board, within the Hawai`i Department of Commerce and Consumer Affairs, does not preclude the Court from issuing a declaratory judgment interpreting that statute. The Circuit Court cited HRS § 91-14 to support its ruling that Appellants should have exhausted their administrative remedies first before the Court could review Appellants' claims as a contested case. ROA at 291. The fact that Appellants arguably had ***an alternative remedy*** for that single aspect of the relief sought in the form of a petition asking the Hawai`i Medical Board to interpret HRS § 453-1 as permitting medical aid in dying does not preclude Appellants from seeking declaratory relief under HRS § 632-1 for the reasons already discussed.

Moreover, the case relied upon by the Circuit Court in support of this ruling, *Application of Air Terminal Services, Inc.*, involved pending governmental action—which is not present here. The Hawai`i Medical Board **has not taken any action** with respect to which the declaratory relief sought in this case could interfere. In any event, that case specifically states that the court has discretion to grant declaratory judgments in the public interest, and that granting declaratory relief, **even where governmental action is involved**, is proper where "**the need for equitable relief is clear, not remote or speculative**." 47 Haw. 499, 531 (1964) (emphasis added).

In *Air Terminal,* two actions were brought regarding an airport terminal concession contract: one by an unsuccessful bidder (Air Terminal Services, a foreign corporation), and the other by a taxpayer. *Id.* Each complaint contained the same causes of action, with the exception that the taxpayer also sought a declaratory judgment determining that the contract specifications of the winning bid were fatally defective, and that any award based thereon was void. *Id.* at 499, 530, 393 P.2d 60, 78. The *Air Terminal, Inc.* Court noted that the claim had been brought by the taxpayer in Air Terminal's interest, because the foreign company lacked standing to bring this claim. *Id.* In analyzing whether declaratory relief was called for in the taxpayer's cause of action, the Court stated the recognized test:

> 'A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. [Citations.] It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially **where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative**.'

Id. at 499, 531, 393 P.2d 60, 78 citing *In Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426, 431, 68 S.Ct. 641, 644, 92 L.Ed. 784 (1948) (emphasis added; internal citations omitted). The Court further noted that:

> [t]he requirement that a direct pecuniary injury be shown in a taxpayer's suit is generally recognized [and that its] importance is emphasized by the holding in *Doremus v. Board of Education of the Borough of Hawthorne*, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952), where the court ruled that absent such showing no justiciable case or controversy was presented and the case would not be decided on the merits even if this point was waived in the court below.

Id. at 532–33, 393 P.2d 60, 79. Accordingly, the *Air Terminal* Court held, *inter alia,* that "[t]here having been no clear showing of direct pecuniary injury [as required to establish tax payer standing], **the court will not accord [declaratory] relief at this stage of the case even though a less exacting standard of proof might perhaps have been applied under different circumstances**." *Id.* at 499, 536, 393 P.2d 60, 81 (emphasis added). The Court reasoned that the dispute was between a taxpayer, seeking to represent all taxpayers, and a public officer defended by the Attorney General. "To wrest the enforcement of the laws from the Attorney General into the hands of the taxpayers in a situation such as that with which we are here confronted, more must be shown than has been shown here." *Id*. at 499, 536–37, 393 P.2d 60, 81. In other words, the *Air Terminal* Court was concerned more with the issue of taxpayer standing as it applied to the availability of declaratory relief—not just with the involvement of governmental action, as the Circuit Court's Order here implies.

Unlike *Air Terminal,* this case involves neither taxpayer standing for the purpose of disputing a contract bid nor governmental action with respect to which Appellants could have exercised—and exhausted—an administrative remedy, before seeking declaratory relief from the court. Rather, the case before the Court here involves an individual's right to make his own end-of-life medical decisions. Mr. Radcliffe is nearing the end of his life and wishes to have the option of medical aid in dying should his suffering become unbearable, and Dr. Miller is willing to provide medical aid in dying, but for the threat of being criminally prosecuted for doing so. As

such, Appellants have a direct interest in the controversy and have standing to bring their claims, as discussed *supra,* Section V.A.2.b. Also, in contrast to *Air Terminal,* the need for equitable relief in this case is abundantly clear and imminent—Mr. Radcliffe is terminally ill and wishes to know whether the option of medical aid in dying is available to him. Without clarification from the court, it is exceedingly unlikely that physicians would be willing to write a prescription for him, pursuant to the applicable standard of care, if they risk imprisonment for doing so. Because of the imminent nature of this action, the Circuit Court should not refuse to exercise its powers to grant equitable relief and thereby force a terminally ill patient to instead seek a declaratory ruling from the Hawai`i Medical Board regarding the specific issue of interpretation of HRS § 453-1 as permitting medical aid in dying—which is but one of several requests for declaratory ruling made by Appellants. For these reasons, *Air Terminal* actually *supports* a finding that Appellants are entitled to declaratory relief—contrary to the Circuit Court's reliance on it in refusing to exercise its discretion to even consider Appellants' request for equitable relief.

The Circuit Court erroneously concluded that the requested declaratory judgment would interfere with the jurisdiction and functioning of the agencies charged with regulation and enforcement of HRS Chapter 453.

D. The Circuit Court erred in refusing to exercise its jurisdiction on the mere basis that medical aid in dying has been considered by the Legislature, which has to date failed to pass any legislation on the subject.

On page 12 of its Order, the Circuit Court noted that "Senate Bill No. 1129 S D2 (2017), the proposed Medical Aid in Dying Act, generated 2,613 pages of testimony and comments from diverse organizations and individuals before ultimately being deferred by the House Health Committee." Based on this, the Court stated that "the relief sought by the plaintiffs is political, not judicial, in nature and should be addressed by the political branches of government." The Circuit Court's characterization of the relief sought by Appellants as "political, not judicial, in nature" is mistaken, and does not justify the Court's decision to refuse to exercise its jurisdiction. The mere fact that medical aid in dying may be subject to eventual action by the Legislature is not a proper basis for dismissing Appellants' claims. Indeed, the history of the Hawai`i Legislature's consideration of medical aid in dying, and its repeated failure to pass any law either expressly outlawing the practice, or setting forth in detail the procedures and safeguards by which medical aid in dying may be employed is proof positive that the matter is ripe for judicial review. In light of the undisputed language of the statutes at issue,

the Attorney General's interpretations of those statutes, and the Legislature's repeated failure to advance any Bill on the topic, Plaintiffs are entitled to have the merits of their claims considered by the Circuit Court. The Court's refusal to consider Plaintiffs' claims based on the mere fact of the Legislature's prior (or even continued) consideration of medical aid in dying was in error.

Moreover, the cases cited by the Circuit Court do not require dismissal. In fact, the Hawai`i case cited by the Circuit Court in support of its decision to leave this issue to the political branches of government actually supports the opposite conclusion. In *TMJ Hawaii, Inc. v. Nippon Tr. Bank*, 113 Hawai`i 373, 374, 153 P.3d 444, 445 (2007), the Supreme Court accepted ***and answered*** the certified question "whether Hawai`i law recognizes the assignability of tort claims of professional malpractice, breach of fiduciary duty, and fraud claims." The Court analyzed the applicable authority at length, and answered the question in the affirmative. The Court stated that it was "not unsympathetic to the view that public policy may nevertheless preclude such assignments . . . , [but that] questions regarding the wisdom of permitting such assignments are more appropriately directed to the legislature, which is better positioned to balance the policy considerations and potential consequences that will flow from such a decision." *Id.*, 113 Hawai`i at 384, 153 P.3d at 455.

Rather than decline to rule, based on the issues of public policy, the *TMJ Hawaii* Court proceeded to decide the question of law presented. The Court also noted that it has, in the past, "exhibited such restraint when faced with policy decisions of similar magnitudes." *Id.,* n. 6. The Circuit Court's reliance on the *TMJ Hawaii* case to justify its refusal to consider Plaintiffs' claims is misplaced, as the *TMJ Hawaii* Court proceeded to answer the certified question, merely noting that the policy implications that flow from its decision may need to be addressed by the Legislature. Similarly here, the Court should grant the declaratory relief requested, and encourage the Legislature to address the policy considerations surrounding the legal practice of medical aid in dying.

The Circuit Court also relied upon a New York case, *Myers v. Schneiderman,*[6] for the proposition that the issue of medical aid in dying should be "left to the discretion of the political branches of government." 140 A.D.3d 51, (N.Y. App. Div. 2016). *Myers* has no application here, because in that case, the statute at issue specifically prohibited "aiding" suicide,

[6] *Myers v. Schneiderman*, 140 A.D.3d 51, 31 N.Y.S.3d 45 (N.Y. App. Div. 2016), *aff'd,* 30 N.Y.3d 1, 62 N.Y.S.3d 838 (2017).

and the statute had already been extensively reviewed by the U.S. Supreme Court in *Vacco v. Quill,* 521 U.S. 793, 796, n.1, 117 S.Ct. 2293, 2296, n.1. Far more persuasive is *Baxter v. Montana,* where the Montana Supreme Court exercised jurisdiction and answered the relevant statutory interpretation question at issue. 354 Mont. 234, 224 P.3d 1211 (2009).

It is true that courts have sometimes chosen to defer to the political branch on complex issues of civil rights. However, many of the civil rights we claim today would never have been recognized if courts were precluded from exercising jurisdiction over claims and issues that happen to also be debated by the Legislature. Even though the issues presented in Appellants' Complaint have been previously considered by the Hawai`i Legislature, and may be considered again in future sessions, this was not a proper basis to dismiss this action, given that the Legislature has not criminalized medical aid in dying, or for that matter even specifically criminalized assisted suicide. Judicial recognition that Hawaii's constitutional right of personal autonomy and privacy applies to medical aid in dying is likely to stimulate—and will certainly not deter—careful legislative attention to the need for appropriate regulation. The judicial relief sought by Appellants is in no way incompatible with the Legislature's important role in addressing these issues. To the contrary, this would not be the first time that the courts—with their responsibility to enforce the Constitution—led the way for the Legislature, which is subject to the time constraints of legislative session and the logistics of moving a Bill through the legislative process. Had the courts waited on State Legislatures to acknowledge other important constitutional rights, important advances in racial and gender rights would have been greatly delayed, if they had been made at all. In this field, as is so often the case, the judicial and political branches should be partners—not adversaries—in the guarantee of fundamental individual rights and the protection against their abuse.

The Circuit Court erred in deferring to the Legislature, and the Order should be reversed and remanded for consideration of Appellants' claims on their merits.

E. The Circuit Court abused its discretion in denying Appellants' oral motion for leave to amend the Complaint.

The Circuit Court abused its discretion in denying Appellants' motion for leave to amend their Complaint. HRCP Rule 15(a) permits pleadings to be amended by leave of court and expressly states that "leave shall be freely given when justice so requires." HRCP Rule 15(a). "Leave should be freely granted in the absence of bad faith or dilatory actions, or undue prejudice to the opposing party," and a request for leave "may be made at any time." *Fisher v.*

Grove Farm Co., Inc., 123 Hawai`i 82, 109, 230 P.3d 382, 409 (Ct. App. 2009) (citations omitted). Where there is no "apparent or declared reason" to deny a motion to amend, "the leave should, as the rules require, be 'freely given.'" *Hirasa v. Burtner,* 68 Haw. 22, 26, 702 P.2d 772, 775 (1985) (quoting *Bishop Trust Co. v. Kamokila Development Corp.,* 57 Haw. 330, 337, 555 P.2d 1193, 1198 (1976)). There is "a presumption in favor of granting leave to amend." *Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir. 2003).

In this case, Appellants should have been granted leave to amend the Complaint because the request was neither dilatory nor made in bad faith; nor would granting leave have prejudiced the opposing parties. Rather, the motion was made during the hearing on the motion to dismiss—*i.e.,* very early on in the proceedings. *See* JEFS Dkt. # 9 (Motion to Dismiss Hr'g Tr., July 13, 2017), p. 12, ll. 7-14; p. 17 ll. 9-13. No discovery had been performed on the case, and Appellants had not previously amended their Complaint. Nor would the requested amendment have been futile, as the Circuit Court specifically stated that "but for" the lack of certain factual allegations in the Complaint, the Court may have been more inclined to agree that there were "special circumstances" providing a basis on which to grant declaratory relief. During the hearing of Defendants' motions to dismiss, the Court stated that it did not find "special circumstances" as enunciated in *Kahaikupuna* in this case. *Id.* at p. 11, ll. 12-15. In response, Appellants' counsel argued that "the nature of the claims, the nature of the underlying facts and the opinion memorand[a] by the attorney general that they [] and the prosecutors would be applying these criminal statutes to the medical aid in dying process, specifically the prescribing of the medication" constitute "special circumstances." *Id.* at p. 11, ll. 16-23. The Circuit Court asked Appellants' counsel how Appellants would articulate the special circumstances presented by this case, in response to which Appellants' counsel asked that "the plaintiffs be allowed the opportunity to amend the complaint" if the Court was not inclined to allow the case to go forward. *Id.* at p. 12, ll. 7-14.

Later during the hearing, the Circuit Court expressed its concerns regarding factual issues that, in its view, should be decided by a criminal court: (a) at what point a person is considered "terminally ill;" (b) whether the person seeking medical aid in dying is competent at the time the request is made; (c) whether the person needs to be competent when he or she makes the decision to take the prescribed medication. *Id.* at pp. 15, ll. 20 – p. 16, ll. 7. The Circuit Court then noted that:

> those are the kinds of circumstances that [] the Court believes need to be articulated by the plaintiff[s] in order to qualify as special circumstances under *Kahaikupuna.* And if the plaintiff[s] can't do that now based on the allegations made in the Complaint, I don't know that the *Kahaikupuna* test is satisfied.

Id. at 17, ll. 2-5. These issues are related to the applicable standard of care that a physician would have to exercise in writing a prescription pursuant to medical aid in dying, and would only be a proper line of inquiry for the court if in fact the statutes at issue do not *per se* prohibit medical aid in dying—something which the Court improperly decided, as discussed above, at section V.A. That said, Appellants' counsel again asked for the opportunity to amend the Complaint, which the Circuit Court declined. *Id.* at p. 17 ll. 9-16. Instead, the Court dismissed the case without granting leave to amend the Complaint—an extremely severe measure, especially given the unique circumstances of this case, and the important issues raised by Appellants' claims.

As the Circuit Court did not set forth any "apparent or declared reason" in its Order that justified denying Plaintiffs' motion for leave to amend the Complaint, and because such leave must be "freely given," the Circuit Court abused its discretion. The Order should be vacated and the case remanded for further proceedings.

VI. CONCLUSION

By refusing to exercise jurisdiction over Appellants' declaratory judgment action on the erroneous ground that *Pacific Meat* prohibited it from "grant[ing] declaratory relief on any criminal statutes," the Circuit Court set an insurmountable obstacle to obtaining a declaratory judgment in unique cases such as this one, involving first, the *applicability*, and secondarily, the constitutionality of a State criminal statute, as applied to medical aid in dying.

The Circuit Court summarily rejected Appellants' principal argument that the statutes at issue simply do not *apply* to medical aid in dying, and instead jumped to the conclusion—based on a misreading of *Kahaikupuna* and *Pacific Meat*—that it could not entertain a challenge to the validity of the statutes, as applied. Appellants are entitled to brief and argue the merits of their claim that the criminal statutes do not prohibit medical aid in dying, and the Circuit Court erred in concluding otherwise on a motion to dismiss. Moreover, the unique facts and circumstances alleged in the Complaint are sufficient to constitute the "special circumstances" contemplated by the *Kahaikupuna* Court that would justify declaratory relief under *Kahaikupuna* and *Pacific Meat.*

In addition, the Circuit Court's decision to dismiss the Complaint based on the purported availability of another form of relief (*i.e.* assuming the risk of facing criminal prosecution) violates long-standing U.S. Supreme Court precedent. Even if the alternative "remedy" of facing criminal prosecution were an *adequate* remedy (which it is *not*), dismissal of the Complaint here was still in violation of *Dejetley* (holding that where other forms of relief are available, petitioners are allowed to bring declaratory judgment actions) and the express language and the spirit of the declaratory relief statute, HRS § 632-1.

Further, the Circuit Court erred in concluding that the requested declaratory judgment would interfere with the jurisdiction and functioning of the agencies charged with the regulation and enforcement of HRS Chapter 453. Contrary to the Circuit Court's ruling, applicable authority actually *supports* a finding that Appellants are entitled to declaratory relief. And, given the important civil rights issues presented by the Complaint, the Circuit Court also erred in deferring the issue to the political branches of government.

Finally, the Circuit Court abused its discretion in denying Appellants' oral motion for leave to amend the Complaint where there was no apparent reason to deny such leave—which should be "freely granted." Nor did the Circuit Court set forth in its Order any "apparent or declared reason" for denying the request for leave to amend.

For these reasons, Plaintiffs-Appellants John Radcliffe, Charles Miller, M.D., and Compassion & Choices ask this Court to vacate the Order and Judgment of dismissal, and remand the case for further proceedings (potentially including amendment of the Complaint), allowing Appellants the opportunity to have their claims considered on their merits.

DATED: Honolulu, Hawai`i, December 6, 2017.

/s/ John-Anderson Meyer
PAUL ALSTON
DIANNE WINTER BROOKINS
JOHN-ANDERSON L. MEYER
AGLAË VAN DEN BERGH
KEVIN DÍAZ (*pro hac vice*)

Attorneys for Plaintiffs-Appellants
JOHN RADCLIFFE, CHARLES MILLER, M.D.,
and COMPASSION & CHOICES

ORIGINAL

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

JOHN RADCLIFFE, CHARLES MILLER, M.D., and COMPASSION & CHOICES, Plaintiffs, vs. STATE OF HAWAIʻI, DOUGLAS CHIN, Attorney General, and KEITH M. KANESHIRO, Prosecuting Attorney for the City and County of Honolulu, Defendants.	CIVIL NO. 17-1-0053-01 (KKH) ORDER GRANTING ATTORNEY GENERAL'S MOTION TO DISMISS AND PROSECUTING ATTORNEY'S JOINDER, AND DENYING PROSECUTING ATTORNEY'S MOTION TO DISMISS AS MOOT; NOTICE OF ENTRY

ORDER GRANTING ATTORNEY GENERAL'S MOTION TO DISMISS AND PROSECUTING ATTORNEY'S JOINDER, AND DENYING PROSECUTING ATTORNEY'S MOTION TO DISMISS AS MOOT

This case involves the subject referred to as "physician aid-in-dying."[1] Accepting the allegations made in the complaint as true and viewing them in the light most favorable to the plaintiffs, Hungate v. Law Office of David B. Rosen, 139 Hawaiʻi 394, 401 (2017), plaintiff John Radcliffe has incurable, terminal cancer. He is a mentally competent adult and wants to end his life when, in his opinion, his suffering becomes unbearable. The current and a former Hawaiʻi Attorney General have formally

[1] E.g., www.nytimes.com/2017/01/16/health/physician-aid-in-dying.html.

opined that a physician who provides assistance with dying could be criminally charged under Hawai‘i law. Plaintiff Charles Miller is a licensed physician who, but for potentially being subject to criminal prosecution, would issue Mr. Radcliffe a prescription for a drug which would cause death when self-administered by Mr. Radcliffe. Plaintiff Compassion & Choices is a non-profit organization dedicated to improving care and expanding choice at the end of life.[2]

Plaintiffs' complaint was filed on January 11, 2017. It seeks a judgment declaring that **(1)** Haw. Rev. Stat. §§ 707-701.5[3] and 707-702[4] are unconstitutional as applied to the acts of a physician who provides medical aid in dying to a mentally competent, terminally ill adult patient facing a dying process that the patient finds intolerable, **(2)** Haw. Rev. Stat. § 453-1 ("Practice of medicine defined.") permits medical aid in dying,

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[2] Compassion & Choices was recently granted leave to file an amicus brief for the New York Supreme Court's consideration in an appeal from Myers v. Schneiderman, 31 N.Y.S.3d 45 (App.Div. 2016) (holding that New York laws prohibiting licensed physician from providing aid in dying do not violate New York state constitution). Myers v. Schneiderman, 75 N.E.3d 673 (N.Y. 2017).

[3] **§ 707-701.5. Murder in the second degree**

(1) Except as provided in section 707-701 [murder in the first degree], a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

[4] **§ 707-702. Manslaughter**

(1) A person commits the offense of manslaughter if:

* * *

(b) The person intentionally causes another person to commit suicide.

and **(3)** no Hawai‘i statute bars the acts of a physician who provides medical aid in dying to a mentally competent, terminally ill adult patient facing a dying process that the patient finds intolerable. The complaint also seeks an injunction and an award of attorneys fees.

Defendants State of Hawai‘i and its attorney general, Douglas S. Chin, filed a Rule 12(b)(6) motion to dismiss on March 9, 2017. Defendant Keith M. Kaneshiro, the prosecuting attorney for the City and County of Honolulu, joined in the Attorney General's motion. The Prosecuting Attorney filed his own Rule 12(b)(6) motion to dismiss on March 10, 2017. Both motions were heard on July 13, 2017. For the reasons explained below, the court GRANTS the Attorney General's motion to dismiss and the Prosecuting Attorney's joinder, and DENIES the Prosecuting Attorney's motion to dismiss as moot since the court declines to address the constitutional issues raised by the latter motion.

I.

Although only mentioned in passing by the Attorney General's motion, the issue of standing must be addressed first because it implicates the court's jurisdiction. McDermott v. Ige, 135 Hawai‘i 275, 283 (2015). Legal standing requirements promote the separation of powers between the three branches of government by limiting the availability of judicial review. Id., 135 Hawai‘i at 278.

> [J]udicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context. For prudential rules of judicial self-governance founded in concern about the proper and properly limited role of courts in a democratic society are always of relevant

> concern. And even in the absence of constitutional restrictions, courts still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government.

Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171-72 (1981) (citations and internal quotation marks omitted). Legal standing is evaluated using the three-part injury-in-fact test; the plaintiff must allege that: **(1)** he or she has suffered an actual or threatened injury as a result of the defendant's wrongful conduct; **(2)** the injury is fairly traceable to the defendant's actions; and **(3)** a favorable decision would likely provide relief for the plaintiff's injury. McDermott, 135 Hawai'i at 284.

The complaint in this case seeks declaratory relief pursuant to Hawai'i Revised Statutes Chapter 632. Section 632-1 provides, in relevant part:

> (a) In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right[.] * * * Controversies involving the interpretation of . . . statutes . . . may be so determined[.]
>
> (b) Relief by declaratory judgment may be granted in civil cases where . . . a party asserts a . . . right . . . in which the party has a concrete interest and that there is a challenge or denial of the asserted . . . right . . . by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.

"[F]or the purposes of establishing standing in an action for declaratory relief, HRS § 632-1 interposes less stringent requirements for access and participation in the court process." Citizens for Protection of North Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 100 (1999). Chapter 632 is remedial in nature; "Its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle the party to maintain an ordinary action therefor." HRS § 632-6. It is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people. Citizens for Protection, 91 Hawai'i at 100 (citations and alterations omitted). For that reason, "[t]he standing doctrine should not create a barrier to justice where one's legitimate interests have, in fact, been injured." McDermott, 135 Hawai'i at 284.

Mr. Radcliffe contends that he, as a mentally competent but terminally ill adult, has a fundamental right under the Hawai'i Constitution to obtain Dr. Miller's aid in dying, and that the Hawai'i murder and manslaughter statutes are unconstitutionally depriving him of that right. The defendants are the chief law enforcement officer for the state, who has formally opined that a physician who provides assistance with dying could be criminally charged under Hawai'i law, and the prosecuting attorney with the primary authority and responsibility for initiating and conducting criminal prosecutions within the county in which Dr. Miller practices. Amemiya v. Sapienza, 63 Haw. 424, 427 (1981). Mr. Radcliffe has alleged an actual injury-in-fact fairly traceable to the defendant Attorney General's allegedly wrongful legal opinion for which a favorable court decision would likely provide relief. The court concludes that Mr. Radcliffe has standing to maintain this declaratory judgment action. Having determined that

Mr. Radcliffe has legal standing, the court can proceed to a decision on the merits of the case and need not determine whether the other plaintiffs also have standing. McDermott, 135 Hawai‘i at 284.

II.

A.

The Attorney General argues, with the Prosecuting Attorney joining, that a declaratory relief action is not the appropriate vehicle to challenge a criminal statute, citing Kahaikupuna v. State, 109 Hawai‘i 230 (2005). In Kahaikupuna the plaintiffs were descendants of native Hawaiians who sought a judgment declaring that they had the right to raise and fight roosters as a "traditional native Hawaiian cultural practice," 109 Hawai‘i at 232, notwithstanding the state and Maui county criminal laws prohibiting cockfighting. The plaintiffs had not actually been charged with any criminal offense. The circuit court granted the county's motion to dismiss (which was treated as a motion for summary judgment) and the state's joinder on substantive grounds. The court concluded that the plaintiffs "failed to overcome the presumption that state and county laws that prohibit cockfighting are constitutional, or [establish] that the constitutional defect in such laws is clear, manifest, and unmistakable." 109 Hawai‘i at 232 n.9. The plaintiffs appealed.

The Supreme Court first noted that Hawai‘i law follows the traditional view "that declarative relief is inappropriate as to criminal matters . . . but allows for certain exceptions." 109 Hawai‘i at 235. The Court cited Pacific Meat Co. v. Otagaki, 47 Haw. 652, 655 (1964) for the proposition that a declaratory judgment action "cannot be utilized to circumvent the general rule that equity will not enjoin the enforcement of a valid criminal statute; neither will it be used to determine in advance

precise rights existing between the public and law violators on particular facts where no special circumstances require it." 109 Hawai'i at 235 (alteration omitted). The "special circumstances" present in Pacific Meat Co. were **(1)** the criminal statute at issue[5] was malum prohibitum,[6] **(2)** the statute directly affected the plaintiff's property rights in a continuing course of business,[7] and **(3)** a method of testing the statute was not in fact available in criminal court because the defendants[8] refused to initiate criminal proceedings. Kahaikupuna, 109 Hawai'i at 236 (citing Pacific Meat Co., 47 Haw. at 656).

The Supreme Court observed that only one of the three Pacific Meat Co. factors was present in Kahaikupuna - the cock-fighting laws were malum prohibitum. 109 Hawai'i at 236. The challenge in Kahaikupuna did not "involve a continuing course of business," and there was no indication that the state or county had refused to prosecute the plaintiffs for cockfighting. Id. Under those circumstances, the Supreme Court held:

> [D]eclaratory relief will not ordinarily be employed to determine the enforcement of criminal statutes, and ***in the absence of the particular circumstances like those in***

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[5] Act 109, S.L.H. 1961, requiring uncooked poultry to be labeled with its geographic origin.

[6] Malum prohibitum describes "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral. Misdemeanors such as jay-walking and running a stoplight are mala prohibita, as are many regulatory violations." Kahaikupuna, 109 Hawai'i at 236 n.11 (quoting Black's Law Dictionary 978 (8th ed. 2004)).

[7] Pacific Meat Co. was a wholesaler of food products.

[8] The chair and members of the Hawai'i state board of agriculture.

Pacific Meat Co., we believe it is inappropriate here.

109 Hawai'i at 237 (emphasis added).

None of the Pacific Meat Co. factors are present in this case. The murder and manslaughter statutes at issue here are malum in se,[9] not malum prohibitum. They do not affect property rights in a continuing course of business.[10] And there is no allegation that law enforcement officials declined to prosecute Dr. Miller or any other physician who provided aid in dying.[11]

The plaintiffs in this case contend, as did Justice Levinson in his concurring and dissenting opinion in Kahaikupuna, that "the threat of prosecution, in the absence of an actual case pending against the same plaintiff, may justify a declaratory judgment action." 109 Hawai'i at 237 (emphasis added). In this case the party claiming the right to a physician's aid in dying -

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[9] Malum in se describes an act that is "inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Such are most or all of the offenses cognizable at common law (without the denouncement of a statute); as murder, larceny, etc." State v. Torres, 66 Haw. 281, 287 n.7 (1983) (quoting Black's Law Dictionary 865 (5th ed. 1979)). Although not explicitly stated in Kahaikupuna, the rationale appears to be that a purely regulatory statute is more likely to be arbitrary or unconstitutional than a law which prohibits an inherent evil.

[10] The court recognizes that Dr. Miller claims the murder and manslaughter statutes "deter [him] from providing medical aid in dying to [his] qualifying patients[.]" Complaint, ¶23. Even if Dr. Miller's medical practice qualifies as "a continuing course of business," Dr. Miller does not allege that he regularly provides aid in dying to his patients as part of that business. Nor is he the party claiming to have the constitutional right to receive a physician's aid in dying.

[11] Were that the case, there would arguably be no "actual controversy" to trigger jurisdiction under HRS § 632-1.

Mr. Radcliffe - is not "the same plaintiff" who would be prosecuted under the criminal statutes being challenged. Whether that or any of the other facts alleged in the complaint constitutes "other circumstances [as] would justify declaratory relief" in the absence of any of the three Pacific Meat Co. circumstances, Kahaikupuna, 109 Hawai'i at 237, n.13, is for the appellate courts to decide. The Supreme Court's directive is binding on this circuit court:

> While criminal proceedings may be inconvenient and costly . . . it is the best forum to resolve all of the factual,[12] statutory[13] and constitutional questions that may arise in this case. * * * The relief that Plaintiffs request is essentially one of injunctive relief and would prohibit the State and County from enforcing [the cock-fighting statutes] against them. Such an injunction would greatly interfere with the enforcement of the law, especially in the determination of who should or should not be prosecuted. A declarative judgement [sic] in favor of Plaintiffs in this context would likely hinder enforcement of what are presumptively valid laws. * * * As noted above, declaratory relief will not ordinarily be

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[12] For example, whether the patient was in fact mentally competent and terminally ill when the physician's aid in dying was requested, or given, or acted upon by the patient, whether the physician knew or reasonably should have known that the patient would not be physically able to self-administer the prescribed medication, or whether it was actually the patient or another person who administered or aided in administering the lethal dose of medication.

[13] For example, whether and under what circumstances a physician who prescribes medication "intentionally causes" a patient's subsequent suicide, whether and under what circumstances accessory liability under HRS §§ 702-221 and 222 could also apply, and whether and under what circumstances the defenses of consent (HRS § 702-233) or choice of evils/necessity (HRS § 703-302) could apply.

> employed to determine the enforcement of criminal statutes, and in the absence of the particular circumstances like those in Pacific Meat Co., we believe it is inappropriate here.

Kahaikupuna, 109 Hawai'i at 237 (citations omitted) (footnotes added). Accordingly, the complaint for declaratory and injunctive relief as to HRS §§ 707-701.5 and 707-702 is dismissed.

B.

Plaintiffs also seek a judgment declaring that Haw. Rev. Stat. § 453-1 permits medical aid in dying. Chapter 453 of the Hawai'i Revised Statutes regulates the practice of medicine. The enforcement entity is the Hawai'i Department of Commerce and Consumer Affairs. HRS § 453-7.5. The regulatory authority is the Hawai'i Medical Board. HRS §§ 453-5, 453-5.1, 453-8, et seq. Neither of these governmental entities is a party to this action. The court has not been asked to review a final decision or order in a contested case before the medical board pursuant to HRS § 91-14. The Hawai'i Supreme Court has held that a declaratory judgment is a discretionary equitable remedy, which a court should be reluctant to grant, especially where governmental action is involved, unless the need for an equitable remedy is clear:

> A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. **Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.**

Application of Air Terminal Services, Inc., 47 Haw. 499, 531 (1964) (formatting altered, emphasis added) (quoting Eccels v. Peoples Bank of Lakewood Village, 333 U.S. 426, 431 (1948)). Under the circumstances of this case, the court declines to interfere with the function and primary jurisdiction of the medical board and the DCCA, the governmental entities charged with regulation and enforcement under HRS Chapter 453.[14]

C.

Plaintiffs seek a judgment declaring that no Hawai‘i statute bars the acts of a physician who provides medical aid in dying to a mentally competent, terminally ill adult patient facing a dying process that the patient finds intolerable. For the reasons set forth in sections A. and B. above, the court is not authorized to grant declaratory relief on any criminal statutes that might apply, and the court declines to interfere with the function and primary jurisdiction of the governmental entities charged with regulation and enforcement under HRS Chapter 453. As to the potential applicability of any other yet-to-be-identified statute, the issue is not ripe for decision and the court is not authorized to give advisory opinions. Kapuwai v. City and County of Honolulu, 121 Hawai‘i 33, 41 (2009).

D.

Plaintiffs seek an order enjoining the defendants from enforcing HRS §§ 707-701.5 and 707-702 against Hawai‘i physicians who provide medical aid in dying to mentally-competent,

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[14] Although the issue was not raised by either defendant's motion to dismiss, the court questions whether the DCCA and the Medical Board are necessary parties under Haw. R. Civ. P. 19(a) to the extent plaintiffs seek a declaratory judgment concerning HRS § 453-1.

terminally-ill patients who request such assistance. Since "equity will not enjoin the enforcement of a [presumptively] valid criminal statute[,]" Kahaikupuna, 109 Hawai'i at 235 (quoting Pacific Meat Co., 47 Haw. 652, 655 (1964)) (alteration omitted) the court cannot issue the injunction requested by the plaintiffs.

E.

Finally, plaintiffs' complaint alleges:

> 16. It is, or in light of the rights guaranteed by the Hawai'i Constitution should be declared to be, the public policy of the State of Hawai'i to allow physicians to provide medical aid in dying to their mentally-competent, terminally ill adult patients who are experiencing severe suffering at the end of life and request such assistance.

The complaint cites the Hawai'i Uniform Health-Care Decisions Act (Modified), Haw. Rev. Stat. Chapter 327E, as an example of the public policy promoting the rights of privacy and autonomy in end-of-life care decisions. But see HRS § 327E-13© ("This chapter shall not authorize . . . assisted suicide") and HRS § 703-308 (use of force to prevent suicide justified). The court notes that Senate Bill No. 1129 SD2 (2017), the proposed Medical Aid in Dying Act, generated 2,613 pages of testimony and comments from diverse organizations and individuals before ultimately being deferred by the House Health Committee. All of this underscores that the relief sought by the plaintiffs is political, not judicial, in nature and should be addressed by the political branches of government. See, TMJ Hawaii, Inc. v. Nippon Trust Bank, 113 Hawai'i 373, 384 & n.6 ("the legislature . . . is better positioned to balance the policy considerations and

potential consequences that will flow from such a decision.") (citing cases). Accord, Myers v. Schneiderman, 31 N.Y.S.3d 45, 55 ("the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government. Considering the complexity of the concerns presented here, we defer to the political branches of government on the question of whether aid-in-dying should be considered a prosecutable offense.") (citation omitted).

For the foregoing reasons and any other good cause appearing in the record, the Attorney General's motion to dismiss and the Prosecuting Attorney's joinder are granted. The Prosecuting Attorney's motion to dismiss is denied as moot.

Dated: Honolulu, Hawai'i, July 14, 2017.

Judge of the Above-Entitled Court

Order Granting Attorney General's Motion to Dismiss and Prosecuting Attorney's Joinder, and Denying Prosecuting Attorney's Motion to Dismiss as Moot: Radcliffe, et al. vs. State of Hawai'i, et al., Civil No. 17-1-0053-01(KKH), Circuit Court of the First Circuit, State of Hawai'i.

COPY TO:

PAUL ALSTON, ESQ.
DIANNE WINTER BROOKINS, ESQ.
JOHN-ANDERSON L. MEYER, ESQ.
CANDACE M. HOUGH, ESQ.
Alston Hunt Floyd & Ing
1001 Bishop Street, Suite 1800
Honolulu, Hawaii 96813

KEVIN DIAZ, ESQ. (U.S. Postal Mail)
Compassion & Choices
4224 NE Halsey Street, Suite 335
Portland, Oregon 97213

Via Circuit Court Jackets / U.S. Postal Mail
Attorneys for Plaintiffs
John Radcliffe, Charles Miller, M.D., and
Compassion & Choices

JOHN M. CREGOR, ESQ.
Deputy Attorney General
State of Hawai`i
425 Queen Street
Honolulu, Hawai`i 96813

Via Circuit Court Jacket
Attorney for Defendants
State of Hawai'i & Douglas Chin, Attorney General

CURTIS E. SHERWOOD, ESQ.
ROBERT M. KOHN, ESQ.
Deputies Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawai`i 96813

Via Circuit Court Jacket
Attorneys for Defendant
Keith M. Kaneshiro, Prosecuting Attorney
for the City and County of Honolulu

NOTICE OF ENTRY

The foregoing Order in Civil No. 17-1-0053-01 (KKH) has been entered and copies thereof served on the above-identified parties by placing the same in their Circuit Court jackets or U.S. Postal Mail, on July 14, 2017.

Clerk of the Above-Entitled Court

ORIGINAL

PKN

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED
1225 o'clock P M.
August 15 20 17
Clerk, 11th Division

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

JOHN RADCLIFFE, CHARLES MILLER, M.D., and COMPASSION & CHOICES, Plaintiffs, vs. STATE OF HAWAIʻI, DOUGLAS CHIN, Attorney General, and KEITH M. KANESHIRO, Prosecuting Attorney for the City and County of Honolulu, Defendants.	CIVIL NO. 17-1-0053-01 (KKH) JUDGMENT; NOTICE OF ENTRY

JUDGMENT

Pursuant to Haw. R. Civ. P. 58 and the July 14, 2017 Order Granting Attorney General's Motion to Dismiss and Prosecuting Attorney's Joinder, and Denying Prosecuting Attorney's Motion to Dismiss as Moot, judgment is hereby entered in favor of Defendants State of Hawaiʻi, Douglas Chin, Attorney General and Keith M. Kaneshiro, Prosecuting Attorney for the City and County of Honolulu, and against Plaintiffs John Radcliffe, Charles Miller, M.D. and Compassion & Choices, on all claims alleged in

Compliance Program
Date: 08/15/17
11th Division

plaintiffs' complaint (filed on January 11, 2017). Any claims not specifically identified are hereby dismissed.

Dated: Honolulu, Hawai'i, August 15, 2017.

Judge of the Above-Entitled Court

Judgment: Radcliffe, et al. vs. State of Hawai'i, et al., Civil No. 17-1-0053-01(KKH), Circuit Court of the First Circuit, State of Hawai'i.

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PAUL ALSTON, ESQ.
DIANNE WINTER BROOKINS, ESQ.
JOHN-ANDERSON L. MEYER, ESQ.
CANDACE M. HOUGH, ESQ.
Alston Hunt Floyd & Ing
1001 Bishop Street, Suite 1800
Honolulu, Hawaii 96813

KEVIN DIAZ, ESQ. (U.S. Postal Mail)
Compassion & Choices
4224 NE Halsey Street, Suite 335
Portland, Oregon 97213

Via Circuit Court Jackets / U.S. Postal Mail
Attorneys for Plaintiffs
John Radcliffe, Charles Miller, M.D., and
Compassion & Choices

DOUGLAS S. CHIN, ESQ.
CARON M. INAGAKI, ESQ.
JOHN M. CREGOR, ESQ.
Deputy Attorney General
State of Hawai`i
425 Queen Street
Honolulu, Hawai`i 96813

Via Circuit Court Jacket
Attorney for Defendants
State of Hawai'i & Douglas Chin, Attorney General

DONNA Y.L. LEONG, ESQ.
CURTIS E. SHERWOOD, ESQ.
ROBERT M. KOHN, ESQ.
Deputies Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawai`i 96813

Via Circuit Court Jacket
Attorneys for Defendant
Keith M. Kaneshiro, Prosecuting Attorney
for the City and County of Honolulu

NOTICE OF ENTRY

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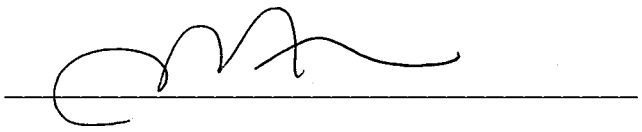

Clerk of the Above-Entitled Court

NO. CAAP-17-0000594

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI`I

JOHN RADCLIFFE,
CHARLES MILLER, M.D., and
COMPASSION & CHOICES

Plaintiffs-Appellants,

vs.

STATE OF HAWAI`I;
DOUGLAS CHIN, Attorney General; and
KEITH M. KANESHIRO, Prosecuting Attorney for the City and County of Honolulu,

Defendants-Appellees.

Civil No. 17-1-0053-01 KKH

APPEAL FROM THE:

A) ORDER FILED AUGUST 15, 2017 DISMISSING PLAINTIFFS-APPELLANTS' COMPLAINT, PURSUANT TO THE CIRCUIT COURT'S GRANTING ATTORNEY GENERAL'S MOTION TO DISMISS AND PROSECUTING ATTORNEY'S JOINDER, AND DENYING PROSECUTING ATTORNEY'S MOTION TO DISMISS AS MOOT; NOTICE OF ENTRY, FILED ON JULY 14, 2017

FIRST CIRCUIT COURT

HONORABLE KEITH K. HIRAOKA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document will be served on counsel of record as indicated below through JEFS upon the filing hereof:

DONNA Y.L. LEONG, ESQ.
Corporation Counsel
CURTIS E. SHERWOOD, ESQ. csherwood@honolulu.gov
ROBERT M. KOHN, ESQ. Robert.kohn@honolulu.gov
Deputies Corporation Counsel
City and County of Honolulu
530 S. King Street, Room 110
Honolulu, Hawai`i 96813

Attorneys for Defendant-Appellee
KEITH M. KANESHRIO, Prosecuting Attorney for the City and County of Honolulu

DOUGLAS S. CHIN, ESQ.
Attorney General of Hawai`i
CARON M. INAGAKI, ESQ. Caron.M.Inagaki@hawaii.gov
JOHN M. CREGOR, ESQ. John.M.Cregor@hawaii.gov
Deputy Attorneys General
Department of the Attorney General,
State of Hawai`i
425 Queen Street
Honolulu, Hawai`i 96813

Attorneys for Defendants-Appellees
DOUGLAS S. CHIN, Attorney
General, and STATE OF HAWAI`I

DATED: Honolulu, Hawai`i, December 6, 2017.

/s/ John-Anderson L. Meyer
PAUL ALSTON
DIANNE WINTER BROOKINS
JOHN-ANDERSON L. MEYER
AGLAË VAN DEN BERGH
KEVIN DÍAZ (*pro hac vice*)

Attorneys for Plaintiffs-Appellants
JOHN RADCLIFFE, CHARLES MILLER, M.D.,
and COMPASSION & CHOICES

NOTICE OF ELECTRONIC FILING

An electronic filing was submitted in Case Number CAAP-17-0000594. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID: CAAP-17-0000594
Title: John Radcliffe, Charles Miller, M.D., and Compassion & Choices, Plaintiffs-Appellants, vs. State of Hawai'i Douglas Chin, Attorney General, and Keith M. Kaneshiro, Prosecuting Attorney for the City and County of Honolulu, Defendants-Appellees.
Filing Date / Time: WEDNESDAY, DECEMBER 6, 2017 04:04:28 PM
Filing Parties: John Radcliffe
Charles Miller
Compassion & Ch Compassion & Choices
Paul Alston
Dianne Brookins
John-Anderson Meyer
Aglae Van den Bergh
Case Type: Appeal
Lead Document(s): Opening Brief
Supporting Document(s):

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.

This notification is being electronically mailed to:
Dianne Winter Brookins *(dbrookins@ahfi.com)*
Caron M. Inagaki *(Caron.M.Inagaki@hawaii.gov)*
Paul Alston *(palston@ahfi.com)*
Donna Y.L. Leong *(COR@honolulu.gov)*
Robert M. Kohn *(robert.kohn@honolulu.gov)*

Dkt #44

Curtis Edwin Sherwood *(csherwood@honolulu.gov)*
John M. Cregor *(john.m.cregor@hawaii.gov)*
Douglas Shih-Ging Chin *(hawaiiag@hawaii.gov)*
Aglae Sabine Van den Bergh *(avandenbergh@ahfi.com)*
Kimberly Tsumoto Guidry *(kimberly.t.guidry@hawaii.gov)*
John-Anderson L. Meyer *(ameyer@ahfi.com)*