

Electronically Filed
Supreme Court
SCWC-17-0000145
05-AUG-2019
04:54 PM

SCWC-17-0000145

IN THE SUPREME COURT OF THE STATE OF HAWAII

GILBERT V. MALABE and
DAISY D. MALABE,

Respondents/
Plaintiffs-Appellants,

vs.

ASSOCIATION OF APARTMENT
OWNERS OF EXECUTIVE CENTRE,
by and through Its Boards of Directors;
DOE DEFENDANTS 1-10,

Petitioner/
Defendant-Appellee.

) CAAP-17-0000145
) CIVIL NO. 16-1-2256-12 (RAN)
) (Declaratory Relief and Damages)
)
) APPEAL FROM THE:
) (1) DISPOSITION ORDER, filed November
) 29, 2018
) (2) FINAL JUDGMENT, filed on January
) 31, 2019
)
) First Circuit Court
) The Honorable Rhonda A. Nishimura
)
)
)

Of Counsel:

BAYS LUNG ROSE & HOLMA

DAVID R. MAJOR 9194-0

Attorney at Law

A Law Corporation

JAI W. KEEP-BARNES 10787-0

Topa Financial Center

700 Bishop Street, Suite 900

Honolulu, Hawaii 96813

Tel: (808) 523-9000

Attorneys for Respondent/

Defendant-Appellee

ASSOCIATION OF APARTMENT

OWNERS OF EXECUTIVE CENTRE, by

and through Its Boards of Directors

RESPONDENT/DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF

RE: THE EFFECT OF SB 551, CD 1 OF 2019 ON THIS CASE

CERTIFICATE OF SERVICE

Table of Contents

Table of Authorities	iii-vi
I. INTRODUCTION	1
II. STATEMENT OF PRIOR PROCEEDINGS	4
III. SB 551'S EFFECT ON THIS CASE.....	6
A. The Effect of SB 551 to this Case Requires a Reversal, in Part, of the ICA'S Erroneous Holding.....	6
i. SB 551 applies to the AOA's appeal	6
ii. SB 551 contains plain and unambiguous language	8
iii. SB 551's plain and unambiguous language requires the reversal of the ICA's erroneous holding.....	9
B. The Plain Language of SB 551 and its Effect on This Case Are Consistent with the Arguments Set Forth in the AOA's Writ	10
IV. MALABES CANNOT DISPUTE THAT APPLICATION OF SB 551 ENDS THIS CASE	13
A. The Malabes' Argument Regarding the Legislative Intent of HRS Chapter 667, Part I and Part II, is Without Merit and is Directly Contradicted by the Plain Language of SB 551	14
V. THE APPLICATION OF SB 551 WILL NOT IMPLICATE ANY CONSTITUTIONAL ISSUES IN THIS CASE	17
A. The Malabes Do Not Have Standing to Raise Constitutional Concerns Regarding the Application of SB 551 to This Case.....	17
i. Hawaii Rules of Appellate Procedure, Rule 44, does not confer standing	18
ii. The Malabes cannot establish standing under any of the applicable tests	18
a. The Malabes do not have standing under the injury in fact test.....	20

b.	The Malabes are not seeking declaratory relief under HRS § 632-1	21
c.	The Malabes cannot establish standing to challenge the constitutionality of SB 551 as applied	22
B.	The Malabes Cannot, in the Instant Appellate Proceeding, Challenge SB 551 as a Violation of Due Process, Equal Protection, or as a Takings, Because There is No State Action at Issue	24
C.	The Passage of SB 551 was Within the Legislature’s Authority and thus, SB 551 is Presumed to be Constitutional and Valid	26
D.	This Court Must Give Effect to the Legislature’s Retroactive Intent.....	27
E.	The Legislature did Not Violate the Separation of Powers Doctrine Because it did Not Compel the Courts to Rule a Specific Way	29
VI.	CONCLUSION.....	30

Table of Authorities

Cases

<u>Adams v. S. Cal. First Nat'l Bank</u> , 492 F.2d 324, 330 (9th Cir. 1974).....	25, 26
<u>Alaka'i Na Keiki, Inc. v. Matayoshi</u> , 127 Hawaii 263, 275, 277 P.3d 988, 1000 (2012).....	29
<u>Apao v. Bank of New York</u> , 324 F.3d 1091, 1095 (9th Cir. 2003)	25
<u>Aquarian Found. v. Ass'n of Apartment Owners of Waikiki Park Heights</u> , No. 21732, 2001 Haw. LEXIS 97, at *41-42 (Mar. 2, 2001)	24
<u>Awakuni v. Awana</u> , 115 Hawaii 126, 143, 165 P.3d 1027, 1044 (2007)	7, 8
<u>Bank Markazi v. Peterson</u> , 136 S. Ct. 1310, 1325, 194 L.Ed.2d 463, 482 (2016)	19, 20
<u>Barrera v. Sec. Bldg. & Inv. Corp.</u> , 519 F.2d 1166, 1172-3 (5th Cir. 1975)	25, 26
<u>Bissen v. Fujii</u> , 51 Haw. 636, 638, 639, 466 P.2d 429, 431 (1970).....	26, 27-29
<u>Bradley v. Richmond Sch. Bd.</u> , 416 U.S. 696, 711-712 (1974)	7
<u>Bryant v. Jefferson Fed. Sav. & Loan Ass'n</u> , 166 U.S. App. D.C. 178, 509 F.2d 511, 515 (D.C. Cir. 1974)	26
<u>Bush v. Watson</u> , 81 Hawaii 474, 479, 918 P.2d 1130, 1135 (1996)	19
<u>Campbell v. United States</u> , 809 F.2d 563, 569 (9th Cir. 1987)	7
<u>Charmicor, Inc. v. Deaner</u> , 572 F.2d 694, 696 (9th Cir. 1978)	25
<u>Carter v. California Dept. of Veterans Affairs</u> , 38 Cal. 4th 914, 922, 44 Cal. Rptr. 3d 223, 135 P.3d 637, 642 (2006).....	7
<u>Child Support Enf't Agency v. Doe</u> , 109 Hawaii 240, 247, 125 P.3d 461, 468 (2005)	24
<u>Employees' Ret. Sys. v. Wah Chew Chang</u> , 42 Haw. 532, 540 (1958)	27
<u>Erlenbaugh v. United States</u> , 409 U.S. 239, 244 (1972).....	3
<u>Flagg Bros., Inc. v. Brooks</u> , 436 U.S. 149, 158-60, 164-165, 166, 1092, 1094, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978)	25, 26
<u>Galima v. Ass'n of Apt. Owners of Palm Court</u> , 2018 U.S. Dist. LEXIS 217801, *23 (D. Haw. Dec. 31, 2018)	16

<u>Gov't Emples. Ins. Co. v. Hyman</u> , 90 Hawaii 1, 5, 975 P.2d 211, 215 (1999)	28
<u>Hanabusa v. Lingle</u> , 119 Hawaii 341, 347, 198 P.3d 604, 610 (2008).....	20
<u>Hawaii Hous. Auth. v. Lyman</u> , 68 Haw. 55, 67, 704 P.2d 888, 895 (1985).....	24
<u>Honolulu v. Ariyoshi</u> , 67 Haw. 412, 419, 689 P.2d 757, 763 (1984).....	22
<u>In re Collins</u> , No. 13-01783, 2014 Bankr. LEXIS 2534, 20142 WL 2575898, at *4 (Bankr. D. Haw. June 9, 2014)	21
<u>In re Estate of Bishop</u> , 53 Haw. 604, 611, 499 P.2d 670, 675 (1972)	24
<u>In re Genesys Data Techs., Inc.</u> , 95 Hawaii 33, 41, 18 P.3d 895, 903 (2001).....	21
<u>IndyMac Bank v. Miguel</u> , 117 Hawaii 506, 512, 184 P.3d 821,20, 21 827 (Haw. Ct. App. 2008)	20, 21
<u>Kahoohanohano v. State</u> , 114 Hawaii 302, 339, 162 P.3d 696, 733 (2007).....	27
<u>Kapuwai v. City & Cty. of Honolulu</u> , 121 Hawaii 33, 39, 211 P.3d 750, 756 (2009)	23
<u>Kawamata Farms v. United Agri Prods.</u> , 86 Hawaii 214, 251-52, 948 P.2d 1055, 1092-93 (1997)	18
<u>Koike v. Bd. of Water Supply</u> , 44 Haw. 100, 102, 103, 352 P.2d 835, 837-838, 844 (1960)	26, 27
<u>Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan</u> , 87 Hawaii 217, 229-30, 953 P.2d 1315, 1327-28 (1998)	15
<u>Landgraf v. USI Film Prods.</u> , 511 U.S. 244, 264 (1994).....	7
<u>Leone v. Cty. of Maui</u> , 141 Hawaii 68, 87, 404 P.3d 1257, 1276 (2017)	24
<u>McDermott v. Ige</u> , 135 Hawaii 275, 283-84, 349 P.3d 382, 390-91 (2015)	23
<u>Oleson v. Borthwick</u> , 33 Haw. 766, 774 (1936).....	28
<u>Patchak v. Zinke</u> , 138 S. Ct. 897, 905, 200 L.Ed.2d 92, 101-02 (2018)	30
<u>Ronald Git Sum Au v. Ass'n of Apartment Owners of the Royal Iolani</u> , No. 14-00271 SOM/BMK, 2014 U.S. Dist. LEXIS 111581, at *18 (D. Haw. Aug. 12, 2014).	25

<u>Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch</u> , 143 Hawaii 219, 225, 227, 426 P.3d 443, 449, 451 (Haw. Ct. App. 2018).....	3, 5, 9
<u>Schnack v. Clark</u> , 21 Haw. 661, 665, 1913 Haw. LEXIS 18, *11 (1913).....	7
<u>Shin v. McLaughlin</u> , 89 Hawaii 1, 4, 967 P.2d 1059, 1062 (1998).....	15
<u>State v. Armitage</u> , 132 Hawaii 36, 55, 319 P.3d 1044, 1063 (2014).....	20
<u>State v. Bloss</u> , 64 Haw. 148, 151, 637 P.2d 1117, 1121 (1981), <u>cert. denied</u> , 459 U.S. 824, 103 S. Ct. 56, 74 L. Ed. 2d 60 (1982)	20, 22
<u>State v. Nakata</u> , 76 Hawaii 360, 379, 878 P.2d 699, 718 (1994).....	28
<u>State Savings & Loan Association</u> , 50 Haw. at 546, 445 P.2d at 115 <u>State Savings & Loan Association</u> , 50 Haw. at 546, 445 P.2d at 115.....	11
<u>Tauese v. State, Dep’t of Labor & Indus. Relations</u> , 113 Hawai’i 1, 28, 147 P.3d 785, 812 (2006)	20
<u>Tax Found. of Haw. v. State</u> , 144 Hawaii 175, 189, 439 P.3d 127, 141 (2019).....	18, 19, 22
<u>Thorpe v. Housing Auth. Of Durham</u> , 393 U.S. 268, 281 (1969)	7
<u>Ulrich v. Security Inv. Co.</u> , 35 Haw. 158, 182 (Haw. Terr. 1939)	14
<u>United States v. Schooner Peggy</u> , 5 U.S. 103, 111 (1801)	8
<u>U.S. Bank Nat’l Ass’n v. Higa</u> , No. 15-00251 DKW-RLP, 2015 U.S. Dist. LEXIS 146027, at *10 (D. Haw. Oct. 28, 2015)	18

Rules

Hawaii Rules of Appellate Procedure Rule 40.1(a)(1)	4
Hawaii Rules of Appellate Procedure Rule 44	5
Hawaii Rules of Civil Procedure 8(a).....	6, 18, 21
Hawaii Rules of Civil Procedure Rule 12(b)(6)	18
Federal Rules of Civil Procedure 5.1(a)(1)(B)	18

Statutes

HRS Chapter 514B	13
HRS Chapter 667	4, 10, 13, 14-18, 28, 30
HRS §§ 1-3	27
HRS § 514A-82	3
HRS § 514A-82(b)(13)	15
HRS § 514A-90	2, 15, 16
HRS § 514B-146	3, 5, 7, 9, 12, 14-16, 30
HRS §§ 514B-146 and 667-5	3
HRS § 514B-146(a)	12, 13
HRS § 632-1	19, 21
HRS § 632-1(b)	19
HRS § 667-5 through 667-10	2, 3, 5, 9, 11, 14, 25
HRS §§ 667-21 through 667-42	14
HRS § 667-51	14

Other

Brown v. Porter McGuire Kiakona & Chow, LLP, et al. (Civil No. 1:17-cv-00554-LEK-RT)	13
Connelly, et al. v. Ekimoto & Morris, LLLC, et al. (Civil No. 1:16-cv-00448-LEK-WRP)	13
Galima, et al. v. Association of Apartment Owners of Palm Court, by and through its Board of Directors, et al. (Civil No. 1:16-00023-LEK-RT)	13
Parks, et al. v. Association of Apartment Owners of Makaha Surfside, by and through its Board of Directors (Civil No. 19-1-0100-01)	13

RESPONDENT DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF
RE: THE EFFECT OF SB 551, CD 1 OF 2019 ON THIS CASE

Petitioner/Respondent/Defendant-Appellee Association of Apartment Owners of Executive Centre (the "AOAO"), by and through its counsel, Bays Lung Rose & Holma, hereby submits its supplemental brief per the Court's Order, filed July 16, 2019, requesting briefing on the following issue: What effect, if any, does SB 551, CD1 of 2019 have on this case.

I. INTRODUCTION

This appellate proceeding arises out of Plaintiffs Gilbert V. Malabe and Daisy D. Malabe's (referred to herein collectively as "Malabes") Complaint, filed December 13, 2016 ("Complaint") in which they asserted claims for wrongful foreclosure and unfair or deceptive acts or practices. On February 17, 2017, the Circuit Court of the First Circuit of the State of Hawaii dismissed the Malabes' Complaint with prejudice ("Dismissal Order"). The Malabes appealed the Dismissal Order, and on November 29, 2018, via a Summary Disposition Order, ("Disposition Order") the Intermediate Court of Appeals of the State of Hawaii ("ICA") vacated the trial court's dismissal of the Malabes' claim for wrongful foreclosure and affirmed the Dismissal Order with respect to the dismissal of the Malabes' claim for unfair and deceptive acts or practices. On January 31, 2019, the ICA issued its Judgment on Appeal. Both the Malabes and the AOAO appealed the Disposition Order and Judgment on Appeal, in part, resulting in the instant appeal to the Hawaii Supreme Court.¹

On July 10, 2019, during the pendency of this proceeding, SB 551, SD1, HD2 CD1 became Hawaii law as Act 282 ("SB 551").² See Judiciary Electronic Filing and Service System ("JEFS") Document Number ("Dkt.") 40, Supplemental Authority (SCWC-17-0000145). SB 551 clarifies the applicable guidelines for the non-judicial foreclosure at issue and speaks directly to this case – specifically, SB 551 amends the law to expressly recognize that condominium associations, such as the AOAO, have always been authorized to use non-judicial foreclosures to collect delinquencies regardless of the presence or absence of power of sale language in their governing documents. Indeed, SB 551 is consistent with the arguments the AOAO has set forth during the entirety of this matter, it is consistent with the trial court's

¹ For purposes of this Supplemental Brief, the AOAO is addressing the points of error as raised in its Application for Writ of Certiorari, filed March 29, 2019, with respect to the ICA's vacatur of the dismissal of the Malabes' claim for wrongful foreclosure.

² "SB 551" shall mean and include SB 551, SD1, HD2 CDD1 and Act 282.

holding below, it is consistent with the positions set forth in the AOA's Writ of Certiorari, and as controlling Hawaii law, it must be applied to this case.

A recitation of Hawaii law concerning the non-judicial foreclosure procedure at issue is informative. In 1999, the Hawaii State Legislature passed Act 236, Session Laws of Hawaii 1999, "[c]larify[ing] that associations of apartment owners may enforce liens for unpaid common expenses by non-judicial power of sale foreclosure procedures, as an alternative to legal action[.]" 1999 Haw. Sess. Laws Act 236, § 2 at 724. The legislature accomplished this by:

- (1) Specifying that condominium associations may foreclose liens by nonjudicial or power of sale foreclosure within the statute governing the priority of a condominium association lien (section 514A-90, Hawaii Revised Statutes (repealed January 1, 2019)); and
- (2) Incorporating into the bylaws of all condominium associations a provision authorizing condominium associations to enforce liens by nonjudicial or power of sale foreclosure pursuant to chapter 667, Hawaii Revised Statutes (section 514A-82, Hawaii Revised Statutes (repealed January 1, 2019)).

See JEFS Dkt. 40, at p. 7 (SCWC-17-0000145); see also 1999 Haw. Sess. Laws Act 236, § 4 at 727 and § 3 at 727 respectively. Accordingly, the foregoing, "provided a statutory grant of power and an incorporation into written documents authorizing condominium associations to utilize nonjudicial foreclosure under sections 667-5 (repealed June 28, 2012) and 667-40, Hawaii Revised Statutes, to enforce their liens." See JEFS Dkt. 40, at pp. 7-8 (SCWC-17-0000145).

At the time the subject non-judicial foreclosure occurred, there was no statutory language restricting the AOA's authority to utilize the non-judicial foreclosure procedures set forth in HRS § 667-5. In fact, the AOA was expressly instructed that it had the authority to foreclose on its statutorily granted lien "by action or by nonjudicial or power of sale foreclosure procedures set forth in Chapter 667 . . . in like manner as a mortgage of real property." See HRS 514A-90 (2010) (referencing the correlative and identical provision to HRS § 514B-146(a), prior to the 2012 amendments). This is precisely what the AOA did. Many years after the AOA conducted the subject foreclosure, Hawaii Courts, including the ICA below, began to hold that condominium associations were required to possess a power of sale in order to avail themselves to the non-judicial procedures set forth in HRS § 667-5. However, in doing so, Hawaii Courts improperly placed non-profit condominium associations in the shoes of for-profit financial institutions, thereby requiring condominium associations to hold a written instrument providing them with authority to conduct non-judicial foreclosures, notwithstanding the statutory grant of

authority provided in HRS § 514A-82(b)(13) (later incorporated into HRS § 514B-146) and HRS Chapter 667. Simply put, condominium associations do not hold mortgages or other negotiated written debt instruments with power of sale language. Instead, **statutorily** created condominium associations were given their authority to non-judicially foreclose on their liens via **statute**.

In reaching its erroneous holding, thereby resulting in the instant appeal, the ICA applied the same faulty analysis, and concluded that it would “not infer that the power to extrajudicially sell another person’s property was granted, in the absence of a clear legislative act doing so.” See JEFS Dkt. 46, Summary Disposition Order, at p. 6 (quoting Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch, 143 Hawaii 219, 227, 426 P.3d 443, 451 (Haw. Ct. App. 2018)) (CAAP-17-0000145). Despite this being its intent since 1999, the Hawaii State Legislature took heed of the Hawaii court’s holdings, and subsequently provided exactly what was requested – i.e. SB 551, which is “a clear legislative act” explicitly authorizing condominium associations the right to conduct non-judicial foreclosures “regardless of the presence or absence of power of sale language in an association’s governing documents[.]” See JEFS Dkt. 40, at p. 15 (SCWC-17-0000145). Moreover, to effectuate what has been the intent of the legislature since 1999, SB 551 applies “retroactively to any case, action, proceeding, or claim arising out of a nonjudicial foreclosure under section 667-5 (repealed June 28, 2012), Hawaii Revised Statutes . . . that arose before the effective date of this Act and in which a final non-appealable judgment has not yet been entered.” See id. at p. 17. Thus, no inference regarding a condominium association’s right to extrajudicially sell property within its membership is needed, as Hawaii law now expressly declares that they have always had this right.

For the reasons set forth in the AOA’s Application for Writ of Certiorari, the reasons set forth below, and the plain language of SB 551, the ICA committed grave errors of law and fact in concluding that the plain language of Hawaii Revised Statutes (“HRS”) §§ 514B-146 and 667-5 did not authorize the AOA to use the non-judicial procedures under HRS § 667-5 without a power of sale, and that HRS § 514B-146 did not grant the AOA a power of sale. Indeed, as the AOA was not required to hold a mortgage containing a power sale at the time it conducted the subject non-judicial foreclosure, with SB 551 resolving any ambiguity surrounding this (there was none), SB 551’s effect on this appeal requires a reversal of the ICA’s erroneous vacatur of the dismissal of the Malabes’ claim for wrongful foreclosure. See Erlenbaugh v. United States, 409 U.S. 239, 244 (1972) (internal quotations and alterations

omitted) (declaring that “a later act can . . . be regarded as legislative interpretation of an earlier act . . . in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting, and is therefore entitled to great weight in resolving any ambiguities and doubts”).

Furthermore, and as addressed below, despite the Malabes’ counsel indicating that they intend to bring a constitutional challenge with respect to SB 551, this civil action is not the proper vehicle in which to challenge Hawaii law. In other words, this private, two-party civil action, devoid of any declaratory relief claim against a state actor or claim involving state action, simply cannot be the basis for a proceeding to determine whether Hawaii law is constitutional. Thus, any constitutional arguments submitted in the Malabes’ Supplemental Brief, with no state actor present to address such issues, should be rejected as improper. In sum, it cannot be disputed that SB 551 is Hawaii law, it cannot be disputed that SB 551 must be applied to this case, and in doing so, it cannot be disputed that the ICA committed grave errors of law and fact in vacating the dismissal of Malabes’ claim for wrongful foreclosure.

II. STATEMENT OF PRIOR PROCEEDINGS

The underlying action concerned Apartment 1907 (“Apartment”) within the Executive Centre condominium project (“Project”). JEFS Dkt. 14, ROA³, at p. 9 (CAAP-17-0000145). In or around May 2005, the Malabes purchased the Apartment. Id. at p. 10. The Malabes were unable to timely pay their association dues, and as a result, the AOA proceeded to foreclose on the Apartment pursuant to HRS 514B-146. See id. The AOA, through counsel, gave notice that it would sell the Apartment at public sale pursuant to HRS § 514B-146 and HRS Chapter 667. Id. On December 17, 2010, the AOA sold the Apartment at public auction, meeting all of the procedural requirements under the non-judicial foreclosure portions of the statute. See id. at p. 11. On January 4, 2011, the AOA submitted the winning bid for the Apartment and executed a quitclaim deed for the same as both the grantor and grantee. Id. The quitclaim deed for the Apartment was recorded on January 7, 2011. Id. at p. 12.

On December 13, 2016, nearly six years later, the Malabes filed their underlying Complaint in the Circuit Court for the First Circuit of the State of Hawaii. Id. at p. 8. On January 11, 2017, the AOA filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6) of the Hawaii Rules of Civil Procedure (“HRCP”). Id. at p. 21. The AOA’s Motion to Dismiss

³ “ROA” refers to the original Record on Appeal.

correctly argued that the AOA was authorized to conduct a nonjudicial foreclosure on the Apartment pursuant to HRS § 514B-146 and HRS Chapter 667. See generally id. at pp 21-36.

On February 2, 2017, the Motion to Dismiss came on for hearing before the Honorable Rhonda A. Nishimura. See id. at pp. 89-90. The Order granting the AOA's Motion to Dismiss and Final Judgment were entered on February 16, 2017. Id. at pp. 89-92. On February 17, 2017, a Notice of Entry of Final Judgment was entered. Id. at pp. 95-96. On March 9, 2017, the Malabes filed a Notice of Appeal of the Order granting the AOA's Motion to Dismiss and the Final Judgment. Id. at pp. 97-98.

On November 29, 2018, the ICA issued its Summary Disposition Order. See JEFS Dkt. 46 (CAAP-17-0000145). In vacating in part and affirming in part the Circuit Court's order granting the AOA's Motion to Dismiss, the ICA incorrectly held that the plain language of HRS § 514B-146 did not authorize the AOA to conduct a non-judicial foreclosure on the Apartment under HRS § 667-5. More specifically, the ICA incorrectly held, based upon its partial reliance on Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, 143 Hawaii, 219, 225, 426 P.3d 443, 449 (Haw. Ct. App. 2018), that, "in order for an association to invoke this authority and utilize the procedures outlined in HRS § 667-5, there must have existed an agreement that independently provides for a power of sale." See id. at p. 4. In reaching its erroneous conclusion, the ICA went on to expressly declare that, "here, as in Sakal, 'we will not infer that the power to extrajudicially sell another person's property was granted, in the absence of a clear legislative act doing so.'" See id. at p. 6 (quoting Sakal, 143 Hawaii at 227, 426 P.3d at 451)⁴. The ICA entered its Judgment on Appeal on January 31, 2019. JEFS Dkt. 48 (CAAP-17-0000145).

On February 21, 2019, the AOA submitted its request for an extension of time to file its Writ of Certiorari, which was granted on February 22, 2019. JEFS Dkt. 50 & 52 respectively (CAAP-17-0000145). On March 29, 2019, the AOA timely submitted its Application for Writ of Certiorari pursuant to HRAP Rule 40.1(a)(1) ("AOA's Writ"). JEFS Dkt. 1 (SCWC-17-0000145). On May 23, the Court entered its order accepting the AOA's Writ and further indicated that the AOA's Writ would be set for oral arguments. JEFS Dkt. 32.

⁴ The AOA notes that SB 551 is, in part, a clear legislative act, granting the AOA the power to "extrajudicially sell" the Apartment, notwithstanding the lack of an express grant of a power of sale.

On June 3, 2019, the Malabes filed their Motion for Leave to File Supplemental Brief, with the AOA timely filing its Memorandum in Opposition to the same on June 6, 2019. JEFS Dkt. 34 & 36, respectively.

On July 10, 2019, Governor Ige allowed SB 551 to become Hawaii law without his signature as Act 282. See JEFS Dkt. 40. SB 551 declares, in relevant part, “this Act confirms the legislative intent that condominium associations should be able to use nonjudicial foreclosure to collect delinquencies regardless of the presence or absence of power of sale language in an association’s governing documents.” See id. at p. 10.

On July 16, 2019, this Court entered its Order granting Respondents’ Motion to File Supplemental Briefing (“Supplemental Brief Order”). See JEFS Dkt. 43. The Supplemental Brief Order requested that the Parties address the following issue: “What effect, if any, does SB 551, CD1 of 2019 have on this case?” Id. Furthermore, the Supplemental Brief reminded the Parties that pursuant to Hawaii Rules of Appellate Procedure (“HRAP”) Rule 44, a party who draws in question the constitutionality of any statute of the State of Hawaii, is required to give notice in writing to the Attorney General of the State of Hawaii. See id. Accordingly, the AOA hereby timely submits its Supplemental Brief addressing the effects of SB 551 on this case, in accordance with the Supplemental Brief Order.

III. SB 551’S EFFECT ON THIS CASE

A. The Effect of SB 551 to this Case Requires a Reversal, in Part, of the ICA’S Erroneous Holding

The plain language of SB 551 must result in a reversal of the ICA’s erroneous vacatur of the trial court’s dismissal of the Malabes’ claim for wrongful foreclosure. Simply put, the Malabes cannot prevail on their claim for wrongful foreclosure because the non-judicial foreclosure at issue is expressly authorized by Hawaii law. As described in detail below, the effect of SB 551 to this case is to preclude any finding of liability with respect to the AOA arising from its non-judicial foreclosure of the Apartment.

i. SB 551 applies to the AOA’s appeal

There can be no question that SB 551 must be applied to the instant appellate proceeding. First, SB 551 states, in relevant part, that it “confirms the legislative intent” that since 1999, condominium associations could use nonjudicial foreclosures to collect delinquencies regardless of whether their governing documents contained power of sale

language. See JEFS Dkt. 40, at pp. 6 & 10 (SCWC-17-0000145). In order to **clarify** this intent, SB 551 amends HRS § 514B-146 to expressly recognize that, “[t]he lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association’s governing documents[.]” See id. at p. 15. As this Court has recognized, “[a] statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment.” Awakuni v. Awana, 115 Hawaii 126, 143, 165 P.3d 1027, 1044 (2007) (quoting with approval, Carter v. California Dept. of Veterans Affairs, 38 Cal. 4th 914, 922, 44 Cal. Rptr. 3d 223, 135 P.3d 637, 642 (2006)). Accordingly, the Hawaii State Legislature’s clarification of its intent, i.e. that the AOA did not need to hold power of sale language in its governing documents at the time it conducted the subject nonjudicial foreclosure, applies to this case.

Irrespective of the foregoing, and regardless of whether this Court considers what the legislature’s intent was at the time the AOA conducted the subject nonjudicial foreclosure, SB 551 must be applied to this appellate proceeding. It has long been recognized that, “With the logic or wisdom of distinctions drawn or discriminations made by statute . . . the courts are not concerned, **it being their duty merely to construe and apply the law as they find it to have been enacted.**” See Schnack v. Clark, 21 Haw. 661, 665, 1913 Haw. LEXIS 18, *11 (1913) (emphasis added); see also Landgraf v. USI Film Prods., 511 U.S. 244, 264 (1994) (acknowledging that, “The first is the rule that ‘a court is to apply the law in effect at the time it renders its decision’”); Bradley v. Richmond Sch. Bd., 416 U.S. 696, 711 (1974) (concluding that the court “anchor[s] [its] holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision”); Thorpe v. Housing Auth. Of Durham, 393 U.S. 268, 281 (1969) (declaring that, “The general rule, however, is that an appellate court must apply the law in effect at the time it renders its decision.”). Moreover, the foregoing rule applies in cases, such as the instant matter, in which the law changes during the pendency of the case, or appeal, as the matter may be. See e.g. Campbell v. United States, 809 F.2d 563, 569 (9th Cir. 1987) (acknowledging that although the rule enunciated in the Bradley case was in “the context of a change of law during the pendency of a direct appeal on that very issue, the rule may also apply in cases involving changes in law prior to the district court’s determination of the issue”). In reaching its decision in Bradley, the United States Supreme Court expressly acknowledged that

the origin and justification for the rule that a court is to apply the law in effect at the time it renders its decision is as follows:

It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed . . . the court must decide according to existing laws, and if be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

See Bradley, 416 U.S. at 711-12 (quoting United States v. Schooner Peggy, 5 U.S. 103, 111 (1801)). SB 551 became Hawaii law on July 10, 2019 during the pendency of this appeal. See JEFS Dkt. 40 (SCWC-17-0000145). Accordingly, based on the above, SB 551 must be applied to this case.

ii. SB 551 contains plain and unambiguous language

The interpretation of SB 551, with respect to its application to this case, is governed by the following rules:

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

Awakuni v. Awana, 115 Hawaii 126, 133, 165 P.3d 1027, 1034 (2007).

In this case, SB 551 contains plain and unambiguous language, which includes, but is not limited to the following, “The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association’s governing documents, by the managing agent or board, acting on behalf of the association and in the name of the association[.]” See JEFS Dkt. 40, at p. 15. In turning to SB 511’s preamble, the following language sets forth its purpose and the intent of the Hawaii State Legislature:

- “[T]he legislature finds that condominium associations, since 1999, have been authorized to conduct nonjudicial foreclosures regardless of the presence or the absence of power of sale language in an association’s governing documents.” See id. at p. 6;
- “[T]he intermediate court of appeals in Sakal v. Association of Apartment Owners of Hawaiian Monarch, 143 Haw. 219, 426 P.3d 443 (2018), held that the legislature intended that associations can only conduct nonjudicial foreclosures if they have specific authority to conduct nonjudicial foreclosures in their declaration or bylaws or in an agreement with the owner being foreclosed upon. The legislative history indicates this **was not** the intent of the legislature in 1999, **nor** in legislatures that have made subsequent amendments.” See id. at p. 10 (emphasis added); and
- “Therefore, **this act confirms the legislative intent that condominium associations should be able to use nonjudicial foreclosure to collect delinquencies regardless of the presence or absence of power of sale language in an association’s governing documents.**” See id. (emphasis added).

The above language makes it crystal clear that the ICA committed grave errors of law and fact in concluding that “the [Malabes’] claim for wrongful foreclosure may proceed on the basis that the AOA was not authorized to conduct the foreclosure pursuant to HRS § 667-5 without a power of sale[.]” See JEFS Dkt. No. 46, at p. 6, n. 6 (CAAP-17-0000145).

- iii. SB 551’s plain and unambiguous language requires the reversal of the ICA’s erroneous holding

Applying the plain language of SB 551 and the clear legislative intent stated therein to the case at hand must result in a reversal of the ICA’s erroneous vacatur of the dismissal of the Malabes’ claim for wrongful foreclosure. In reaching its holding, the ICA incorrectly concluded that in order for the AOA to conduct its non-judicial foreclosure of the Apartment, the AOA was required to hold a power of sale. See id. at p. 4. The ICA further improperly rejected the AOA’s argument that the plain language of HRS § 514B-146 authorized the AOA to conduct the non-judicial foreclosure of the Apartment under HRS § 667-5, and went on to conclude that it would “not infer that the power to extrajudicially sell another person’s property was granted, in the absence of a clear legislative act doing so.” See id. at pp. 5-6. In fact, the plain language of SB 551 is a “clear legislative act” that has the practical effect of granting the AOA “the power to extrajudicially sell another person’s property[.]”

regardless of the presence or absence of power of sale language in the AOA's governing documents. This clarification recognizes the statutory authority the legislature had always intended to grant associations. Further, it provides the courts with an express declaration to effectuate this intent, and to prevent further misunderstanding as was prevalent in the case at bar.

Even the Malabes' counsel recognizes the inevitable outcome of the application of SB 551 to this case, and acknowledges that it will preclude the Malabes from bringing their claim that is the subject of this appeal. See Steven Chung, *This Bad Legislation Would Bail Out Condo Associations*, Civil Beat (July 3, 2019), <https://www.civilbeat.org/2019/07/this-bad-legislation-would-bail-out-condo-associations/>. In other words, the Malabes' counsel admits that application of SB 551 precludes a finding of liability with respect to the Malabes' wrongful foreclosure claim. Moreover, the Malabes' counsel admits that SB 551 clearly authorizes condominium associations to utilize Part I of HRS Chapter 667, i.e. the very procedure that the Malabes' claim was wrongful. See id. (acknowledging that, "This year, the Legislature passed SB 551, which seeks to bail out associations and attorneys who unlawfully used Part I by retroactively legalizing its use.")⁵. The Malabes' Complaint expressly alleges that the "AOA was not authorized or entitled to conduct a nonjudicial foreclosure or power of sale under Part I and the sale that occurred was unlawful and constituted a wrongful foreclosure." JEFS Dkt. 14, ROA, at p. 13, ¶ 33 (CAAP-17-0000145). Notably, the Malabes' allegations set forth in their Complaint and the plain language of SB 551 are irreconcilable; the natural result being that there can be no claim for wrongful foreclosure based upon a procedure that Hawaii law expressly permits.

B. The Plain Language of SB 551 and its Effect on This Case Are Consistent with the Arguments Set Forth in the AOA's Writ

The plain language of SB 551 and its effect on this case are consistent with the arguments set forth in the AOA's Writ. First, as correctly raised in the AOA's Writ, the ICA committed grave errors of law and fact in treating the non-profit AOA as a for-profit financial institution, and by ignoring the powers conferred to the AOA by the condominium property regime. As acknowledged in SB 551's preamble, "Brought into being by the legislature through

⁵ The AOA disagrees with this statement to the extent that it implies that prior to SB 551 becoming Hawaii law, associations and attorneys were not authorized to utilize the procedures set forth in HRS Chapter 667, Part I. However, the AOA does agree with the Malabes' counsel that SB 551 makes it clear that condominium associations and attorneys are and were authorized to utilize the procedures set forth in HRS Chapter 667, Part I.

Act 180, Session Laws of Hawaii 1961, condominiums are ‘creature[s] of statute,’ State Savings & Loan Association, 50 Haw. at 546, 445 P.2d at 115, which are governed by *statutes*, as well as their governing documents.” See JEFS Dkt., at p. 5 (SCWC-17-0000145). Because condominium associations such as the AOA are created and governed by statute as well as their governing documents, the ICA erred in ignoring the statutorily granted authority permitting the AOA to conduct the non-judicial foreclosure at issue. Instead, the ICA incorrectly concluded that, “HRS § 667-5 (repealed 2012) did not grant a power of sale but merely authorized use of certain nonjudicial procedures in order to effect a foreclosure only ‘[w]hen a power of sale [was] contained in a mortgage.’” See JEFS Dkt. 46, at p. 5 (CAAP-17-0000145). Condominium associations do not hold mortgages containing a power of sale, rather, their power to conduct non-judicial foreclosures in a like manner as a mortgage was expressly granted via statute, just like all their other powers. The ICA’s erroneous holding ignored the AOA’s statutory grant of authority to conduct non-judicial foreclosure.

Second, SB 551 further acknowledges the fact that in working in the best interest of the association as whole, “it is crucial that condominium associations be able to secure timely payment of dues to provide services to all residents of a condominium community.” JEFS Dkt. 40, at pp. 5-6 (SCWC-17-0000145). In addressing a condominium association’s need to serve all of its members in the association, SB 551 provides the following insight:

In 1999, the legislature noted ‘that more frequently associations of apartment owners are having to increase maintenance fee assessments due to increasing delinquencies and related enforcement expenses. This places an unfair burden on those non-delinquent apartment owners who must bear an unfair share of common expenses . . .’ Moreover, lengthy delays in the judicial foreclosure process exacerbated the financial burden on association owners. **The legislature determined that associations needed a more efficient alternative, such as power of sale foreclosures, to provide a remedy for recurring delinquencies.**

See id. at p. 6 (emphasis added). The foregoing language of SB 551 supports the arguments set forth in the AOA’s Writ. Namely, the statutory grant of authority for the AOA to exercise the non-judicial foreclosure procedures arises from the AOA’s obligation to serve the sum of its membership. This special relationship shared between the AOA and its condominium community is readily distinguishable from the relationship that is formed by and between a for-profit financial institution and a borrower, and thus, it is improper to treat the AOA as such. Indeed, the bank and lender non-judicial foreclosure cases relied upon by the ICA start from a

significantly different perspective and have nothing to do with the management of a community, which is precisely what the AOA was engaged in when it conducted the subject non-judicial foreclosure. For instance, for-profit financial institutions are in the “business” of participating in an arm’s length transaction with a borrower, resulting in a negotiated debt instrument setting forth the respective rights of the parties involved. In the case of non-profit condominium associations, their rights arise via statute, and no negotiations take place with respect to the debt obligation, i.e. the accrual of a lien, nor with respect to the associations’ power to foreclose on the debt, i.e. the statutory grant of authority in HRS § 514B-146. Thus, the relationship formed between a for-profit financial institution and a borrower necessarily requires a different analysis from that of a non-profit condominium association and its membership; at a minimum, it requires recognition that a non-profit condominium association forecloses upon a lien in furtherance of its obligations owed to the membership as a whole, and not from any self-motivated interest in recouping a loan or turning a profit. However, despite these obvious differences, the ICA treated the AOA as a for-profit financial institution, thereby resulting in the flawed conclusion that in order for the AOA to conduct the non-judicial foreclosure at issue, it was required to hold “an agreement that independently provides for a power of sale.” See JEFS Dkt. 46, at p. 4 (CAAP-17-0000145).

In support of its erroneous holding, the ICA relied on various cases that were limited to foreclosures by for-profit mortgage holders. In fact, the ICA went as so far as to quote Santiago v. Tanaka, which held that “no state statute creates a right in mortgagees to proceed by non-judicial foreclosure; the right is created by contract.” See id. at p. 4. Of course, there are no contracts at issue in this matter and there are no statutory constructs for mortgages or negotiated debt agreements establishing the foundational rights between the parties. In the case of financial institutions, as noted above, the debt arises via a written agreement such as a mortgage and note, and the right to exercise a non-judicial foreclosure of this debt likewise arises from the same written agreement, the power of sale contained therein. Moreover, financial institutions, as lenders, have a clear advantage over borrowers in negotiating the written instrument securing the debt obligation, and thus, there are apparent reasons as to why financial institutions are required to secure all their rights at the time the debt obligation is created – such as a power of sale. In stark contrast, the lien secured by the AOA against the Apartment was not a negotiated debt obligation, rather, it was created by an operation of law – the statutory scheme. See HRS §

514B-146(a) (“All sums assessed by the association but unpaid for the share of the common expenses chargeable to any unit shall constitute a lien on the unit.”). Similarly, the AOA’s authority to proceed with the non-judicial foreclosure at issue did not arise from a negotiated debt obligation, rather, it was also created by an operation of law – HRS Chapter 514B and HRS Chapter 667. Finally, as SB 551 now makes clear, a condominium association’s power of sale is also statutorily given, with HRS § 667-1’s definition of “power of sale” including a nonjudicial foreclosure when, “an association enforces its claim of an association lien, regardless of whether the association documents provide for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure.” See JEFS Dkt. 40 at pp. 16-17 (SCWC-17-0000145). Accordingly, not only does SB 551 resolve this dispute, it further works in part to clarify the apparent difference between non-profit condominium associations and for-profit financial institutions. This difference was ignored by the ICA when it vacated, in part, the trial court’s dismissal of the Malabes’ Complaint, and therefore, the ICA’s holding must be reversed.

IV. THE MALABES CANNOT DISPUTE THAT APPLICATION OF SB 551 ENDS THIS CASE

As the Court may already be aware, the Malabes’ counsel represents a weighty list of other plaintiffs with respect to a similar, if not the same wrongful foreclosure claim that is the subject of this appeal.⁶ It is because of this, that the AOA’s counsel, who represents numerous defendants in the same wrongful foreclosure cases, has particular knowledge of the arguments the Malabes may attempt to raise with respect to SB 551. However, as set forth in detail below, the Malabes have no credible argument disputing the inevitable effect of SB 551 to this case. Namely, that there can be no claim for wrongful foreclosure against the AOA, as a result of the AOA following the non-judicial foreclosure procedures expressly authorized by Hawaii law. Moreover, and as described in detail below, the application of SB 551 does not implicate constitutional issues in this private, two-party civil action involving no state actor.

⁶ See e.g. Galima, et al. v. Association of Apartment Owners of Palm Court, by and through its Board of Directors, et al. (Civil No. 1:16-00023-LEK-RT); see also Brown v. Porter McGuire Kiakona & Chow, LLP, et al. (Civil No. 1:17-cv-00554-LEK-RT); Connelly, et al. v. Ekimoto & Morris, LLC, et al. (Civil No. 1:16-cv-00448-LEK-WRP); Parks, et al. v. Association of Apartment Owners of Makaha Surfside, by and through its Board of Directors (Civil No. 19-1-0100-01).

A. The Malabes' Argument Regarding the Legislative Intent of HRS Chapter 667, Part I and Part II, is Without Merit and is Directly Contradicted by the Plain Language of SB 551

As was correctly rejected by the trial court below, from the inception of this case, the Malabes have, and continue to assert, that the AOA was only authorized to use the alternate power of sale foreclosure process set forth in HRS §§ 667-21 through 667-42 ("Part II"), but in fact, improperly utilized the procedures set forth in HRS §§ 667-5 through 667-10 ("Part I"). Such an argument should be acknowledged for what it is – a clear attempt by the Malabes to avoid the plain language of SB 551 and its practical effect on this case. In other words, the Malabes, realizing that SB 551 precludes any finding of liability based upon their theory that the AOA was required to hold a power of sale, are now attempting to shift the attention away from this inevitable outcome and raise procedural issues that are contradicted by the plain language of HRS § 514B-146, HRS Chapter 667, and SB 551. Unfortunately for the Malabes, such an argument is without merit.

As a preliminary matter, any argument concerning the procedure of the non-judicial foreclosure at issue should have been raised at the time of foreclosure through judicial intervention by way of enjoining the sale or seeking to set aside the foreclosure action. See Ulrich v. Security Inv. Co., 35 Haw. 158, 182 (Haw. Terr. 1939) ("It is unquestionably the rule that the mortgagor must act with reasonable promptness in a proceeding undertaken by him to set aside the foreclosure sale made under power of sale. Equity will not grant relief to a litigant who has negligently slept on his rights and permitted his demand to become stale where injustice would be done by granting the relief asked."). Fundamentally, if the Malabes took issue with the legal basis for the procedures utilized to conduct the non-judicial foreclosure at issue, they had every right to obtain an attorney to timely litigate, and if necessary, appeal the matter. See generally HRS § 667-51. However, there can be no dispute that the Malabes did nothing to preserve their defenses before, during, or shortly after the foreclosure took place. See JEFS Dkt. 14, ROA, at pp. 8 & 11, ¶ 20 (establishing that the Malabes waited approximately six-years from the time the non-judicial foreclosure occurred on or around December 17, 2010, to the time they filed their Complaint on December 13, 2016) (CAAP-17-0000145). If individuals who wish to challenge a foreclosure are permitted to allege procedural defects that were apparent at the time of the foreclosure as a new independent cause of action six-years later, the Hawaii courts will no

doubt see a very significant influx in extremely belated foreclosure claims in the State of Hawaii. The facts are that the Malabes did nothing to raise these concerns even remotely close to the time of foreclosure and did nothing to otherwise timely protect their interests. Accordingly, the Court should preclude the Malabes from converting a nearly six-year-old defense, arising from their claim that there were procedural defects with the foreclosure, into an affirmative cause of action.

Irrespective of the foregoing, the AOA and its counsel properly conducted the non-judicial foreclosure at issue because the legislature granted the AOA the right to use non-judicial foreclosure procedure under HRS Chapter 667, which necessarily included HRS § 667-5. Specifically, the Hawaii State Legislature, in promulgating HRS § 514B-146 during the relevant time period, and prior to SB 551 becoming law, expressly granted the following rights to condominium associations:

The lien of the association **may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in Chapter 667**, by the managing agent or board, acting on behalf of the association and in the name of the association, **in like manner as a mortgage of real property**.

514A-90 (2010) (emphasis added) (referencing the correlative and identical provision to HRS § 514B-146(a), prior to the 2012 amendments). Similarly, § 514A-82(b)(13) further provided that, “[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, **including nonjudicial or power of sale foreclosure procedures authorized by chapter 667[.]**” HRS § 514A-82(b)(13) (emphasis added). The foregoing provisions establishes that the Hawaii State Legislature intended to afford condominium associations options to proceed with foreclosing on its lien, including by action, non-judicial, or power of sale foreclosure, in like manner as a mortgage.⁷ This is precisely what the AOA did when it foreclosed on the Apartment in 2010, and nothing in HRS §§ 514A-82(b)(13) and/or 514A-90 (later replaced by the correlative provision of HRS § 514B-146) limited the AOA to a specific section of HRS Chapter 667, whether it be Part I or Part II.

Despite the foregoing, the Malabes asserted, and the ICA erroneously agreed, that HRS Chapter 667, Part I, “was a nonjudicial foreclosure process that could only be used by the

⁷ Under Hawaii law, courts have repeatedly acknowledged that “[i]n interpreting a statute . . . our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself.” Shin v. McLaughlin, 89 Hawaii 1, 4, 967 P.2d 1059, 1062 (1998) (citing Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawaii 217, 229-30, 953 P.2d 1315, 1327-28 (1998)).

holder of a mortgage containing a power of sale.” See JEFS Dkt. 14, ROA, at p. 10, ¶ 12 (CAAP-17-0000145). Furthermore, in applying SB 551 to this case, the Malabes’ claim fails on its face. First, the Malabes cannot contend that the AOA was required to hold a “mortgage” in order to foreclose on the Apartment under HRS Chapter 667, Part I. In this case, there was no written instrument, such as a mortgage, securing the debt obligation that the AOA was authorized to foreclose on, rather, the debt obligation arose via statute. See HRS § 514B-146(a) (“All sums assessed by the association but unpaid for the share of the common expenses chargeable to any unit shall constitute a lien on the unit.”). Moreover, the Hawaii State Legislature imposed a statutory scheme in HRS § 514A-90 (now replaced by HRS 514B-146), whereby condominium associations could foreclose on this statutorily created lien by “nonjudicial . . . foreclosure procedures set forth in Chapter 667 . . . in a like manner as a mortgage of real property.” HRS § 514A-90 (2010). In other words, the Hawaii State Legislature clearly recognized that condominium associations are not in the “business” of foreclosing on debt obligations secured by a written instrument such as a mortgage, rather, its intent was to provide condominium associations the ability to foreclose on a debt that accrued via statute, by granting the authority to do so, via statute, “in like manner as a mortgage.” Accepting the Malabes’ erroneous argument would impose an obligation upon condominium associations to go seek out the delinquent owner (in this case, the Malabes) and secure a “mortgage” in order to foreclose on said lien. Such an assertion defies the realities of the relationship between condominium associations and their membership, as well as the plain language of Hawaii law. Moreover, as acknowledged by the ICA below, as well as the United States District Court for the District of Hawaii, condominium associations **do not** need to establish that they hold a “mortgage” in order to utilize the non-judicial foreclosure procedures under HRS Chapter 667, Part I. See JEFS Dkt. 46, Summary Disposition Order, at p. 4 (CAAP-17-0000145) (acknowledging that, “in order for an association to invoke this authority and utilize the procedures outlined in HRS § 667-5, there must have existed an **agreement** that independently provides for a power of sale”) (emphasis added); see also Galima v. Ass’n of Apt. Owners of Palm Court, 2018 U.S. Dist. LEXIS 217801, *23 (D. Haw. Dec. 31, 2018) (declaring that, “if the Governing Documents contains a power of sale provision, this would constitute an agreed upon power of sale that entitled the AOA to utilize the Chapter 667, Part I nonjudicial foreclosure process.”). Based on the above, and as addressed by the ICA

below, the AOA was not required to hold a “mortgage” in order to utilize the non-judicial foreclosure procedures under HRS Chapter 667, Part I.

Turning to the later portion of the Malabes’ claim – that the AOA was required to hold a power of sale in order to utilize the non-judicial foreclosure procedures of HRS Chapter 667, Part I – SB 551 puts this issue to rest. Specifically, SB 551 confirms that, “The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, **regardless of the presence or absence of a power of sale language in an association’s governing documents.**” See JEFS Dkt. 40, at p. 15 (emphasis added). Thus, in accordance with the AOA’s argument since the inception of this case, the AOA was not required to hold a mortgage with a power of sale to conduct the non-judicial foreclosure at issue, and any ambiguity surrounding this has been resolved by SB 551. As the Malabes do not (and cannot) allege that the AOA failed to meet any procedural requirements as provided under HRS Chapter 667, any argument concerning the applicability of Part I versus Part II cannot be sustained.

V. THE APPLICATION OF SB 551 WILL NOT IMPLICATE ANY CONSTITUTIONAL ISSUES IN THIS CASE

A. The Malabes Do Not Have Standing to Raise Constitutional Concerns Regarding the Application of SB 551 to This Case

In the Supplemental Brief Order, the Parties were reminded of the notice requirements arising from a constitutional challenge brought against a statute of the State of Hawaii. See JEFS Dkt. 43 (SCWC-17-0000145). However, this two-party civil action, devoid of any declaratory relief claim against a state actor or claim involving state action, simply cannot be the basis for a proceeding to determine whether the law is constitutional. While HRAP Rule 44⁸ provides a process by which parties can raise a constitutional question in a proceeding, this rule does not confer standing on the parties. The Malabes have no standing to raise

⁸ HRAP Rule 44 provides:

It shall be the duty of a party who draws in question the constitutionality of any statute of the State of Hawaii in any proceeding in any Hawaii appellate court to which the State of Hawaii, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the appellate court, to give immediate notice in writing to the Attorney General of the State of Hawaii of the existence of said question.

constitutional claims related to the passage of SB 551 or its application to this case, because they have not suffered an injury that is ripe for adjudication, and any claim related to SB 551 must be asserted against the State of Hawaii, not the AOA. Moreover, federal courts in the Ninth Circuit have already ruled on the constitutionality of HRS Chapter 667, and SB 551 does not affect this analysis. Thus, the constitutionality of SB 551 is not a justiciable issue in the instant case.

i. Hawaii Rules of Appellate Procedure, Rule 44, does not confer standing

HRAP Rule 44 is substantively similar to FRCP Rule 5.1(a)(1)(B), which provides, in relevant part,

A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a state statute must promptly file a notice of constitutional question stating the question and identifying the paper that raises it, if a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity.

See FRCP Rule 5.1(a)(1)(B).

The U.S. District Court for the District of Hawaii has explained⁹ that FRCP “Rule 5.1 governs the **process** for challenging the constitutionality of state or federal statutes – it does not confer subject matter jurisdiction.” U.S. Bank Nat’l Ass’n v. Higa, No. 15-00251 DKW-RLP, 2015 U.S. Dist. LEXIS 146027, at *10 (D. Haw. Oct. 28, 2015) (emphasis in original) (addressing federal question jurisdiction). Analogously, HRAP Rule 44 governs the **process** by which the constitutionality of a state statute is challenged; it does not confer standing nor does it address the propriety of such a challenge.¹⁰

ii. The Malabes cannot establish standing under any of the applicable tests

It appears that Hawaii courts have applied, on occasion, at least three different tests depending on the causes of action asserted to determine whether a plaintiff has standing. However, as described below, the Malabes do not have standing to challenge the

⁹ “Where this Court has patterned a rule of procedure after an equivalent rule within the FRCP, interpretations of the rule by the federal courts are deemed to be highly persuasive in the reasoning of this Court.” Kawamata Farms v. United Agri Prods., 86 Hawaii 214, 251-52, 948 P.2d 1055, 1092-93 (1997) (citation and quotation marks omitted).

¹⁰ “In Hawaii state courts, standing is a prudential consideration regarding the ‘proper — and properly limited — role of courts in a democratic society’ and is not an issue of subject matter jurisdiction, as it is in federal courts.” Tax Found. of Haw. v. State, 144 Hawaii 175, 188, 439 P.3d 127, 140 (2019). However, “[i]n federal courts, standing does implicate subject matter jurisdiction.” Id., at 190, 439 P.3d at 142.

constitutionality of SB 551 in the instant case. First, in Hawaii, “the use of judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context.” Trs. of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 171, 737 P.2d 446, 456 (1987) (citations and quotation marks omitted). Thus, Hawaii courts have traditionally employed the three-part “injury in fact” test in order to determine whether a party has standing to litigate a claim. Bush v. Watson, 81 Hawaii 474, 479, 918 P.2d 1130, 1135 (1996). “Under this three-prong test, standing arises where “(1) [the plaintiff] has suffered an actual or threatened injury as a result of the defendant’s wrongful conduct, (2) the injury is fairly traceable to the defendant’s actions, and (3) a favorable decision would likely provide relief for a plaintiff’s injury.” IndyMac Bank v. Miguel, 117 Hawaii 506, 512, 184 P.3d 821, 827 (Haw. Ct. App. 2008) (citing Bush at 479, 918 P.2d at 1135). In this case, under the injury in fact test, the Malabes have no standing to challenge the constitutionality of SB 551 because, to the extent that the Malabes have been injured by SB 551, such an injury is not fairly traceable to the AOA’s conduct, as opposed to the State, and, without State as a party, such an injury cannot be adequately redressed.

Second, this Court has acknowledged that for purposes of a declaratory action,

[A] party seeking declaratory relief under HRS § 632-1 need not satisfy the three-part “injury in fact” test to have standing. Rather, consistent with standing requirements prescribed by the legislature through the language of HRS § 632-1, we hold that a party has standing to seek declaratory relief in a civil case brought pursuant to HRS § 632-1(b) (2016): (1) where antagonistic claims exist between the parties (a) that indicate imminent and inevitable litigation, or (b) where the party seeking declaratory relief has a concrete interest in a legal relation, status, right, or privilege that is challenged or denied by the other party, who has or asserts a concrete interest in the same legal relation, status, right, or privilege; and (2) a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.

Tax Found. of Haw. v. State, 144 Hawaii 175, 189, 439 P.3d 127, 141 (2019). Notably, the Malabes do not seek any declaratory relief under HRS § 632-1, and even if they did, a declaratory action challenging the constitutionality of SB 551 is not an “antagonistic claim” between the Malabes and the AOA. To the extent that the Malabes have such a claim, that claim is against the State, which is not a party to this litigation. Thus, the Malabes do not have standing to challenge the constitutionality of SB 551 in any declaratory action that could have been raised with respect to the AOA.

Finally, in the context of whether standing to challenge the constitutionality of a statute as applied exists, the general rule is that one can establish standing “[w]here restraints imposed act directly on an individual or entity and a claim of specific present objective harm is presented[.]” State v. Bloss, 64 Haw. 148, 151, 637 P.2d 1117, 1121 (1981), cert. denied, 459 U.S. 824, 103 S. Ct. 56, 74 L. Ed. 2d 60 (1982) (citation omitted).

This standing requirement is termed the “rule against vicarious assertion of constitutional rights.” Tauese v. State, Dep’t of Labor & Indus. Relations, 113 Hawai’i 1, 28, 147 P.3d 785, 812 (2006). “One must show that **as applied to him** the statute is constitutionally invalid.” Ariyoshi, 67 Haw. at 419, 689 P.2d at 765 (citing State v. Marley, 54 Haw. 450, 509 P.2d 1095 (1973)).

State v. Armitage, 132 Hawaii 36, 55, 319 P.3d 1044, 1063 (2014) (emphasis added). In this case, the Malabes cannot establish that they have suffered any “specific present objective harm” because SB 551 has not yet been applied to them, and thus, cannot establish standing under an as applied analysis. See e.g. id. (concluding that, “Because Petitioners were subject to penal liability pursuant to HAR § 13-261-10, they have ‘a claim of specific present objective harm’ . . . and therefore have standing to challenge the constitutionality of that regulation.”).

Accordingly, as described in detail below, the Malabes cannot establish that they have standing in the instant appeal to challenge the constitutionality of SB 551 under any of the above enumerated tests – injury in fact, declaratory relief, or as applied.

a. The Malabes do not have standing under the injury in fact test

With respect to the first prong of the “injury in fact” test, the Malabes must show a “distinct and palpable injury” as a result of the defendant’s wrongful conduct, that is not “abstract, conjectural, or merely hypothetical.” Hanabusa v. Lingle, 119 Hawaii 341, 347, 198 P.3d 604, 610 (2008) (citations omitted). The Malabes are unable to meet this burden because they are unable to show they have suffered any injury as a result of the AOA’s conduct, as opposed to the Legislature. This is because the AOA did not pass SB 551 and cannot be held liable for SB 551’s effect on this case. Indeed, there are no state actors nor state action involved in this appeal, and the Malabes are not permitted to challenge the law in their two-party civil lawsuit.

With respect to the second prong of the “injury in fact” test, the Malabes must show that, “the injury is fairly traceable to the defendant’s actions.” See IndyMac Bank, 117

Hawaii at 512, 184 P.3d at 827. However, the Malabes have not suffered and cannot suffer any injury to their constitutional rights that is fairly traceable to the challenged action of the AOA. Put another way, any injury to the Malabes' constitutional rights is not the result of the AOA's foreclosure. The AOA is not responsible (nor could it be) for any alleged injury resulting from the enactment of SB 551.

Finally, the Malabes are also unable to satisfy the third prong of the traditional standing test, as it is not likely a constitutional claim related to their injury will be redressed by a favorable decision. The only injury the Malabes have allegedly suffered that is ripe for adjudication is the AOA's non-judicial foreclosure of their unit, and it is abundantly clear "the Hawaii nonjudicial foreclosure statute is constitutional." In re Collins, No. 13-01783, 2014 Bankr. LEXIS 2534, 2014 WL 2575898, at *4 (Bankr. D. Haw. June 9, 2014). The clarification SB 551 provides does absolutely nothing to change the long-established rule that a legislature may grant private power of sale procedures for a foreclosure, and an AOA's use of those procedures is constitutional. Accordingly, based on the above, the Malabes cannot establish standing under the injury in fact test in order to raise a constitutional challenge to SB 551 in this private, two-party civil action devoid of any declaratory relief claim against a state actor or any claim involving state action.

b. The Malabes are not seeking declaratory relief under HRS § 632-1

The Malabes cannot seek a declaratory judgment that SB 551 is unconstitutional because the Malabes have failed to allege such a claim. Rule 8(a) of the Hawaii Rules of Civil Procedure provides that a "pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a **demand for judgment for the relief the pleader seeks.**" Haw R. Civ. P. 8(a) (emphasis added). The complaint is the pleading "that provides [the] defendant with fair notice of what plaintiff's claim is and the grounds upon which the claim rests." In re Genesys Data Techs., Inc., 95 Hawaii 33, 41, 18 P.3d 895, 903 (2001). In accordance with these pleading rules and the underlying purpose of providing fair notice, "[i]ssues not raised by the pleadings cannot be determined." Pires v. Pires, 29 Haw. 849, 851 (Haw. Ter. 1927).

Here, it is undisputed that the Malabes' complaint does not allege a claim for declaratory relief. It is also undisputed that at no time in this proceeding, nor in the underlying litigation, have the Malabes sought a declaratory judgment that SB 551 is unconstitutional.

Thus, the Malabes cannot now, on their last appeal, ask this Court to declare SB 551 unconstitutional when the Malabes have failed to demand such relief in their Complaint.

Even if the Malabes' failure to allege a claim for declaratory relief was somehow excused, this is not the proper proceeding to bring such a claim. There are no "antagonistic claims" existing between the AOA and the Malabes concerning the constitutionality of SB 551 whereby a declaratory judgment would "serve to terminate the uncertainty or controversy giving rise to the proceeding." See Tax Found. Of Haw., 144 Hawaii at 189, 439 P.3d at 141 (2019). Nor do the Malabes possess any "concrete interest in a legal relation, status, right, or privilege that is[, or has been] challenged or denied by the [AOA,]" with respect to SB 551. See id. Said differently, with respect to SB 551, there is no antagonistic claim between the Malabes and the AOA because the AOA has not denied the Malabes a concrete interest in a legal right. See id. Again, the AOA is not and cannot be held responsible for the passing of SB 551, and thus, the Malabes cannot seek declaratory relief against the AOA challenging the constitutionality of SB 551. The Malabes would need to assert such a claim against the State, who is not a party to this litigation.

- c. The Malabes cannot establish standing to challenge the constitutionality of SB 551 as applied

In order for the Malabes to establish standing to challenge the constitutionality of SB 551 as applied, the general rule is that standing may exist "[w]here restraints imposed act directly on an individual or entity and a claim of specific present objective harm is presented[.]" See State v. Bloss, 64 Haw. at 151, 637 P.2d at 1121. Moreover, the Malabes "must show that **as applied to [them]** the statute is constitutionally invalid." Honolulu v. Ariyoshi, 67 Haw. 412, 419, 689 P.2d 757, 763 (1984). However, the Malabes have no claim of "specific present objective harm," because SB 551 has not yet been applied to them. Unless and until there is a determination that SB 551 has indeed taken away the Malabes' claim, the Malabes have not suffered any injury arising out of the application of SB 551. For example, this Court could determine that SB 551 does not apply here, in which case the Malabes would have suffered no injury from the enactment of SB 551. Similarly, this Court could determine that even without SB 551 the Malabes have no claim, in which case the Malabes would also have suffered no harm from the enactment of SB 551. Any injury that the Malabes believe they have suffered from the enactment of SB 551 is inchoate and speculative, at best. Because the Malabes lack a "specific

present objective harm,” the Malabes cannot prove that their constitutional challenge is ripe for review. Of course, “it is axiomatic that ripeness is an issue of subject matter jurisdiction,” and without jurisdiction over a claim, this court may not rule on it. See Kapuwai v. City & Cty. of Honolulu, 121 Hawaii 33, 39, 211 P.3d 750, 756 (2009).

In sum, because the Malabes have no standing to litigate any constitutional claims related to SB 551 in this action—as none are ripe for adjudication and there are no state actors or state action at issue—this Court must refrain from ruling on any constitutional issues the Malabes may raise. Indeed, “[t]he requirements that a party must have legal standing to litigate a claim . . . serve[s] several purposes that are fundamental in ensuring the effective role of the courts in our society.” McDermott v. Ige, 135 Hawaii 275, 283-84, 349 P.3d 382, 390-91 (2015).

Legal standing requirements promote the separation of powers between the three branches of government by limiting the availability of judicial review to cases in which there is an actual dispute between adverse parties, which “focuses attention directly on the question of what is the proper place of the judiciary in the American system of government.” Erwin Chemerinsky, *Federal Jurisdiction* 57-58 (4th ed. 2003).

This is particularly important where, as in this case, one party claims that action taken by another branch of government was unconstitutional. Raines v. Byrd, 521 U.S. 811, 819-20, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997). For example, this court noted in Life of the Land v. Land Use Comm'n of State of Haw., that “even in the absence of constitutional restrictions [on justiciability], courts still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government.” 63 Haw. 166, 172, 623 P.2d 431, 438 (1981). In Trustees of Office of Hawaiian Affairs v. Yamasaki, this court further explained that we must be wary of the “inappropriateness of judicial intrusion into matters which concern the political branch of government,” and that “too often, courts in their zeal to safeguard their prerogatives overlook the pitfalls of their own trespass on legislative functions.” 69 Haw. 154, 172, 737 P.2d 446, 456-57 (1987) (citations, quotation marks, and brackets omitted). **Thus, a judicial determination of the constitutionality of a statute without an actual dispute between genuinely adverse parties could constitute an unwarranted encroachment into the authority of the legislative branch of government.**

Id. at 283-84, 349 P.3d at 390-91 (emphasis added). Accordingly, the Malabes should be precluded from raising a constitutional challenge to SB 551 in this two-party civil action, devoid of any declaratory relief claim against a state actor or claim involving state action.

B. The Malabes Cannot, in the Instant Appellate Proceeding, Challenge SB 551 as a Violation of Due Process, Equal Protection, or as a Takings, Because There is No State Action at Issue

In order for the Malabes to assert a violation of due process, equal protection, or a takings claim, there must be state action giving rise to such a claim. However, it cannot be disputed that there is no state action at issue in the instant appeal, and thus, the Malabes are precluded from raising such constitutional challenges to SB 551.

First, alleged due process violations under the United States and Hawaii Constitutions both require state action. Indeed, as stated succinctly by this Court, “To state a claim under the fourteenth amendment, a litigant must assert that **some state action** has deprived the litigant of a constitutionally protected ‘liberty’ or ‘property’ interest.” Child Support Enf’t Agency v. Doe, 109 Hawaii 240, 247, 125 P.3d 461, 468 (2005) (citation omitted) (emphasis added). Similarly, “[t]he Equal Protection Clause of the United States Constitution provides that ‘**No State** shall . . . deny to any person within its jurisdiction the equal protection of laws.’” See In re Estate of Bishop, 53 Haw. 604, 611, 499 P.2d 670, 675 (1972) (emphasis added). Finally, pursuant to the Hawaii Constitution, “Article I, section 20, **vests the state** with the right of eminent domain empowering it to take private property for public use upon payment of just compensation[.]” Hawaii Hous. Auth. v. Lyman, 68 Haw. 55, 67, 704 P.2d 888, 895 (1985) (emphasis added). “At all times in a takings analysis, it is solely the **government action** that must be evaluated.” See Leone v. Cty. of Maui, 141 Hawaii 68, 87, 404 P.3d 1257, 1276 (2017) (emphasis added).

In this case, it cannot be disputed that no state action is at issue, and thus, there can be no claim for a violation of due process, equal protection, or a takings. As this Court has recognized:

A state can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed that of the State. When the state directs, supports, and encourages those private parties to take specific action, that is State action. In other words, there must be a sufficiently close nexus between the State and the challenged action so that the action of the private entity may be fairly treated as that of the State itself.

Aquarian Found. v. Ass’n of Apartment Owners of Waikiki Park Heights, No. 21732, 2001 Haw. LEXIS 97, at *41-42 (Mar. 2, 2001) (citation omitted). As there is no nexus between the state

and the AOA's non-judicial foreclosure of the Apartment, there is no state action at issue for purposes of this appellate proceeding. In fact, both the United States District Court of the District of Hawaii and the Ninth Circuit have explicitly held that Hawaii's non-judicial foreclosure statute does not involve state action and is constitutional:

It is unclear as to how "constitutional provisions . . . would be implicated by the nonjudicial foreclosure of [plaintiff's] property. *See, e.g., Apao v. Bank of New York*, 324 F.3d 1091, 1095 (9th Cir. 2003) ("While the bar for state action is low . . . non-judicial foreclosure procedures like Hawaii's nevertheless slip under it for want of direct state involvement.").

Ronald Git Sum Au v. Ass'n of Apartment Owners of the Royal Iolani, No. 14-00271 SOM/BMK, 2014 U.S. Dist. LEXIS 111581, at *18 (D. Haw. Aug. 12, 2014).

In Apao v. Bank of New York, plaintiff lost her home to a foreclosure conducted under HRS § 667-5 and filed a federal action challenging the statute as violating the due process clause of the Fourteenth Amendment. 324 F.3d 1091, 1092 (9th Cir. 2003). Affirming dismissal, the Ninth Circuit explained:

The district court dismissed the case for failure to state a claim because **the sale was a purely private remedy and involved no state action**. Apao appealed. In effect, she asks us to reconsider the round of decisions by this circuit and others a generation ago that upheld the constitutionality of similar statutorily authorized sale procedures. *See, e.g., Charmicor, Inc. v. Deaner*, 572 F.2d 694, 696 (9th Cir. 1978); cf. *Adams v. S. Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1974). We conclude there has been no legal or historical development in the intervening years that would require a departure from prior authority. We therefore affirm.

...

[I]n a case materially similar to this one, **when a creditor enforced a lien through a purely private, non-judicial sale, the Supreme Court held that there was no state action**, even though the lien was authorized by the state's legislative enactment of the Uniform Commercial Code. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978). In *Flagg Bros.*, as in the case before us, the debtor argued first that the legislative grant of a private power of sale was a delegation of a traditional government function, and second, that the statutory authorization constituted state encouragement of such non-judicial remedies. The Supreme Court considered and rejected both arguments.

The Court held that **legislative approval of a private self-help remedy was not the delegation of a public function**. *Id.* at 158-60. As a number of circuits have noted, self-help foreclosure remedies have existed since early in the common law, and thus one cannot say that the power of foreclosure is one traditionally belonging only to the government. *See, e.g., Barrera v. Sec. Bldg. & Inv. Corp.*,

519 F.2d 1166, 1172-3 (5th Cir. 1975); Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 166 U.S. App. D.C. 178, 509 F.2d 511, 515 (D.C. Cir. 1974). Our Circuit shares this view. See Adams, 492 F.2d 324, 330.

Flagg Bros. further held that **the state's statutory authorization of self-help provisions is not sufficient to convert private conduct into state action.** 436 U.S. at 164-65. The statute neither encourages nor compels the procedure, but merely recognizes its legal effect. **The state "has not compelled the sale of a [debtor's property], but has merely announced the circumstances under which its courts will not interfere with a private sale."** Id. at 166.

Id. at 1092, 1094 (emphasis added). Accordingly, the AOA's non-judicial foreclosure of the Apartment does not constitute a state action. Without any state action before this Court, the Malabes cannot assert a violation of due process, equal protection, or a takings claim in the instant appeal.

C. The Passage of SB 551 was Within the Legislature's Authority and thus, SB 551 is Presumed to be Constitutional and Valid

The AOA is not the correct party, and this is not the correct case to defend the constitutionality of SB 551. However, because the Court afforded the parties an opportunity to fully brief the effect of SB 551 and to potentially include arguments related to its constitutionality, the AOA will address constitutional theories establishing the validity of the law. Namely, as the Hawaii State Legislature properly exercised its power in passing SB 551, SB 551 is presumed to be constitutional and valid.

As this Court has explained:

[T]he power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.

Koike v. Bd. of Water Supply, 44 Haw. 100, 103, 352 P.2d 835, 838 (1960) (citation omitted).

In passing SB 551, the Hawaii State Legislature wholly acted within its power to "enact laws and to declare what the law shall be." Bissen v. Fujii, 51 Haw. 636, 638, 466 P.2d

429, 431 (1970). “All concede it is proper legislative function to make and change the law and that the courts should always respect the exercise of this function by a coordinate branch of government.” Id. at 639, 466 P.2d at 431 (citation omitted). To be sure, “[t]he power of the state to pass laws through its Legislature is the most important power it possesses, and one that should never be interfered with by the courts except when imperatively required by the fundamental law.” Koike, 44 Haw. at 115, 352 P.2d at 844.

Turning to SB 551 itself, this Court has declared that, “laws duly passed by the legislature are to be deemed constitutional and valid unless the contrary clearly appears. **All presumptions are in favor of constitutionality and validity.** In cases of doubt, the doubts must be resolved in favor of constitutionality and validity.” Koike, at 102, 352 P.2d at 837-38 (citation omitted) (emphasis added). “[W]here it is alleged that the legislature has acted unconstitutionally . . . a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt. The infraction should be plain, clear, manifest, and unmistakable.” Kahoonohano v. State, 114 Hawaii 302, 339, 162 P.3d 696, 733 (2007). Thus, SB 551 is presumed to be constitutional and valid, and it will be the Malabes’ burden to establish, beyond a reasonable doubt, that it is not.

D. This Court Must Give Effect to the Legislature’s Retroactive Intent

This Court has held, “once the legislature has acted, it is not for us to evaluate the wisdom of legislative action, including the determination regarding retroactive or prospective applicability.” Bissen, 51 Haw. at 639, 466 P.2d at 431. It is also well-settled that “where the legislative intent is clearly manifest” that a law operates retroactively, that intent will be given effect. Employees’ Ret. Sys. v. Wah Chew Chang, 42 Haw. 532, 540 (1958). See also HRS § 1-3 (providing “no law has any retrospective operation, unless otherwise expressed or obviously intended.”) It is indisputable that the Hawaii State Legislature clearly manifested its intent that SB 551 shall apply retroactively to this case. SB 551 states, in relevant part,

Sections 3 and 4 of this Act¹¹ shall be applied retroactively to any case, action, proceeding, or claim arising out of a nonjudicial foreclosure under section 667-5

¹¹ Sections 3 and 4 of SB 551 provide, respectively:

The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association’s governing documents . . .

[and]

(repealed June 28, 2012), Hawaii Revised Statutes, and parts II and VI of chapter 667, Hawaii Revised Statutes, that arose before the effective date of this Act and in which a final non-appealable judgment has not yet been entered.

SB 551, Section 5.

It is also an established rule of construction¹² that “a statute providing remedies or procedures that do not affect existing rights, **but merely alter the means of enforcing or giving effect to such rights**, may apply to pending claims—even those arising before the effective date of the statute.” Gov’t Emples. Ins. Co. v. Hyman, 90 Hawaii 1, 5, 975 P.2d 211, 215 (1999) (emphasis added). Thus, there is no prohibition against applying SB 551 to the Malabes’ pending wrongful foreclosure claim. The case State v. Nakata, 76 Hawaii 360, 878 P.2d 699 (1994), is instructive.

In Nakata, this Court held that the retrospective¹³ application of a criminal statute was constitutional, because, among other reasons, the new act did “not divest the appellants of a constitutional right[.] In enacting the statute, **the legislature merely clarified its original view[.]**” Id. at 379, 878 P.2d at 718 (emphasis added). Similarly, in passing SB 551, the legislature did not divest the Malabes of any constitutional right—it merely clarified its original intent “that condominium associations should be able to use nonjudicial foreclosure to collect delinquencies regardless of the presence or absence of power of sale language in an association’s governing documents.” See JEFS Dkt. 40 at p. 10. Based on the foregoing, there is simply no constitutional basis for the Malabes to challenge the retroactive application of SB 551 to this case.

“Power of sale” or “power of sale foreclosure” means a nonjudicial foreclosure when . . . (2) For the purposes of part VI, an association enforces its claim of an association lien, regardless of whether the association documents provide for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure.

¹² This Court does not even need to reach this rule, because where the legislature “has expressly prescribed the statute’s proper reach . . . there is no need to resort to judicial default rules.” Gov’t Emples. Ins. Co. v. Hyman, 90 Hawaii 1, 5, 975 P.2d 211, 215 (1999).

¹³ “There is no difference in principle between a retrospective law and a retroactive law, either of which is one which takes away or impairs vested rights acquired under a different law or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past.” Oleson v. Borthwick, 33 Haw. 766, 774 (1936).

E. The Legislature did Not Violate the Separation of Powers Doctrine Because it did Not Compel the Courts to Rule a Specific Way

The Malabes may try to claim that SB 551 “attempts to interfere with judicial functions” and is “an unconstitutional encroachment of the judicial branch of government.” Bissen, 51 Haw. at 638, 466 P.2d at 431. In other words, the Malabes may argue SB 551 violates the separation of powers doctrine. Such an argument is unavailing, because the legislature merely found that “condominium associations, since 1999, have been authorized to conduct nonjudicial foreclosures regardless of the presence or the absence of power of sale language in an association’s governing documents” and changed the language of the law to reflect this intent. See JEFS Dkt. 40, at p. 6. The legislature did not compel the courts to rule a specific way under old law, which may have resulted in a violation of the separation of powers doctrine.

The separation of powers doctrine is not expressly set forth in any single constitutional provision, but like the federal government, Hawaii's government is one in which the sovereign power is divided and allocated among three co-equal branches. The separation of powers doctrine is intended to preclude a commingling of essentially different powers of government in the same hands and thereby prevent a situation where one department would be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.

Alaka'i Na Keiki, Inc. v. Matayoshi, 127 Hawaii 263, 275, 277 P.3d 988, 1000 (2012)
(citations, brackets and quotation marks omitted).

In the context of a legislature power overstepping a judicial power, the U.S. Supreme Court has explained,

The separation of powers, among other things, prevents Congress from exercising the judicial power. One way that Congress can cross the line from legislative power to judicial power is by usurping a court’s power to interpret and apply the law to the circumstances before it. The simplest example would be a statute that says, “In Smith v. Jones, Smith wins.” At the same time, the legislative power is the power to make law, and Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins.

To distinguish between permissible exercises of the legislative power and impermissible infringements of the judicial power, this Court’s precedents establish the following rule: Congress violates Article III when it compels . . . findings or results under old law. But Congress does not violate Article III when it changes the law.

Patchak v. Zinke, 138 S. Ct. 897, 905, 200 L.Ed.2d 92, 101-02 (2018) (citations, brackets and quotation marks omitted).

As discussed in Section III above, the retroactive application of SB 551 to this pending lawsuit has the practical effect of ensuring the AOA wins. However, as the Patchak Court explained, this does not translate into an impermissible exercise of the legislature’s power. The legislature did not usurp any court’s power to interpret and apply the law to the circumstances before it—rather, it changed the law to clarify the law’s original intent. “A statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts.” Bank Markazi v. Peterson, 136 S. Ct. 1310, 1325, 194 L.Ed.2d 463, 482 (2016). As such, retroactive application of SB 551 to the instant appeal does not violate the separation of powers doctrine, and is not an unconstitutional exercise of the legislature’s power.

VI. CONCLUSION

For the reasons set forth above, the effect of SB 551 to this case is to end the Malabes’ claim for wrongful foreclosure because the plain language of HRS 514B-146, HRS Chapter 667, and SB 551 expressly authorized the AOA to conduct the non-judicial foreclosure at issue. Thus, SB 551 requires a reversal of the ICA’s erroneous vacatur of the dismissal of the Malabes’ claim for wrongful foreclosure. Furthermore, any constitutional challenge to SB 551 is inappropriate for this instant civil dispute, as the Malabes have no standing to raise constitutional claims related to the passage of SB 551, or its application to this case, because they have not suffered an injury that is ripe for adjudication, and any claim challenging the constitutionality of SB 551 must be asserted against a state actor and/or involve state action.

DATED: Honolulu, Hawaii, August 5, 2019.

/s/ David R. Major

DAVID R. MAJOR

JAI W. KEEP-BARNES

Attorneys for Respondent/Defendant-Appellee
ASSOCIATION OF APARTMENT OWNERS OF
EXECUTIVE CENTRE, by and through Its Boards
of Directors

SCWC-17-0000145

IN THE SUPREME COURT OF THE STATE OF HAWAII

GILBERT V. MALABE and
DAISY D. MALABE,

Respondents/
Plaintiffs-Appellants,

vs.

ASSOCIATION OF APARTMENT
OWNERS OF EXECUTIVE CENTRE,
by and through Its Boards of Directors;
DOE DEFENDANTS 1-10,

Petitioner/
Defendant-Appellee.

) CAAP-17-0000145
) CIVIL NO. 16-1-2256-12 (RAN)
) (Declaratory Relief and Damages)
)
) APPEAL FROM THE:
) (1) DISPOSITION ORDER, filed November
) 29, 2018
) (2) FINAL JUDGMENT, filed on January
) 31, 2019
)
) First Circuit Court
) The Honorable Rhonda A. Nishimura
)
)
)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 5, 2019, a copy of the foregoing will be duly served on the following party at their last known address via electronic service, unless otherwise noted below:

STEVEN K.S. CHUNG, ESQ.
MICHAEL L. IOSUA, ESQ.
TIMOTHY E. HO, ESQ.
Imanaka Asato, LLC
745 Fort Street Mall, 17th Floor
Honolulu, HI 96813

Attorneys for Petitioners/Plaintiffs-Appellants

DATED: Honolulu, Hawaii, August 5, 2019.

/s/ David R. Major

DAVID R. MAJOR

JAI W. KEEP-BARNES

Attorneys for Respondent/Defendant-Appellee
ASSOCIATION OF APARTMENT OWNERS OF
EXECUTIVE CENTRE, by and through Its Boards
of Directors