HAWAI`I CIVIL RIGHTS COMMISSION

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March 24, 2009
Rm. 325, 2:00 p.m.

To: The Honorable Jon Riki Karamatsu, Chair
Members of the House Committee on Judiciary

From: Coral Wong Pietsch, Chair, and Commissioners of the Hawai`i Civil Rights Commission

Re: S.B. No. 1137, S.D.2, H.D.1

The Hawai`i Civil Rights Commission (HCRC) has enforcement jurisdiction over state laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services. The HCRC carries out the Hawai`i constitutional mandate that "no person shall be discriminated against in the exercise of their civil rights because of race, religion, sex or ancestry". Art. I, Sec. 5.

The HCRC opposes S.B. No. 1137, S.D.2, H.D.1, which amends §378-2.5 to allow the Hawaii Health Systems Corporation (HHSC) to conduct criminal history record checks on all current or prospective board members, employees, applicants seeking employment, current and prospective volunteers, providers or contractors. The HCRC has not opposed narrowly drawn exceptions allowing pre-offer inquiries into records of criminal convictions for positions that involve **unsupervised** contact with vulnerable persons – children, the elderly, persons with disabilities. However, the proposed exception is not narrowly drawn, and there is no reason that

HHSC's interests cannot be addressed by the post-offer inquiry and consideration of record of criminal conviction allowed under §378-2.5. At prior hearings on this bill, the HHSC testified that it can currently obtain the needed information from the FBI criminal history bank through the Hawaii Criminal Justice Data Center (HCJDC) after an employment offer is made. Requests for a further statutory exception should be carefully scrutinized, or an endless line of requestors for similar exceptions will threaten to swallow up the rule.

Background and Legislative History

Under Chapter 378, persons with an arrest and court record are protected against employment discrimination. These provisions were passed in 1974 to promote the rehabilitation and employment of convicted persons because the legislature recognized that such persons are not inherently and permanently bad and that opportunities afforded to other citizens should be made available to them. SCRep 862-74, 1974 Senate Journal at 1079.

In 1998 H.R.S. § 378-2.5 was passed as a legislative compromise, in which the HCRC, the Chamber of Commerce, and other interested government and private parties agreed to a broad exception to the arrest and court record protection, allowing post-offer inquiry into and consideration of records of conviction convictions if the convictions are rationally related to the duties and responsibilities of the job and occurred within 10 years of the application (excluding periods of incarceration).

The law was subsequently amended in 2003, pursuant to enactment of an omnibus bill based on the recommendation of the legislatively created Criminal History Record Check Working Group which met during 2002. Pursuant to the 2003 legislation, § 378-2.5 was amended to exclude periods of incarceration from the 10 year look-back period, and numerous

statutory exceptions to the arrest and court record check provisions were identified and listed in § 378-2.5(d), clarifying that the provisions of § 378-2.5(b) & (c) limiting employers to post-offer inquiry and consideration of criminal convictions and a 10 year look-back limit do not apply to those expressly excepted under subsection (d).

In addition, under §378-2.5(d) employer pre-offer inquiries into conviction records are allowed only where employment involves: a) **unsupervised** contact with vulnerable persons (children, the elderly, the disabled, prisoners, etc.); 2) licensing of detective and security guard agencies; 3) schools; 4) financial institutions and positions involving the handling of money; 5) co-op and AOAO managers; and 6) police and the courts.

CONCLUSION

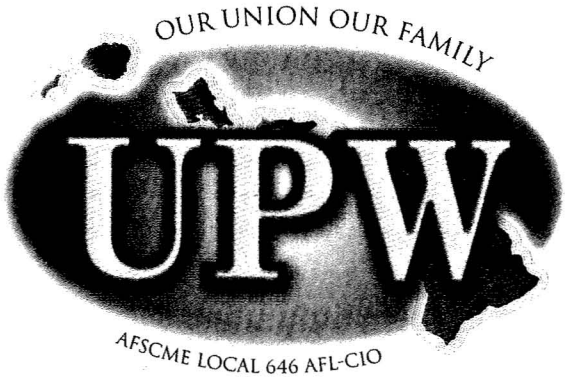
The HCRC has consistently expressed concern over the creation of a slippery slope, where a growing number of employer entities line up for an exception to the arrest and court record protection. We have pointed out that the provisions of § 378-2.5 were the result of the 1998 legislative compromise, in which all the parties at the table agreed to a broad exception to the arrest and court record protection, allowing post-offer inquiry into and consideration of records of conviction not more than 10 years old (excluding periods of incarceration).

§378-2.5(d) was meant to consolidate and codify existing exceptions, not to provide an avenue for carving out additional exceptions. Given that § 378-2.5 was agreed upon as the exception to the arrest and court record protection, the provisions of § 378-2.5(d) are literally exceptions to the exception. There is little reason why additional employer entities should be granted this "super" exception, absent a showing that the post-offer inquiry and consideration of records that are rationally related to the duties of the position is somehow not sufficient – a

showing that they cannot be subject to the same law as all other employers. It is important to remember that these employers are not prohibited from inquiry and consideration of records of criminal conviction – they can inquire and consider rationally related convictions the same as every other employer, post-offer.

The HCRC opposes S.B. No. 1137, S.D. 2, H.D.1. The HCRC has not opposed narrow statutory exceptions sought for positions that involve unsupervised contact with vulnerable persons as patients, clients, customers, or students. However, the HHSC seeks a much broader exception, covering all of its employees (among a host of others). That over-breadth is the primary reason for the HCRC's opposition to SB 1131. In addition, there is no proffered reason why the HHSC cannot make post-offer inquiries, continuing to obtain information from the FBI criminal history bank through the HCJDC, and consider convictions that are rationally related to the duties and responsibilities of the job, in the same manner that **all** employers are allowed to under H.R.S. §378-2.5.

The Commission urges the legislature exercise restraint in granting requests for statutory exceptions to arrest and court record protections under Chapter 378, in order to maintain both the original rehabilitative and employment purposes of the statute, as well as the integrity and balance of the statutory protection and exception as carefully calibrated by the legislature over the past decade.



House of Representatives
The Twenty-Fifth Legislature
Regular Session of 2009

Committee on Health
Rep. Jon Riki Karamatsu, Chair
Rep. Ken Ito, Vice Chair

DATE: Tuesday, March 24, 2009
TIME: 2:00 p.m.
PLACE: Conference Room 325
State Capitol
415 South Beretania Street

TESTIMONY OF THE UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO ON S.B. 1137, S.D. 2 RELATING TO HEALTH

My name is Dayton M. Nakanelua and I am the state director of the United Public Workers, AFSCME, Local 464, AFL-CIO (UPW). In behalf of approximately 500 blue collar non-supervisory employees of bargaining unit 1 and 1,000 institutional and health workers from bargaining unit 10 who are currently employed by the Hawaii health System Corporation (HHSC) the UPW opposes Senate Bill No. 1137, Senate Draft 2 which totally exempts HHSC from the basic protections afforded under Section 831-3.1, Hawaii Revised Statutes (HRS), and violates the constitutional rights of employees.

As you know, in recent years the legislature has significantly amended the fair employment practices act (chapter 378) and the public employment statute (chapter 78) to permit employers to inquire into the conviction records of job

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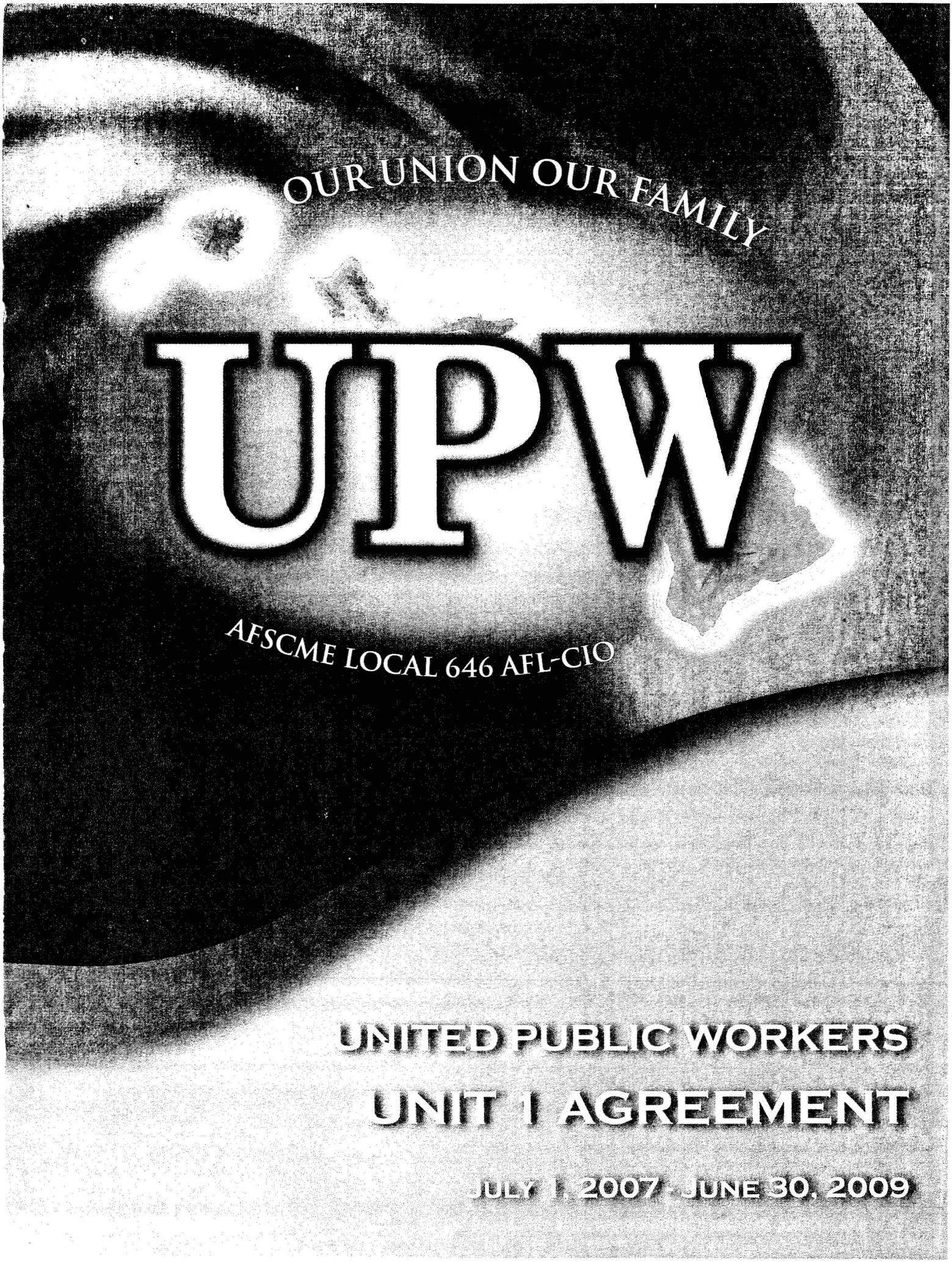
applicants and employees in various occupations. See Sections 378.2.5 and 78-2.7, HRS. Records of criminal convictions may only be considered where it "bears a rational relationship to the duties and responsibilities of the position" under Section 378.2.5, HRS, or for employees who work "in close proximity with children, dependent adults, or persons" committed to correctional facility under Section 78-2.7 (b), HRS. A prior criminal conviction does not disqualify an employee of the State or its political subdivisions or agency unless the crime in question "bears a rational relationship to the duties and responsibilities of the job" under Section 831-3.1 (b) and (c), HRS. These statutory provisions already apply to HHSC because it is "an instrumentality and agency of the State" under Section 323F-2 (a), HRS.

The proponents of this measure seek a total exemption from existing statutory requirements at page 4 of this measure. No agency or subdivision of the State has been afforded such an exemption, and none is warranted here. If enacted such an exemption would eliminate basic due process rights for existing employees of HHSC, and violate the right of public employees to engage in collective bargaining under Article XIII of the State constitution. The discipline or discharge of an employee is a mandatory subject of collective bargaining. For years public employers and the UPW have negotiated over this subject matter and the current agreement in Section 11 provides that employees may be subject to discipline "for just and proper cause," and Section 14 prohibits an abridgement and amendment of prior rights of employees under the constitution, statutes, and rules and regulations. See attachment.

Where the legislature seeks to change by statute a mandatory subject of bargaining it violates Article XIII, Section 2 of the State constitution. See United Public Workers,

AFSCME, Local 646, AFL-CIO v. Yogi, 101 Hawai`i 46, 62 P.3d 189 (2002) (statute which imposed a wage freeze for 2 years was unconstitutional). In addition, this law would impair the contractual rights of existing employees of HHSC and violate Article I, Section 10 of the U.S. Constitution. See University of Hawai`i Professional Assembly v. Cayetano, 183 F.3d 1096 (9th Cir. 1999) (where a statute substantially impairs a contractual relationship it is unconstitutional). For the foregoing reasons we urge you not to change the existing statute regarding use of criminal history records of employees of HHSC.



UNITED PUBLIC WORKERS
UNIT 1 AGREEMENT

JULY 1, 2007 - JUNE 30, 2009

SECTION 11. DISCIPLINE.

11.01 PROCESS.

11.01 a. A regular Employee shall be subject to discipline by the Employer for just and proper cause.

11.01 b. An Employee who is disciplined, and the Union shall be furnished the specific reason(s) for the discipline in writing on or before the effective date of the discipline except where the discipline is in the form of an oral warning or reprimand. However, if the oral warning or reprimand is documented or recorded for future use by the Employer to determine future discipline the Employee who is disciplined shall be furnished the specific reason(s) for the oral warning or reprimand in writing.

11.01 c. When an Employee is orally warned or reprimanded for disciplinary purposes, it shall be done discreetly to avoid embarrassment to the Employee.

11.01 d. In the event the need to impose discipline other than an oral warning or reprimand is immediate, the Employee and the Union shall be furnished the reason(s) in writing within forty-eight (48) hours after the disciplinary action is taken.

11.01 e. Written notifications of disciplinary actions involving suspension and discharge shall include the following:

11.01 e.1. Effective dates of the penalties to be imposed and

11.01 e.2. Details of the specific reasons.

11.01 f. An Employee who is discharged shall be granted an opportunity to respond to the charges prior to the effective date of discharge.

11.02 MEETING.

11.02 a. In the event that an Employee is scheduled in advance by the Employer to meet to answer questions, the Employee shall be informed of the purpose of the meeting.

11.02 b. When the subject of the meeting is on a job related incident and the Employee reasonably feels that disciplinary action may result from the meeting, the Employee may request that a Union representative or steward be present in the meeting.

11.02 c. The Employee shall be credited with work time in the event the meeting is held on non-work hours.

SECTION 14. PRIOR RIGHTS, BENEFITS AND PERQUISITES.

14.01 Nothing in this Agreement shall be construed as abridging, amending or waiving any rights, benefits or perquisites presently covered by constitutions, statutes or rules and regulations that Employees have enjoyed heretofore, except as expressly superseded by this Agreement.

14.01 a. The Employer retains the right to modify or terminate the furnishing of perquisites after consulting with the Union prior to modifying or terminating the perquisites.

14.01 b. When the Employer takes action and the Employee or the Union believes that the reason(s) for the change is unjust the disagreement may be processed through Section 15.

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Supreme Court of Hawai'i.
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO; Hawai'i Government Employees Association, AFSCME, Local 152, AFL-CIO; Hawai'i State Teachers Association; and Hawai'i Fire Fighters Association, Local 1463, International Association of Fire Fighters, AFL-CIO, Plaintiffs-Appellees/Cross-Appellants,
v.
Davis YOGI, Chief Negotiator, State of Hawai'i; Benjamin Cayetano, Governor, State of Hawai'i; The Board of Education; Maryanne Kusaka, Mayor, County of Kaua'i; Stephen Yamashiro, Mayor, County of Hawai'i, Defendants-Appellants/Cross-Appellees,
and
Jeremy Harris, Mayor, City and County of Honolulu; James Apana, Mayor, County of Maui; and The Board of Regents of The University of Hawai'i, Defendants/Cross-Appellees.
No. 23705.

Dec. 6, 2002.

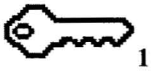
Public employee unions sought declaratory and injunctive relief against State Chief Negotiator, Governor, Board of Education, State University and its Board of Regents, and mayors, alleging that a statute unconstitutionally prohibited public employers and public employee unions from collectively bargaining over cost items for the 1999-2001 biennium. After a non-jury trial, the First Circuit Court, Virginia Lea Crandall, J., declared the statute unconstitutional under the State Constitution and granted permanent injunctive relief to the unions. Cross-appeals were taken. The Supreme Court, Ramil, J., held that the statute violated the State constitutional provision that public employees have the right to organize for the purpose of collective bargaining "as provided by law," because the constitutional provision did not grant the legislature absolute discretion to deny public employees the right to negotiate on core issues of collective bargaining.

Affirmed.

Nakayama, J., filed a concurring opinion in which Moon, C.J., and Levinson, J., joined.

Acoba. J., filed concurring opinion.

West Headnotes

Labor and Employment 231H  **1104**

231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1101 Constitutional and Statutory Provisions
231Hk1104 k. Validity. Most Cited Cases
(Formerly 232Ak173 Labor Relations)
Statute prohibiting public employers and public employee unions from collectively bargaining over cost items for the 1999-2001 biennium violated the State constitutional provision that public employees have the right to organize for the purpose of collective bargaining "as provided by law"; the phrase "as provided by law" could not be interpreted as granting the legislature absolute discretion to abrogate the right to organize for the purpose of collective bargaining by denying public employees the right to negotiate on core issues of collective bargaining. Const. Art. 13, § 2; HRS § 89-9(a).

West Codenotes
Held UnconstitutionalHRS § 89-9(a). ****189 *46** Herbert R. Takahashi (Rebecca L. Covert, Honolulu, with him on the briefs), of Takahashi, Masui & Vasconcellos, for plaintiffs-appellees/ cross-appellants.

Gary Hynds, Deputy Attorney General, (Kathleen A.

Watanabe, with him on the briefs), for defendants-appellants/cross-appellees Davis Yogi, Benjamin Cayetano, and The Board of Education.

Ted H.S. Hong, Deputy Corporation Counsel, (Margaret Hanson, with him on the briefs) for defendants-appellants/cross-appellees Stephen Yamashiro and Maryanne Kusaka.

Steven Christensen, Deputy Corporation Counsel, on the brief, for defendant-appellant/cross-appellee Stephen Yamashiro.

****190 *47** Opinion by RAMIL, J., in which ACOBA, J. Joins, Announcing the Decision of the Court.

Defendants-appellants/cross-appellees Davis Yogi, Chief Negotiator, State of Hawai'i; Benjamin Cayetano, Governor, State of Hawai'i; The Board of Education; Maryanne Kusaka, Mayor, County of Kauai; Stephen Yamashiro, Mayor County of Hawai'i; Jeremy Harris, Mayor, City and County of Honolulu; James Apana, Mayor, County of Maui; and the Board of Regents of the University of Hawai'i [hereinafter, collectively, Defendants],[FN1] appeal from the August 4, 2000 judgment and order of the first circuit court [FN2] in favor of plaintiffs-appellees/cross-appellants public employee unions [hereinafter, collectively, Plaintiffs].[FN3] The judgment and order declared unconstitutional Section 2 of Act 100, *see* 1999 Haw. Sess. L. Act 100, § 2, at 368-69, which prohibits public employers and public employee unions from collectively bargaining over cost items for the biennium 1999 to 2001 and permanently enjoined Defendants from enforcing it. Plaintiffs cross-appeal from those portions of the court's order dismissing their alternative grounds for relief.[FN4]

FN1. All of the above persons were defendants at the trial level. Defendants Jeremy Harris and the Board of Regents of the University of Hawai'i did not appeal the judgment but have responded to the plaintiffs' cross-appeal and so are actually defendants/cross-appellees.

FN2. The Honorable Virginia Lea Crandall presided over this case.

FN3. The plaintiffs in this case include United Public Workers, AFSCME, Local 646, AFL-CIO; Hawai'i Government Employees Association, AFSCME, Local 152, AFL-CIO; Hawai'i State Teachers Association; and Hawai'i Fire Fighters Association, Local 1463, International Association of Fire Fighters, AFL-CIO.

FN4. Plaintiffs cross-appeal the circuit court's order on the following grounds:

(1) The court erred by excluding the entire testimony of Bender, a linguistic expert, on the meaning and significance of key constitutional terms and phrases.

(2) The court erred in concluding that the employees' right under article XIII of the constitution is not a "fundamental right."

(3) The court erred in concluding that enforcement of Section 2 did not violate the equal protection clause under article I, section 5 of the constitution.

(4) The court erred in concluding that Section 2 did not violate the doctrine of separation of powers.

(5) The court erred in concluding that Section 2 did not violate article III, section 14 of the constitution which mandates that "[e]ach law shall embrace but one subject."

Because we hold that Section 2 of Act 100 violates the rights of public employees under article XIII, section 2 of the Hawai'i Constitution, we need not address Plaintiffs' cross-appeal claims.

The main issue before us is whether Section 2 violates article XIII, section 2 of our state constitution.[FN5] We hold that it does. Accordingly, we focus our analysis on Plaintiffs' collective bargaining rights. We affirm.

FN5. Article XIII, section 2 [formerly article

> XII, section 2] provides that "[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law." Prior to the 1968 amendment, article XII, section 2 provided that "[p]ersons in public employment shall have the right to organize and to present their grievances and proposals to the State, or any political subdivision or any department or agency thereof." *Proceedings of the Constitutional Convention of Hawai'i of 1968,* at 476 (1972) [hereinafter 1 *Proceedings 1968*]. Article XII, section 2 was amended in 1968 to read, "[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining as prescribed by law." *Id.* at 207. Ten years later, at the 1978 Constitutional Convention, article XII, section 2 was renumbered to article XIII, section 2, and the phrase, "as prescribed by law" was replaced with the phrase as "provided by law." *Proceedings of the Constitutional Convention of Hawai'i of 1978,* at 743 (1980) [hereinafter 1 *Proceedings 1978*].

I. *BACKGROUND*

During the 1999 legislative session, the Hawai'i State Legislature enacted Act 100. *See* 1999 Haw. Sess. L. Act 100, at 368-70. Section 2 of Act 100 amended Hawai'i Revised Statutes ("HRS") § 89-9(a) by adding the language underscored:

§ 89-9 Scope of negotiations.

> [Section effective until June 30, 2002 ....](a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, the number of incremental ****191 *48** and longevity steps and movement between steps within the salary range, the amounts of contributions by the State and respective counties to the Hawai'i public employees health fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to negotiations under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession; provided that the parties may not negotiate with respect to cost items as defined by section 89-2 for the biennium 1999 to 2001, and the cost items of employees in bargaining units under section 89-6 in effect on June 30, 1999, shall remain in effect until July 1, 2001.

HRS § 89-9(a) (2001) (underscoring added). "Cost items" include "wages, hours, amounts of contributions by the State and Counties to the Hawai'i public employees health fund, and other terms and conditions of employment, the implementation of which requires an appropriation by a legislative body." HRS § 89-2 (1993). In essence, Section 2 of Act 100 prohibited public employers and public employees' unions from collectively bargaining over cost items for the biennium 1999 to 2001.

On October 11, 1999, Plaintiffs filed a complaint against Defendants, alleging, *inter alia,* that, Section 2 violated their "right to organize for the purpose of collective bargaining" as provided by article XIII, section 2 of the Hawai'i Constitution. The complaint sought injunctive and declaratory relief.

A non-jury trial was held on January 4, 6, and 7, 2000 on the consolidated motion for preliminary injunction and trial on the merits. Plaintiffs did not request damages at trial. Plaintiffs moved for costs on March 17, 2000.

On August 4, 2000, the trial court issued its findings of fact, conclusions of law, orders, and judgment, ruling that Section 2 violated Plaintiffs' state constitutional right to collectively bargain and issued a permanent injunction against its enforcement.[FN6]

> FN6. In pertinent part, the trial court's conclusions of law stated as follows:
>
> > 8. *With respect to Article XIII, Section 2, of the Hawai'i State Constitution, the phrase "as provided by law" does not provide the legislature with unfettered discretion* to enact law which take away all issues from the process of collective bargaining

9. Such a construction that the legislature has unlimited discretion would produce an absurd result inconsistent with the purpose of Article XIII, Section 2, Hawai'i State Constitution. *See* [ ] *In [r]e Application of Pioneer Mill Co.*, 53 Haw. 496, 500 [, 497 P.2d 549, 552] (1972).

10. The legislature has wide authority to set the parameters for collective bargaining and has constitutionally exercised such legislative discretion and authority on previous occasions, for example; establishing the bargaining units (§ 89-6), specifying matters that are not subject to collective bargaining such as Health Fund Benefits (§ 89-9(d)), determining the expiration date for collective bargaining agreements and proscribing reopener of cost items during the agreement (89-10(c)).

11. The legislature has the authority and discretion to decide whether to fund collective bargaining agreements or arbitration awards. §§ 89-10(b) and 89-11(d), HRS.

12. *While the legislature has broad authority to structure the collective bargaining process, it may not infringe on the "core principles of the bargaining" as mandated by Article XIII, Section 2 of the Hawai'i State Constitution.*

13. *A legislative prohibition against the employer and employee discussing all cost items including wages is an unconstitutional infringement on the right to organize for the purpose of collective bargaining.* ...Section 2, Act 100, 1999 SLH is an unwarranted infringement of the constitutional right of public employees "to organize for the purpose of collective bargaining as provided by law."

14. It is uncontroverted that wages and cost items are the core of the subjects of collective bargaining in the private and public sectors.... By prohibiting bargaining over "cost-items" and establishing, in effect, a freeze in contractual terms on cost items from July 1, 1999 to July 2001, section 2. Act 100, 1999 SLH, abrogates the right of public employees "to organize for the purpose of collective bargaining as provided by law" under Article XIII, Section 2 of the Hawai'i State Constitution.

(Emphases added.)

Based on the findings and conclusions, the court ordered, adjudged and declared[ ] that Section 2, Act 100, 1999 SHL, is unconstitutional and null and void on grounds that it violates the right of public employees represented by Plaintiffs ..."to organize for the purpose collective bargaining as provided by law" in contravention of Article XIII, Section 2 of the Hawai'i State Constitution.

The court also ordered and adjudged that Plaintiffs' request for permanent injunction be and is hereby granted. Accordingly, the above named Defendants, their officers, agents, servants, employees, and all other persons acting in concert or participation with them are permanently enjoined from enforcing Section 2, Act, 100, 1999 SLH, in its entirety.

****192 *49** On August 29 through September 1, 2000, Defendants filed notices of appeal. On September 1, 2000, Plaintiffs filed a notice of cross-appeal. On September 5, 2000, the court awarded Plaintiffs costs of $6,044.60.

Defendant Yogi submits that the court committed reversible error in declaring Section 2 unconstitutional and in issuing an injunction against the enforcement of the Act. Yogi contends that article XIII, section 2"recognize[s] a constitutional right to organize for the purpose of collective bargaining" but "does not create a right to collectively bargain." Yogi maintains that, by inserting the phrase as "provided by law", the framers intended for the legislature to retain the ultimate authority to govern the parameters of collective bargaining. According to Yogi,

committee reports of the constitutional convention indicate the drafters's intent "to give complete discretion to the legislature to define the terms of collective bargaining for public employees." Yogi lists "numerous amendments" to HRS § 89-9 to show "[t]he legislature's power to control the scope of collective bargaining." Yogi concludes that "if the legislature had the power to grant public employees the right to collectively bargain over cost items, the legislation had the authority to suspend that right."

Defendants Kusaka and Yamashiro argue that (1) the legislature intended Section 2 to serve an important public interest; (2) HRS chapter 89 exhibits examples of the legislature's discretion to limit the right to bargain collectively; and (3) Plaintiffs suffered no irreparable injury.[FN7]

> FN7. Defendants argue that chapter 89 of the HRS contains several examples of how the legislature limited the scope, subjects, and time period for negotiations over costs items. *See e.g.,* HRS § 89-6 (excluding an entire class of "public employees" from bargaining collectively); HRS § 89-9 (excluding entire subjects from collective bargaining process); HRS § 89-10 (restricting the lifetime of collective bargaining agreements and when negotiations, including cost "items," may be reopened.) However, the examples cited by the Defendants are not issues before this court. Accordingly, we need not address the constitutionality of these cited sections of chapter 89.

Plaintiffs assert that (1) the words "collective bargaining as provided by law" in article XIII, section 2 had "a well-recognized meaning in pre-existing federal and state statutes[ ] and five state constitutions" by 1968, and the term "law" referred "not just to statutory 'law,' but also to constitutional and case 'law' which gave substance and meaning to the words 'collective bargaining' "; (2) "the object of the 1968 amendment was to extend to public employees rights enjoyed by private employees"; and (3) their position is supported by the legislative history of HRS chapter 89, "contemporary 'understanding' " of the meaning of "collective bargaining as provided by law," and case law from other states.

II. *STANDARDS OF REVIEW*

A. *Constitutional Construction*

We review questions of constitutional law *de novo,* under the right/wrong standard. *Bank of Hawai'i v. Kunimoto,* 91 Hawai'i 372, 387, 984 P.2d 1198, 1213,*recon. denied,* 91 Hawai'i 372, 984 P.2d 1198 (1999). "We answer questions of constitutional law by exercising our own independent judgment based on the facts of the case." *State v. Jenkins,* 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000).

In interpreting a constitutional provision, "the words of the constitution are presumed to be used in their natural sense ...'unless the context furnishes some ground to control, qualify or enlarge (them).' " *State ex rel. Amemiya v. Anderson,* 56 Haw. 566, 577, 545 P.2d 1175, 1182 (1976) (citation omitted).

"We have long recognized that the Hawai'i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent." ****193*50***Convention Center Auth. v. Anzai,* 78 Hawai'i 157, 167, 890 P.2d 1197, 1207 (1995). "This intent is to be found in the instrument itself. When the text of a constitutional provision is not ambiguous, the court, in construing it, is not at liberty to search for its meaning beyond the instrument." *State v. Kahlbaun,* 64 Haw. 197, 201, 638 P.2d 309, 314,*recon. denied,* 64 Haw. 197, 638 P.2d 309 (1981) (citations omitted).

B. *Statutory Interpretation*

"The constitutionality of a statute is a question of law which is reviewable under the right/wrong standard.... [T]his court has consistently held that every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt. The infraction should be plain, clear, manifest and unmistakable." *State v. Bates,* 84 Hawai'i 211, 220, 933 P.2d 48, 57 (1997).

III. *DISCUSSION*

"In the construction of a constitutional provision, the rule is well established that the words of the constitution are presumed to be used in their natural sense." *Employees' Ret. Sys. v. Budget Dir. Ho,* 44 Haw. 154, 159, 352 P.2d 861, 864-65 (1960). The words "as provided by law" do not appear to be ambiguous and therefore are presumed to be used in their natural sense. The court may look at "legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms ... not defined." *State v. Kalama,* 94 Hawai'i 60, 63 n. 6, 8 P.3d 1224, 1227 n. 6 (2000).

At the time that the proposed amendment to article XII, section 2 (now article XIII, section 2) was drafted and ratified, the word "law" was understood to mean "a rule of conduct prescribed by lawmaking power of state" or "judicial decisions, judgments or decrees." *Black's Law Dictionary* 1028 (1968). "Provided" was defined as "[t]he word used in introducing a proviso.... Ordinarily, it signifies or expresses a condition; but, this is not invariable; for according to the context, it may import a covenant, or a limitation or qualification, or a restraint, modification, or exception to something which precedes." *Id.* at 1388, 8 P.3d 1224. As written, the dependent clause "as provided by law" qualifies the preceding independent clause describing the right to organize for collective bargaining.

Similar principles of construction were applied to the identical phrase in article I, section 11, in *State v. Rodrigues,* 63 Haw. 412, 629 P.2d 1111 (1981).[FN8] Section 11"create[d] the position of an independent grand jury counsel, [but] it fail[ed] to define the number of independent counsel required, appointment or removal procedure, qualifications, length of term, compensation, or source of funding." *Id.* at 414, 629 P.2d at 1113. In *Rodrigues,* the defendants argued that article I, section 11 was "self-executing" and "mandate[d] the immediate appointment of independent counsel to grand juries." *Id.* at 413, 629 P.2d at 1113. Disagreeing, this court observed that, at the time article I, section 11 was adopted, there was no other constitutional provision or statute to which the phrase "as provided by law" could refer. *Id.* at 415, 629 P.2d at 1114. We held that in the absence of a constitutional provision or statute to which "as provided by law" could refer, "subsequent legislation was required to implement the amendment." *Id.,* 629 P.2d at 1114.

FN8. Article I, section 11 provides as follows:

> Whenever a grand jury is impaneled, there shall be an independent counsel appointed as *provided by law* to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.
>
> (Emphasis added).

Relying on cases from other jurisdictions, this court in *Rodrigues* observed that the phrase "as provided by law" has been interpreted as "a direction to the legislature to enact implementing legislation," that "the subject matter which this phrase modifies is not locked into the Constitution but may be dealt with by the Legislature as it deems appropriate," and that the phrase "directs the legislature to provide the rule by which ****194 *51** the general right which it (the constitutional provision) grants may be enjoyed and protected." *Id.,* 629 P.2d at 1114. Defendant Yogi rely heavily on *Rodrigues* to support their argument that the legislature has an unfettered discretion to enact law which take away all issues from the process of collective bargaining. Defendant Yogi contends that "as provided by law" clearly indicates that legislation is required before the right created becomes enforceable.

Defendants' reliance on *Rodrigues* is inapposite. The context in which the phrase as "provided by law" in *Rodrigues* was used is factually distinguishable from the situation presented in the instant case. Unlike the amendment at issue in *Rodrigues,* when article XII, section 2 was amended in 1968, there were pre-existing federal and state statutes, constitutional provisions, and court cases which give meaning to the term "collective bargaining."

Before the framers convened in 1950, the Wagner Act, as amended, defined collective bargaining as the "mutual obligation of the employer and the representative of the employees to meet at reasonable

times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (2002). In 1945, territorial lawmakers modeled Hawai'i's first collective bargaining statute after Wagner Act, and specifically defined collective bargaining in the Hawai'i Employment Relations Act as follows:

> "Collective bargaining" is the negotiating by an employer and a majority of the employer's employees in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

HRS § 377-1(5).

Private and public employees had already been granted varying degrees of constitutional protection for collective bargaining in the states of New York in 1939, Florida in 1944, Missouri in 1945, and New Jersey in 1947. The framers acknowledged their awareness of the statutory and state constitutional provisions in formulating and adopting article XII in 1950, and considered the right of employees fundamental enough to grant it constitutional foundations as four other states had done. 1 *Proceedings 1950* at 236, 238-39.

Before the voters ratified the constitutional provision, by plebiscite held on June 27, 1959, the United States Supreme Court had clarified that the right to organize for collective bargaining obligated employers to negotiate in good faith over wages, hours, and other terms and conditions of employment. *Local 24 of the Int'l Bhd. v. Oliver*, 358 U.S. 283, 295, 79 S.Ct. 297, 3 L.Ed.2d 312 (1959).

The record of the proceedings at the 1968 constitutional convention verified that the framers actually knew wh at "collective bargaining as provided by law" (or as "prescribed by law") meant. 1 *Proceedings 1968* at 207, 342, 429. In fact, they were even provided a written opinion by the Attorney General on the legal question.

> "Collective bargaining" has been defined as: "[A] procedure looking toward the making of a collective agreement between the employer and the accredited representative of his employees concerning wages, hours, and other conditions of employment." 51 CJS, *Labor Relations* (1967 ed.), sec. 148.

1 *Proceedings 1968* at 479.

Thus, unlike the provision at issue in *Rodrigues*, "collective bargaining as provided by law" had a well recognized meaning, usage, and application under both federal and state laws as well as case law.[FN9] At the time article XII, section 2 was amended, there were federal, state, and case laws to which the phrase "collective bargaining as provided by law" could refer. Accordingly, we must consider the constitutionality of Section 2 of Act 100 in ****195 *52** light of these other sources of law which give meaning to that provision.

> FN9. Our understanding that the word "law" could also refer to case law is not a novel idea. For example, in *Konno v. County of Hawai'i*, we held that the phrase "as defined by law" in Article XVI, Section 1 required an examination of "statutory law and case law." 85 Hawai'i 61, 70, 937 P.2d 397, 406 (1997).

Our state's constitution " 'must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent.' " *Hirono v. Peabody*, 81 Hawai'i 230, 232-33, 915 P.2d 704, 707 (1996). "This intent is to be found in the instrument itself." *Kahlbaun*, 64 Haw. at 201, 638 P.2d 309.

Based upon our careful review of the proceedings of the constitutional convention, we find that the framers of article XII, section 2 did not intend to grant our legislators complete and absolute discretion to determine the scope of "collective bargaining." There are evidence in the 1968 proceedings indicating that the framers were not in favor of granting the legislature the ultimate power to deny the right to organize for the purpose of collectively bargaining. For instance, the framers defeated an amendment in the committee of the whole to limit public employee rights to "procedures as established by law in the areas therein prescribed" by a vote of 62 to 13. 1 *Proceedings 1968* at 495. Moreover, when Delegate Kauhane voiced his understanding of

the purpose of Committee Proposal No. 5 (thereafter adopted as article XII, section 2), it was evident that no one opposed such interpretation. Delegate Kauhane remarked:

> Mr. Chairman, I speak in favor of Proposal No. 5. The purpose and intent of Proposal No. 5 is to protect the right to organize for the purpose of collective bargaining. As a matter of Constitutional right, however, that right is subject to reasonable regulation by the legislature. That's why the insertion of the words "as prescribed by law" or probably some would like to have the words "in accordance with law." Certainly, Mr. Chairman, the legislators should be prevailed upon to take their stand on this matter of providing the necessary regulations as prescribed by law. This is one of the responsibilities and they should not shirk this responsibility in providing the necessary regulations for collective bargaining by government employees.

1 *Proceedings 1968* at 497-98. Delegate Kauhane observed:

> Perhaps the words "as prescribe by law" mean that the right of collective bargaining and the right to organize don't exist until the legislature prescribes and recognizes that right. And therefore the legislature should at this time recognize this right and establish regulations for the right for collective bargaining. To recognize the right to organize for the purpose of collective bargaining is a matter of policy. *It does not mean that the legislature can take away that right nor remove that right, of the public employees to organize and bargain collectively.* This proposal is for the purpose, the full purpose of protecting the rights of public employees to organize for the specific purpose of collective bargaining. I urge that the proposal submitted by the committee be approved.

1 *Proceedings 1968* at 498 (emphasis added). Thereafter, Committee Proposal No. 5 was adopted by a vote of 57 to 17. The fact the none of the framers rose to oppose such interpretation was a strong indicia of the framers' acquiescence to Delegate Kauhane's understanding of the phrase "as prescribed by law."

That the framers did not intend to grant the legislature absolute discretion to take away the right to collectively bargain altogether is also evident in Delegate Yoshinaga's remarks during the 1968 proceedings. He pleaded:

> All that the government employees ask here is the right of an expression in our Constitution, the finest document in the land, we hope when we get through, that they too shall have the right not only to organize but to use that organization for collective bargaining purposes so that can better their standard of living, so they can walk and live and study and play in Hawai'i like all employees.
>
> Mr. Chairman, all they ask is that right from this Convention. *That right will have to be implemented by legislation and if the legislature fails, perhaps that right will be taken into court for court action, I do not know. But that is all government employees are asking.*
>
> ****196 *53** I urge all of you here, if you do nothing else in this convention, to adopt one principle that declares to anyone who works in Hawai'i that in Hawai'i at least we recognize that there may be some differences between the private employees and the public employees, but that the people of Hawai''i, through our constitutional delegation, are trying to make people equal here whether they work for the private industrial empire here or for the government of the State and county.

1 *Proceedings 1968* at 497 (emphasis added). Based upon Delegate Yoshinaga's remarks, it is clear that the intent and object of the framers was to extend to public employees similar rights to collective bargaining previously adopted in 1950 for "persons in private employment" under article XII, section 1 of the Constitution. 1 *Proceedings 1968* at 497. A construction of article XII, section 2 that would allow the legislature to have absolute power to deny public employees the right to negotiate on core issues of collective bargaining is simply inconsistent with the framers' objectives in adopting this provision.

In construing a constitutional provision, the court can also look to understanding of voters who ratified the constitutional provision, and legislative implementation of constitutional amendment. *Kahlbaun*, 64 Haw. at 202, 638 P.2d 309. At the time the people voted, the word "collective bargaining as prescribed by law" had a well recognized meaning.

Black's defined "collective bargaining" as follows:

> COLLECTIVE BARGAINING. As contemplated by National Labor Relations Act is a procedure looking toward making of collective agreements between employer and accredited representatives of employees *concerning wages, hours, and other conditions of employment,* and requires that parties deal with each other with open and fair minds and sincerely endeavor to overcome obstacles existing between them to the end that employment relations may be stabilized and obstruction to free flow of commerce prevented.

Black's Law Dictionary 328-29 (1968) (emphasis added). Webster's defines the phrase "collective bargaining" as:

> [A] negotiation for the settlement of terms of collective agreement between an employer or group of employers on one side and a union or number of unions on the other; broadly, any union-management negotiation.

"Collective agreement" is defined as:

> [A]n agreement between an employer and a union usually reached through collective bargaining and *establishing wage rates, hours of labor, and working conditions.*

Webster's Third New International Dictionary (1966) (emphasis added). Finally, Random House defines "collective bargaining" as follows:

> [T]he process by which *wages, hours, rules, and working conditions are negotiated* and agreed upon by a union with an employer for all the employees collectively whom it represents.

Random House Unabridged Dictionary (1967) (emphasis added).

In light of the foregoing definitions of "collective bargaining," it is clear that, when the people ratified article XII, section 2, they understood the phrase to entail the ability to engage in negotiations concerning core subjects such as wages, hours, and other conditions of employment. Section 2 of Act 100 violates article XII, section 2, because it withdraws from the bargaining process these core subjects of bargaining that the voters contemplated.

Granting the lawmakers absolute discretion to define the scope of collective bargaining would also produce the absurd result of nullifying the "right to organize for the purpose of collective bargaining." A constitutional provision must be construed "to avoid an absurd result" and to recognize the mischief the framers intended to remedy. *State v. City of Sherwood,* 489 N.W.2d 584, 588 (N.D.1992). As a matter of policy, we do not blindly apply rules of construction to the point that we reach absurd conclusions that are inconsistent with the intent of our lawmakers. *See e.g., State v. Kahlbaun,* 64 Haw. 197, 206, 638 P.2d 309, 317 (1981) ("A legislative construction implementing a constitutional amendment cannot produce an absurd result or be inconsistent with the purposes**197 *54 and policies of the amendment."); *Dines v. Pac. Ins. Co., Ltd.,* 78 Hawai'i 325, 337, 893 P.2d 176, 188 (1995) (Ramil, J., dissenting) (*citing Richardson v. City & County of Honolulu,* 76 Hawai'i 46, 60, 868 P.2d 1193, 1207,*recon. denied,* 76 Hawai'i 247, 871 P.2d 795 (1994)) ("Statutory construction dictates that an interpreting court should not fashion a construction of statutory text that effectively renders the statute a nullity or creates an absurd or unjust result.").

Here, the intent and object of the framers who adopted article XII, section 2 was to extend to public employees similar rights to collective bargaining previously adopted for private employees under article XII, section 1.[FN10] Defendants' construction of article XII, section 2 would render that provision meaningless, because, if we follow the Defendants' reading of that provision to its logical conclusion, it would be possible for the legislature to establish a freeze in contractual terms on cost items not only for two years but for two decades. Surely, the framers did not contemplate such an absurd and unjust result, especially in light of the fact that their foremost intent in drafting this constitutional provision is to improve the standard of living of public employees.[FN11] Accordingly, we reject Defendants' contention that the phrase "as provided by law" gave the legislature complete discretion to take away public employees' right to organize for the purpose of collective bargaining. Such reading is contrary to the underlying object and purpose of the constitutional provision.[FN12]

FN10. Article XII, section 1 of the Hawai'i Constitution states, "Persons in private

employment shall have the right to organize for purposes of collective bargaining."

FN11. That the framers' primary intent was to better the lives of public employees is evident in the pleas of supporters of Committee Proposal No. 5., such as that made by Delegate Yamamoto:

> Therefore, I do urge you fellow delegates, let us give public employees a fair shake and not rate them as second-class citizens, they are by an large dedicated workers.
>
> 1 *Proceedings 1968* at 477.

FN12. To support their contention that the framers intended to give absolute discretion to the legislature in defining the terms of collective bargaining for public employees, Defendants rely heavily upon selected portions of committee reports. To give effect to the intention of the framers and the people adopting a constitutional provision, examination of debates, proceedings and committee reports is useful. However, "the debates, proceedings and committee reports do not have binding force on this court and their persuasive value depends upon the circumstances of each case." *Kahlbaun*, 64 Haw. at 204, 638 P.2d at 316. While there is some evidence in the convention reports to suggest deferral to legislation action, the portions relied upon by Defendants were focused on the issue of the right to strike and who should determine that question. For example, to support his position, Defendant Yogi cites to the committee report stating that:

> This amendment providing, "collective bargaining as prescribed by law," allayed the opposition and concern expressed by some members of your committee.... In the case of public employees the rights of collective bargaining will be restricted to those areas in such a manner as will be determined by the legislature.
>
> 1 *Proceedings 1968* at 207 (quoting Stand. Comm. Rep. No. 42). Defendant Yogi overlooked the sentence following the above quoted passage. That sentence read, "Therefore, the right to strike determination." By reading the two passages together, it becomes clear that the second passage qualified the meaning of first, so that deferral to legislative action is intended to be observed only on the issue of the right to strike.

IV. *CONCLUSION*

Based on the foregoing, we hold that Section 2 of Act 100, 1999 Haw. Sess. L., violates the rights of public employees under article XIII, section 2 of the Hawai'i Constitution.

The circuit court's judgment is hereby affirmed.

RAMIL and ACOBA, JJ.; and NAKAYAMA, J., concurring separately, with whom MOON, C.J., and LEVINSON, J., join; and ACOBA, J., concurring separately.Concurring Opinion by NAKAYAMA, J., In which MOON, C.J., and LEVINSON, J., join.
I agree with Justice Ramil's conclusion that Section 2 of Act 100, 1999 Haw. Sess. L. (Section 2), violates article XIII, section 2 of the Hawai'i Constitution, inasmuch as the legislature went beyond its constitutional authority in abrogating altogether the right of public employees to organize for the purpose **198 *55 of collective bargaining. I write separately to clarify the reason for this conclusion.

Article XIII, section 2 of the Hawai'i Constitution provides that "[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining *as provided by law.*" Haw. Const. art. XIII, § 2 (emphasis added). Pursuant to this provision, the legislature is given broad discretion in setting the parameters for collective bargaining. Indeed, the legislature has constitutionally exercised such discretion on previous occasions. *See*Hawai'i Revised Statutes (HRS) § 89-6 (1993) (establishing bargaining units); HRS § 89-9(d) (1993) (specifying matters that are not subject to collective bargaining); HRS § 89-10(c) (1993) (determining the expiration date for collective bargaining agreements and proscribing the reopening of cost items during the term of the agreement).

While the legislature is given broad discretion

pursuant to article XIII, section 2, the language "as provided by law" does not give the legislature unfettered discretion to infringe upon the core principles of collective bargaining.

> The fundamental principle in construing a constitutional provision is to give effect to the intention of the framers and the people adopting it. This intent is to be found in the instrument itself. When the text of a constitutional provision is not ambiguous, the court, in construing it, is not at liberty to search for its meaning beyond the instrument.

State v. Kahlbaun, 64 Haw. 197, 201, 638 P.2d 309, 314 (1981) (citations omitted). In this case, the intent is found in the instrument itself. The language "as provided by law" in article XIII, section 2 does not provide the legislature with unfettered discretion to enact laws that completely abrogate the right of public employees to organize for the purpose of collective bargaining pursuant to article XIII, section 2. Interpreting this language in such a manner would produce an absurd result inconsistent with the intent of the framers. *See In re Application of Pioneer Mill Co.*, 53 Haw. 496, 500, 497 P.2d 549, 552 (1972) ("We are always reluctant to decide that the constitutional draftsmen intended to accomplish what appears to be an absurd result.").

Inasmuch as article XIII, section 2 does not grant the legislature unfettered discretion to infringe on the core principles of collective bargaining, the legislature went beyond its constitutional authority in enacting Section 2. Article XIII, section 2 expressly provides that "[p]ersons in public employment shall have the right to organize *for the purpose of collective bargaining* as provided by law." Haw. Const. art. XIII, § 2 (emphasis added). "Collective bargaining" is defined as

> the performance of the mutual obligations of the public employer and an exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawai'i public employees health fund, and other terms and conditions of employment, except that by any such obligation neither party shall be compelled to agree to a proposal, or be required to make a concession.

HRS § 89-2 (Supp.2001). Section 2 amended HRS § 89-9(a) by adding the following underscored language, thus prohibiting altogether negotiation over "cost items" for two years:

> The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, the number of incremental and longevity steps and movement between steps within the salary range, the amounts of contributions by the State and respective counties to the Hawai'i public employees health fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to negotiations under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession; *provided that the parties may not negotiate with respect to cost items as defined by section 89-2 for the biennium 1999 to 2001, and the cost items* ***199** **56* *of employees in bargaining units under section 89-6 in effect on June 30, 1999, shall remain in effect until July 1, 2001.*

HRS § 89-9(a) (Supp.2001) (emphasis added). "Cost items" are defined as "all items agreed to in the course of collective bargaining that an employer cannot absorb under its customary operating budgetary procedures and that require additional appropriations by its respective legislative body for implementation."HRS § 89-2. It is undisputed that wages and cost items are among the core subjects of collective bargaining. *See*HRS § 89-3 (Supp.2001) ("Employees shall have the right of self-organization ... for the purpose of collectively bargaining ... on questions of wages, hours, and other terms and conditions of employment...."); HRS § 89-9(a) (quoted *supra*); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 490-91, 99 S.Ct. 1842, 60 L.Ed.2d 420, n. 2 (1979) ("As originally enacted, the Wagner Act [of 1935] did not define the subjects of [the] obligation to bargain [imposed by § 8(a)(5) of the National Labor Relations Act], although § 9(a), which was contained in the Wagner Act, made reference to 'rates of pay, wages, hours of employment, or other conditions of employment.' Section 8(d) was added by the Taft-Hartley amendments to the Act in 1947,

and expressly defined the scope of the duty to bargain as including 'wages, hours, and other terms and conditions of employment.' "). Thus, by enacting Section 2, which completely prohibited negotiation of "cost items," the legislature was in fact abrogating the right of public employees to "organize for the purpose of collective bargaining." The legislature did not have the constitutional authority to enact a law that in effect completely abrogated the right granted under article XIII, section 2 of the Hawai'i Constitution. It is for the foregoing reasons that I concur with Justice Ramil's conclusion.

Concurring Opinion of ACOBA, J.

I agree with Justice Ramil that Section 2 of Act 100, 1999 Haw. Sess. L. (Section 2), violates the core of Article XIII, Section 2 of the Hawai'i Constitution, inasmuch as relevant history confirms that the right to organize and bargain collectively was to remain inviolate.[FN1]

FN1. Because this opinion construes the constitution, I agree with its publication. *See e.g.*, Mich. Ct. R. 7.215(A)-(B) ("A court opinion must be published if it involves a legal issue of continuing public interest."); 4th Cir. R. 36(a) (an opinion will be published if it involves a legal issue of continuing public interest); 5th Cir. R. 47.5.1 (an opinion is published if it "concerns or discusses a factual or legal issue of significant public interest").

In that regard, Justice Ramil has recommended a rule which would require publication of a case at the request of one justice. *See Doe v. Doe*, 99 Hawai'i 1, 15, 52 P.3d 255, 269 (2002) (Ramil, J., dissenting). As one commentator has said of this rule,

the "one justice publication" rule, unlike the "majority rules" rule, faithfully abides by the premises upon which [summary disposition orders] and memorandum opinions were based, promotes judicial accountability, and facilitates a judge or justice's role in the legal system-without sacrificing judicial economy.

N.K. Shimamoto, *Justice is Blind, But Should She be Mute?*, 6 Hawai'i B.J. 6, 12 (2002).

Nothing highlights the inefficacy or undermines the rationalization of a "majority rules" approach to publication more than the proposal submitted to this court on June 14, 2002, by the Hawai'i Chapter of the American Judicature Society (AJS), to permit (1) citation to unpublished opinions as persuasive authority and (2) petitions for publication of unpublished cases based on "a *problem* perceived by the legal community with the continued use of summary disposition orders and ... memorandum opinions." Report of AJS Special Committee on Unpublished Judicial Opinions Hawai'i Chapter of American Judicature Society § IV (2002) (emphasis added).

Also, the dissatisfaction with the number of unpublished opinions is one reason why the State legislature authorized two additional judges on the Intermediate Court of Appeals (ICA) level in 2001. *See* Stand. Comm. Rep. No. 1460, in 2001 House Journal, at 1495 (finding that the procedures and processes employed to deal with the appellate case load have "caus[ed] some litigants to question whether the parties are getting due process[ ]" and as an example, stating that "a large number of cases were decided by summary disposition orders instead of opinion, and oral argument has become rare").

Justice Ramil and I have agreed and will continue to agree to a recommendation by one of the other justices to publish a case even if the majority will not adhere to such a policy. We do so because we support and respect the opinion of any one of our colleagues that a decision warrants publication and that the views raised in the opinion should be disseminated and that a one justice rule best makes use of the wisdom and experience of each justice.

I.

As conceded by Plaintiffs at oral argument, Plaintiffs' claim for injunctive relief has become**200 *57 moot. From June 30, 1999, the effective date of Act 100, *see* 1999 Haw. Sess. L. Act 100, § 9, at 370, through August 4, 2000, the date the circuit court issued its injunction, no wage increases were honored by Defendants, except the arbitration award issued to the State of Hawai'i Organization of Police Officers (SHOPO).[FN2] When Act 100 expired on July 1, 2001, there was no longer any restriction on the employees' rights to collectively bargain or any reason to maintain the status quo for contracted cost items.

> FN2. The circuit court found that "[o]n and after July 1, 1999, some police officers, depending on their anniversary dates, began receiving wage adjustments" and that "[o]n January 1, 2000, police officers in bargaining unit 12 received an across the board increase of 1 percent in wages...." Plaintiffs claim that Section 2 of Act 100, *see* 1999 Haw. Sess. L. Act 100, § 2, at 368-69, was discriminatorily enforced because Defendants granted SHOPO wage increases after the effective date of the Act, in violation of their right to equal protection of the laws.

Since the legislature prohibited negotiations over cost items only for the biennium 1999 to 2001 and not for any other period, *see id.*, § 2, at 368-69 [hereinafter Section 2], the parties were free to negotiate over cost items after July 1, 2001. Furthermore, the freezing of cost items, in effect on June 30, 1999, was removed after July 1, 2001. The statutory impediment to negotiations and the mandate to freeze cost items no longer exists. Therefore, there is presently nothing to be enjoined. The employers and public employees are no longer statutorily prevented from negotiating on cost items. Consequently, the injunctive relief claim is moot.

II.

A.

However, Plaintiffs' claim for declaratory judgment is not moot.[FN3] "In the words of [Hawai'i Revised Statutes (HRS)] § 632-1, the dispositive question is whether 'the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.' This is a question of law." *Island Ins. Co. v. Perry*, 94 Hawai'i 498, 502, 17 P.3d 847, 851 (App.2000). In determining whether parties "still retain sufficient interests and injury as to justify the award of declaratory relief[,] ... [the] question is 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant ... a declaratory judgment.' " *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974) (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941)). As a matter of law, there manifestly remains a substantial controversy in this case.

> FN3. Hawai'i Revised Statutes (HRS) § 632-1 (1993) authorizes actions for declaratory judgments. It provides in pertinent part as follows:
>
> > In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, *whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for;* provided that declaratory relief may not be obtained in any district court....
> >
> > Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or *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, and the court is satisfied also that a*

> *declaratory judgment will serve to terminate the uncertainty or controversy* giving rise to the proceeding.
>
> (Emphases added.)

At the heart of this appeal is the scope of the constitutional right afforded to public employees to collectively bargain,[FN4] as well as the extent of the legislature's power to limit that right. On appeal, Plaintiffs have argued, among other things, that: (1) "the lower court erred by failing to recognize Article XIII, section 2 rights as 'fundamental' [and] refusing to apply [a] strict scrutiny [construction] to [that section]"; (2) "because ****201 *58** [SHOPO] was not subjected to the enforcement of Section 2, that law was enforced in violation of Plaintiffs' equal protection rights[,]"*see supra* note 2; (3) "prohibiting the executive branch to negotiate cost items and imposing a freeze on wages[, as imposed by section 2,] violates the separation of powers doctrine"; and (4) "legislation [such as section 2] adopted with a broad title and containing multiple and separate subjects is unconstitutional."

> FN4. Article XIII, section 2 of the Hawai'i Constitution reads, "Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law."

B.

At this stage in our jurisprudence, our appellate courts have merged two, sometimes overlapping, yet distinct exceptions to the mootness doctrine: the "public interest" exception and the "capable of repetition, yet evading review" exception.

An allusion to the "public interest" exception first appeared in our jurisprudence in *Johnston v. Ing*, 50 Haw. 379, 441 P.2d 138 (1968). There, this court stated that

> *[t]here is a well settled exception to the rule that appellate courts will not consider moot questions.* When the question involved affects the public interest, and it is likely in the nature of things that similar questions arising in the future would likewise become moot before a needed authoritative determination by an appellate court can be made, the exception is invoked.
>
> *Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.*

Id. at 381, 441 P.2d at 140 (internal quotation marks and citations omitted) (emphases added). The foregoing quote was taken from *In re Brooks*, 32 Ill.2d 361, 205 N.E.2d 435, 437-38 (1965). In that case, the Supreme Court of Illinois acknowledged that the issue there was moot but said that, "when the issue presented is of substantial *public interest,* a well-recognized exception exists to the general rule that a case which has become moot will be dismissed upon appeal." *Id.* (emphasis added) (citing M.A. Leffingwell, Annotation, *Public Interest as Ground for Refusal to Dismiss an Appeal, Where Question has Become Moot, or Dismissal is Sought by One or Both Parties*, 132 A.L.R. 1185 (1941) [hereinafter *Public Interest as Ground for Refusal*]). The *Brooks* court established three criteria for the public interest test, stating that there must be "[(1)] the existence of the requisite degree of public interest [in] the public or private nature of the question presented, [(2)] the desirability of an authoritative determination for the future guidance of public officers, and [(3)] the likelihood of future recurrence of the question." *Id.* at 438. "Applying these criteria," the *Brooks* court decided the merits of the case. *Id.* Later, seemingly in *dicta,* the *Brooks* court observed that "the very urgency which presses for prompt action by public officials makes it probable that any similar case arising in the future will likewise become moot by ordinary standards before it can be determined by this court." *Id.* A review of the annotation cited by the *Brooks* court indicates that the mootness doctrine was "modified or abrogated [when] the appeal involve[d] questions of *public interest.*" Leffingwell, *Public Interest as Grounds for Refusal, supra,* at 1185-86 (emphasis added).

In *Johnston,* this court melded the "public interest" criteria with the observation by the *Brooks* court that a similar case may become moot before review was possible. *See* 50 Haw. at 381, 441 P.2d at 139. This

approach was followed in subsequent cases. *See* Alfapada v. Richardson, 58 Haw. 276, 277-78, 567 P.2d 1239, 1241 (1977); *Wong v. Board of Regents, University of Hawai'i,* 62 Haw. 391, 395, 616 P.2d 201, 204 (1980); *Kona Old Hawaiian Trails Group v. Lyman,* 69 Haw. 81, 87-88, 734 P.2d 161, 165-66 (1987); *cf.* State v. Cullen, 86 Hawai'i 1, 13, 946 P.2d 955, 967 (1997) ("Our affirmance of Cullen's conviction moots the prosecution's points on cross-appeal. However, this court has long recognized the exception to the mootness doctrine that arises with respect to matters affecting the public interest." (Citations omitted.)). None of these cases contained the "capable of repetition, yet evading review" language.

****202 *59** The evading review exception was first expressly stated in this jurisdiction in Life of the Land v. Burns, 59 Haw. 244, 580 P.2d 405 (1978). In that case, this court initially referred to the public interest exception, quoting *Johnston,* then related that there was a "similar" exception described as "capable of repetition, yet evading review":

> A *similar* view was stated in Valentino v. Howlett, 528 F.2d 975[,] 979-980 (7th Cir.1976):
>
> > There is an exception to this precept, however, that occurs in cases involving a legal issue which is capable of repetition yet evading review. *The phrase, "capable of repetition, yet evading review," means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because of the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit.*
>
> *Id.* at 251, 580 P.2d at 409-10 (emphases added).

While the evading review language has been applied without discussion of a public interest exception, *see* In re Application of Thomas, 73 Haw. 223, 227, 832 P.2d 253, 255 (1992); Ariyoshi v. Hawai'i Pub. Employment Relations Bd., 5 Haw.App. 533, 535 n. 3, 704 P.2d 917, 921 n. 3 (1985), several cases have either treated the public interest exception as part of the "capable of repetition" exception or have not clarified a distinction between the two. *See* Okada Trucking v. Board of Water Supply, 99 Hawai'i 191, 196, 53 P.3d 799, 804 (2002) ("[W]e have repeatedly recognized an exception to the mootness doctrine in cases involving questions that affect the public interest and are 'capable of repetition yet evading review.' " (Citations omitted.)); Carl Corp. v. State, 93 Hawai'i 155, 165, 997 P.2d 567, 577 (2000) (outlining the "capable of repetition exception," then stating that "the present case clearly involves matters of public concern"); McCabe Hamilton & Renny Co. v. Chung, 98 Hawai'i 107, 120, 43 P.3d 244, 257 (App.2002) ("In sum, we believe that this is not the exceptional situation, affecting the public interest, that is capable of repetition, yet evading review." (Internal quotation marks and citations omitted.)). Also, the public interest language has been utilized without reference to the evading review phrase. *See* Kona Old Hawaiian Trails, 69 Haw. at 87, 734 P.2d at 165; Cullen, 86 Hawai'i at 13, 946 P.2d at 967.

III.

A.

Despite this jurisdiction's apparent merger of the two exceptions, other jurisdictions continue to recognize the exceptions as separate and distinct. Thus, courts recognize the public interest test as a separate exception to the general rule regarding mootness. *See, e.g.,* State v. Roman, 2002 WL 1974061, *5 (Me.Super.Ct. Aug. 1, 2002) ("The Law Court ... has recognized *three* exceptions to mootness where a defendant has already been released from custody: (1) where collateral consequences will result; (2) where questions of great public interest may be addressed; and (3) where the issues are capable of repetition yet escape appellate review." (Emphasis added.) (Citations omitted.)); Shah v. Richland Mem'l Hosp., 350 S.C. 139, 564 S.E.2d 681, 687 (S.C.Ct.App.2002) (explaining that, in civil cases, three exceptions may apply to the mootness doctrine, and listing them as issues that are "capable of repetition yet evading review[,]""questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest[,]" and "decision[s] by the trial court [which] may affect future events, or have collateral consequences for the parties" (citation omitted)); Fraternal Order of Police v. City of Philadelphia, 789 A.2d 858, 860 (Pa.Commw.Ct.2002) ("Exceptions are made, however, where the conduct complained of is capable of repetition yet likely to

evade review, where the case involves issues important to the public interest *or* where a party will suffer some detriment without the court's decision." (Emphasis added.) (Citation omitted.)); *DeCoteau v. Nodak Mut. Ins. Co.*, 636 N.W.2d 432, 437 (N.D.2001) ("Issues characterized as moot may nonetheless be decided by this Court if the controversy is capable of repetition, yet evading review, *or* if the controversy is one of great ****203 *60** public interest and involves the power and authority of public officials." (Emphasis added.) (Citation omitted.)); *In re Brooks*, 143 N.C.App. 601, 548 S.E.2d 748, 751 (2001) (reporting that five exceptions to mootness have been recognized by the North Carolina appellate courts, and listing two of them as the " 'capable of repetition yet evading review' exception" and the "public interest exception" (citations omitted)).

B.

On the other hand, in applying the evading review exception, courts in general require only two elements: "[(1)] the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and [(2)] there was a reasonable expectation that the same complaining party would be subject to the same action again." C. Wright, *Law of Federal Courts* § 12 (4th ed.1983) (citing *Murphy v. Hunt*, 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982); *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975)); *see also Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *State v. Fernald*, 168 Vt. 620, 723 A.2d 1145, 1146 (1998) (noting the two elements); *Matter of Woodruff*, 567 N.W.2d 226, 228 (S.D.1997) (expressing the two elements for the "capable of repetition, yet evades review" exception); *Board of Educ. v. City of New Haven*, 221 Conn. 214, 602 A.2d 1018, 1019 (1992) (stating the two elements for "capable of repetition, yet evades review" exception); *see, e.g.*, 5 Am.Jur.2d *Appellate Review* § 646 (2002) (in the absence of a class action, only two elements are required for the evading review exception) and cases cited therein.

IV.

In light of the fact that we are a state court, as to which review of moot cases is restricted only by self-imposed prudential considerations, *see* H. Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L.Rev. 1833, 1861 (2001) [hereinafter *State Courts and the "Passive Virtues"*] (state courts treat mootness as "a principle of judicial restraint" without "constitutional jurisdictional underpinnings [ ]" (citations and footnotes omitted)), I believe it is appropriate that we distinguish between the public interest and the evading review exceptions inasmuch as they encompass different considerations.

I see no reason why our mootness exceptions should be stricter than that controlling in the federal courts, which are expressly limited by the article III "case or controversy" requirement in the United States Constitution. *See Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1318 (7th Cir.1992) ("Under Article III of the Constitution, our jurisdiction extends only to actual cases and controversies. We have no power to adjudicate disputes which are moot." (Citations omitted.)). There is no basis in the Hawai'i State Constitution [FN5] for such an approach, nor, in the interest of substantial justice, should we impose such prudential restraints upon this court. *See* Hershkoff, *State Courts and the "Passive Virtues"*, *supra*, at 1837 ("State courts more typically find it their duty to resolve constitutional questions that federal courts would consider moot, elaborating constitutional norms as 'a matter of public interest' on the view that the other branches will benefit from receiving 'authoritative adjudication for further guidance.' " (Citations and footnotes omitted.)); *Carroll County Ethics Comm'n*, 119 Md.App. 49, 703 A.2d 1338, 1342 (Md.Ct.Spec.App.1998) ("Unlike the Article III constitutional constraints on the federal courts ... our mootness doctrine is based entirely on prudential considerations. As a result, we may decide a case, even though it is moot, where there is an imperative and manifest ****204 *61** urgency to establish a rule of future conduct in matters of important public concern[.]" (Citations omitted.)). In my view, both exceptions apply in the instant case.

FN5. For instance, the most relevant section of article VI states:

Judicial Power

Section 1. The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit

> courts, district courts and in such other courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules.
>
> Haw. Const. art. VI, § 1 (1993) (boldfaced font in original).

V.

A.

To reiterate, a public interest exception implicates a three-pronged test requiring that: (1) there is a public interest at stake, (2) determination of the matter would assist public officers in the future, and (3) the question is likely to recur. Undoubtedly, the public interest is involved in this case. During oral argument, Plaintiffs' counsel explained that the plaintiffs in this case are four unions representing 48,000 workers. As Plaintiffs report in their Opening Brief, "over a period of nearly thirty years[,] employee representatives and their employer counter parts [sic] in the executive branch have freely engaged in bargaining over wages, hours, and other terms and condition of employment[.]"

This court has said that collective bargaining affects the public interest, inasmuch as "good faith bargaining or negotiation is fundamental in bringing to fruition the legislatively declared policy 'to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government.' " *Board of Educ. v. Hawai'i Pub. Employees Rel. Bd.*, 56 Haw. 85, 87, 528 P.2d 809, 811 (1974). The "legislatively declared policy" outlined in HRS § 89-1 (1993), the statement of findings and policy regarding collective bargaining in public employment, includes the legislature's judgment that "government is made more effective" if "public employees have been granted the right to share in the decision-making process affecting wages and working conditions[.]" Disruption of government services caused by collective bargaining disputes can have a substantial impact on the public in general. Between 1990 and 2000, there were approximately twenty work stoppages in this state, totaling more than 235,771 days of lost work and services. *See The State of Hawai'i Data Book 2000: A Statistical Abstract* 415 (2001). Plainly, the issues in this case affect significant public interests.

Second, in this context, it is eminently desirable that authoritative guidance be established for the benefit of public officers. First, as stated *infra,* counsel for the State urged this court to define the legislature's power in limiting the right to collectively bargain. The executive branch, which engages in bargaining with public worker unions,[FN6] as well as the chief negotiator for the state,[FN7] would obviously profit from instructions by this court as to the parameters of the law. Similarly, the labor relations board, vested with the power to resolve labor disputes, *see*HRS § 89-5 (Supp.2001), and the legislature, which must approve or reject cost items in collective bargaining agreements, *see*HRS § 89-10 (1993), would gain from the direction provided by this court.

> FN6. HRS § 89-9(a) (Supp.2001), outlining the scope of negotiations between public employees and the government, states that "[t]he employer and the exclusive representative shall meet at reasonable times ... and shall negotiate in good faith[.]" For purposes of the Collective Bargaining in Public Employment Act, "employer" includes
>
> > [t]he governor in the case of the State, the respective mayors in the case of the city and county of Honolulu and the counties of Hawai'i, Maui, and Kauai, the board of education in the case of the department of education, and the board of regents in the case of the University of Hawai'i, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the governor shall be the employer for the purposes of this chapter.
>
> HRS § 89-2 (1993).
>
> FN7. HRS § 89A-1 (Supp.2001) established the "office of collective bargaining and managed competition" and the position of chief negotiator, both of which assist the governor in collective bargaining policy.

See HRS § 89A-1(a)-(c).

Thirdly, as discussed *infra,* it reasonably can be said that the issues raised are likely to reoccur. Limitations on collective bargaining as exemplified by Section 2 are potentially raised whenever fiscal crises arise in state and county government. *Cf. Schulz v. Silver,* 212 A.D.2d 293, 294, 295 n. 1, 629 N.Y.S.2d 316 (N.Y.1995) (explaining that "this litigation has its genesis in the recurring failure of the Legislature to adopt a ****205 *62** budget on or before April 1, the commencement of the State's fiscal year" and determining that, "[t]o the extent that it could be asserted that the passage of the State budget has rendered this matter moot, we find, under the circumstances present here, that an exception to the mootness doctrine would lie" (citation omitted)); *New Haven v. State Bd. of Educ.,* 228 Conn. 699, 638 A.2d 589, 591 n. 2 (1994) (in case where question was whether a town met statutory minimum expenditure requirements in its appropriation of funds to board of education, holding that the issue was not moot, despite town's compliance with injunction order, because it was "apt to evade review because it involves an annual budget"). The fact that this state has been in intermittent financial crises since the 1990's is not a matter that escapes judicial notice. In the nature of things, it is unreasonable to conclude that questions concerning the collective bargaining process and limitations on, or the deferral of, government expenditures would not appear again.

B.

That the issues raised in the instant case are likely to reoccur was the unanimous position of the parties. All parties to this suit at oral argument maintained that this case is not moot, inasmuch as these issues will arise in the future.[FN8] *Cf. Philipsburg-Osceola Educ. Ass'n by Porter v. Philipsburg-Osceola Area Sch. Dist.,* 159 Pa.Cmwlth. 124, 633 A.2d 220, 222 n. 5 (1993) (explaining that, while issue on appeal was arguably moot, appellate court would not dismiss case as moot, in part because "neither party has raised the issue of mootness and we did not have the opportunity to present the issue to them; although this case was originally to be heard at oral argument, the parties chose instead to submit it on briefs"). For example, Plaintiffs' counsel maintained that the controversy "by its very nature" is likely to re-emerge in the future, and that this court must take the opportunity to declare the rights of public employees to collectively bargain.

> FN8. In this case, we had the invaluable benefit of oral argument. As stated in *Blair v. Harris,* 98 Hawai'i 176, 45 P.3d 798 (2002),
>
> > [i]n deciding cases such as this one, the benefit of oral argument is evident. "Oral arguments can assist judges in understanding issues, facts, and arguments of the parties, thereby helping judges decide cases appropriately." (Quoting R.J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom,* 72 Iowa L.Rev. 1, 4 (1986)).... A dialogue among the members of the court and counsel, which is the essence of oral argument, enlivens the written briefs, heightens our awareness of what is significant to the parties, and invigorates our analytical senses.
> >
> > ....
> >
> > ... It has been observed that "the principal purpose of the argument before the [United States Supreme Court] Justices is ... to communicate to the country that the Court has given each side an open opportunity to be heard [and, t]hus[,] not only is justice done, but it is publicly seen to be done." B. Schwartz & J.A. Thomson, *Inside the Supreme Court: A Sanctum Sanctorium,* 66 Miss. L.J. 177, 196 (1996). This consideration-that justice should always be seen to be done-is applicable to all appellate courts. It is our duty as the court of last resort in this state to foster and maintain this hallmark of American judicial process.
>
> *Id.* at 187, 45 P.3d at 809 (Acoba, J., dissenting in part and concurring in part) (some brackets in original.)

Counsel for the State was asked whether it was in the State's interest for this case to be ruled moot. He answered, "No," and, like Plaintiffs' counsel, urged

that this court define the legislature's power with respect to collective bargaining rights. Citing a pending circuit court case, he argued that "this issue arises often[.]" The State's counsel asserted that the questions surrounding collective bargaining rights "will come up again and again and it will never be resolved." Finally, counsel for the mayor of Kaua'i county agreed that the instant issues are subjects of public interest likely to return in the future.

VI.

Indeed, nearly all of the public employee unions in this state, the governor, and the mayors of each county are parties to this suit and have already extensively briefed and argued this case before the circuit court. The circuit court entertained eighteen motions filed by the parties and held hearings therefor. It has issued fifty-seven extensive findings**206 *63 of fact and nineteen lengthy conclusions of law totaling twenty-two pages. All issues have been thoroughly briefed to this court in fourteen written briefs totaling 349 pages. Oral argument has been had before this court.

Moreover, the issues to be decided are questions of law, which (1) constitute subject matter plainly and particularly within the province and competence of this court, and (2) as the court of last resort in this state, we are responsible to decide. What we have here is not a depletion of scarce resources, but what would be a waste of substantial time and resources already expended by the parties and the judiciary were this case held to be moot. Plainly, this case falls within the public interest exception to the mootness doctrine.

VII.

A.

This case also fulfills the requirements of the "capable of repetition yet evading review" formulation, as that test was recently expounded by this court. As was clarified in *Okada Trucking,* this test does not demand certainty, but only the *likelihood* that "similar questions" arising in the future would become moot:

> [T]he exception to the mootness requirement does not require absolute certainty that the issue will evade review; *all that is required is that "it is likely in the nature of things that similar questions arising in the future would likewise become moot* before a needed authoritative determination by the appellate court can be made."

Okada Trucking, 99 Hawai'i at 198 n. 8, 53 P.3d at 806 n. 8 (emphasis and brackets omitted) (emphasis added) (quoting *Johnston,* 50 Haw. at 381, 441 P.2d at 140).

Undoubtedly, the legal questions are "capable of repetition." Other jurisdictions have determined, in various circumstances, that questions related to employee-union relations qualify under this exception. *See Central Dauphin Educ. Ass'n v. Central Dauphin School Dist.*, 792 A.2d 691, 701 n. 11 (Pa.Cmwlth.2001) (characterizing as "capable of repetition yet likely to evade review[,]" appeal from an injunction which required school district to employ teachers in compliance with an expired collective bargaining agreement, despite fact that subsequently, new agreement was ratified); *Goodson v. State,* 228 Conn. 106, 635 A.2d 285, 289 (1993) ("[W]e conclude that the question of whether a trial court may reinstate a discharged state employee pending the operation of a contractual grievance procedure is a fundamental labor relations issue likely to arise again, yet apt to evade review."); *Hartford Principals' & Supervisors' Assn. v. Shedd,* 202 Conn. 492, 522 A.2d 264, 265 (1987) (where question was whether mediation is available to resolve contractual dispute between employer and employee arising during existing contract, such question is "capable of repetition" and not moot, even though collective bargaining agreements expired prior to appeal).

B.

The issues raised in this case are also *likely* to evade review. In *Okada Trucking,* we applied the evading review exception where the question was whether a city procurement contract violated the Hawai'i Public Procurement Code, even though the contract granted had already been completed. We explained that the history of the case illustrated how "the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit." *Okada*

Trucking, 99 Hawai'i at 197, 53 P.3d at 805 (internal quotation marks and citation omitted). In the instant case, as in *Okada Trucking*, "the passage of time" has "prevent[ed] ... [P]laintiff[s] from remaining subject to the restriction complained of for the period necessary to complete the lawsuit." *Id.* It has been over three years since the legislature passed the legislation at issue, three years since the suit was filed, and more than two years since the order was entered, and the parties remain without an "authoritative judicial decision regarding the important legal questions raised ... in [this] appeal." *Id.* For the foregoing reasons, the "capable ****207 *64** of repetition, yet evading review" exception also applies.

Hawai'i,2002.
United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi
101 Hawai'i 46, 62 P.3d 189

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183 F.3d 1096, 161 L.R.R.M. (BNA) 2977, 137 Ed. Law Rep. 77, 99 Cal. Daily Op. Serv. 5621, 1999 Daily Journal D.A.R. 7175
(Cite as: 183 F.3d 1096)

United States Court of Appeals,
Ninth Circuit.
UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY; Alexander Malahoff; Linda Currivan; Diane Ferreira; Hugh Folk; Vincent Linares; and David Miller, Plaintiffs-Appellees,
v.
Benjamin J. CAYETANO, in his capacity as Governor of the State of Hawaii, and Sam Callejo, in his capacity as Comptroller of the State of Hawaii, Defendants-Appellants.
No. 98-16148.

Argued and Submitted Jan. 15, 1999.
Filed July 14, 1999.

Union representing faculty at state university sued state, seeking preliminary injunction preventing implementation of delays in issuance of paychecks, pursuant to statutory scheme designed to convert payroll payment basis from predicted payroll to after-the-fact payroll. The United States District Court for the District of Hawai'i, Alan C. Kay, J., 16 F.Supp.2d 1242, granted preliminary injunction. State appealed. The Court of Appeals, Silverman, Circuit Judge, held that: (1) statute represented substantial impairment of parties' collective bargaining agreement (CBA), for Contracts Clause purposes; (2) state failed to demonstrate that statute delaying issuance of payroll checks was reasonable and necessary to fulfill an important public purpose in light of Hawaii's budgetary crisis; and (3) district court did not abuse its discretion in granting preliminary injunction.

Affirmed.

West Headnotes

[1] Federal Courts 170B 815

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk814 Injunction
170Bk815 k. Preliminary Injunction; Temporary Restraining Order. Most Cited Cases
Grant of preliminary injunction will be reversed only where district court abused its discretion and based its decision on erroneous legal standard or on clearly erroneous findings of fact.

[2] Injunction 212 138.21

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.21 k. Likelihood of Success, or Presence of Substantial Questions, Combined with Other Elements. Most Cited Cases
District court will grant motion for preliminary injunction if party demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor; these are not two tests, but rather the opposite ends of a single continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.

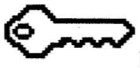
[3] Constitutional Law 92 2689

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities

92XXII(B)1 In General
92k2689 k. Contracts with States in General. Most Cited Cases
(Formerly 92k121(1))
Federal cause of action is stated under Contract Clause when one alleges that he or she has a contract with the state, which the state, through its legislative authority, has attempted to impair. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[4] Labor and Employment 231H  **1279**

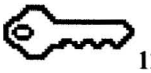
231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1279 k. Wages and Hours. Most Cited Cases
(Formerly 232Ak257.1 Labor Relations)
Timing of payment was part of state university faculty union's collective bargaining agreement (CBA), even in absence of any explicit terms in CBA regarding specific pay days, especially given 25-year course of dealing under which it was understood that state employees would be paid on the fifteenth and last days of every month. HRS § 89-9(a).

[5] Labor and Employment 231H  **1128**

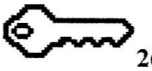
231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1123 Particular Subjects of Bargaining
231Hk1128 k. Wages and Hours. Most Cited Cases
(Formerly 232Ak178 Labor Relations)
Under Hawai'i labor statute, wages are a mandatory subject for good faith negotiation, and by implication, so also is the time for payment of wages. HRS § 89-9(a)

[6] Labor and Employment 231H  **1272**

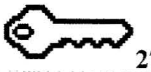
231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1272 k. Language of Agreement. Most Cited Cases
(Formerly 232Ak257.1 Labor Relations)

Labor and Employment 231H  **1273**

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1273 k. Negotiations; Extrinsic Circumstances. Most Cited Cases
(Formerly 232Ak257.1 Labor Relations)
In construing collective bargaining agreement (CBA), not only the language of the agreement is considered, but also past interpretations and past practices are probative.

[7] Constitutional Law 92  **2687**

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)1 In General
92k2687 k. Existence and Extent of Impairment. Most Cited Cases
(Formerly 92k121(1))
Whether a change in law impairs contractual relationship, for Contracts Clause purposes, turns on whether the State has used its law-making powers not merely to breach its contractual obligations, but to create a defense to the breach that prevents the recovery of damages. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[8] Constitutional Law 92  **2723**

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)2 Particular Issues and Applications

92k2721 Public Employees and Officials
92k2723 k. Compensation. Most Cited Cases
(Formerly 92k140(1))

Labor and Employment 231H 1265

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1252 Validity or Propriety
231Hk1265 k. Public Employment. Most Cited Cases
(Formerly 232Ak249 Labor Relations)

States 360 64(1)

360 States
360II Government and Officers
360k56 Compensation of Officers, Agents and Employees
360k64 Allowance, Payment and Collection
360k64(1) k. In General. Most Cited Cases
Amendment to Hawai'i statute governing timing of payroll checks to state employees, providing for increasing delays in issuance of paychecks over one-year period in order to convert from predicted to after-the-fact payroll system, was impairment of collective bargaining agreement (CBA) between state university and its faculty, for Contracts Clause purposes, since statute both adversely affected employees' contractual expectations and prevented any effective remedy; there was no suit in court for breach of labor agreement under Hawai'i law, and statute provided that pay lag was nonnegotiable, thereby precluding state labor board from invalidating it. U.S.C.A. Const. Art. 1, § 10, cl. 1; HRS § 78-13.

[9] Constitutional Law 92 2723

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)2 Particular Issues and Applications
92k2721 Public Employees and Officials
92k2723 k. Compensation. Most Cited Cases
(Formerly 92k140(1))

Labor and Employment 231H 1265

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1252 Validity or Propriety
231Hk1265 k. Public Employment. Most Cited Cases
(Formerly 232Ak249 Labor Relations)

States 360 64(1)

360 States
360II Government and Officers
360k56 Compensation of Officers, Agents and Employees
360k64 Allowance, Payment and Collection
360k64(1) k. In General. Most Cited Cases
Impairment of collective bargaining agreement (CBA) between state university and its faculty, resulting from Hawai'i statute providing for increasing delays in issuance of state paychecks over one-year period in order to convert from predicted to after-the-fact payroll system, was substantial, as required to establish Contracts Clause violation, since employees were wage earners, not volunteers, they had various financial responsibilities, and even brief delay in getting paid could cause financial embarrassment and displacement of varying degrees of magnitude. U.S.C.A. Const. Art. 1, § 10, cl. 1; HRS § 78-13.

[10] Constitutional Law 92 2722

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)2 Particular Issues and Applications
92k2721 Public Employees and Officials
92k2722 k. In General. Most Cited Cases
(Formerly 92k140(1))

Labor and Employment 231H 1265

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1252 Validity or Propriety
231Hk1265 k. Public Employment. Most Cited Cases
(Formerly 232Ak249 Labor Relations)

States 360 53

360 States
360II Government and Officers
360k53 k. Appointment or Employment and Tenure of Agents and Employees in General. Most Cited Cases
In reviewing state employees' Contracts Clause claim, court was required to determine whether substantial impairment of collective bargaining agreement (CBA) was both reasonable and necessary to fulfill an important public purpose, such that the impairment was justifiable. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[11] Constitutional Law 92 2722

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)2 Particular Issues and Applications
92k2721 Public Employees and Officials
92k2722 k. In General. Most Cited Cases
(Formerly 92k140(1))
As defendants in state employees' Contracts Clause action challenging state statute resulting in impairment of collective bargaining agreement (CBA), State officials bore burden of proving that the impairment was reasonable and necessary. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[12] Constitutional Law 92 2723

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)2 Particular Issues and Applications
92k2721 Public Employees and Officials
92k2723 k. Compensation. Most Cited Cases
(Formerly 92k140(1))

Labor and Employment 231H 1265

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1252 Validity or Propriety
231Hk1265 k. Public Employment. Most Cited Cases
(Formerly 232Ak249 Labor Relations)

States 360 64(1)

360 States
360II Government and Officers
360k56 Compensation of Officers, Agents and Employees
360k64 Allowance, Payment and Collection
360k64(1) k. In General. Most Cited Cases
State failed to demonstrate that Hawai'i statute

delaying issuance of payroll checks, which impaired collective bargaining agreement (CBA) between state university and its faculty, was reasonable and necessary to fulfill an important public purpose in light of Hawaii's budgetary crisis, as required to survive Contracts Clause challenge, since there were other ways of dealing with budget crisis, such as raising taxes, and state knew of budgetary crisis when CBA was negotiated, and previously had attempted to implement a similar pay lag plan. U.S.C.A. Const. Art. 1, § 10, cl. 1; HRS § 78-13.

[13] Constitutional Law 92 2671

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2671 k. Existence and Extent of Impairment. Most Cited Cases
(Formerly 92k115)

Constitutional Law 92 2672

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2672 k. Police Power; Purpose of Regulation. Most Cited Cases
(Formerly 92k115)

To determine reasonableness of a contractual impairment, for Contracts Clause purposes, court looks at extent of the impairment as well as public purpose to be served, and, on review, court balances the contractual rights of the individual against the essential attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[14] Constitutional Law 92 2680

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)1 In General
92k2680 k. In General. Most Cited Cases
(Formerly 92k121(2))

Constitutional Law 92 2689

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)1 In General
92k2689 k. Contracts with States in General. Most Cited Cases
(Formerly 92k121(1))

A contractual impairment may not be considered necessary, for Contracts Clause purposes, if there is an evident and more moderate course of action that would serve defendants' purposes equally well, since Contract Clause limits ability of a State, or subdivision of a State, to abridge its contractual obligations without first pursuing other alternatives. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[15] Constitutional Law 92 2689

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)1 In General
92k2689 k. Contracts with States in General. Most Cited Cases
(Formerly 92k121(1))

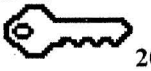
Courts are less deferential to a state's judgment of reasonableness and necessity when a state's legislation is self-serving and impairs obligations of its own contracts. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[16] Constitutional Law 92 2671

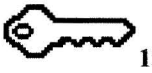
92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2671 k. Existence and Extent of Impairment. Most Cited Cases
(Formerly 92k115)

A contractual impairment is not a reasonable one, for

Contract Clause purposes, if the problem sought to be resolved by an impairment of the contract existed at the time the contractual obligation was incurred. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[17] Labor and Employment 231H  **2021**

231H Labor and Employment
231HXII Labor Relations
231HXII(L) Injunction
231HXII(L)1 In General
231Hk2021 k. Nature and Grounds of Relief in General. Most Cited Cases
(Formerly 232Ak805.1 Labor Relations)
Upon showing that Hawai'i statute providing for delays in issuance of state paychecks over one-year period impaired collective bargaining agreement (CBA) between state university and its faculty, faculty were entitled to preliminary injunction preventing operation of statute, since faculty met their burden of showing that, if pay lag was implemented, they likely would suffer irreparable harm and that damages, even if available, would not adequately compensate faculty for hardships caused by delay in the receipt of pay, balance of hardships tipped in favor of faculty, and there were equally important public interests at stake on both sides. U.S.C.A. Const. Art. 1, § 10, cl. 1; HRS § 78-13.

[18] Injunction 212  **138.15**

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.15 k. Balancing Hardships or Equities. Most Cited Cases
To determine which way the balance of hardships tips, court must identify possible harm caused by preliminary injunction against possibility of the harm caused by not issuing it.
***1099** Gary Hynds, Deputy Attorney General, Honolulu, Hawaii, for the defendants-appellants.

T. Anthony Gill, Gill & Zukeran, Honolulu, Hawaii, for the plaintiffs-appellees.

Appeal from the United States District Court for the District of Hawai'i; Alan C. Kay, District Judge, Presiding. D.C. No. CV-98-00165-ACK.

Before: WIGGINS, TASHIMA, and SILVERMAN, Circuit Judges.

SILVERMAN, Circuit Judge:

This case involves a challenge by employees of the State of Hawaii to Act 355, the State's "pay lag" law. Act 355 would allow the State to postpone by a few days, at six different times, the dates on which state employees are to be paid. It also declares those postponements to be "not subject to negotiation." The district court granted a preliminary injunction against the operation of this statute on the ground that it impaired the obligations of the employees' collective bargaining agreement in violation of the Contract Clause of the United States Constitution. We agree with the district court's reasoning and affirm.

BACKGROUND

The predecessor to Act 355 was Act 80 (Session Laws of Hawaii 1996). Enacted in 1996, Act 80 gave Hawaii's governor the power to convert from a "predicted payroll" to an "after-the-fact payroll." A predicted payroll requires state agencies to assume or predict their employees' rate of absenteeism during an entire pay cycle. An after-the-fact payroll system pays employees only for time already worked, eliminating the overpayment problem. The problem with a predicted payroll is that if employees failed to report to work and had insufficient leave to draw against, overpayment results. The changeover from a predicted to an after-the-fact payroll system was to have been accomplished, according to the statute, by implementing "a one-time once a month payroll payment ... to effect [the] conversion...."

Before Act 80's enactment, Hawaii Revised Statutes ("HRS") § 78-13 provided that state employees were to be paid "at least semi-monthly." It is undisputed that for over twenty-five years it had been the custom and practice of the State to pay its employees on the fifteenth day and the last day of each month.

In response to Act 80, two unions, the Hawaii State

Teachers Association ("HSTA") and the University of Hawaii Professional Assembly ("UHPA") filed a prohibited practice complaint with the Hawaii Labor Relations Board. The Unions complained that unilateral implementation of Act 80's pay lag program without first bargaining in good faith constituted a prohibited labor practice under state law. *See*HRS §§ 89-13(a)(5), (6), (7), (8), and 89-9.[FN1]

> FN1. HRS §§ 89-13(a) provides in pertinent part:
>
> > It shall be a prohibited practice for a public employer or its designated representative wilfully to:
> >
> > ...
> >
> > (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
> >
> > (6) Refuse to participate in good faith in mediation, fact-finding, and arbitration procedures set forth in section 89-11;
> >
> > (7) Refuse or fail to comply with any provision of this chapter;
> >
> > (8) Violate the terms of a collective bargaining agreement.
>
> HRS § 89-9(a) provides, in pertinent part:
>
> > The employer and the exclusive representative ... shall negotiate in good faith with respect to wages....

***1100** The Hawaii Labor Board issued Order 1402 on January 17, 1997 finding that the long-standing fifteenth and last-day-of-the-month pay dates were material to the existing collective bargaining agreement. Order 1402 directed the State to cease and desist from implementing any pay lag without first negotiating with the unions. The State appealed Order 1402 to the state court, which reversed the order of the Labor Board. The state court reasoned that Order 1402 was not supported by the evidence and remanded the matter to the Labor Board for further proceedings. In any event, the State never implemented Act 80.

Meanwhile, the previous collective bargaining agreement between UHPA and the State expired. Negotiations over a new collective bargaining agreement were not proceeding well and by the end of 1996, the faculty members voted to strike if an agreement were not reached. UHPA wanted to bargain over the issue of any change in pay dates, but the State declined. Nevertheless, UHPA and the State entered into a new collective bargaining agreement on January 27, 1997. It was retroactive to July 1, 1995 and effective until June 30, 1999. Although the new collective bargaining agreement contained no provision regarding specific pay dates, it is undisputed that at that time, state employees were still being paid on the fifteenth and last days of the month.

Despite the fate of Act 80, on July 3, 1997, the Hawaii legislature enacted Act 355 (Session Laws of Hawaii 1997).[FN2] Act 355 does two main things. First, it authorizes a total of six pay lags, of between one and three days duration, aimed at implementing a conversion from a predicted to an after-the-fact payroll system. Second, it specifically excludes the subject of the pay lag from collective bargaining. It states: "The implementation of the after-the-fact payroll shall not be subject to negotiation under chapter 89."

> FN2. Act 355 amended HRS § 78-13 to provide:
>
> > Unless otherwise provided by law, all officers and employees shall be paid at least semi-monthly except that substitute teachers, part-time hourly rated teachers of adult and evening classes, and other part-time, intermittent, or casual employees may be paid once a month and that the governor, upon reasonable notice and upon determination that the payroll payment basis should be converted from predicted payroll to after-the-fact payroll, may allow a one-time once a month payroll payment to all public officers and employees to effect a conversion to after-the-fact payroll as follows:

> (1) the implementation of the after-the-fact payroll will commence with the June 30, 1998, pay day, which will be delayed to July 1, 1998;
>
> (2) The July 15, 1998, pay day will be delayed to July 17, 1998;
>
> (3) The July 31, 1998 pay day will be delayed to August 3, 1998;
>
> (4) The August 14, 1998 pay day will be delayed to August 19, 1998;
>
> (5) The August 31, 1998 pay day will be delayed to September 4, 1998;
>
> (6) The September 15, 1998 pay day will be delayed to September 18, 1998; and
>
> (7) Thereafter, pay days will be on the fifth and the twentieth of every month. If the fifth and the twentieth fall on a state holiday, Saturday, or Sunday, the pay day will be the immediately preceding weekday. The implementation of the after-the-fact payroll shall not be subject to negotiation under chapter 89.

Defendants touted that the pay lags would create a savings of approximately $51 million for the State by rolling over salaries to the next fiscal year and by reducing inadvertent salary overpayments.

Plaintiffs are individually named University of Hawaii faculty members and their union, the University of Hawaii Professional Assembly. On February 23, 1998, Plaintiffs filed the underlying complaint against Defendants for declaratory and ***1101** prospective injunctive relief seeking to enjoin the implementation of Act 355. Plaintiffs alleged that Act 355 constituted an impairment of their collective bargaining agreement in violation of the Contract Clause, Art. I, § 10 of the United States Constitution.

On June 16, 1998, the district court granted UHPA's motion for preliminary injunction. The court found that Plaintiffs had shown a likelihood of success on the merits, that the possibility of irreparable harm existed, and that the balance of hardships tipped in their favor.

Defendants appealed, moving for a stay of the preliminary injunction pending appeal under Rule 62, Fed.R.Civ.P., which the district court denied. Defendants then moved this court to stay the preliminary injunction, which we denied, also. This appeal ensued.

STANDARD OF REVIEW

[1] "The grant of a preliminary injunction will be reversed only where the district court abused its discretion and based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *FDIC v. Garner*, 125 F.3d 1272, 1276 (9th Cir.), *cert. denied*, 523 U.S. 1020, 118 S.Ct. 1299, 140 L.Ed.2d 466 (1998). A finding of fact is clearly erroneous when after weighing the entire evidence, the reviewing court is left with "the definite and firm conviction that a mistake has been committed." *Zepeda v. INS*, 753 F.2d 719, 724 (9th Cir.1985) (internal citations and quotation marks omitted).

[2] A district court will grant a motion for a preliminary injunction if a party demonstrates either "1) a combination of probable success on the merits and the possibility of irreparable injury, or 2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor." *Garner*, 125 F.3d at 1276. "These are not two tests, but rather the opposite ends of a single continuum in which the required showing of harm varies inversely with the required showing of meritoriousness." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir.1988) (internal citation and quotation marks omitted).

DISCUSSION

I Likelihood of Success on the Merits

Article I, § 10, of the Constitution provides: "No State shall ... pass any ... Law impairing the Obligation of Contracts."

[3] "A federal cause of action is stated under the contract clause when one alleges that he or she has a contract with the state, which the state, through its legislative authority, has attempted to impair." *E & E*

Hauling, Inc. v. Forest Preserve District of Du Page County, 613 F.2d 675, 678 (7th Cir.1980). Plaintiffs claim that Act 355 substantially impairs the obligation of the collective bargaining agreement with the State because it not only changes the employees' pay dates, but removes the whole subject from the bargaining table in violation of Hawaii's labor law. The State, however, argues that although Act 355 arguably might have impaired the performance of the collective bargaining agreement under a breach of contract theory, any obligation under the contract was not impaired.

Our analysis begins with a determination of whether Act 355 "operated as a substantial impairment of a contractual relationship." *General Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992), (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). In other words, we must address whether the State, through its legislative authority, enacted Act 355 to impair its contract with Plaintiffs. The Supreme Court has stated that "[t]his inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment***1102** is substantial." *Seltzer v. Cochrane*, 104 F.3d 234, 236 (9th Cir.1996) (*quoting General Motors Corp.*, 503 U.S. at 181, 112 S.Ct. 1105).

A. The Contractual Relationship

[4] The first component to be addressed is whether a contractual relationship existed between Plaintiffs and the State. It is undisputed that the collective bargaining agreement is the contractual relationship between Plaintiffs and the State, and that the collective bargaining agreement makes no specific mention of the dates on which Plaintiffs are to be paid. Plaintiffs contend that Act 355 unconstitutionally impairs *implicit* terms of the collective bargaining agreement. Defendants argue that a promise to pay on the fifteenth and last days of the month was not part of the agreement, implicitly or otherwise.[FN3]

FN3. The parties do not argue whether HRS section 89, the statute creating Hawaii's public employee labor system, itself is a contract that was unconstitutionally impaired. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). Therefore, we do not address this issue.

We agree with the district court that even in the absence of any explicit terms in the collective bargaining agreement regarding specific pay days, "[i]t is likely that the timing of the payment of each paycheck is included in the collective bargaining agreement." For over twenty-five years, the State and its employees had a course of dealing under which it was understood that employees would be paid on the fifteenth and last days of every month. A course of dealing can create a contractual expectation. *See Stewart v. Brennan*, 7 Haw.App. 136, 748 P.2d 816, 821 (Haw.Ct.App.1988).

[5] We also agree with the district judge that the pay dates were material to the terms of employment and, at the time the collective bargaining agreement was negotiated, the timing of the payroll was a negotiable matter. Under HRS § 89-9(a), wages are a mandatory subject for good faith negotiation, and by implication, so also is the time for payment of wages. In *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962), the Supreme Court held that employers may not unilaterally implement changes on bargainable topics.[FN4]

FN4. See *also In the Matter of Hawaii Government Employees Association, Local 152, HGEA/AFSCME, AFL-CIO and George R. Ariyoshi, Governor, et al.*, Decision 63, I HPERB 570 (1975) (Unilateral implementation of seven-day work schedule for Hawaii State Public Libraries is prohibited practice due to Employer's failure to negotiate over staffing).

[6] The district court's ruling is consistent with the law on the interpretation of collective bargaining agreements. In construing a collective bargaining agreement, not only the language of the agreement is considered, but also past interpretations and past practices are probative. *See Gealon v. Keala*, 60 Haw. 513, 591 P.2d 621, 626 (Haw.1979). We consider an employer's past practices because "[t]he

collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). The custom and practice of the State had been to pay its employees on the fifteenth and last days of each month. That was the status quo at the time the collective bargaining agreement was entered into.

We affirm the district court's determination that the timing of payment is part of the collective bargaining agreement.

B. Contract Impairment

[7] The second component of the substantial impairment test turns on whether the State has used its law-making powers not merely to breach its contractual obligations, but to create a defense to the breach that prevents the recovery of damages. As one commentator put it:

> ***1103** [T]he question should be whether the modification that the legislation imposes simply breaches the contract like any other unilateral attempt to modify an agreement, or whether the statute prevents or materially limits the contractor's ability to enforce his contractual rights. For example, legislation impairs a public contract only if it prevents or materially limits the remedies that would be available if the contract were between private parties.

Leo Clarke, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. Miami L.Rev. 183, 234 (1985).

This principle is illustrated in *Horwitz-Matthews, Inc. v. Chicago*, 78 F.3d 1248 (7th Cir.1996). In *Horwitz-Matthews*, a developer sued the City of Chicago under the Contract Clause when the City enacted an ordinance repealing an earlier ordinance that had approved the developer's offer to purchase land and develop it in accordance with the City's plan. *Id.* at 1249.

In analyzing whether an impairment of the Contract Clause had occurred, the Seventh Circuit asked:

> [W]hether Chicago, rather than merely breaking the promise it made to [the developer], set up a defense that prevented the promisee from obtaining damages, or some equivalent remedy for the breach.

Id. at 1251. The court determined that the City's repeal of the ordinance simply breached the contract created by the original ordinance and that the developer could sue for damages. *Id.* Moreover, the repealing ordinance was "not a defense to a suit for breach of contract...." *Id.* at 1252.

By contrast, in *E & E Hauling*, the plaintiff, a waste hauling company, entered into a contract in 1995 with the Forest Preserve District of DuPage County. In the contract, the plaintiff was given the exclusive right to operate and maintain a sanitary landfill at a recreational preserve and to develop ski hills at the preserve using the technique of sanitary landfill. *E & E Hauling*, 613 F.2d at 677. The contract had no restrictions on the material suitable for deposit. The plaintiff and its customers deposited liquids and sludge at the landfill. In 1978, the District adopted an ordinance that prohibited the deposit of liquids; the ordinance was later amended to prohibit the deposit of any liquid or sewage sludge at the landfill. The District stationed armed guards at the landfill to enforce the ordinance by turning away trucks carrying liquid or sewage sludge. *Id.*

The plaintiff argued that the District's actions in enacting the ordinance impaired its contractual obligation in violation of the Contract Clause. It argued that the ordinance "prevented it from performing under the contract or enforcing its rights thereunder" thus impairing the contract. *Id.* at 678-79.

The District, however, argued that its action only impaired the *performance* of the contract for which a damage remedy was available. *Id.* at 679. On appeal, the Seventh Circuit agreed with the plaintiff's argument and held:

> [I]f a state or its subdivision passes a law and through enforcement of it prevents another party from fulfilling its obligation under the contract because the use of the [law] precludes a damage remedy the

> non-breaching party cannot be made whole. Instead, the law has impaired the obligation of the contract. Use of law normally will preclude a recovery of damages because the law will be a defense to a suit seeking damages unless it is clear the law is not to have that effect.

Id. The Seventh Circuit held that the ordinance impaired the contractual rights of the plaintiff because "[i]f the plaintiff sued for damages for a breach of the contract the District could claim that an ordinance prevents it from accepting sludge or liquids. In essence, the ordinance would be a complete defense to a suit for damages." *Id.* at 680.

***1104** The Seventh Circuit in *E & E Hauling* relied on the Eighth Circuit's reasoning in *Jackson Sawmill Co. v. United States*, 580 F.2d 302 (8th Cir.1978), to differentiate between a breach of contract and an impairment of contractual obligations. In *Jackson Sawmill,* the City of East St. Louis, Illinois financed the construction of an expressway extension on a bridge across the Mississippi River through a trust agreement with a trust company that issued bonds to fund the project. Later, the City, State of Missouri, and the federal government decided to build another bridge and the bondholders sued on the grounds that the original bridge's loss of revenue from the competing new bridge impaired its contract.

The Eighth Circuit held that the bondholder's action was not a constitutional contract impairment but an ordinary breach of contract action because "no attempt was made to use the law, federal or state, to repudiate a contractual obligation." *Id.* at 312.

[8] In the case before us, Act 355 not only adversely affects Plaintiffs' contractual expectations, but it slams the door on any effective remedy. Since under Hawaii law there is no suit in court for breach of a labor agreement, HRS §§ 89-13(a)(8), 89-14; [FN5] *see also Lepere v. United Public Workers, Local 646, AFL-CIO*, 77 Hawai'i 471, 887 P.2d 1029, 1032 (Haw.1995), Plaintiffs only other conceivable remedies would be a prohibited practice complaint or binding arbitration. These remedies are more theoretical than real. The "prohibited practice" of which Plaintiffs supposedly could complain is not prohibited at all; it is the law under Act 355. And as the district court noted, Act 355 "provides that this pay lag is not a negotiable matter, thereby precluding the HLRB from invalidating [it]." Likewise, any arbitration award in Plaintiffs' favor would fly in the face of Act 355. It is thus apparent that the State has not merely relieved itself of a contractual obligation, it has eliminated any avenues of redress.

FN5. HRS § 89-13(a)(8) states:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (8) Violate the terms of a collective bargaining agreement.

HRS § 89-14 states:

> Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

C. Substantiality of the Impairment

In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983), the Supreme Court held that an impairment of a contract must be "substantial" for it to violate the Contract Clause.

[9] The district court found that "Act 355's impairment of the collective bargaining agreement is likely to be substantial," because a "pay lag would likely impose a substantial hardship on many employees who would not be able to meet their financial obligations such as mortgage payments in a timely manner."

The district court also based its finding that Act 355 substantially impaired the collective bargaining agreement on a line of cases from other jurisdictions that, with one exception, have "agreed that a unilateral reduction in contractually established, future state employee salary obligations constitutes substantial impairment for Contract Clause purposes." *Massachusetts Community College v. Commonwealth,* 420 Mass. 126, 649 N.E.2d 708, 711 (Mass.1995); *see also* *Condell v. Bress,* 983 F.2d 415 (2d Cir.1993); *Association of Surrogates & Supreme Court Reporters v. New York,* 940 F.2d 766 (2d Cir.1991)***1105** ("*Surrogates I* "); *Association of Surrogates & Supreme Court Reporters v. State,* 79 N.Y.2d 39, 580 N.Y.S.2d 153, 588 N.E.2d 51 (N.Y.1992) ("*Surrogates II* ").[FN6] The Second Circuit has addressed this issue on numerous occasions. In *Surrogates I,* a pay lag statute provided that certain state employees were to be paid nine days' salary for the ten days worked in each pay period for ten two-week periods. 940 F.2d at 772. The two weeks withheld pay would be paid to employees at the termination of their employment with the state. *Id.* The *Surrogates I* court found that the pay lag substantially impaired the collective bargaining agreement between the employees and the state. *Id.*

> FN6. The one exception was the Fourth Circuit's 1993 decision in *Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO v. Mayor and City Council of Baltimore,* 6 F.3d 1012 (4th Cir.1993). In *Baltimore Teachers,* police and teachers brought suit against the City of Baltimore, alleging that salary reductions implemented to meet a budgetary shortfall violated the Contract Clause. The Fourth Circuit reversed the district court and held that the salary reduction plan did not violate the Contract Clause because the city's furlough program was determined to be reasonable and necessary. This decision has been severely criticized. *See* *Massachusetts Community College,* 649 N.E.2d at 714,*(citing* *Baltimore Teachers Union v. Mayor of Baltimore: Does the Contract Clause Have Any Vitality in the Fourth Circuit?,* 72 N.C.L.Rev. 1633, 1644-48 (1994)); *Note, Fourth Circuit Upholds City's Payroll Reduction Plan as a Reasonable and Necessary Impairment of the Public Contract,* 107 Harv.L.Rev. 949, 949 (1994).

When the *Surrogates I* court compared the pay lag's deleterious impact on the employees versus the benefits to be derived by the state, it determined that the pay lag would have a "significant and material impact on the employees' working conditions in creating a financial hardship for the employees." *Id.* The court reasoned:

> The affected employees have surely relied on full paychecks to pay for such essentials as food and housing. Many have undoubtedly committed themselves to personal long-term obligations such as mortgages, credit cards, car payments, and the like-obligations which might go unpaid in the months that the lag payroll has its immediate impact.... Indeed, it would be inconsistent for us to accept the defendants' argument that this impairment was necessary because of a fiscal crisis, and to do so by disregarding the personal fiscal crises that the lag payroll would create.

Id. (citation omitted).

The *Surrogates I* court also considered whether the impairment was "reasonable and necessary to serve an important public purpose." *Id.* at 773. Noting that the Contract Clause "is especially vigilant when a state takes liberties with its own obligations," the Second Circuit held that the impairment was neither reasonable nor necessary in light of alternatives the state could have pursued for the needed funding. *Id.* at 773-74.

Relying on *Surrogates I,* the New York Court of Appeals decided a similar contract impairment issue. *See* *Surrogates II,* 580 N.Y.S.2d 153, 588 N.E.2d at 51 (N.Y.1992). In *Surrogates II,* the State attempted to off-set anticipated budgetary shortfalls by effecting a five-day pay lag for non-judicial employees, through legislative amendments to the state finance law. *Id.* The pay lag was to be implemented by paying employees for nine days, rather than the ten days employees had worked in five bi-weekly pay periods.

The court held that the impairment of contract created by the pay lag was substantial and "not reasonable and necessary to achieve an important public purpose." *Id.* at 54. The court specifically noted that "withholding 10% of an employee's

expected wages each week over a period of ten weeks,"'"is not an insubstantial impairment to one confronted with monthly debt payments and daily expenses for food and the other necessities of life." *Id.* Thus, the Court of Appeals concluded, the "menu of alternatives" open to the State for revenue-raising***1106** or revenue-saving, "does not include impairing contract rights to obtain forced loans to the State from its employees." *Id.*

The Second Circuit again addressed a pay lag statute in *Condell v. Bress,* 983 F.2d 415, 419 (2d Cir.1993). In *Condell,* unions sought injunctive relief after the New York State Legislature enacted a statute that imposed a five-day pay lag on executive branch employees such that the employees would receive only nine-tenths of their salary for each of five bi-weekly pay periods. *Id.* at 417. The lagged pay would not be released until the employee died, retired, or left state employment. Already in place was a collective bargaining agreement that provided that paychecks were computed on the basis of ten working days and a continued two-week pay lag that had been negotiated in the previous agreement. *Id.*

As in the *Surrogates* cases, the *Condell* court hinged its analysis on whether the pay lag was "reasonable and necessary notwithstanding the availability of other alternatives." *Id.* at 419. The court concluded that no justification for the use of a pay lag existed because "[j]ust as in *Surrogates I,* other (albeit unpopular) alternatives existed." *Id.* at 420.

Other jurisdictions also have addressed whether a pay lag and similar proposals unconstitutionally impair an agreement between a state and its employees. In *Opinion of the Justices (Furlough),* 135 N.H.625, 609 A.2d 1204 (N.H.1992), the State of New Hampshire sought to impose a furlough program on state employees that would force them to take non-paid days off. *Id.* at 1206-07. The New Hampshire Supreme Court found that the proposed statute impaired the collective bargaining agreement between the employees and the State because the agreement guaranteed a work week of a certain length and that forcing employees to take unpaid leave violated it. *Id.* at 1209. Relying on *Surrogates I,* the court held that the collective bargaining agreement was substantially impaired because "[i]ts impact would likely wreak havoc on the finances of many of the affected workers." *Id.* at 1210. The court reasoned: "The legislature had many alternatives available to it, including reducing non-contractual state services and raising taxes and fees. Although neither of these choices may be as politically feasible as the furlough program, the State cannot resort to contract violations to solve its financial problems." *Id.* at 1211.

In *Massachusetts Community College,* the Massachusetts Supreme Judicial Court held that in the face of a valid collective bargaining agreement, the State violated the constitutional prohibition against impairing contracts when to meet a budget deficit, it mandated unpaid furloughs (days off) for certain state employees. 649 N.E.2d at 710.

We agree with these cases. Plaintiffs are wage earners, not volunteers. They have bills, child support obligations, mortgage payments, insurance premiums, and other responsibilities. Plaintiffs have the right to rely on the timely receipt of their paychecks. Even a brief delay in getting paid can cause financial embarrassment and displacement of varying degrees of magnitude.

D. Defendant's Justification

1. Impairment-Reasonable and Necessary?

[10][11] We next must determine whether, even if the collective bargaining agreement were substantially impaired, the impairment was "both reasonable and necessary to fulfill an important public purpose," such that the impairment is justifiable. *Seltzer,* 104 F.3d at 236, (*citing Energy Reserves Group,* 459 U.S. at 411-12, 103 S.Ct. 697). Defendants bear the burden of proving that the impairment was reasonable and necessary because "[t]he burden is placed on the party asserting the benefit of the statute only when that party is the state." *Id.; see also Nevada Employees Ass'n. v. Keating,* 903 F.2d 1223, 1228 (9th Cir.1990).

***1107** [12] Defendants claim that the pay lag is reasonable and necessary in light of Hawaii's budgetary crisis. Plaintiffs respond, of course, that it is not, and that the savings anticipated by the State are nothing more than "paper savings" achieved by accounting hocus pocus. They also contend that over a 17-year period, payroll overpayments have been less than $6 per employee annually. The district court

found that Defendants failed to show that the pay lag is reasonable and necessary to fulfill an important public purpose. We agree.

[13] To determine reasonableness, we look at the extent of the impairment as well as the public purpose to be served. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 29, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). On review, we balance "the contractual rights of the individual against the essential attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens." *Surrogates I*, 940 F.2d at 771 (internal citations and quotations omitted).

[14] An impairment may not be considered necessary if there is "an evident and more moderate course" of action that would serve Defendants' "purposes equally well," *see United States Trust Co.*, 431 U.S. at 31, 97 S.Ct. 1505, because "[t]he contract clause of the Federal Constitution limits the ability of a State, or subdivision of a State, to abridge its contractual obligations without first pursuing other alternatives." *See Cliff*, 661 N.Y.S.2d at 739.

[15] A higher level of scrutiny is required to assess "abrogations of government obligations than in the case of legislative interference with the contract of private parties." *Massachusetts Community College*, 649 N.E.2d at 710. Accordingly, we are "less deferential to a state's judgment of reasonableness and necessity when a state's legislation is self-serving and impairs the obligations of its own contracts." *Condell*, 983 F.2d at 418. A less deferential review is employed because "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *United States Trust Co.*, 431 U.S. at 29, 97 S.Ct. 1505.

We agree with the district court that Defendants have not established that Act 355 was both necessary and reasonable. As the district court stated, "[a]lthough perhaps politically more difficult, numerous other alternatives exist which would more effectively and equitably raise revenues." Other options available to Defendants were a federal maximization project (to obtain additional reimbursements from the federal government), additional budget restrictions, the repeal of tax credits, and the raising of taxes. Defendants have not explained why it is reasonable and necessary that the brunt of Hawaii's budgetary problems be borne by its employees.

[16] Also, "[a]n impairment is not a reasonable one if the problem sought to be resolved by an impairment of the contract existed at the time the contractual obligation was incurred." *Massachusetts Community College*, 649 N.E.2d at 713. Defendants knew of the budgetary crisis at the time the collective bargaining agreement was negotiated and as the history of Act 80 shows, previously had attempted to implement a similar pay lag plan.

II Irreparable Harm

[17] Defendants contend that the district court erred in finding the possibility of irreparable harm. We agree with the district court that Plaintiffs have met their burden of showing that if the pay lag is implemented, they likely will suffer irreparable harm and that damages, even if available, will not adequately compensate Plaintiffs for hardships caused by the delay in the receipt of pay.

III Balance of Hardships

[18] The district court held that the balance of hardships in this case weighed ***1108** against Defendants. To determine which way the balance of the hardships tips, a court must identify the possible harm caused by the preliminary injunction against the possibility of the harm caused by not issuing it. *See Los Angeles Memorial Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1203 (9th Cir.1980).

After weighing the hardships of each party against one another, we conclude that the district court did not err in finding that the balance of hardships tips in favor of Plaintiffs. Moreover, we agree with the district court's determination that there are equally important public interests at stake on both sides so that the factor favors neither party.

CONCLUSION

We conclude that the district court did not abuse its discretion in granting Plaintiffs' motion for a

preliminary injunction. Plaintiffs have shown a likelihood of success on the merits. In addition, the balance of hardships weighs against Defendants; absent a preliminary injunction, irreparable harm to Plaintiffs will likely result.

AFFIRMED.

C.A.9 (Hawai'i),1999.
University of Hawai'i Professional Assembly v. Cayetano
183 F.3d 1096, 161 L.R.R.M. (BNA) 2977, 137 Ed. Law Rep. 77, 99 Cal. Daily Op. Serv. 5621, 1999 Daily Journal D.A.R. 7175

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HAWAII HEALTH SYSTEMS
CORPORATION

"Touching Lives Everyday"

House of Representatives
Committee on Judiciary
Representative Jon Riki Karamatsu, Chair
Representative Ken Ito, Vice Chair

Tuesday, March 24, 2009
2:00 p.m.
Conference Room 325
Hawaii State Capitol

Testimony Supporting SB 1137, SD2, HD1 Relating to Health
Authorizes Hawaii Health Systems Corporation to conduct criminal history record checks

Thomas M. Driskill, Jr.
President and Chief Executive Officer
Hawaii Health Systems Corporation

On behalf of the Hawaii Health Systems Corporation (HSSC) Corporation Board of Directors, thank you for the opportunity to present testimony in strong support of SB 1137, SD2, HD1 that authorizes HHSC to conduct criminal history record checks.

Criminal History Record Checks

Purpose: HHSC is requesting the passage of a criminal history record check bill that would further define and allow the Hawaii Health Systems Corporation (HHSC) to perform criminal checks on all existing employees, prospective contractors, volunteers and vendors via the Hawaii Criminal Justice Data Center's (HCJDC) FBI checks. Such criminal history records checks are currently limited to prospective employees (applicants) after a conditional offer of employment is made.

The following legislation provides the justification to allow for the criminal history checks:

- The federal Volunteer for Children's Act, (**42 U.S.C. 5119** et. seq.) is federal legislation that allows the use of national fingerprint-based criminal history checks to screen out volunteers and employees with relevant criminal records for those organizations and businesses dealing with children, elderly and disabled.

- **HRS 378-2.5** and **831-3.1,** allow employers to inquire into an individual's criminal conviction background after a conditional offer of employment has been made. This offer of employment may be rescinded if there is a conviction within the applicant's past ten years, excluding periods of incarceration that has a rational relationship to the duties and responsibilities of the position.

- **HRS 78-2.6** states that "All prospective employees, regardless of the position they will assume, shall demonstrate their suitability for public employment by: 1) passing a pre-employment controlled substance drug test if required by the employing jurisdiction; and 2) attesting that during the three-year period immediately preceding the date of application for employment, the person was not convicted of any controlled substance-related offense. If an applicant fails to meet the suitability requirements of the employing jurisdiction, the applicant shall be disqualified from further employment consideration or deemed ineligible for appointment under section HRS 76-29 on the basis of unsuitability for public employment."

In addition, these codes also provide further rationale for such criminal history checks:

- **42 US Code 1320a-7(1)** lists types of crimes such as fraud, theft, abuse and neglect that may result in exclusion from the Medicare program.

- **Code of Federal Regulation 42 CFR 483.13** requires nursing homes to do pre-employment check of all employees and not hire individuals who have been found guilty of abuse, neglect or mistreatment of residents by a court of law or have a finding entered into the State nurse aide registry.

- **Code of Federal Regulation 42 CFR 455.106** requires providers to disclose to Medicaid the identity of any person who has been convicted of a criminal offense related to a program under Medicare, Medicaid, or the Title XX program.

- **Joint Commission** of Accreditation for Hospital Organizations (JCAHO) requires standards outlined in the HHSC's polices/guidelines to be followed in accordance with the above Federal regulations.

HHSC has conducted State criminal history checks with the assistance of the Hawaii Criminal Justice Data Center (HCJDC) and the Office of Inspector General (OIG) / General Services Administration (GSA) checks utilizing a private contractor. These within-State checks and the OIG/GSA checks have been done since the creation of HHSC in 1997. As a consequence of a shortage of health care workers, HHSC, by necessity has recruited heavily from out-of-state. Convictions from out-of-state are not in the Hawaii State's data bank and cannot be obtained through this source. Although HHSC could probably access county criminal data banks for every county where the

applicant has worked, this process is lengthy and if an applicant wishes to hide conviction data, he or she can simply omit that county employment from the application.

Therefore, the most efficient and effective process would be to access the FBI data bank where information on criminal history for all States is kept.

Since access to the FBI criminal history bank requires specific legislation granting this authority, HHSC has attempted several times to seek this legislation authority. With many other agencies requesting similar measures, the Legislature passed Act 263, SLH 2001, to create a working committee to resolve policy issues relating to the access and use of criminal history record information (for the purpose of employment and licensing). The Legislature implemented the recommendations of the working committee during the 2003 session. Accordingly, Act 95, SLH 2003, provided comprehensive amendments to various statutes pertaining to criminal history record checks, including revisions to chapters 78, 281, 302A, 302C, 321, 333F, 346, 352, 353C, 378-2.5, 421I, 463, 571, 831-3, 831-3.1, and 846, HRS. The working committee reminded all agencies and jurisdictions that individual legislative language for the respective agencies/jurisdictions would still be required in order to access the FBI files. HHSC has not been successful as yet with the proposed legislation authorizing HHSC to perform criminal history record checks utilizing the FBI fingerprint – based data bank and to be listed as one of the agencies in Chapter 846, HRS that grants this authority.

The HCJDC has recognized our problem and volunteered to assist the HHSC while we continue in our attempts to get the needed legislation. Therefore, in late January of 2004, HCJDC, utilizing their statutory authority, began doing FBI checks for HHSC. These checks were limited to prospective employees (those receiving employment offers). While we sincerely appreciate HCJDC efforts on our behalf, HHSC needs the proposed legislation to allow us direct access to the FBI files. Such legislation will enable HHSC to do the checks much faster and to expand the review of criminal history checks to current employees, vendors, consultants, volunteers and all others who may come into contact with our patients and residents. This authority will enable us to fulfill the intent of the various statutes, codes and regulations governing background history checks.

Thank you for this opportunity to testify before this committee. We strongly urge passage of this measure and respectfully request an effective date of July 1, 2009.

karamatsu3-Leanne

From: mailinglist@capitol.hawaii.gov
Sent: Sunday, March 22, 2009 11:11 PM
To: JUDtestimony
Cc: jagnes@gmail.com
Subject: Testimony for SB1137 on 3/24/2009 2:00:00 PM

Testimony for JUD 3/24/2009 2:00:00 PM SB1137

Conference room: 325
Testifier position: support
Testifier will be present: No
Submitted by: Joanne Agnes
Organization: Individual
Address:
Phone:
E-mail: jagnes@gmail.com
Submitted on: 3/22/2009

Comments:
As someone who is familiar with the intent of this bill, I encourage the committee to pass this bill.

Thank you for this opportunity.