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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

N[.] F., a Minor, by and through her natural guardian, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI‘I, *et al.*,

Defendants.

CIVIL NO. 1CCV-22-0000631
(Environmental Court)

DEFENDANTS' MOTION TO DISMISS; MEMORANDUM IN SUPPORT OF MOTION; NOTICE OF HEARING and CERTIFICATE OF SERVICE

Hearing Date: October 5, 2022
Hearing Time: 9:00 a.m.

Judge: Hon. Jeffrey P. Crabtree
Trial Date: None

DEFENDANTS' MOTION TO DISMISS

This Court should dismiss both counts alleged in Plaintiffs' complaint because neither states a claim for relief. Article XI, Section 9 of the Hawai'i Constitution provides a private right of action to enforce a *violation* of an existing environmental law. Though Plaintiffs cite many statutory provisions throughout their complaint, they do not allege facts that, even if true, would demonstrate that the Hawai'i Department of Transportation ("HDOT") has violated those laws. Similarly, Plaintiffs' Article XI, Section 1 claim fails because Plaintiffs have not alleged facts that could demonstrate HDOT has engaged in any conduct in violation of its public trust duties.

Plaintiffs' complaint must also be dismissed for three independent, threshold reasons. First, Plaintiffs ask the Court to resolve a political question that would require it to make quintessentially legislative judgments about the optimal state actions for addressing climate change and to act for years as a supervisor for HDOT that directs the timing of the agency's regulations and reviews their sufficiency. Second, Plaintiffs have not alleged an injury that is caused by and redressable by HDOT; their complaint is fundamentally about the actions of absent third parties who use fossil-fuel-powered transportation options. Third, Plaintiffs have identified only a set of abstract issues rather than an actual, ripe controversy that is suitable for judicial resolution.

Finally, Plaintiffs' request for attorney's fees must be stricken because it is barred by Hawaii's sovereign immunity.

This motion is made pursuant to Rules 7 and 12(b)(6) of the Hawai‘i Rules of Civil Procedure and Rule 7 of the Rules of the Circuit Courts of the State of Hawai‘i and is based on the memorandum in support attached hereto.

DATED: Honolulu, Hawai‘i, August 22, 2022.

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Climate change is one of the most pressing environmental issues of our time, and Hawai‘i has worked to become a leader among U.S. states in seeking to mitigate it through reduction of greenhouse gas emissions. It passed, for instance, the Zero Emissions Clean Economy Target in 2018, which set a goal of achieving net zero emissions by 2045 and established priorities and plans for reaching that goal. More recently, the Hawai‘i legislature created an additional intermediate target for 2030 because Hawai‘i has *already accomplished* its goal of reducing emissions to below 1990 levels by 2020. Act 238, H.B. 1800 (July 5, 2022).

Plaintiffs contend that Hawai‘i should be doing even more. To that end, they want this Court to take control of the Hawai‘i Department of Transportation ("HDOT"). (While the complaint names other state defendants, Plaintiffs' factual allegations and requests for injunctive relief are directed at HDOT *only*.) Neither Section 1 nor Section 9 of Article XI of the Hawai‘i Constitution, however, sustains Plaintiffs' unprecedented effort to have this Court dictate HDOT's actions. Section 9 only gives Plaintiffs the right to enforce Hawaii's environmental laws when the legislature has not provided another mechanism for enforcement. Despite citing a litany of statutory and regulatory goals and objectives, Plaintiffs do not allege that HDOT has violated any environmental law, nor have they shown that the ordinary process of obtaining judicial review of HDOT actions through the Hawai‘i Administrative Procedure Act ("HAPA") is constitutionally inadequate. Section 1 requires HDOT to protect public trust resources, but Plaintiffs allege no facts that HDOT is not doing so. At most, Plaintiffs raise a policy dispute, which they must pursue through state legislative and executive processes that are undeniably receptive to climate change concerns.

These are not the only problems with Plaintiffs' complaint. Plaintiffs' claims also fail because they present political questions that the judiciary cannot answer. This Court cannot coopt legislative and executive power by issuing an injunction ordering HDOT to create new regulatory programs. In the end, Plaintiffs have no real, judicially resolvable controversy with HDOT; they have a judicially unmanageable controversy with the countless individuals who independently choose to use fossil-fuel-powered vehicles in the state. And Plaintiffs' concerns that HDOT might violate the law in the future are speculative and unripe.

Plaintiffs are not shy about their goals. They want this Court to require HDOT to embark on an extensive, new regulatory project, subject to court-ordered deadlines and supervised by a special master—potentially for decades to come. Those extraordinary measures would not be designed to ensure compliance with any particular legal requirement, but rather accomplish Plaintiffs' policy goal of drastically reducing, even eliminating, fossil-fuel-powered vehicles from Hawai‘i. No statute or Constitutional provision warrants such an invasive and long-term encroachment upon the state's separation of powers. If Plaintiffs' policy goals are to prevail, they must prevail in the halls of the legislature, not the halls of justice. This case must be dismissed.

II. BACKGROUND

A. HDOT's Mission and Authority

HDOT is the state agency tasked with constructing and maintaining Hawaii's roads and other transportation infrastructure, "including highways, airports, [and] harbors." Haw. Rev. Stat. ("HRS") § 26-19. Those duties include a responsibility to "acquire, subdivide, consolidate, construct, maintain, and administer all highways comprising the state highway system." HRS § 264-43. HDOT is also authorized to "plan, construct, operate, and maintain any commercial harbor facility in the State," HRS § 266-2, and to "plan, acquire, establish,

construct, enlarge, improve, maintain, equip, install, operate, regulate, and protect, airports, air navigation facilities, buildings, and other facilities to provide for the servicing of aircraft," HRS § 261-4.

B. Applicable Law

Plaintiffs' two-count complaint rests on two provisions of the Hawai'i Constitution, Article XI, Section 9 and Article XI, Section 1. Section 9 provides that:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law. Haw. Const. art. XI § 9.

Section 1 provides that:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people. Haw. Const. art. XI § 1.

III. ARGUMENT

A. Standard of Review

A complaint fails to state a claim when the plaintiff can prove no set of facts that would entitle him or her to relief. *See* Haw. R. Civ. P. 12(b)(6); *Flores v. Ballard*, 149 Hawai'i 81, 86, 482 P.3d 544, 549 (App. 2021). In applying this standard, "the court is not required to accept conclusory allegations on the legal effect of the events alleged." *Kealoha v. Machado*, 131 Hawai'i 62, 74, 315 P.3d 213, 225 (2013).

B. Plaintiffs' Article XI, Section 9 Claim Must Be Dismissed Because Plaintiffs Allege No Violation of Any Environmental Law

Article XI, Section 9 protects Hawai'i citizens' right to a clean and healthful environment by allowing them to sue to enforce "laws relating to environmental quality" consistent with "reasonable limitations and regulations as provided by law." Haw. Const. art. XI § 9. Section 9 does not create a right for citizens to enforce a "freestanding interest in general aesthetic and environmental values." *In re Application of Maui Elec. Co.*, 141 Hawai'i 249, 264, 408 P.3d 1, 16 (2017) ("*MECO*"). The substance of the right Section 9 protects is defined by statutes and regulations, and the litigation Section 9 authorizes can be limited by statutes and regulations. To state a Section 9 claim, then, Plaintiffs must allege both that HDOT has violated a specific environmental law and that Plaintiffs have no other reasonable means to litigate the alleged violation.

The Hawai'i Supreme Court's opinions on Section 9 recognize that Section 9 is inextricably linked with *already existing* environmental statutes and regulations. *County of Hawai'i v. Ala Loop* involved a challenge to a county's decision to allow a charter school to operate in an agricultural zone without issuing a special use permit. 123 Hawai'i 391, 396, 235 P.3d 1103, 1108 (2010), *abrogated on other grounds by Tax Found. of Haw. v. State*, 144 Haw. 175, 439 P.3d 127 (2019). Homeowners sued, arguing that the county and school violated zoning laws by operating without a special use permit under HRS § 205-6. The Hawai'i Supreme Court let the suit proceed, holding that Section 9 lets citizens "maintain[] an action for alleged violations" of environmental laws. *Id.* at 408. In *Ala Loop*, Section 9 sustained the plaintiffs' suit because they plausibly alleged a violation of an environmental law, HRS Chapter 205, *id.* at 409, and because the plaintiffs had no other cause of action in

which they could challenge the defendants' alleged violation of the special-use-permitting law, *id.* at 417–422.

Seven years after *Ala Loop*, in *MECO*, the Hawai‘i Supreme Court confirmed Section 9's dependence on extant environmental laws. The court considered whether to let an environmental group intervene in an agency proceeding regarding a power purchase agreement. 141 Hawai‘i at 249. The court held that the group could intervene because it alleged violations of an environmental law, HRS Chapter 269, which required the agency to "consider the need to reduce the State's reliance on fossil fuels" and the impact of relying on fossil fuel on "greenhouse gas emissions." *Id.* at 261–62. Because the group alleged a violation of HRS Chapter 269, the court held that the group had a right under Section 9 to enforce that statute by intervening in the proceeding. *Id.* at 261.

Consistent with *Ala Loop* and *MECO*, to state a Section 9 claim, Plaintiffs here must (1) allege a violation of a law (2) that is "relat[ed] to environmental quality" and (3) demonstrate that the legislature has not provided for private enforcement of that environmental law by other means. Plaintiffs' Section 9 claim does not meet that standard. They do not allege that HDOT has violated any of the many statutory and regulatory provisions mentioned throughout their complaint, nor can they demonstrate why a timely filed suit under HAPA would be inadequate to challenge any violation.

Several of the laws Plaintiffs cite are totally irrelevant because they *do not apply to HDOT*. Act 73 (Compl. ¶ 96) makes no reference to HDOT; it created the environmental response, energy, and food security tax to provide resources for addressing the effects of climate change on the state. 2010 Haw. Sess. Laws Act 73. Act 234 (Compl. ¶ 109) provides

a broad mandate to the Hawai‘i Department of Health, not HDOT. *See* HRS § 342B-72 (empowering the director of DOH to adopt rules establishing greenhouse gas emission limits).

Other statutes on which Plaintiffs rely apply to HDOT but are irrelevant because they are *not environmental laws* encompassed by Section 9.

- HRS § 264-142 (Compl. ¶ 187) requires HDOT to develop a plan to establish a "contiguous network" of motor vehicle highways, bicycle lanes, and pedestrian pathways. Contrary to Plaintiffs' assertion, HRS § 264-142 does not mention "greenhouse gas pollution from transportation" or instruct HDOT to "decarbonize the transportation sector" (Compl. ¶ 187). HRS § 264-142 is part of Chapter 264, which generally governs the highway system and Hawaii's transportation objectives.[1] The purpose of HRS § 264-142 is not environmental; rather, it "require[s] the Department of Transportation to create motor vehicle, bicycle, and pedestrian highway and pathway networks." Haw. Com. Rep., Apr. 7, 2021, STAND. COM. REP. NO. 1690.

- HRS § 264-20.5(a) (Compl. ¶ 88 n.2) requires HDOT to "reasonably accommodate convenient access and mobility for all users of the public highways . . . including pedestrians, bicyclists, transit users, [and] motorists." Like HRS § 264-142, HRS § 264-20.5(a) is not an environmental law; it is a "safety" law. Haw. Com. Rep., Mar. 25, 2009, STAND. COM. REP. NO. 1276.

- HRS Chapters 261 and 266 (Compl. ¶ 85) generally govern airports and harbors. Neither specifies environmental objectives. Both focus on transportation objectives

[1] *See, e.g.*, HRS § 264-22 (designating HDOT as the state highway department); *id.* § 264-23 (laying out the general duties of the director of transportation); *id.* § 264-28 (general rules for highway appropriations). None imposes environmental duties on HDOT.

specific to airports and harbors, such as "commercial harbor [. . .] improvements," HRS § 266-2, "salaries," *id*., and "fire and safety inspections," HRS § 261-4.

- HRS § 26-19 (Compl. ¶ 85) grants HDOT authority to "establish, maintain, and operate transportation facilities of the State, including highways, airports, harbors, and such other transportation facilities and activities." There is no indication that the provision is environmental—the statute does reference "ridesharing programs" and "bicycling programs," but articulates no environmental purpose.

- HRS § 279A-2 (Compl. ¶ 85) mandates a statewide transportation plan. Nothing in HRS § 279A-2 mandates that the transportation plan include environmental goals, and HDOT's identification of environmental goals in the State Transportation Plan *published in 2011* does not render HRS § 279A-2 an environmental law.

In any event, Plaintiffs have failed to allege that any of those laws were violated—they have not alleged, for example, that HDOT has failed to develop a plan to establish a network of highways in violation of HRS § 264-142, much less failed to "establish, maintain, and operate transportation facilities" in violation of HRS § 26-19. But the fact that each of those statutes is not environmental in nature is sufficient by itself to render Section 9 inapplicable. *See MECO*, 141 Hawai'i at 261.

Finally, the remaining laws Plaintiffs cite contain broad, aspirational objectives that Plaintiffs have not and cannot show HDOT violated.[2]

[2] Even if HDOT had violated any, Plaintiffs could not maintain this suit under Section 9 because the legislature has provided an adequate alternative remedy for challenging agency action—a suit under HAPA after a contested case proceeding or a suit challenging the validity of an agency rule. *See* HRS §§ 91-7, 91-14; *see also In re Application of Hawaiian Elec. Co.*, 66 Haw. 538, 541, 669 P.2d 148, 151 (1983) (recognizing the potential for a challenge to an agency's denial of a petition for promulgation of a rule under HRS § 91-6).

- HRS Chapter 225P[3] ("Hawaii's Zero Emissions Target") sets a goal of 2045 to "sequester more atmospheric carbon and greenhouse gases than emitted." *See* HRS § 225P-5; *see also* HRS § 225P-1; 2018 Haw. Sess. Laws Act 15. It is not possible to argue that HDOT has violated a 20-years-from-now deadline. The parts of HRS Chapter 225P that set more immediate requirements—like an instruction to "manage . . . fleets to achieve the clean ground transportation goals," HRS § 225P-7—are not alleged to have been violated. (Plaintiffs have not, for example, challenged a procurement decision where HDOT should have purchased more electric vehicles.) Plaintiffs likewise have not identified any instance where HDOT failed to "give consideration" to climate objectives in one of its "plans, decisions, [or] strategies." HRS § 225P-5.

- HRS § 196-9(c)(6) (Compl. ¶¶ 89, 187) is similarly aspirational. It instructs agencies to "promote" efficient operation of vehicles. Specifically, "each agency is directed to implement, *to the extent possible*" a set of "*goals*." HRS § 196-9(a) (emphases added). Plaintiffs did not and cannot allege facts showing that HDOT failed to "promote" efficient vehicles or implement those goals "to the extent practicable." Discounting Plaintiffs' legal conclusions, nothing in their complaint alleges that HDOT failed to reasonably exercise its judgment about the most practicable way to promote vehicle efficiency or implement the goals of HRS § 196-9 in light of a myriad of policy considerations and resource constraints.

- HRS § 264-143 (Compl. ¶ 88) instructs HDOT to "*endeavor*" to meet various "*goals*" such as reducing carbon emissions to meet standards in HRS § 269-92, "reduc[ing] vehicle miles traveled," reducing single occupancy vehicles, and reducing "urban

[3] Several provisions of Hawaii's Zero Emissions Target also do not apply to HDOT at all (like the duties of the Hawai'i Climate Change Mitigation and Adaptation Task Force and the Greenhouse Gas Sequestration Task Force). *See* HRS §§ 225P-1, 225P-3, 225P-4.

temperatures by incorporating tree canopy and foliage over hardened surfaces."[4] Legislative history confirms that HRS § 264-143 contains broad "goals" for purposes of planning and implementing infrastructures. *See* 2021 Haw. Senate Bill No. 1402, Haw. 31st Leg., Reg. Session 2021. Plaintiffs again do not allege a violation of that broad, discretionary instruction. Their complaint does not and cannot demonstrate that HDOT has in no way "endeavored" to meet the goals mentioned in HRS § 264-143.

- HRS Chapter 226 (Compl. ¶ 86) is another set of aspirational considerations that Plaintiffs have not plausibly alleged HDOT violated. HRS § 226-4 includes no requirement at all; it is merely a statement of purpose that provides that "it shall be the *goal* of the State" to, among other things "achieve a desired natural environment." (Emphasis added.) The other sections Plaintiffs cite, HRS §§ 226-17 and 226-18, instruct state agencies to "encourage"[5] or "promote" alternative fuels and various efficiency measures.[6] Plaintiffs have not and cannot allege facts suggesting that HDOT has not appropriately used its discretion in implementing those statutory instructions.

- Plaintiffs note (Compl. ¶ 92) the legislature's recent declaration of a "climate emergency" in S. Con. Res. 44, 31st Leg. (2021). That Resolution declared a set of climate objectives and "requested" that state entities "pursue these climate mitigation and adaptation

[4] HRS § 269-92 sets the renewable portfolio standards for electric utility companies seeking to sell electricity in Hawai‘i, a program that is managed by the Public Utilities Commission ("PUC").
[5] "Encourage safe and convenient use of low-cost, energy-efficient, non-polluting means of transportation," HRS § 226-17(b)(11), and "[e]ncourage diversification of transportation modes and infrastructure to promote alternate fuels and energy efficiency," HRS § 226-17(b)(13).
[6] "Promote alternate fuels and transportation energy efficiency," HRS § 226-18(b)(7).

efforts and mobilize at the necessary scale and speed."[7] Again, that legislative "request" is one that leaves the details of pursuing climate mitigation and adaptation to state agencies, and Plaintiffs have not included any factual allegation that HDOT has not properly used its discretion in addressing the legislature's climate emergency declaration.[8]

Plaintiffs' failure to allege any violation of law cannot be remedied by Plaintiffs' reference to a series of plans that have been proposed by various Hawai'i state agencies over a period exceeding ten years. *See* Compl. ¶¶ 141-142, 145-151, 159-165, 171, 173-174. Indeed, it is unclear from the complaint what Plaintiffs believe the legal significance of these plans (or lack of plans) is, or what law they believe HDOT violated by allegedly failing to sufficiently meet the plans' objectives. Many are not HDOT's plans and would not be subject to HDOT jurisdiction, such as plans prepared for Hawaii's Department of Business, Economic Development and Tourism. *See* Compl. ¶¶ 141-142, 145-149. Others are merely Plaintiffs' allegations of a failure to create a specific plan (*see id.* ¶¶ 159-165, 169-70, 173-174), but Plaintiffs cite no law requiring such plans. And where Plaintiffs describe a plan or action by HDOT, they do not allege any facts that could demonstrate a violation of law—for example, they assert that HDOT has failed to timely reconvene its Sustainable Transportation Forum to work on a plan for achieving emissions reductions, *id.* ¶ 169, but they identify no legal obligation to do so.

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[7] Plaintiffs also cite two very recent laws: 2021 Haw. Sess. Laws Acts 74 and 131. Act 74 encourages adoption of EVs by state agencies and Act 131 requires HDOT, among other things, to *endeavor* to implement the goals of the complete streets policy, reduce vehicle miles traveled, and reduce carbon emissions to meet the zero emissions clean economy goal by 2045. Beyond Plaintiffs' conclusory statement that "HDOT has consistently failed to meet [these] goals," Plaintiffs have asserted no facts (nor can they) to suggest that HDOT is not endeavoring to meet these goals of laws that are a year old.

[8] Plaintiffs also identify various other environmental laws as "background" to their complaint, but fail to allege any violations of those laws. *See, e.g.*, 2014 Haw. Sess. Laws Act 83 (creating an interagency climate adaption committee).

Plaintiffs implicitly confess that their Section 9 claim is not based on a violation of any environmental law. Instead, they are trying to use Section 9 to vindicate an amorphous, "extensive and growing body of laws" (*id.* ¶ 186). But Section 9 does not empower courts to direct HDOT or any state agency to *go above and beyond* its statutory obligations and fulfill whatever objectives Plaintiffs deem "appropriate and necessary" in light of Plaintiffs' perception of the purposes behind a laundry list of laws HDOT is not violating. *See id.* ¶¶ 69-70. Plaintiffs' right to "enforce" the state's environmental laws is not a license for Plaintiffs to write the laws and ask this Court to supervise their implementation. *Ala Loop*, 123 Hawai'i at 406.

Finally, even if Plaintiffs did allege that HDOT violated its duties under an environmental law, their Section 9 claim could not proceed because the legislature has provided a reasonable means for private citizens to obtain judicial review of state agencies that allegedly violate their duties—HAPA, HRS § 91-1 *et seq.* Section 9 expressly recognizes that the legislature can impose reasonable procedural and jurisdictional limitations on citizens' private right to enforce the state's environmental laws. *See Ala Loop*, 123 Hawai'i at 418; *see also id.* (identifying exhaustion of administrative remedies and the doctrine of primary jurisdiction as, potentially, reasonable limitations); *id.* at 422 (acknowledging that the plaintiffs' Section 9 claim would be improper if they had a separate right of action). For more than 60 years, HAPA has prescribed a process and right of action for citizens to challenge all sorts of agency actions that allegedly violate statutory requirements. *See* HRS §§ 91-7, 91-14. There can be no question that HAPA's requirements are "reasonable limitations" under Section 9. Plaintiffs completely fail to address HAPA in their complaint. HAPA's timing, exhaustion, and jurisdictional requirements are fatal to Plaintiffs' effort to litigate the merits

of the many HDOT actions Plaintiffs' conclusorily allege violate the state's environmental laws. *See Punohu v. Sunn*, 66 Haw. 485, 487, 666 P.2d 1133, 1135 (1983) (holding that "it would be anomalous to permit a declaratory judgment action to be substituted for an appeal from an agency determination in a contested case").

C. Plaintiffs Have Not Alleged a Claim Under Article XI, Section 1

Under Article XI, Section 1 of the Hawai'i Constitution, state agencies must "assess and balance" the "protection and utilization of public trust resources." *Matter of Maui Elec. Co.*, 150 Hawai'i 528, 537, 506 P.3d 192, 201 (2022) ("*Matter of MECO*"). An agency's Section 1 duties are "independent" of its statutory obligations but often work "in tandem"—an agency "must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations." *Id.* at 538. An agency's statutory authorities thus cabin its public trust obligations because an agency "can only wield powers expressly or implicitly granted to it by statute." *Id.*

Plaintiffs do not allege a Section 1 claim under those standards, for two reasons. First, they do not and cannot identify a specific exercise of a "statutory function" that HDOT failed to perform in accordance with its public trust duties. The public trust doctrine applies "to the specific task faced by the agency." *Kauai Springs, Inc. v. Planning Comm'n of County of Kaua'i*, 133 Hawai'i 141, 184, 324 P.3d 951, 994 (2014) (Recktenwald, C.J., concurring in part). In *Matter of MECO*, the Hawai'i Supreme Court assessed whether the PUC had appropriately considered impacts on local air, water, and plants when approving a power purchase agreement. 150 Hawai'i at 540. In *Kauai Springs*, the Hawai'i Supreme Court examined a county planning commission's use of the public trust doctrine to reject a water bottling company's permit application. 133 Hawai'i at 173. The public trust doctrine has

never been used to require an agency to institute entirely new programs or to supervise the entire implementation of those programs. Nor could it; the doctrine only requires that agencies "wield powers expressly or implicitly granted" to them consistent with protection of public trust resources.

Second, Section 1's protection for the "public trust resource of Hawai'i" applies only to a specific set of "water, air, minerals and energy sources"—those that are part of "Hawaii's . . . natural resources." Courts have applied the doctrine to fundamentally local issues including water resources, *Kauai Springs*, 133 Hawai'i at 172, surface and ground water, *In re Molokai Pub. Utils., Inc.*, 127 Hawai'i 234, 237, 277 P.3d 328, 331 (App. 2012), marine waters and submerged lands, *Umberger v. Dep't of Land & Nat. Res.*, 140 Hawai'i 500, 521, 403 P.3d 277, 298 (2017), and coastal waters, *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 223, 140 P.3d 985, 1003 (2006). In *Matter of MECO*, the court noted that the PUC had considered "air pollution and other trust resources" through its consideration of climate change issues, but that consideration was a result of a statutory obligation to address climate change, and it incidentally covered "co-extensive" public trust considerations. 150 Hawai'i at 538.

To be sure, climate change impacts Hawaii's public trust resources. But reading an obligation to address climate change into HDOT's duty to "assess and balance" the "protection and utilization" of Hawaii's natural resources strains the public trust doctrine too far. Because Hawai'i agencies are only able to control a small portion of the globe's greenhouse gas emissions, they cannot realistically control climate change's local impacts, like sea level rise and shoreline erosion. The Washington Supreme Court recently rejected such an approach in *Aji P. ex rel. Piper v. State*, finding the plaintiffs' concerns about

emissions that a state agency had "allowed into the atmosphere" could not be "recharacterized" as an obligation to protect local lands and waters. 480 P.3d 438, 458 (Wash. Ct. App. 2021), *review denied sub nom*. *Aji P. v. State*, 497 P.3d 350. This Court should also reject an overbroad reading of the public trust doctrine for the same reasons.

Finally, just as with Plaintiffs' Section 9 count, Plaintiffs' Section 1 count must fail because they have not followed the legislature's mandated process for obtaining judicial review of state agencies regulations and decisions in HAPA, HRS § 91-1 *et seq.*

D. Plaintiffs' Claims Must Be Dismissed for Other Reasons

1. The Political Question Doctrine Requires Dismissal

As explained above, Plaintiffs are not asking this Court to adjudicate a concrete dispute over a statutory violation connected with Section 1 or 9 of the Constitution. They want the Court to make threshold policy determinations that the legislative and executive branches must make. Hawai'i courts follow *Baker v. Carr*, 369 U.S. 186 (1962), and refrain from answering political questions in order to "preserv[e] separation of powers." *Nelson v. Hawaiian Homes Comm'n*, 127 Hawai'i 185, 194, 277 P.3d 279, 288 (2012). In accordance with the political question doctrine, a court must refrain from deciding a case when *at least one* of the following six factors is present and "inextricable": (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government"; (5) "an unusual need for unquestioning

adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

At least three of those factors are present here. First, the thrust of Plaintiffs' complaint—decarbonizing transportation in the state—requires this Court to make a "policy determination of a kind clearly for nonjudicial discretion." To accomplish their goals, Plaintiffs ask this Court to construct a set of "concrete action steps" "under prescribed deadlines" for HDOT to take. Compl. ¶ 70. To do that, the Court would have to make policy judgments about steps and timing necessary to achieve greenhouse gas reduction objectives, weigh those concerns against technical issues and competing state policy objectives, and then craft a detailed scheme of required regulatory products and deadlines. Those are quintessentially legislative judgments, and the Hawai‘i legislature has not delegated HDOT the authority to address them.

Second, for this Court to *direct* HDOT's performance of its duties, rather than *review* HDOT's actions, "expresses a lack of respect" for a coequal branch of government. Plaintiffs request that the Court appoint a special master to "oversee and report to the Court on Defendants' compliance and progress," Compl. ¶ 70, but overseeing HDOT is exactly the job of the politically accountable director of HDOT. The Court cannot appoint its own super-director of the agency, particularly one that would be responsible not only for ensuring that HDOT implements a regulatory program according to judicially established deadlines but also evaluating those regulations to ensure their "compliance" with the Court's directives. What's more, the oversight Plaintiffs seek could last for decades, as several statutory targets need not be met for decades and as climate change is, at a minimum, going to take decades to correct.

Climate change is not a problem the legislature has proven incapable of handling. Plaintiffs acknowledge that the legislature has passed many recent statutes to achieve carbon neutrality and mitigate climate impacts. *See* Compl. ¶¶ 90-93. The Court should not substitute Plaintiffs' policy preferences for those that already have been chosen by Hawaii's other branches of government on behalf of the people of Hawai‘i.

Third, Plaintiffs' complaint is devoid of "judicially discoverable and manageable standards" by which HDOT's conduct could be adjudged. As discussed above, Plaintiffs do not identify a particular action of HDOT that they allege violates any particular statute. Instead, they are asking the Court to generally determine that HDOT's actions to date—none of which Plaintiffs timely challenged in judicial review proceedings allowed by HAPA, HRS §§ 91-7, 91-14—do not sufficiently address Plaintiffs' climate change concerns. *See, e.g.*, Compl. ¶ 178 (alleging that HDOT has a "long-running pattern and practice of establishing, maintaining, and operating the state transportation system in violation of state climate change mitigation goals and needs"). To give Plaintiffs the relief they seek, the Court would have to invent standards for HDOT to implement.

Tellingly, three other courts—one Federal Court of Appeals and two state appellate courts—have each dismissed similar cases on political question grounds. While there are some differences in the underlying state laws in those other cases, the considerations that led those courts to decline to decide a political question are equally present here. For example, in *Aji P.*, the Washington Court of Appeals held that resolving the case would "inevitably involve resolution of questions reserved for the legislative and executive branches." 480 P.3d at 447. The court emphasized in part the presence of the same three factors discussed above, finding that: (1) the plaintiffs' request to "retain jurisdiction over this action to approve,

monitor and enforce compliance with Defendants' Climate Recovery Plan" would "disrespect" the other branches of government; (2) the legislative and executive branches had already created a climate regulatory scheme; and (3) there was "no judicially manageable standard" to resolve the plaintiffs' claims because doing so would require "scientific expertise" and "balancing the many implicated and varied interests affected by any GHG emission reduction policies." *Id.* at 448; *see also Juliana v. United States*, 947 F.3d 1159, 1172 (9th Cir. 2020) ("The plaintiffs' request for a remedial plan would subsequently require the judiciary to pass judgment on the sufficiency of the government's response to the order, which necessarily would entail a broad range of policymaking."); *Sagoonick v. State*, 503 P.3d 777, 798 (Alaska 2022) (finding it "impossible to grant plaintiffs' requested injunctive relief without . . . disrespecting our coordinate branches of government by supplanting their policy judgments with our own normative musings").

2. Plaintiffs Allege No Actual or Imminent Harm Caused by HDOT

To maintain suit against HDOT, Plaintiffs must establish that HDOT has caused or will imminently cause them harm and that succeeding in this case would redress that harm. *See Sierra Club v. Haw. Tourism Auth. ex rel. Bd. of Dirs.*, 100 Hawai'i 242, 250, 59 P.3d 877, 885 (2002). Plaintiffs' complaint shows that they have no actual or imminent dispute with HDOT. Instead, Plaintiffs' dispute is with third parties' greenhouse gas ("GHG") emissions, which HDOT did not cause and Plaintiffs' requested relief will not redress.

The injuries Plaintiffs allege—impacts of climate change—are caused by GHG emissions. *See* Compl. ¶¶ 109-124. Yet, Plaintiffs do not allege that HDOT is emitting the GHGs that cause climate change. They allege that HDOT manages and maintains roads, harbors, and airports. *See id.* ¶ 57; HRS §§ 261-4, 264-41, 264-42, 264-43, 266-2. Those

physical facilities do not emit the GHGs Plaintiffs complain about. Rather, it is the users of those facilities who emit GHGs from their privately owned cars, trucks, ships, and airplanes. HDOT does not cause private parties to emit GHGs, and HDOT lacks legal authority to stop private parties from travelling on planes, from using cars instead of public transportation, or from using gasoline-powered cars instead of EVs.

Imagine if, overnight, everyone in Hawai‘i abandoned fossil-fuel-running vehicles and switched to electric vehicles. The GHG emissions that Plaintiffs complain about would drop dramatically, yet the physical facilities that HDOT maintains would exist and operate exactly the same. Thus, it is clear that HDOT is not causing Plaintiffs' injuries.

Likewise, the relief Plaintiffs seek will not redress their injuries. Even if the Court ordered HDOT to expand bike lanes throughout the islands, private individuals would retain the freedom to choose whether to use bike lanes or to continue driving cars. Even if Plaintiffs won all the relief they demand, Plaintiffs would still need private third parties to change their behaviors in order for Plaintiffs' injuries to be redressed.

The central role of third-party decisions and actions makes this case much like *Sierra Club*, where the Hawai‘i Supreme Court held that an environmental group lacked standing to challenge the Hawai‘i Tourism Authority's marketing expenditures. 100 Hawai‘i at 252. The Court noted in part that "it would appear self-evident that tourists visit the state for various reasons—reasons that may be wholly unrelated to the HTA's expenditures or its marketing program." *Id.* Presumably, the Hawai‘i Tourism Authority's marketing affected tourism, but because tourists were the actual cause of the plaintiffs' injuries, the plaintiffs could not use the state to try to indirectly change tourists' behavior. So too here: Plaintiffs' injuries are caused by third-party drivers, pilots, and individuals other than HDOT, and anything HDOT could

conceivably do to influence those third parties has only a remote and speculative possibility of actually changing the third-party behavior causing Plaintiffs' injuries. That is not enough to sustain Plaintiffs' case.

3. Plaintiffs Have Not Identified a Ripe, Actual Controversy

Plaintiffs generally object to how HDOT executes its mission—"establishing, maintaining, and operating a state transportation system." Compl. ¶ 180. Plaintiffs speculate that HDOT *might* take actions or fail to take actions that *could* violate statutory requirements, like setting an emissions target for 2045. Those allegations do not change the reality that Plaintiffs ultimately and actually complain about private parties, not HDOT, and they confirm that Plaintiffs currently have no real controversy with anything HDOT has done. *See Kau v. City & County of Honolulu*, 104 Hawai'i 468, 475, 92 P.3d 477, 484 (2004) (courts may not grant relief based on "an event that will occur at some time in the future"); *see also* HRS § 632-1 (requiring an "actual controversy" before a court can issue declaratory relief).

The Alaska Supreme Court rejected similar requests for relief as failing to present an actual controversy in *Sagoonick*. 503 P.3d 777. Just as here, the plaintiffs sought a declaration that the State had violated their constitutional rights, that it had a public trust duty to protect the state's natural resources, and that it had violated its public trust and other obligations by failing to sufficiently reduce greenhouse gas emissions. *Id.* at 799. The court found that resolving those claims would not "settle" any legal issues between the parties for a number of reasons, including that the court lacked the ability and expertise "to provide the plaintiffs any certain basis on which to determine in the future whether the State has breached its duties." *Id.* at 801. It emphasized that "the judiciary is the least competent branch" to address such broad challenges because "we lack scientific, economic, and technological

resources and may not commission scientific studies or convene groups of experts essential to understanding evolving complexities." *Id.*

If HDOT someday violates a statutory or regulatory obligation, Plaintiffs can challenge that action under HAPA, same as any other person aggrieved. At that point, the Court will be able to adjudicate whether there has been a violation of a law based on a particular set of facts. But asking this Court to broadly assess HDOT's practices devoid of any context is asking purely for the type of adjudication of "abstract disagreements over administrative policies" that Hawai'i courts avoid.

E. Plaintiffs' Request for Attorney's Fees Must Be Stricken

Finally, Plaintiffs' request for attorney's fees must be stricken because it is barred by Hawaii's sovereign immunity. Nothing Plaintiffs have identified in their complaint, including Article XI, Section 9, waives sovereign immunity here. *Kaleikini v. Yoshioka*, 129 Hawai'i 454, 468–69, 304 P.3d 252, 266–67 (2013) (rejecting attorney's fees demand because "[n]othing in article XI, section 9 expressly waives the State's immunity for attorney's fees").

IV. CONCLUSION

The Court should dismiss all claims in Plaintiffs' complaint with prejudice and strike Plaintiffs' request for attorneys' fees.

DATED: Honolulu, Hawai'i, August 22, 2022.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

N[.] F., a Minor, by and through her natural guardian, *et al*., Plaintiffs, v. DEPARTMENT OF TRANSPORTATION, STATE OF HAWAIʻI, *et al.*, Defendants.	CIVIL NO. 1CCV-22-0000631 (Environmental Court) NOTICE OF HEARING and CERTIFICATE OF SERVICE

NOTICE OF HEARING

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NOTICE IS HEREBY GIVEN that the above-identified Motion to Dismiss shall come on for hearing before the Honorable Jeffrey P. Crabtree, Judge of the above-entitled Court, in his courtroom at Kaʻahumanu Hale, 777 Punchbowl Street, Honolulu, Hawaiʻi 96813, on October 5, 2022 at 9 a.m., or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawai‘i, August 22, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was served upon the following, by the methods of service noted below, on August 22, 2022:

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