CAAP 11-[REDACTED]

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant, v. [REDACTED], Defendant-Appellee.	Case No. [REDACTED] APPEAL FROM THE ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, FILED DECEMBER 15, 2010 DISTRICT COURT OF THE THIRD CIRCUIT, NORTH AND SOUTH HILO DIVISION HONORABLE BARBARA T. TAKASE, JUDGE

BRIEF OF *AMICUS CURIAE* ACLU OF HAWAII FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEE

APPENDICES "A"-"D"

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

I. INTRODUCTION

Hawai'i Revised Statutes ("HRS") § 329-121 *et seq*., decriminalizes the "medical use" of marijuana. "Medical use" is defined as "the acquisition, possession, cultivation, use, distribution, or *transportation* of marijuana" by qualifying patients. HRS § 329-121 (emphasis added). In the very next statutory section, however, the "medical use" of marijuana is prohibited in "any moving vehicle" and in any "[o]ther place open to the public." HRS § 329-122(c)(2). The statutes, therefore, are inconsistent on their face: HRS § 329-121 allows qualifying patients to transport marijuana, but HRS § 329-122 prohibits "medical use" (which includes possession and transportation) in any public place and in any moving vehicle. In other words, reading the statutes literally, the Legislature gave medical marijuana patients the right to transport their medicine, but then immediately took that right away.

Defendant-Appellee [REDACTED] (Appellee), a qualifying medical marijuana patient, was transporting his medicine through a public place, and was charged with promoting a detrimental drug in the second degree in violation of HRS § 712-1248(1). The District Court granted Appellee's Motion to Dismiss, based on the vagueness created by HRS §§ 329-121 and -122; in so doing, the District Court ruled that "HRS §329 is void for vagueness." Second Amended Record on Appeal ("R.O.A.") at 54.[1]

Amicus respectfully contends that the District Court reached the correct result, but that the District Court was inexact in the language it used in reaching this result. *Amicus* submits that the District Court correctly concluded that the charge against Appellee must be dismissed, and that this result is correct for one of two reasons: either (1) HRS §§ 329-121 and -122, read *in pari materia*, permit medical marijuana patients to transport their medicine (such that Appellee has an affirmative defense, pursuant to HRS § 329-125, to prosecution for violation of HRS § 712-1248(1)); or (2) HRS § 712-1248(1) is unconstitutionally void with respect to the

[1] All R.O.A. page numbers refer to the pagination of the Second Amended Record on Appeal, filed electronically as a PDF on March 3, 2011. Page 54 of the R.O.A., the final page of the Second Amended Record on Appeal, refers to Page 5 of the District Court's Order.

legitimate and necessary transportation of medical marijuana by qualifying medical marijuana patients.

Amicus also writes to provide the Court with some background information from the other sixteen jurisdictions (fifteen states and the District of Columbia) with medical marijuana programs, as well as information on the federal government's recent policy shift with respect to medical marijuana patients. In short, to counsel's knowledge, Big Island prosecutors appear to be the only prosecutors in the entire nation who are prosecuting qualifying medical marijuana patients for doing nothing more than moving their medicine from point "A" to point "B." Furthermore, the United States Department of Justice has issued a memorandum stating that United States Attorneys "should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." Appendix A (Memo. from David W. Ogden, Deputy Att'y Gen., to Selected United States Attorneys, at 1-2 (Oct. 19, 2009)).

II. ISSUES PRESENTED

The instant case presents the following issues:

1. Whether HRS §§ 329-121 and -122 permit medical marijuana patients to transport their medicine in public places and in moving vehicles; and

2. Whether HRS § 712-1248 is unconstitutionally vague with respect to the legitimate and necessary transportation of medical marijuana by qualifying medical marijuana patients.

III. STATEMENT OF THE CASE

The District Court's Order accurately sets forth the pertinent facts of the instant case. *See* R.O.A. at 51-53. In short, on [REDACTED], Appellee – who was certified as a medical marijuana patient by the State of Hawaii – was arrested at the Hilo Airport for Promotion of a Detrimental Drug in violation of HRS § 712-1248(1). R.O.A. at 52. On October 28, 2010, Appellee filed a Motion to Dismiss, R.O.A. at 32, and on December 15, 2010, the District Court granted Appellee's Motion. R.O.A. at 50.

The District Court pointed to the ambiguity and vagueness resulting from the language of HRS § 329-121, authorizing "medical use," and HRS § 329-122(c)(2), prohibiting the "medical

use" of marijuana in "place[s] open to the public" and "any moving vehicle." The District Court ruled that a strict construction of the statute "would make it virtually impossible for any qualifying patient [to access] marijuana." R.O.A. at 53. Consequently, the District Court ruled that:

> 3. The legislature passed Chapter 329 to allow the medical use of marijuana. Given the intent of the legislature to allow this limited legal use of medical marijuana, it does not make logical sense that the legislature would, within the context of that same statute, allow a qualifying patient to acquire the medical marijuana, and then prohibit the transport of the medical marijuana in a "moving vehicle[,"] traveling on public roads "open to the public" for consumption/ingestion at home; nor to take the medical marijuana with them when travelling as it would require the transport in "places open to the public[."] The statute is ambiguous.
> 4. The term "medical use" within the context of HRS §329-121 and §329-122 fails to provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or she may act accordingly, and fails to provide explicit standards for those who apply the statute, in order to avoid arbitrary and discriminatory enforcement and the delegation of basic policy matters to policemen, judges, and juries for resolution on an[] ad hoc and subjective basis. State v. Kalani, 108 Haw[ai'i] 279, 287 (2005). Therefore, HRS §329 is void for vagueness.

R.O.A. at 53-54. On January 6, 2011, the State filed a notice of appeal.

IV. POINTS OF ERROR

Amicus writes in support of Appellee and contends that this Court should uphold the District Court's judgment. Nevertheless, *amicus* respectfully submits that the District Court's language in granting Appellee's Motion to Dismiss was inexact: the District Court ruled that "HRS §329 is void for vagueness." R.O.A. at 54. *Amicus* believes that the District Court did not, in fact, intend to strike down Hawaii's medical marijuana law, but instead meant to rule that the prosecution of Appellee pursuant to HRS § 712-1248(1) was invalid due to the ambiguity created by HRS §§ 329-121 and -122 (*i.e.*, that HRS § 712-1248(1) is void for vagueness with respect to medical marijuana patients who transport their medicine).

V. IDENTITY AND INTEREST OF THE AMICUS

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with nearly 500,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights and the nation's civil rights laws. The ACLU established the Drug Law Reform Project in 1998 to end punitive drug policies that cause the widespread violation of constitutional and human rights, as well as unprecedented levels of incarceration. In furtherance of that goal, the Drug Law Reform Project has litigated numerous cases ranging from racial profiling in drug law enforcement to protecting medical marijuana users and their doctors from prosecution. *Amicus*, the American Civil Liberties Union of Hawaii Foundation ("ACLU of Hawaii"), the state affiliate of the ACLU, has over 2,000 members in Hawaii and is similarly committed to defending and protecting civil rights and civil liberties. The ACLU of Hawaii supported passage of the Medical Use of Marijuana Act, and the ACLU of Hawaii continues to support the Act and the right of the people of Hawaii to use marijuana for medical purposes. For example, the ACLU of Hawaii Co-Chaired the Medical Cannabis Working Group and produced a 188-page report for the Legislature.[2]

The instant case is important to the ACLU of Hawaii because it involves a patient's right to participate in Hawaii's medical marijuana program, which implicates a patient's right to privacy, medical autonomy, and liberty. These rights strike at the core of the ACLU of Hawaii's mission and, therefore, the ACLU of Hawaii and its members have a personal, vested and organizational interest in the outcome of this case. The instant case will affect large numbers of seriously ill persons, their primary caregivers, and their physicians, all of whom depend on having a clear understanding of the statute to make decisions about their medical care and avoid criminal liability.

[2] *See* Medical Cannabis Working Group, Report to the Hawai'i State Legislature (2010), available at http://www.dpfhi.org/A_PDF/MCWG_final_report.pdf.

VI. STANDARD OF REVIEW

The District Court's Conclusions of Law, including its statutory interpretation(s) and the ultimate conclusion to grant Appellee's Motion to Dismiss, are subject to *de novo* review under the right/wrong standard. *Gray v. Admin. Dir. of the Court*, 84 Hawai'i 138, 144, 931 P.2d 580, 586 (1997) ("The interpretation of a statute is a question of law reviewable *de novo*." (Citations omitted.)); *State v. Herbert*, 112 Hawai'i 208, 212, 145 P.3d 751, 755 (App. 2006) ("A trial court's conclusions of law are reviewable *de novo* under the right/wrong standard. Under the *de novo* standard, this court must examine the facts and answer the pertinent question of law without being required to give any weight or deference to the trial court's answer to the question." (Quoting *State v. Kelekolio*, 94 Hawai'i 354, 356, 14 P.3d 364, 366 (App. 2000).) (Block quote formatting omitted.)), *cert. denied*, 113 Hawai'i 56, 147 P.3d 840.

VII. ARGUMENT

Amicus' argument is twofold. First, as discussed in Section A, *infra*, a literal construction of HRS §§ 329-121 and -122 would lead to an absurd result; applying well-established rules of statutory construction, however, demonstrates that the Legislature intended to permit the transportation of medical marijuana in public places. Second, as discussed in Section B, *infra*, if this Court determines that the Legislature did *not* intend to permit the transportation of medical marijuana in public places, then HRS §§ 712-1248 and -1249 are unconstitutionally vague with respect to the legitimate and necessary transportation of medical marijuana by qualifying medical marijuana patients.

Additionally, as discussed in Section C, *infra*, *amicus* has provided this Court with information about other states' medical marijuana programs and the federal government's response to those programs. In short, prosecutors in Hawaii County appear to be the only prosecutors in the entire nation pursuing criminal charges against qualified medical marijuana patients who do nothing more than transport lawful, personal quantities of marijuana in accordance with applicable state law, and the federal government has indicated that it does not intend to spend its limited resources prosecuting individuals who are in full compliance with their states' medical marijuana laws.

A. Hawaii's Medical Marijuana Law Authorizes Patients to Transport Marijuana, Such That Appellee's Conduct Was Permissible.

1. The plain language of HRS § 329-121 conflicts with the plain language of HRS § 329-122.

HRS Chapter 712 prohibits the possession of marijuana. *See*, *e.g.*, HRS § 712-1249 ("A person commits the offense of promoting a detrimental drug in the third degree if the person knowingly possesses any marijuana . . . in any amount.") Hawaii's medical marijuana law, HRS § 329-121 *et seq*., carves out a narrow exception to that general rule: it decriminalizes the use of marijuana for qualifying patients under certain, limited circumstances. For those patients who meet the criteria for certification, however, the Legislature offers broad protections: patients are allowed the "medical use" of marijuana (and have an affirmative defense to prosecution for any drug-related crime pursuant to HRS § 329-125), with "medical use" defined as "the acquisition, possession, cultivation, use, distribution, or transportation of marijuana." HRS § 329-121.

The general rule, therefore, is that marijuana is prohibited. HRS § 329-121 creates an exception to that general rule. The next statutory section, HRS § 329-122, identifies the boundaries of that exception. The Legislature placed limits on the "medical use" of marijuana, declaring that the "medical use" of marijuana is prohibited in "any moving vehicle" and in any "[o]ther place open to the public." HRS § 329-122(c)(2). The statutes, therefore, conflict with one another: HRS § 329-121 creates an exception that allows qualifying patients to transport marijuana, but HRS § 329-122, on its face, appears to nullify that exception by prohibiting the transportation in any public place (which, of course, would nullify the ability to transport altogether).[3]

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[3] In its Opening Brief, the State contends that "[t]here are practical means of transporting medical marijuana avoiding public places and not using moving vehicles." Opening Brief at 11. The State offers no authority or example for this proposition, of course, because this argument is absurd. "Transportation" necessarily involves going from one place to another; the only way a person could transport an item without being in a public place and without using a vehicle is by carrying the item wholly within one's home, or on private property to an adjacent home. There is nothing to suggest that the Legislature intended to re-define "transportation" to mean "carrying an object wholly within one's house, but no further." *See* HRS § 1-14 (1993) ("The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning."); BLACK'S LAW DICTIONARY 1537 (8th ed. 1999) (defining (continued)

Amicus agrees with the District Court that an ambiguity exists in HRS chapter 329.[4] Ambiguity exists "[w]hen there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute. Put differently, a statute is ambiguous if it is capable of being understood by reasonably well-informed people in two or more different senses." *Farmer v. Admin. Dir. of the Court*, 94 Hawai'i 232, 236, 11 P.3d 457, 461 (2000) (citations omitted). Taking HRS § 329-121 by itself, it appears that qualified patients may transport medical marijuana. Taking HRS § 329-122 by itself, it appears that qualified patients may not possess medical marijuana in any public place or in any moving vehicle, such that transportation is prohibited. On their face, the statutes conflict with one another. A literal reading of the statutes would render superfluous the word "transportation" in HRS § 329-121's definition of "medical use."

As discussed in the next subsection, however, *amicus* respectfully submits that the Legislature intended to allow Appellee to engage in the exact type of behavior that led to his arrest.

2. HRS §§ 329-121 and -122, read *in pari materia* and according to well-established rules of statutory construction, permit the transportation of medical marijuana in public places.

This Court can best effectuate the Legislature's intent by reading HRS § 329-121 and -122 *in pari materia* and holding that transportation (in public, and/or in a moving vehicle) of medical marijuana is permissible. *See* HRS § 1-16 ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another."); *State by Attorney General v. Kapahi's Heirs*, 50 Haw. 237, 239, 437 P.2d 321, 323 (1968) (explaining that "other sections of the chapter should be reviewed to see if such sections may aid this court in the interpretation of [a] term"); *In re Contested Election*, 15 Haw. 323, 1903 WL 1218 at *5 (1903) (statute "must be

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"transportation" as "[t]he movement of goods or persons from one place to another by a carrier"; defining "transport" as "[t]o carry or convey (a thing) from one place to another").

[4] Whether this particular statute is ambiguous is a question that has been presented to this Court, but not resolved, before. *State v. Manzano-Hill*, 122 Hawai'i 58, 222 P.3d 465 (2010) (memorandum opinion).

read in the light of the other parts of the Act, its title, other laws in pari materia[] and the circumstances under which the Act was passed"). Such a holding would give effect to all parts of HRS §§ 329-121 and -122 without rendering any parts of either section superfluous.

As this Court is well aware, "[i]t is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute." *Camara v. Agsalud*, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984). *See also* HRS § 1-15 (1993) ("Where the words of a law are ambiguous[,] . . . [e]very construction which leads to an absurdity shall be rejected."); *Richardson v. City & Cnty. of Honolulu*, 76 Hawai'i 46, 60, 868 P.2d 1193, 1207 (1994) ("[D]eparture from a literal construction of a statute is justified when such construction would produce an absurd . . . result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act." (Citations omitted.)).

If the State were correct in its interpretation of HRS § 329-122, then the inclusion of the word "transportation" in the definition of "medical use" in HRS § 329-121 would be rendered superfluous (because a patient would never be able to transport medical marijuana). This reading of the statute generates an absurd result: there is no reason why the Legislature would take pains to create an exception to the general rule (*i.e.*, to allow transportation of medical marijuana when possession (and, accordingly, transportation) is otherwise illegal), only to rescind that exception in the very next statutory section. *See* HRS § 1-15; *Richardson*, 76 Hawai'i at 60, 868 P.2d at 1207.

Similarly (and as discussed more fully in section VI(B), *infra*), if the State were correct in its interpretation of HRS § 329-122, then HRS §§ 712-1248 and -1249 would be unconstitutionally vague with respect to the legitimate and necessary transportation of medical marijuana by qualifying medical marijuana patients. As this Court is aware, "[i]f feasible within bounds set by their words and purpose, statutes should be construed to preserve their constitutionality." *State v. Raitz*, 63 Haw. 64, 73, 621 P.2d 352, 359 (1980) (citation and internal quotation signals omitted).

By contrast, reading HRS § 329-122 in general, and HRS § 329-122(c)(2) in particular, as permitting transportation fully honors the Legislature's intent in both HRS §§ 329-121 and -122. Again, HRS § 329-121 sets forth the exception to the general rule, and HRS § 329-122

limits on that exception. The Legislature was clearly concerned with public safety, and appears to have drafted HRS § 329-122 for two reasons: to restrict the public's (and, in particular, children's) access to marijuana, and to require discretion by patients (so that patients are not actively consuming marijuana in public). This purpose is manifest in HRS § 329-122(c)'s restrictions: patients may not grow marijuana in a park. They may not purchase marijuana on school grounds. They may not consume marijuana on a public bus. They may not drive while under the influence of marijuana. All of these restrictions seem like measured responses to the Legislature's concerns about the public's access to marijuana. The Legislature, however, specifically authorized patients to possess and transport their medicine, and the Legislature could not have intended to prohibit the activity it had just decriminalized. Such a result would be illogical.

Amicus respectfully suggests that the prohibition on the "medical use" of marijuana in HRS § 329-122(c) was intended to apply only to the acquisition, possession, cultivation, use, and distribution of marijuana, but not to the transportation of marijuana or the possession of marijuana that is necessary to effectuate that transportation; this narrow construction of HRS § 329-122(c) allows the Court to give effect to the Legislature's intent by allowing patients to transport their medicine, while maintaining the prohibitions in HRS § 329-122(c) designed to promote public safety. Recognizing a narrow exception for transportation – which the Legislature itself authorized and intended – will not result in the parade of horribles the State trots out at page 10 of its Opening Brief. No one will be permitted to possess marijuana in a school bus or on school grounds. Patients and caregivers will, however, be allowed to transport their medicine. This will allow, for example, neighbor island cancer patients who fly to Oahu for treatment to continue to use the medicine recommended by their physicians, and it will allow caregivers to deliver medicine to patients who are too sick to leave their homes.

Amicus does not dispute that, "[i]n the absence of an express intention to the contrary, words or phrases used in two or more sections of a statute are presumed to be used in the same sense throughout." *Gaspro, Ltd. v. Comm'n of Labor & Indus. Relations*, 46 Haw. 164, 172, 377 P.2d 932, 936 (1962). Nevertheless, using the exact definition of "medical use" throughout HRS §§ 329-121 and -122 leads to an absurd result (and, as discussed in the following section, requires this Court to hold that HRS § 712-1248(1) is unconstitutional with respect to medical marijuana patients engaged in transportation); *amicus* respectfully suggest that the avoidance of

this absurdity (and the avoidance of this constitutional question) is sufficient justification for overcoming the presumption set forth in *Gaspro*. A narrow reading of "medical use" as used in HRS § 329-122(b) gives effect to all portions of the statute, avoids an absurd result, and best effectuates legislative intent.

3. Legislative History Supports This Interpretation.

In enacting Hawaii's medical marijuana laws, the Legislature indicated its "purpose . . . to ensure that seriously ill people *are not penalized* by the State for the use of marijuana for strictly medical purposes when the patient's treating physician provides a professional opinion that benefits of medical use of marijuana would likely outweigh the health risks for the qualifying patient." 2000 Haw. Sess. L. Act 228, § 1 at 596 (emphasis added). The Legislature's commitment to passing the bill was bolstered after poll results showed an overwhelming majority (77 percent) of Hawaii voters favored the limited use of marijuana by seriously or terminally ill patients in the wake of successful voter initiatives permitting the same in California, Arizona, Oregon, Washington, Alaska, Maine, and the District of Columbia. Sen. Stand. Comm. Rep. No. 2760, in 2000 Senate Journal, at 1137. Consequently, the Legislature "intend[ed] to follow the will of its citizens." *Id*. Senate floor debate confirms that "the key issue [was] . . . the removal of criminal penalties," including the threat of arrest, for those who might ease their suffering by using marijuana upon their physicians' approval. 2000 Senate Journal, at 284 (statement of Senator Matsunaga). Similarly, the floor debate of the House of Representatives articulated the "intent to solely provide protection from arrest for bona fide patients" with respect to Hawaii's "longstanding tradition of both progressive health policy and compassion for the less fortunate." 2000 House Journal, at 579 (statement of Representative Santiago).

The Legislature intended to offer sick individuals a way to use medical marijuana without facing prosecution by the State. The Legislature intended to prevent Appellee, and others like him, from being prosecuted by the State. Appellee was transporting a lawful amount of medicine – less than the amount authorized for personal medical use, *see* HRS § 329-121 – between the islands. There is no indication that the Legislature intended that resources be

expended to prosecute this individual; instead, there is every indication that the Legislature intended to promote a structure that would balance patients' needs with public safety.[5]

Given these safeguards and the explicitly stated purpose of the Legislature to prevent the criminalization and punishment of Hawaii's sickest and neediest patients receiving palliative care through marijuana, it would thus defeat legislative intent to adopt the State's construction of the phrase "medical use."

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[5] The legislative history does not appear to contain any information that addresses the exact question of the conflict between HRS §§ 329-121 and -122 regarding transportation of medical marijuana. The Senate Judiciary Committee commented that it amended the bill by "[a]dding that the authorization for medical use of marijuana shall not apply to medical use of marijuana in any moving vehicle and in the workplace." Sen. Stand. Comm. Rep. No. 2760, 2000 Senate Journal, at 1138. The legislative history does not, however, appear to offer any insight into whether this addition was intended to negate the word "transportation" in HRS § 329-121 or whether it was meant merely to prohibit individuals from consuming marijuana in a moving vehicle. Regardless, Appellee was not in a moving vehicle or at his workplace at the time of his arrest. R.O.A. at 48.

This year's legislative session does offer some insight, however. Senate Bill ("S.B.") 1458 passed both the House and the Senate (albeit in different forms, and the final bill did not pass through Conference Committee by the end-of-session deadline); the bill is still "alive" for next year's legislative session, and the bill begins as follows:

> On June 14, 2000, Act 228, Session Laws of Hawaii 2000, was signed into law, making Hawaii one of the first states to permit the medical use of marijuana by registered patients. No changes have been made to Hawaii's medical marijuana law since its inception, while registered patients have increased and more states have enacted more comprehensive medical marijuana laws. In summary, the current law allows for the growth, *transport*, and possession of marijuana for medical purposes by qualified patients and caregivers.

S.B. 1458, Senate Draft 2, House Draft 3 (2011), available at http://www.capitol.hawaii.gov/session2011/bills/SB1458_HD3_.htm (emphasis added). In other words, the current Legislature appears to believe that Hawaii's medical marijuana law, as written, permits transportation.

B. In the Alternative, HRS § 712-1248(1) is Unconstitutionally Vague with Respect to the Legitimate and Necessary Transportation of Medical Marijuana by Qualifying Medical Marijuana Patients.

Even if this Court determines that the Legislature intended to prohibit transportation in all moving vehicles and in all public places, Appellee is still entitled to judgment in his favor because HRS § 712-1248(1) is unconstitutionally vague as to medical marijuana patients engaged in transportation of their medicine.[6]

The District Court declared "HRS §329" to be unconstitutionally vague. *Amicus* respectfully suggests a slightly more precise formulation: that HRS § 712-1248(1) is unconstitutionally vague with respect to medical marijuana patients engaged in transportation in a moving vehicle or a public place.

To be clear, a vagueness challenge is essentially a facial challenge. As the Hawaii Supreme Court explained in *State v. Lee*, 75 Haw. 80, 92, 856 P.2d 1246, 1254 (1993):

> To date, this court has treated claims that a criminal statute is unconstitutionally vague as essentially facial attacks, subject to the following standard:
>
> > Due process of law requires that a penal statute state with reasonable clarity the act it proscribes and provide fixed standards for adjudging guilt, or the statute is void for vagueness. Statutes must give the person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may choose between lawful and unlawful conduct.

(Citations omitted.) (Quoting *State v. Tripp*, 71 Haw. 479, 482, 795 P.2d 280, 282 (1990).) Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide notice to enable "ordinary people [to] understand what conduct is prohibited"; second, it may authorize or encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*,

[6] As an initial matter, the District Court correctly invoked the standard for vagueness of *criminal* statutes, rather than the vagueness standard for *civil* statutes. Although the Medical Use of Marijuana Act, HRS §§ 329-121 *et seq.*, is a civil statute, it informs (and provides an affirmative defense to) criminal prosecution; the proper focus for the vagueness inquiry, therefore, is HRS § 712-1248(1) (as informed by the affirmative defense provided by HRS §§ 329-121, -122, and -125).

461 U.S. 352, 357 (1983); *Lee*, 75 Haw. at 92, 856 P.2d at 1254. The void-for-vagueness doctrine is the same under both federal and Hawaii law. *State v. Lindstedt*, 101 Hawai‘i 153, 157, 64 P.3d 282, 286 (App. 2003) (“[T]he Hawai‘i Supreme Court . . . has adopted federal constitutional law in the void for vagueness challenges to criminal statutes[.]”). Furthermore, where, as here, the statute may impose criminal penalties, “the standard of certainty [required] is higher.” *Kolender*, 461 U.S. at 358 n.8.

Although a vagueness challenge is essentially a facial attack, *amicus* does not believe that the Court need (or should) strike down HRS §§ 712-1248 or -1249 in their entirety, or any part of HRS §§ 329-121 or -122. Instead, *amicus* respectfully suggests that, if the Court chooses to reach the issue (which, as discussed *supra*, it need not), this Court merely hold that HRS § 712-1248(1) is unconstitutionally vague with respect to the legitimate and necessary transportation of medical marijuana by qualifying medical marijuana patients.

Any medical marijuana patient who wanted to comply with Hawaii law and avoid prosecution under state law would read HRS § 712-1248(1), together with HRS §§ 329-121 and -122, to determine what conduct is or is not permissible. As set forth *supra*, construed literally (and therefore absurdly), the plain language of HRS § 329-122 is superficially irreconcilable with the plain language of HRS § 329-121. Regardless of whether this Court ultimately determines that the Legislature intended to allow or disallow transportation of medical marijuana, the statutes on their face fail to give a person of ordinary intelligence a reasonable chance to determine whether the conduct at issue – transportation of medical marijuana – is permitted. Indeed, at least one District Court judge (Judge Takase, the District Judge in the instant case) has concluded that HRS §§ 329-121 and -122 are contradictory, lending support to the notion that, at the very least, the statute is unclear. *Cf. Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011) (the lack of statutory clarity, which justified qualified immunity, was supported by the fact that multiple judges reached different conclusions as to the meaning of the statute at issue). HRS § 329-121 states that a medical marijuana patient can transport marijuana; HRS § 329-122 states that a medical marijuana patient is prohibited from transporting marijuana in a public place. Construed literally, the statutory scheme is vague, and convicting Appellee – or anyone in a similar situation – is a violation of due process.

C. No Other Jurisdiction That Has Enacted A Medical Marijuana Program Is Prosecuting Patients For Transporting Medical Marijuana, Nor Is The Federal Government Prosecuting Medical Marijuana Patients Who Comply With Local Law.

In addition to Hawaii, fifteen states[7] plus the District of Columbia[8] have medical marijuana programs. To counsel's knowledge, no other jurisdiction besides Hawaii is currently prosecuting qualifying patients who do nothing more than transport their medicine on their person, and the only prosecutors in Hawaii pursuing these kinds of cases are in the Third Circuit (*i.e.*, the County of Hawaii). In short, Hawaii County prosecutors appear to be the only prosecutors in the nation who are pursuing criminal charges against medical marijuana patients when they attempt to move their medicine from point "A" to point "B."

Of the sixteen other jurisdictions with medical marijuana laws, the majority provide clear protections for medical marijuana patients engaged in transportation.[9] Ambiguity appears to

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[7] *See* Alaska Stat. § 17.37.010 *et seq*., Ariz. Rev. Stat. § 36-2801 *et seq*., Cal. Health & Safety Code § 11362.5 *et seq*., Colo. Const. art. 18, sec. 14, 16 Del. C. 4901A *et seq*., Me. Rev. Stat. tit. 22, § 2421 *et seq*., Mich. Comp. Laws § 333.26421 *et seq*., Mont. Code Ann. § 50-46-101 *et seq*., Nev. Rev. Stat. § 453A.010 *et seq*., N.J. Stat. Ann. § 24:6I-1 *et seq*., N.M. Stat. Ann. § 26-2B-1 *et seq*., Or. Rev. Stat. § 475.300 *et seq*., R.I. Gen. Laws § 21-28.6-1 *et seq*., 18 Vt. Stat. Ann § 4472 *et seq*., Wash. Rev. Code § 69.51A.005 *et seq*.

[8] *See* D.C. Code § 7-1671.01 *et seq*.

[9] Generally, other states provide a level of protection for "transportation" that is similar to that provided by HRS § 329-121, yet other states generally provide more clarity with respect to the limitations on medical marijuana (*e.g.*, use on school grounds) than that provided by HRS § 329-122. *See*:

- Alaska Stat. §§ 17.37.030, 17.37.040, 17.37.070;
- Ariz. Rev. Stat. §§ 36-2801, 36-2802;
- Cal. Health & Saf. Code §§ 11362.71, 11362.79;
- 16 Del. C. §§ 4902A, 4903A, 4904A;
- D.C. Code §§ 7-1671.02, 7-16701.03;
- Me. Rev. Stat. tit. 22, §§ 2426, 2427;
- Mich. Comp. Laws §§ 333.26427, 333.26428;
- Mont. Code Ann. §§ 50-46-205, 50-46-206;
- N.J. Stat. §§ 24:6I-6, 24:6I-8;
- R.I. Gen. Laws §§ 21-28.6-3, 6-4, 6-7, 6-8;
- 18 Vt. Stat. Ann §§ 4474b, 4474c;

(continued)

exist in a small handful of states, including Colorado, whose language (appearing in a constitutional amendment) is nearly identical to Hawaii's:

> [1(b)] "Medical use" means the acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians, as provided by this section.
>
> . . .
>
> (5) (a) No patient shall:
>
> . . .
>
> (II) Engage in the medical use of marijuana in plain view of, or in a place open to, the general public.

Colo. Const. art. 18, sec. 14. Counsel for *amicus* are not aware of any Colorado patients being prosecuted for mere possession in the course of otherwise lawful transportation, however.

Oregon has a similar ambiguity as well, but an Oregon judge dismissed the one case of which *Amicus* is aware in which charges were brought against a patient for mere transportation

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- Wash. Rev. Code §§ 69.51A.010, 69.51A.040, 69.51A.060.

But see:

- Colo. Const. art. 18, sec. 14 (quoted *infra*);
- Nev. Rev. Stat. §§ 453A.120 ("'Medical use of marijuana' means . . . [t]he possession, delivery, production or use of marijuana[.]"), 453A.220 (providing an exemption from prosecution for qualified patients), 453A.300(1) (patients are not exempt from prosecution for "[p]ossessing marijuana . . . if the possession of the marijuana . . . is discovered because the person engaged or assisted in the medical use of marijuana in . . . [a]ny public place or in any place open to the public or exposed to public view");
- N.M. Stat. §26-2B-5 ("Participation in a medical use of cannabis program by a qualified patient or primary caregiver does not relieve the qualified patient or primary caregiver from . . . criminal prosecution or civil penalty for possession or use of cannabis . . . at a public park, recreation center, youth center or other public place.");
- Or. Rev. Stat. §§ 475.302 (defining "Medical use of marijuana" as "the production, possession, delivery, or administration of marijuana"), 475.316 (no affirmative defense for a patient who "[e]ngages in the medical use of marijuana in a public place . . . or in public view").

in a public place.[10] Like Hawaii's statutes, Or. Rev. Stat. § 475.302 defines "Medical use of marijuana" as "the production, possession, delivery, or administration of marijuana," and Or. Rev. Stat. § 475.316 provides that no affirmative defense is available for a patient who "[e]ngages in the medical use of marijuana in a public place . . . or in public view." In early 2010, the City of Springfield, Oregon, brought charges against a qualified medical marijuana patient for possessing less than an ounce of marijuana, but the case was dismissed. *See* Appendix B (April 15, 2010 Order in *City of Springfield v. Paul McClain*, No. 10-1238). The court reviewed two documents in addition to the statutory language: a letter from an Oregon State Senator explaining that the Legislature never intended that patients be prosecuted for mere transportation, *see* Appendix C (April 14, 2010 letter from Senator Floyd Prozanski to the Hon. James R. Strickland), and a letter from the Port of Portland (with jurisdiction over the Portland Airport) explaining that the Port of Portland had a policy of *not* bringing charges against medical marijuana patients who were doing nothing more than transporting their medicine, *see* Appendix D (December 22, 2009 letter from Wendy Hain to Jim Klahr). The court concluded that "there is no violation of the law" and dismissed the case. Appendix B.

Washington State provides another instructive example for the Court. When originally passed in 1998, Washington's statute (which defines the "medical use of marijuana" as "the production, possession, or administration of marijuana for the exclusive benefit of a qualifying patient in the treatment of his or her terminal or debilitating illness") stated that "[n]othing in this chapter requires any accommodation of any medical use of marijuana in any place of employment, in any school bus or on any school grounds, or in any youth center." Wash. Rev. Code § 69.51A.060(4). Washington amended its statute in 2007 to restrict the medical use of marijuana in public places, but was careful to confine that restriction to the *smoking* of medical marijuana in public. The new statute now reads: "Nothing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment, in any school bus or on any school grounds, in any youth center, in any correctional facility, or *smoking* medical marijuana in any public place[.]" *Id.* (emphasis added). In other words, when

[10] Counsel for *amicus* are not aware of any Nevada or New Mexico prosecutions for mere possession in the course of otherwise lawful transportation.

confronting this direct issue, another state's legislature was careful to ensure that transportation and possession in public remained protected (while actual *smoking* of marijuana in public was prohibited).[11]

Most other jurisdictions besides Colorado, however, offer clear statutory protection for patients who transport their medicine. For instance, California allows a patient to "transport . . . marijuana for his or her own personal medical use" but does not protect qualified patients who "engage in the smoking of medical marijuana" in places generally accessible to the public or while operating a vehicle. *See* Cal. Health & Saf. Code § 11362.79. Alaska, like Hawaii, protects "transportation" in its definition of "medical use," Alaska Stat. § 17.37.070; the statute clarifies that patients are allowed to possess marijuana in public, but that "possession is limited to that necessary to transport the marijuana directly to the patient or primary caregiver." *Id*. at § 17.37.040(a)(2)(C). Hawaii, as an early adopter of medical marijuana reform,[12] has an imprecise law; if other states' laws and practices are any indication of what the Hawaii Legislature intended, there is simply no reason to believe that the Legislature intended to have criminal penalties imposed upon Appellee.

Similarly, the United States Department of Justice has instructed its prosecutors that they "should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana," including, specifically, "individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law." Appendix A (Memo. from David W. Ogden, Deputy Att'y Gen., to Selected United States Attorneys, at 1-2

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[11] In its Opening Brief, the State suggests that we are dealing with issues that are properly left to the Legislature as a policy matter. State's Opening Brief at 8. Unfortunately, the Legislature has not yet fixed the existing absurdity created by a literal reading of HRS §§ 329-121 and -122. Consequently, the Court may decide whether it can construe HRS §§ 329-121 and -122 so as to avoid a statutory absurdity (by holding that the Legislature intended to allow transportation), or it may decide that HRS § 712-1248(1) is unconstitutionally vague with respect to the transportation of medical marijuana. Given the problem with a literal construction of HRS §§ 329-121 and -122, however, the State's suggestion that this Court simply wait for the Legislature to resolve the issue does not seem to allow room for the Court to resolve the instant case.

[12] Hawaii has not amended its law since it was enacted in 2000.

(Oct. 19, 2009)). In other words, even the federal government has recognized the trend towards the decriminalization of marijuana for medical purposes.

VIII. CONCLUSION

Construed literally, the Medical Use of Marijuana Act either contains an ambiguity, as the District Court concluded as a matter of law, or a patent absurdity. *Amicus* respectfully urges that this Court affirm the District Court's judgment on either of two bases: either (1) the Legislature clearly intended that qualifying patients may permissibly transport their medicine from one place to another (as expressly prescribed by HRS § 329-121); or (2) HRS § 712-1248(1) is unconstitutionally void for vagueness with respect to qualifying medical marijuana patients who are transporting their medicine from one place to another.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Amicus believes that the same issues presented in the instant case – the construction of HRS §§ 329-121, 329-122, 712-1248, and 712-1249 – are presented in another case currently pending before this Court: *State of Hawaii vs.* [REDACTED], CAAP-11-[REDACTED].

APPENDIX A

Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected United States Attorneys (Oct. 19, 2009), available at http://www.justice.gov/opa/documents/medical-marijuana.pdf.

APPENDIX B

City of Springfield v. Paul McClain, No. 10-1238

APPENDIX C

Letter from Senator Floyd Prozanski to the Hon. James R. Strickland (April 14, 2010)

APPENDIX D

Letter from Wendy Hain to Jim Klahr (December 22, 2009)