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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

SONIA DAVIS, JESSICA LAU, LAURALEE B. RIEDELL, and ADAM M. WALTON, Plaintiffs/Appellants, v. MICHAEL P. VICTORINO, County of Maui Office of the Mayor, SCOTT TERUYA, County of Maui Department of Finance, and COUNTY OF MAUI, Defendants/Appellees.	Civil No. 2CCV-21-0000305 Agency Appeal PLAINTIFFS/APPELLANTS' OPENING BRIEF; CERTIFICATE OF SERVICE Judge: Hon. Kirstin M. Hamman Trial Date: none

PLAINTIFFS/APPELLANTS' OPENING BRIEF

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SONIA DAVIS and JESSICA LAU (together, "Plaintiffs/Appellants" or "Houseless Appellants") respectfully submit their Opening Brief under Rule 72 of the Hawai'i Rules of Civil Procedure ("HRCP"), and Hawai'i Revised Statutes ("HRS") §§ 91-14 and 632-1, in their appeal from the final decision of MICHAEL P. VICTORINO, SCOTT TERUYA, and COUNTY OF MAUI (together, "Defendants/Appellees" or "County Appellees") to execute the forced eviction and vacatur of people and their belongings from putative County of Maui property—i.e., property near "Amala Place and Keoneone Street, along with the portion known as the Kahului Wastewater Treatment Plant" in Kahului, Maui (the "Kanahā Area")—on or about September 20, 2021 through September 22, 2021 (the "Kanahā Sweep"), for which final decision was entered on or about September 20, 2021.

Houseless Appellants[1] were among the dozens of houseless individuals[2] residing in the Kanahā Area who filed formal, written requests for a contested case with County Appellees before the Kanahā Sweep began. By allowing the Kanahā Sweep to move forward on September 20, 2021—thereby immediately causing both the eviction and vacatur of Houseless Appellants (and other houseless individuals) from the Kanahā Area, as well as the seizure and destruction of their personal property—without ruling upon Houseless Appellants' requests for a contested

[1] LAURALEE B. RIEDELL and ADAM M. WALTON were originally Plaintiffs/Appellants in this agency appeal. *See* Dkt. 1. However, on March 16, 2022, this Court granted County Appellees' Motion to Dismiss Notice of Appeal as to Ms. Riedell and Mr. Walton on the ground that they "were not deprived of any personal property by County Appellees during the Kanahā Sweep." Dkt. 114, Conclusion of Law ¶ 18. The remaining Appellants do not believe this was an adequate basis to dismiss these two Appellants, but in light of the Court's ruling, they do not treat them as active parties to the present appeal. However, the Court added their testimony to the Record on Appeal because it "presents additional evidence that is material and relevant to the issues in this agency appeal." Dkt. 112 at 3.

[2] Plaintiffs/Appellants prefer the term "houseless" (over the more stigmatized label "homeless") because they believe the term more accurately describes their situations—*i.e.*, they do not have physical *houses* in which to live, but they each have a *home* in Hawai'i. Accordingly, Plaintiffs/Appellants generally use "houseless" to refer to people experiencing homelessness.

case, County Appellees effectively denied Houseless Appellants' requests for a contested case and prejudiced their substantial rights under HRS § 91-14(g)(1), (3), (5), and (6). County Appellees' actions in conducting the Kanahā Sweep further violated Houseless Appellants' rights under both the Hawai'i and U.S. constitutions.

I. STATEMENT OF THE CASE

For years, a community of people have resided in an encampment called "Pu'uhonua o Kanahā" located on Amala Place near Kanahā Beach Park in Kahului, Maui. A combination of exorbitantly high rent prices, hardships that have made it difficult to secure consistent housing or work, and other circumstances out of the control of the residents has led to their becoming houseless despite their best efforts to secure housing. *See, e.g.,* Dkt. 13 (Decl. of Jessica Lau), ¶ 12 (explaining how she became houseless because she needed to pay for her son's medical expenses, and could not pay rent as a result).[3] While many of the Kanahā area residents continue to work and make arrangements to secure housing, they have meanwhile resided peacefully in the area, along with their personal property, which includes all the things they need to survive—including tents and vehicles for shelter, and cookware and clothing—and which may be the entirety of the possessions that they own. *See, e.g.,* Dkt. 13, ¶¶ 17, 23 (describing how Appellant Lau works multiple jobs, and noting how houseless residents want to secure housing); Dkt. 15 (Decl. of Adam M. Walton), ¶ 28 (describing how vehicles can be houseless residents' homes, and they have lived peacefully in Kanahā). Houseless Appellants are among those who have resided in the Kanahā area for months or years. Dkt. 12 (Decl. of Sonia Davis), ¶ 7; Dkt. 13, ¶ 10; Dkt. 14 (Decl. of Lauralee B. Riedell), ¶ 3; Dkt. 15, ¶ 4. In September 2021, Houseless

[3] The Court added Houseless Appellants' declarations (along with other exhibits) to the Record on Appeal. *See* Dkt. 112 (Order Granting Plaintiffs' Motion for Leave to Supplement the Record).

Appellants, along with other houseless residents residing in Pu‘uhonua o Kanahā, were forcibly removed, and had their possessions unlawfully seized, from the Kanahā Area during the Kanahā Sweep.

Appellant SONIA DAVIS is a 64-year-old Native Hawaiian woman born and raised on Maui, Hawai‘i. Dkt. 12, ¶ 2. Appellant Davis has been houseless for about 12 years after no longer being able to afford rent, and has been residing in the Kanahā area for the past 4 to 5 years, including before and during the 2021 Kanahā Sweep. *Id*. at ¶ ¶ 2, 7. Appellant Davis was arrested in December 2019 for possession of drugs, but has since become sober and completed a rehabilitation course. *Id*. at ¶ ¶ 8-9. However, Appellant Davis was incarcerated in jail for three weeks in September 2021 for missing a phone call from her probation officer. *Id*. at ¶ 12. On the day of her release, she learned of the impending Kanahā Sweep from others living in the area and thus had only a few days to gather her personal belongings. *Id*. She was unable to move all of her items before the Kanahā Sweep began, and thus lost many items during the sweep—including four vehicles (which contained and stored various personal property), tents, a tarp, pots and pans, folding tables, diapers, a stroller, a playpen, and a baby’s car seat. *Id*. at ¶ 17. Appellant Davis filed a contested case request with County Appellees on or about September 20, 2021. *Id*. at ¶ 5.

Appellant JESSICA LAU (“Ms. Lau”) is a 52-year-old woman of Hawaiian, Filipino, and Chinese descent from Maui. Dkt. 13, ¶ 2. Appellant Lau become houseless for the first time in her life in March 2020. *Id*. at ¶ 3. Appellant Lau worked as a driver and tour guide for Polynesian Adventure Tours and Robert’s Hawaii for about 4 years, and has continued working throughout the pandemic, primarily finding employment through Jobline X-Press, an alternative staffing company. *Id*. at ¶¶ 11, 17. Appellant Lau has generally worked two jobs at a time at companies including the Maui Family YMCA, Uptown Chevron, Enterprise Rent-A-Car, and Kihei Rent A

Car. *Id*. at ¶ 17. Yet, she could not afford rent and was evicted in March 2020. *Id*. at ¶ 12-13. She also cares for and supports her adult son, who has a series of disabilities. *Id*. at ¶¶ 12, 33. Appellant Lau was living at Pu‘uhonua o Kanahā in the Kanahā Area before and during the Kanahā Sweep, and lost personal property during the Kanahā Sweep, including a portable water tank, fishing poles, and Bluetooth speakers. *Id*. at ¶ 26. Appellant Lau filed a contested case request with County Appellees on or about September 6, 2021. *Id*. at ¶ 6.

On September 1, 2021, Appellee County of Maui announced via press release that it would be conducting a "clean-up of public lands surrounding the Kanaha Pond Wildlife Sanctuary and Wailuku-Kahului Wastewater Treatment Plant." Record on Appeal ("ROA") 0007.[4] That press release also included a statement from Appellee Mayor Victorino that, "[o]nce the unsheltered residents [residing in the area] have settled into new accommodations, we will start the clean-up." *Id.* On or around September 14, 2021, County Appellees engaged Maui Police Department ("MPD") officers to distribute physical flyers of a "Notice to Vacate County Property" ("Notice to Vacate"). ROA 0064; Dkt. 12, ¶ 12; Dkt. 13, ¶ 20. The Notice to Vacate stated that the property near "Amala Place and Keoneone Street, along with the portion known as the Kahului Wastewater Treatment Plant" in Kahului, Maui (the "Kanahā Area") "will be cleared of personal property and vehicular access will be restricted between MONDAY, SEPTEMBER 20, 2021 at 6:00 am – WEDNESDAY SEPTEMBER 22, 2021 at 4:30 pm." ROA 0064. The

[4] Under HRS § 91-14(d) and HRCP Rule 72(d), County Appellees were required to certify and transmit the Record on Appeal ("ROA") to the Court within 20 days of the Court's order. Dkt. 6. They did not do so, instead claiming "there is no record on appeal." Dkt. 33, § III.B. After Houseless Appellants requested that the Court compel County Appellees' obedience to the Order for Certification and Transmission of Record, *see* Dkt. 37 at 11-13, the Court ordered County Appellees to file the ROA, which was filed on January 7, 2022. Dkt. 50. The ROA is available at Dkts. 51 through 85, with Bates numbers beginning with "ROA 0000." Based on the Court's separate order, Dkts. 12 through 27 are also part of the ROA. *See* Dkt. 112.

Notice to Vacate identified whom to contact "For Services," (listing Mental Health Kokua, Ka Hale A Ke Ola, Family Life Center, and Salvation Army), but did not provide any information on how to retrieve any seized personal property post-seizure or pre-destruction, whether and for how long such property would be stored, what procedures were available for challenging the planned sweep, or any information on any procedures available for requesting an accommodation, including, for example, for people with disabilities, or for more time due to extenuating circumstances. ROA 0064; Dkt. 114, Finding of Fact ("FOF") ¶ 4.

Between September 6, 2021 and September 20, 2021, Houseless Appellants, along with about 40 other individuals, filed "REQUEST[S] FOR A CONTESTED CASE" with Appellees County of Maui Office of the Mayor, the County of Maui Department of Finance, and the County of Maui Corporation Counsel regarding the forced eviction and vacatur of people and their belongings from putative County of Maui property on or about September 20, 2021 through September 22, 2021. Dkt. 12, ¶ 5; Dkt. 13, ¶ 6. In their contested case requests, Houseless Appellants stated that they had constitutionally protected property interests "that must be afforded procedural due process before the County may terminate" such interests. Dkt. 1, ¶ 32. Although they had received Houseless Appellants' contested case requests, County Appellees did not respond to the contested case requests, and did not conduct a contested case hearing (or any other hearing) before conducting the Kanahā Sweep. *See* Dkt. 114, FOF ¶ 14; *see also* Dkt. 33 at 6 (Appellees stating "[t]here has been no contested case hearing conducted in this matter").

From the early morning of September 20, 2021 to some time on September 24, 2021, County Appellees conducted the sweep of the Kanahā Area, during which they seized, discarded, or impounded dozens of vehicles and tons of personal property, which included a variety of personal property owned by Houseless Appellants, such as vehicles, shelter, clothing, cooking

supplies, baby supplies, and electronics. ROA 0001-04; Dkt. 12, ¶¶ 17-18; Dkt. 13, ¶ 26; Dkt. 1, ¶¶ 39-42. Houseless Appellants have not recovered their property, nor have they been afforded a hearing from County Appellees about their deprivations. Moreover, by the time the Kanahā Sweep began, not all residents, including Houseless Appellants, had been relocated to safe, alternate shelter even though County Appellees promised in a public press release as well as in private meetings to work to provide housing and other services to houseless people residing in the encampment before starting the Sweep. ROA 0007; Dkt. 13, ¶ 23.

The record does not show that County Appellees had any procedures in place to hold, store, or return personal property (other than vehicles) seized by County Appellees during the Kanahā Sweep, nor does the record show that County Appellees held, stored, or returned personal property (other than vehicles) seized by County Appellees during the Kanahā Sweep. *See generally* ROA (showing no evidence of storage procedures by County); Dkt. 114, FOF ¶¶ 7-8. Instead, the record suggests that, aside from vehicles that were taken under Chapter 290 of the HRS, County Appellees proceeded to destroy the personal property left behind in the Kanahā Area, and that County Appellees had seized, during the Kanahā Sweep. *See generally* ROA; Dkt. 114, FOF ¶ 9.

On October 20, 2021, Houseless Appellants filed their notice of appeal and statement of the case. Dkt. 1. Appellants also filed a Motion for Leave to Supplement the Record—attaching exhibits that included declarations from Houseless Appellants, Maui County press releases, and news articles concerning the Kanahā Sweep—which motion the Court granted. Dkts. 10-27, 112.[5] On November 9, 2021, County Appellees moved to dismiss the appeal for lack of

[5] Because Houseless Appellants were wrongfully denied a contested case hearing, these declarations served as the *only* way to communicate what they would have said had they been provided contested case hearings as required by due process. These declarations became even

jurisdiction under HRCP Rule 12(b)(l), arguing that Houseless Appellants had "no property interest in violating the law," no due process right to a hearing, and that therefore a contested case hearing was not required by law. Dkt. 33. A hearing was held on this motion on December 7, 2021. At the Court's request, the parties submitted supplemental briefing on whether a contested case hearing was required by constitutional due process in preparation for a further hearing on the motion to dismiss, which was held February 22, 2022. In this further hearing, the Court granted in part and denied in part the motion. Dkt. 114 at 10. In its February 22 hearing, the Court determined that it has jurisdiction over the present agency appeal for Houseless Appellants LAU and DAVIS under HRS § 91-14 and that a contested case hearing was "required by law" by constitutional due process within the meaning of HRS § 91-14. Dkt. 114, Conclusion of Law ("COL") ¶ 9.[6]

II. POINTS OF ERROR

A. Whether Appellees' decision to take final agency action to execute the Kanahā Sweep violated Appellants' rights to procedural due process, to privacy, and to freedom from unreasonable seizures under article I, sections 5 and 7 to the Hawai'i Constitution, and the Fourteenth and Fourth Amendments to the U.S. constitutions. HRS § 91-14(g)(1).

B. Whether Appellees' decision to take final agency action was made upon unlawful procedure when Appellees did not provide constitutionally sufficient notice, and did not hold a contested case hearing before seizing and destroying Appellants' personal property. HRS § 91-14(g)(2).

C. Whether Appellees' decision to take final agency action without providing constitutionally sufficient notice or a contested case hearing was clearly erroneous. HRS § 91-14(g)(5).

D. Whether Appellees' decision to take final agency action without providing constitutionally sufficient notice or a contested case hearing was arbitrary,

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more important given County Appellees's original position that there was no Record on Appeal. Dkt. 33, § III.B.

[6] The Court dismissed two of the Houseless Appellants WALTON and RIEDELL for lack of jurisdiction. Dkt. 114 at 10. *See supra* note 1.

capricious, or an abuse of discretion or a clearly unwarranted exercise of discretion. HRS § 91-14(g)(6).

III. STANDARD OF REVIEW

HRS § 91-14 governs the standard of review of an agency decision. HRS § 91-14, "Judicial review of contested cases," provides in relevant part:

> (g) Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (l) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Under HRS § 91-14(g):

> [c]onclusions of law are reviewed de novo, pursuant to subsections (1), (2) and (4); questions regarding procedural defects are reviewable under subsection (3); findings of fact (FOF) are reviewable under the clearly erroneous standard, pursuant to subsection (5), and an agency's exercise of discretion is reviewed under the arbitrary and capricious standard, pursuant to subsection (6).

Cmty. Associations of Hualalai, Inc. v. Leeward Plan. Comm'n, 150 Hawai'i 241, 252, 500 P.3d 426, 437 (2021) (quoting *Lāna'ians for Sensible Growth v. Land Use Comm'n*, 146 Hawai'i 496, 502, 463 P.3d 1153, 1159 (2020)).

IV. ARGUMENT

Houseless Appellants have constitutionally protected interests in their liberty, privacy, and property. Yet County Appellees utterly ignored the protections enshrined in the Hawai'i and U.S. constitutions and provided by the Hawai'i Administrative Procedure Act ("HAPA") both before and after County Appellees made their final decision to move forward with the Kanahā

Sweep. Because County Appellees wrongfully denied Houseless Appellants' requests for a contested case hearing—and because, therefore, no contested case hearing was held here—County Appellees took final agency action without an adequate record and without relevant underlying findings. No matter how County Appellees' decisions and actions are characterized, they fail all applicable 91-14(g) standards of review. In sum, by failing to honor Houseless Appellants' requests for a contested case hearing before conducting the Kanahā Sweep (even though due process required such a hearing), and by seizing and summarily destroying Houseless Appellants' property and otherwise unreasonably invading their privacy, County Appellees deprived Houseless Appellants of constitutionally protected rights (**Section IV.A**), acted upon unlawful procedure (**Section IV.B**), made clearly erroneous agency decisions (**Section IV.C**), and did so in a way that was arbitrary, capricious, and an abuse of discretion (**Section IV.D**).

A. Appellees' final decision to execute the Kanahā Sweep violated Appellants' rights to procedural due process, to privacy, and to freedom from unreasonable seizures under article I, sections 5 and 7 to the Hawai‘i Constitution, and the Fourteenth and Fourth Amendments to the U.S. constitutions (HRS § 91-14(g)(1))

This Court may reverse an agency decision when such decision was made "[i]n violation of constitutional or statutory provisions." HRS § 91-14(g)(1). The Court's review is *de novo*. Here, County Appellees' decision to execute the Kanahā Sweep violated several constitutional provisions in both the Hawai‘i and U.S. constitutions. *First*, County Appellees violated article I, section 5 of the Hawai‘i Constitution and the Fourteenth Amendment to the U.S. Constitution when they issued constitutionally inadequate notice about the planned Kanahā Sweep (**Section IV.A.1**). *Second*, County Appellees violated the same constitutional provisions when they executed the Kanahā Sweep without first holding a contested case hearing (or, for that matter, *any* type of hearing) (**Section IV.A.2**). *Third*, County Appellees violated the prohibition against

unreasonable seizures and invasions of privacy in article I, section 7 of the Hawai‘i Constitution, and the similar prohibition embodied in the Fourth Amendment to the U.S. Constitution, when they seized and summarily destroyed Houseless Appellants' personal property during the Kanahā Sweep (**Section IV.B**).

1. Appellees' action violated Appellants' rights to procedural due process by failing to provide adequate notice or an opportunity to be heard

The Hawai‘i and U.S. constitutions' "requirement of procedural due process exists to protect individuals against the state's deprivation of liberty and property interests." *Brown v. Thompson*, 91 Hawai‘i 1, 9, 979 P.2d 586, 594 (1999). "[F]or procedural due process protections to apply" in the context of a deprivation of property, the party "must possess an interest which qualifies as 'property' within the meaning of the constitution." *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai‘i 249, 260, 408 P.3d 1, 12 (2017). Here, as the Court has already found[7]— and as supported by extensive case law[8]— Houseless Appellants had constitutionally protected

[7] Dkt. 114, COL ¶ 14.

[8] In *Brown v. Thompson*, for example, the Hawai‘i Supreme Court found that a derelict boat was "unquestionably" property protected by due process under both the U.S. and Hawai‘i constitutions. 91 Hawai‘i 1, 9, 979 P.2d 586, 594 (1999). And in *In re Application of Maui Elec. Co., Ltd*., the Hawai‘i Supreme Court stated that "courts have long recognized that 'property interests protected by procedural due process extend well beyond actual ownership of real estate, *chattels*, or money[,]'" thus signaling that chattels are a core type of property interest protected by due process. 141 Hawai‘i at 260, 408 P.3d at 12 (emphasis added) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972)). The U.S. Supreme Court and other courts have held the same. *See Bd. of Regents of State Colleges*, 408 U.S. at 571-72 (stating that "property interests protected by procedural due process extend" to include "chattels"); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1031 (9th Cir. 2012) (describing "Appellees' interest in the continued ownership of their personal possessions" as "the most basic of property interests encompassed by the due process clause"); *Mitchell v. City of Los Angeles*, No. CV1601750SJOGJSX, 2016 WL 11519288, at *5 (C.D. Cal. Apr. 13, 2016) (collecting cases).

property interests in their personal property (*i.e.*, their chattels),[9] and the question then becomes what procedural due process required of County Appellees to protect Appellants' interests.

As the Hawai'i Supreme Court has "repeatedly recognized," *Brown*, "[t]he basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner." 91 Hawai'i at 9, 979 P.2d at 594; *Sandy Beach Def. Fund v. City Council of City & Cty. of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989)); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). That means "constitutionally protected 'property[]' . . . may not be deprived without notice and an opportunity to be heard." *Brown*, 91 Haw. at 12, 979 P.2d at 597. As explained below, County Appellees provided neither constitutionally sufficient notice nor an opportunity to be heard, so their action was "in violation of constitutional . . . provisions" within the meaning of HRS § 91-14(g)(1).

i. Appellees failed to provide constitutionally adequate notice

County Appellees failed in multiple respects to provide constitutionally adequate notice. The Hawai'i Supreme Court "has held that an 'elementary and fundamental requirement of due process' is 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Minton v. Quintal*, 131 Hawai'i 167, 189, 317 P.3d 1, 23 (2013) (quoting *In re Herrick,* 82 Hawai'i 329, 343, 922 P.2d 942, 956 (1996)).

Procedurally, the method the government uses for giving "notice must be reasonably calculated to apprise interested parties" about the planned action. *Freitas v. Gomes*, 52 Haw.

[9] *See* Dkt. 12, ¶ 17-18 (describing how Ms. Davis lost property such as vehicles, pots and pans, tents, a canopy, folding tables, diapers, a stroller, a playpen, and a baby's car seat in the sweep); Dkt. 13, ¶ 26 (describing how Ms. Lau was unable to gather some belongings such as her water tank, fishing poles, and speakers before County Appellees seized them).

145, 152, 472 P.2d 494, 498 (1970) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S 306, 313 (1950)). The Hawai‘i Supreme Court has clarified that this means "a standard of reasonable diligence is required in seeking out interested parties." *Freitas*, 52 Haw. at 152 n.4, 472 P.2d at 499 n.4.

Substantively, "[a]dequate notice under the Due Process Clause has two components." *Brown*, 91 Haw. at 10, 979 P.2d at 595 (citations omitted). *First*, notice "must inform affected parties of the action about to be taken against them." *Id.* This first component "permits the individual to evaluate [the action's] accuracy or propriety and to determine whether or not to contest it[.]" *Atkins v. Parker*, 472 U.S. 115, 152 (1985) (Brennan, J., dissenting). To further this purpose, notice must be in writing; oral notice is inadequate. *See, e.g.*, *Freddy Nobriga Enterprises, Inc. v. State, Dep't of Hawaiian Home Lands*, 129 Hawai‘i 123, 132, 295 P.3d 993, 1002 (Ct. App. 2013) (holding that defendants' "prior oral notice" of the confiscation and sale of trespassing cattle was "inadequate" because owner "was entitled to prior written notice" under *Brown v. Thompson*); *Wong v. City & Cty. of Honolulu*, 333 F. Supp. 2d 942, 956 (D. Haw. 2004) (finding "oral warning" before shop owner's motorcycles were "removed and subsequently destroyed" was "inadequate to satisfy the requirements of Due Process"). Similarly, written notice must state "with precision" the planned action. *Freddy Nobriga Enterprises, Inc.*, 129 Haw. at 132, 295 P.3d at 1002 (citing *Brown,* 91 Hawai‘i at 12, 979 P.2d at 597).

Second, notice must separately inform affected parties "of procedures available for challenging that action." *Brown*, 91 Haw. at 10, 979 P.2d at 595; *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978) (stating due process principle that notice must "afford [interested parties] an opportunity to present their objections"); *Mullane*, 339 U.S. at 314 (same).

This second component "ensures that available error-correction procedures will be effective." *Atkins*, 472 U.S. at 152 (Brennan, J., dissenting). Indeed, the Hawai'i Supreme Court has stated that notice should "clearly indicate . . . how an interested person may challenge [an agency] decision" in part because "[s]uch clarity would help to ensure that grievances are actually resolved through their proper forum rather than precluded due to lack of notice and confusion over the review process." *Kellberg v. Yuen*, 131 Hawai'i 513, 537, 319 P.3d 432, 456 (2014). Unsurprisingly, then, the Hawai'i Supreme Court treats this second component as seriously as the first component. *Brown v. Thompson* is instructive. There, the plaintiff challenged the State's impoundment and disposal of his catamaran sailboat, which plaintiff had moored at a State harbor, and which the State had unilaterally declared as "derelict," towed from the harbor, and stored in an impound yard for eventual disposal. *Brown*, 91 Haw. at 3-6, 979 P.2d at 588-91. The Court acknowledged that the State had sent a letter to plaintiff that "informed him of the impoundment and possible disposal" of his vessel (*i.e.*, the action), but observed that "the letter made no mention of 'procedures available for challenging that action,' administrative or otherwise." *Id.* at 10, 979 P.2d at 595. On that basis alone, the Court concluded that the plaintiff did not receive constitutionally "adequate notice" regarding the impoundment of his vessel. *Id.*

Here, County Appellees failed to provide any type of notice that satisfied *both* substantive components and the procedural component of constitutional due process's notice requirements. The Record on Appeal contains several press releases apparently relating to the Kanahā Sweep. ROA 0001-10. But these press releases fail all components of the notice requirement. First, the press releases did not include a description of the planned action with sufficient precision to be constitutionally adequate. For example, Appellees' September 1, 2021 press release stated only in general terms that it had "announced plans for a comprehensive

clean-up of public lands surrounding the Kanaha Pond Wildlife Sanctuary and Wailuku-Kahului Wastewater Treatment Plant." ROA 0007. It did not specify what the "comprehensive clean-up" entailed, the specific actions sought to be taken, the precise geographic scope of the action, who would be affected by the action, the basis for the action, or even the date(s) of the action. ROA 0007-08. Such lack of precision fails the *Brown* standard. Appellees' September 17, 2021 press release fares no better. ROA 0005-06. While that press release included a date range for the "planned clean-up" and the effort to "restore the area," it still did not state with precision what specifically the action entailed. Nor did the notice explain that County Appellees planned, for example, not just to "remove derelict vehicles and solid waste from the area," but also to remove people, their shelter, and their personal property (including non-derelict vehicles) from the area. ROA 0005-06. In other words, the notice did not accurately describe the eventual actions County Appellees actually took. These press releases also fail the second substantive component by failing to include "procedures available for challenging" Appellees' action. And they fail the procedural component because generalized online press releases do not reflect reasonable diligence, particularly in an attempt to apprise houseless people—who may not have ready access to the Internet—of the planned action.

The other means by which the County allegedly gave notice of the Kanahā Sweep includes "outreach efforts" conducted alongside houseless service providers "several months in advance" of, Dkt. 97 at 4—and a meeting that some members of the community had with Defendant Mayor Victorino a few days before, *id.* at 5—the Kanahā Sweep. But such purported "notice" clearly was constitutionally deficient given that it necessarily relied on oral notice.[10] *See*

[10] Nothing in the Record on Appeal shows any written notice associated with any of these "general notice procedures" that Appellees have cited in related briefing. *See* Dkt. 97 at 6.

Freddy Nobriga Enterprises, Inc., 129 Haw. at 132, 295 P.3d at 1002. That there is no written record of such notice also undermines any argument that the notice was substantively adequate.

The closest County Appellees came to giving adequate notice is the "Notice to Vacate" that MPD officers apparently distributed on September 14, 2021. *See* ROA 0064 (Notice to Vacate); ROA 0011 (Sept. 14, 2021 MPD case summary report). But Appellees' Notice to Vacate also failed to comply with due process's notice requirements, in terms of both procedure and substance. As to procedure, the Record on Appeal does not reflect that County Appellees' method was "reasonably calculated" to apprise Houseless Appellants and other houseless people in the Kanahā Area about the Kanahā Sweep. All the Record on Appeal contains is a single MPD officer's report that officers "assisted the RP1 [*i.e.*, Reporting Party #1] (Maui County Homeless Coordinator) with the issuance of 'Notices to Vacate County Property' to the individuals residing along the roadside along the entire length of Amala Place, Kahului." ROA 0011. But as the Notice to Vacate reflects, the area subject to the Kanahā Sweep encompassed much more land than just the "roadside along . . . Amala Place." *See* ROA 0064 (map showing geographical scope of Kanahā Sweep extending far beyond the Amala Place road). And the Record reflects that County Appellees distributed the Notice to Vacate on no other days, and using no other means. At bottom, County Appellees had an unspecified number of police officers distribute, on a single occasion, a paper notice in a small geographic region (relative to the scope of the planned action) about the Kanahā Sweep. And County Appellees did this even though they knew (and intended for) the sweep to affect all houseless people in the area. Under these circumstances, the County's minimal method of providing notice was not "reasonably calculated" to apprise—and did not reflect "reasonable diligence" in apprising—all interested parties about the upcoming Kanahā Sweep.

The Record on Appeal confirms the insufficiency of the County's procedures for providing notice. As (original) Appellants ADAM M. WALTON and LAURALEE B. RIEDELL testified, they "never received notice from any County official or police officer about the impending sweep." Dkt 15 at ¶ 9. Instead, they only learned about the Notice to Vacate from "one of the houseless residents who had an extra copy." But informal and indirect notice through third parties does not suffice under constitutional due process.

But even assuming the procedure Appellees used to provide the Notice to Vacate were adequate, the substance of the Notice to Vacate unambiguously fails the second component of due process's notice requirements. Specifically, just as in *Brown*, the Notice to Vacate includes no "procedures available for challenging" Appellees' planned action. On top of omitting available procedures, the Notice to Vacate also failed to include any other means for parties to present their objections to the planned action. As the Hawai‘i Supreme Court has stated, "the right to be heard is meaningless without being given the information necessary to exercise that right." *Kellberg*, 131 Hawai‘i at 536, 319 P.3d at 455 (citations omitted). Appellees provided none of the information Appellants needed to challenge the Kanahā Sweep before it occurred.

Thus, Appellees violated due process's notice requirements in myriad ways.

ii. Appellees failed to provide an opportunity to be heard, whether as a contested case hearing or otherwise

County Appellees similarly failed to satisfy the other basic element of procedural due process by failing to provide an opportunity to be heard, either as a contested case hearing or otherwise, before conducting the Kanahā Sweep—even though Appellants filed written requests with the County Appellees for a contested case hearing before the sweep began.

Hawai‘i courts apply a two-step analysis in deciding whether a due process right to a hearing exists: (1) whether "the particular interest which claimant seeks to protect by a hearing

[is] 'property' within the meaning of the due process clauses of the federal and state constitutions," and (2) if so, "what specific procedures are required to protect it." *Flores v. Bd. of Land & Nat. Res.*, 143 Haw. 114, 125, 424 P.3d 469, 480 (2018) (quoting *Sandy Beach Def. Fund*, 70 Haw. at 377, 773 P.2d at 260). As noted, the Court has already found that the first step is satisfied because Houseless Appellants had constitutionally cognizable property interests in their chattels. *See supra* Section IV.A.1. So the question becomes "what specific procedures are required to protect" that property interest.

The answer is that a hearing is required.[11] As a series of Hawai'i Supreme Court precedent reviewing agency action confirms, as soon as a constitutionally protected property interest is implicated, due process requires a hearing of some kind. Indeed, the Hawai'i Supreme Court has been crystal clear that "[c]onstitutional due process protections *mandate* a hearing *whenever the claimant seeks to protect a 'property interest*[.]'" *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994) (emphases added) (quoting *Bush v. Hawaiian Homes Comm'n*, 76 Hawai'i 128, 136, 870 P.2d 1272, 1280 (1994)). In 2017, the Court itself stated that it had "long recognized" this very principle. *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai'i 249, 260, 408 P.3d 1, 12 (2017) ("*Maui Electric*") (quoting *Pele Def. Fund*, 77 Hawai'i at 68, 881 P.2d at 1214). And as recently as last year, the Court again confirmed the validity of this principle. *See Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Plan. Comm'n*, 149 Hawai'i 304, 312, 489 P.3d 408, 416 (2021) (noting that "[t]his court has stated that constitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest[]'" (citation omitted)). In other words—and consistent with

[11] In deciding whether it had jurisdiction over this matter, the Court already found and concluded that a contested case hearing was required here. *See* Dkt. 114. But in the interest of preserving their arguments for appeal, Houseless Appellants present them again here. *See also* Dkt. 99.

foundational due process principles—when a constitutionally protected property interest is at stake, a hearing (*i.e.*, an opportunity to be heard) is *automatically required*.

A review of precedent shows that the Hawai‘i Supreme Court's actual practice conforms with this principle. The Court first applied it in *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 495 522 P.2d 1255, 1266 (1974).[12] In *Aguiar*, low-income housing tenants had asserted a protected property interest in "continuing to receive the benefit of low cost housing" without "paying assertedly erroneous rent increases," and the question before the Court was whether their asserted property interest was protected by due process. *Id*. at 495, 522 P.2d at 1267. The Court explained that, if the tenants' asserted interest was so protected, that would be "enough to *require* agency hearings prior to" the challenged agency action—*i.e.*, that recognition of the existence of a protected property interest "would *automatically invoke* the adjudicatory procedures of the HAPA." *Id*. at 496, 522 P.2d at 1267 (emphasis added). That analytical approach continues to be used today. In *Maui Electric*, as soon as the Court found that a protected interest existed, it then assessed the relevant "hearing procedures" to use in the given case—*not* whether a hearing was required at all. 141 Hawai‘i at 265, 408 P.3d at 17 (proceeding directly to "hearing procedures" after "[h]aving determined that [petitioner] has established a protectable 'property' interest"). In other words, step two's exclusive focus is on "what specific procedures"—as they relate to the mandatory hearing—"are required to protect" the interest at stake. *Matter of Hawai‘i Elec. Light Co., Inc.*, 145 Hawai‘i 1, 16, 445 P.3d 673, 688 (2019); *see also Maui Electric*, 141 Hawai‘i at 260, 408 P.3d at 12 (same); *Sandy Beach Def. Fund*, 70 Haw. at 376, 773 P.2d at 260 (same); *Aguiar*, 55 Haw. at 495, 522 P.2d at 1266 (same).

[12] Coincidentally, *Aguiar* was the Hawai‘i Supreme Court decision that established the "two-step analysis" used for "a claim of a due process right to a hearing." *Id.* at 495, 522 P.2d at 1266.

Even assuming that a hearing is not *automatically* required in all situations involving a protected property interest, the second step of the due process analysis confirms that a hearing—and specifically a Chapter 91 contested case hearing—was required here. "The notion that an individual must be accorded sufficient procedural safeguards before being deprived of a 'property' interest is a cornerstone of Hawai'i law." *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 409, 363 P.3d 224, 257 (2015). To determine the "precise procedures" that a government entity is required to follow to comply with constitutional due process, Hawai'i courts analyze three factors: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." *Id*. at 410, 363 P.3d at 258 (citing *Sandy Beach Def. Fund*, 70 Haw. at 378, 773 P.2d at 261). As explained below, all three factors weigh strongly in favor of Houseless Appellants that a contested case hearing was required before County Appellees deprived Houseless Appellants of their personal property.

Factor 1: "the private interest which will be affected"

The "private interest which will be affected" is significant and weighty here, as the Court has recognized. Dkt. 114, COL ¶ 22. The property interests at stake are chattels, which are already deemed "core" property interests under the Hawai'i and U.S. constitutions. Dkt. 37 at 9; Dkt. 114, COL ¶ 22. And they are not just any chattels, but chattels used as shelter and life-sustenance for Houseless Appellants. Dkt. 114, COL ¶ 22. Indeed, cars, tents, and canopies are literally the only shelter these Houseless Appellants have—and that further strengthens the private interest. *See De-Occupy Honolulu v. City & Cty. of Honolulu*, No. CIV. 12-00668 JMS,

2013 WL 2285100, at *6 (D. Haw. May 21, 2013) ("the court recognizes that a strong private interest exists in Plaintiffs' continued ownership of their possessions, especially given that the possessions impounded under Article 19 may be everything that a homeless individual owns."). *Mitchell*, 2016 WL 11519288, at *5 (finding that private interest was "significant" because it "touches on the basic survival of homeless individuals"). Further, there is a much stronger private interest in chattels used for survival when there are no alternative shelter or housing options. *Cf. Martin v. City of Boise*, 920 F.3d 584, 604 (9th Cir. 2019) (en banc) (holding that it is unconstitutional to "impose[] criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them").

Factor 2: "the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards"

As recognized by the Court in the February 22 hearing, the procedures County Appellees actually used posed a high risk of erroneous deprivation, and tremendous value would have flown from additional and alternative safeguards. Dkt. 114, COL ¶¶ 23, 25.

As to the risk of erroneous deprivation, there was a serious risk that Houseless Appellants' chattels would be considered abandoned property and disposed of (which is precisely what occurred here), and that such deprivation would harm Houseless Appellants in grave ways. That risk was particularly high for at least two reasons.

First, these chattels were the only property/shelter some Houseless Appellants had—they use these particular chattels as a means to survive, which warrants extra protections. *See Aguiar*, 55 Haw. at 498, 522 P.2d at 1268 ("Any administrative burden they [*i.e.*, adjudicatory procedures] impose on the HHA is more than offset by the substantial safeguards they afford to

low-income tenants against erroneous rent increases which *may undermine those tenants' very ability to survive*." (emphasis added)).

Second, given that County Appellees seized and *destroyed* the chattels, there was no possibility of reversing an erroneous decision (*i.e.*, the County cannot feasibly reverse itself if later determined to have made an error). In this way, the risk of erroneous deprivation here is very similar to the risk in *Mauna Kea Anaina Hou*, in which the Court stated "the fact that the Board's administrative rules do not appear to provide a procedural vehicle for the Board to reverse its grant of a permit, if it were later found that the permit was improperly granted, elevated the risk of erroneous deprivation." 136 Hawai'i at 412, 363 P.3d at 260.

As to the benefit of additional safeguards, many such safeguards existed, and would have reduced the risk of erroneous deprivation, as the Court found. Dkt. 114, COL ¶ 25.

First, more time—including specifically the time between receiving formal notice of the sweep and the date of the removal itself—would have made a significant difference. Someone who just got out of jail, and who has four cars—some of which do not have running engines—containing all of their personal belongings, reasonably needs more than six days to move everything they own. *See, e.g.*, Dkt. 12, ¶ 13 (Ms. Davis describing how five days of notice was not sufficient time to move all of her belongings). By comparison, in the residential eviction context, at least 45 days' notice, in writing, is required for month-to-month rentals. Haw. Rev. Stat. Ann. § 521-71(a).

Second, a fully compliant notice would have made a material difference. A long line of Hawai'i Supreme Court cases—including *Brown v. Thompson* and *Erum v. Llego*, 147 Hawai'i 368, 381 n.20, 465 P.3d 815, 828 n.20 (2020)—requires that a constitutionally sufficient notice must include "procedures available for challenging that action." Here, the notice County

Appellees relied on does not include any "procedures available for challenging" the sweep. ROA 0064. The failure to include such information prejudiced Houseless Appellants (and others in the Kanahā Area), who felt hopeless and had no meaningful ability to challenge County Appellees' actions before the sweep occurred. Had those procedures been meaningfully available, Houseless Appellants would have challenged the timing, duration, scope, and existence of the sweep.

Third, a hearing would have made a significant difference. Houseless Appellants would have used a hearing to: (1) explain their individual circumstances, (2) explain that they are more than happy to move but need somewhere they can move to where they will not be threatened with criminal prosecution, (3) request more time, (4) challenge and question the legality of the sweep, and (5) simply have an opportunity to be heard (which is valuable and meaningful in itself). *See* Dkts. 12-15. Given the promises made by Mayor Victorino,[13] a hearing would have allowed Appellants to request more time to find shelter before the County conducted the sweep. Given the problematic (and constitutionally deficient) method County Appellees used to conduct the sweep (*i.e.*, by suddenly posting trespassing signs directly next to Houseless Appellants' tents or cars), Houseless Appellants also would have raised legal objections to the County's action.

Fourth, more serious efforts to provide notice would have made a difference. The houseless people in the area were far beyond confused as to what the County intended to do, when it intended to do it, for what reason, and what the alternatives were. *See, e.g.*, Dkt. 15, ¶ 12 (Mr. Walton stating that "[h]ad we known that there were options, we most definitely would have gone through that process and asked for accommodations"); Dkt. 14, ¶ 16 (Ms. Riedell

[13] *See, e.g.*, Dkt. 13, ¶ 23 (describing how Mayor Victorino, in his meeting with Houseless Appellants, promised that "nothing would happen until all residents were settled into new accommodations" and that adequate alternative housing would be provided prior to the sweep, but such promises were not fulfilled).

stating "[w]e didn't even know there were options or steps we could take to ask for help"). This lack of notice surprised and overwhelmed Houseless Appellants and others. *See, e.g.*, Dkt. 13, ¶ 33 (Ms. Lau stating that "[t]he sweep was very traumatic and disruptive, and I'm feeling overwhelmed with everything"). Had County Appellees engaged in more efforts to provide constitutionally adequate notice, that would reduce the risk of erroneous deprivation. *See also supra* Section IV.A.1.

Factor 3: "the governmental interest, including the burden that additional procedural safeguards would entail"

County Appellees overstate the strength of the government interest and the burdens that additional safeguards would create.

As to the governmental interest, Houseless Appellants acknowledge that preserving public health and the environment are legitimate governmental interests, but make two points in response. First, the governmental interests must be put into perspective *and* balanced against the gravity of the private interests (and specifically the survival interests) at stake here. As important as these generalized interests might be, they do not trump these core countervailing private interests, as the Court has already suggested. Dkt. 114, COL ¶ 26; *See, e.g.*, *Mitchell*, 2016 WL 11519288, at *6 (acknowledging "significant" governmental interest and "heavy costs," but stating that "these costs do not justify infringing the basic constitutional rights of homeless individuals" and that, "[g]iven the scope of the property interest at stake," the city's interest did not "outweigh[] the individual interests of homeless people"). Second, County Appellees are only vaguely asserting these government interests, without justifying them concretely. Given County Appellees' failure to hold a contested case hearing, no one knows precisely the scope of the purported governmental interest and why, for instance, the sweep had to occur in that particular week and in that particular location and under the precise circumstances. In other

words, it is not clear how conducting the Kanahā Sweep in the manner County Appellees relied on actually advanced interests in public health and the environment, other than County Appellees' say-so. This again underscores that part of the purpose of a contested case hearing is for parties with constitutionally protected interests at stake to understand the basis for the agency action. That simply did not occur here.

As to burden, County Appellees overstate the burdens of these additional safeguards. First, the additional safeguards need not be overly burdensome. For example, complying with the minimum requirements of due process when it comes to the contents of a notice creates minimal burden—the County needed only to include a sentence with a phone number and email address that the Houseless Appellants could contact to challenge the sweep or request an accommodation. And an agency contested case hearing is not identical to a full-blown trial in court. In any event, some kind of opportunity to be heard was required. Here, there was literally none.

In sum, the due process analysis requires a *balancing* of the three relevant factors, and that balancing points to the conclusion that a contested case hearing was required here. County Appellees' invocation of "public health" and "the environment" do not outweigh the significant private interests at stake. Nor does the possibility of additional burden absolve County Appellees from providing due process protections. A contested case hearing was required here.

Here, the Record on Appeal reflects that County Appellees did not provide a hearing—whether in the form of a contested case or otherwise. *See also* Dkt. 33 at 3 (arguing that "the County did not need to conduct a contested case hearing" and stating "that no contested case hearing was held"). And County Appellees provided nothing even remotely resembling a hearing—even though they have taken the remarkable position that a single informal community

meeting with Defendant Mayor Victorino was a constitutionally meaningful opportunity to be heard. See Dkt. 97 at 8. On this record, County Appellees clearly violated Houseless Appellants' right to procedural due process by failing to provide them "an opportunity to be heard at a meaningful time and in a meaningful manner. *Erum*, 147 Hawai'i at 381, 465 P.3d at 828.

2. Appellees violated Appellants' rights against unreasonable seizures by seizing and summarily destroying their personal property

In addition to violating Houseless Appellants' procedural due process rights, County Appellees violated Houseless Appellants' rights under the Fourth Amendment to the U.S. Constitution and Article 1, section 7 of the Hawai'i Constitution. *First*, County Appellees unreasonably seized and summarily destroyed Houseless Appellants' personal property—including shelters, supplies, and personal memorabilia—during and as a result of the Kanahā Sweep. *Second*, in conducting a sweep that violated procedural due process, the County necessarily also violated constitutional prohibitions against unreasonable seizures and invasions of privacy.

i. County Appellees unreasonably seized and summarily destroyed Houseless Appellants' personal property

The Fourth Amendment to the U.S. Constitution protects individuals from "unreasonable government seizures" of their property. *Garcia v. City of Los Angeles*, 11 F.4th 1113, 1118 (9th Cir. 2021) (citing *Recchia v. City of L.A. Dep't of Animal Servs*., 889 F.3d 553, 558 (9th Cir. 2018)). A seizure of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 68, (1992); *Young v. Cty. of Hawaii*, 947 F. Supp. 2d 1087, 1098 (D. Haw. 2013), *aff'd*, 578 F. App'x 728 (9th Cir. 2014). The "destruction of property has long been recognized as a seizure" and is recognized as rendering an action unreasonable under the Fourth Amendment. *Garcia*, 11

F.4th at 1118 (quoting *United States v. Jacobsen*, 466 U.S. 109, 124–25 (1984)); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

Article 1, section 7 of the Hawai‘i Constitution similarly protects individuals' property "against unreasonable searches, seizures and invasions of privacy." *State v. Lopez,* 78 Hawai‘i 433, 441, 896 P.2d 889, 897 (1995). The Hawai‘i Supreme Court has observed that, "unlike the federal constitution, our state constitution contains a *specific* provision *expressly* establishing the right to privacy as a constitutional right. Thus, our case law and the text of our constitution appear to invite this court to look beyond the federal standards in interpreting the right to privacy." *State v. Mallan*, 86 Hawai‘i 440, 448, 950 P.2d 178, 186 (1998) (emphasis in original). Thus, the Court has stated that it can "give *broader* privacy protection than that given by the federal constitution." *State v. Detroy*, 102 Haw. 13, 22, 72 P.3d 485, 494 (2003) (emphasis added). And the Court has frequently done so. *See, e.g.*, *State v. Quiday*, 141 Hawai‘i 116, 405 P.3d 552 (2017) (holding that aerial surveillance of an individual's residence and curtilage violates their reasonable expectation of privacy and qualifies as an unconstitutional search under article I, section 7 of the Hawai‘i Constitution, even though it is constitutional under federal law, relying on the broader privacy protection afforded by the state constitution). Thus, a Fourth Amendment violation necessarily violates the Hawai‘i Constitution, and conduct may violate the Hawai‘i Constitution even if it does not violate the U.S. Constitution.

Houseless persons are afforded the same constitutional protections against seizure of their property as anyone else—even when their property is stored in public areas. Indeed, the Ninth Circuit has unequivocally held that the "property of the homeless is entitled to Fourth Amendment protection," including their personal possessions. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1026 (9th Cir. 2012) (upholding a preliminary injunction that prohibited the City

from summarily destroying homeless individuals' personal property stored publicly on sidewalks); *Recchia*, 889 F.3d at 558 ("[h]omeless people living on the street enjoy the protection of the Fourth Amendment" and "[t]he seizure of a homeless person's property implicates important Fourth Amendment concerns."). Importantly, it makes no difference that such personal property may be in public spaces: an unreasonable seizure occurs "even when" that "property is stored in public areas." *Garcia v. City of Los Angeles*, 11 F.4th 1113 (9th Cir. 2021) (granting preliminary injunction against Los Angeles for "summarily destroying homeless individuals' publicly stored personal property").

Here, County Appellees unreasonably seized Houseless Appellants' personal property in violation of the Fourth Amendment to the U.S. Constitution and article 1, section 7 of the Hawai‘i Constitution. Specifically, the record reflects that County Appellees seized *and summarily destroyed* Houseless Appellants' property that was momentarily unattended during the sweep. That was per se unreasonable. *See Lavan*, 693 F.3d at 1024, 1030) (holding that Los Angeles violated the Fourth Amendment by seizing and summarily destroying personal property items such as documents, memorabilia, electronics, blankets, and shelters that were unabandoned but left unattended, thereby "meaningfully interfer[ing] with Appellees' possessory interests in that property"). Even if Houseless Appellants wanted to attend to their personal property located in Amala Place on the days of the sweep, they could not have done so unless they wanted to risk arrest or citation. ROA 0064; Dkt. 12, ¶ 12; Dkt. 13, ¶ 22. Such property—which included shelters, clothing, cooking supplies, baby supplies, and electronics—was removed, discarded, and summarily destroyed, just as in *Lavan*. Dkt. 12, ¶¶ 17-18; Dkt. 13, ¶ 26. Further, County Defendants either knew or had good reason to believe that many items left in the Kanahā Area were not abandoned: some such items were marked with duct or caution tape signaling that they

were unabandoned (*see* Dkt. 13, ¶ 23, "the mayor also said that if we used duct tape or caution tape to mark our belongings, the County would not touch that property"). That the City summarily destroyed such property despite this knowledge is unreasonable. *See Lavan*, 693 F.3d at 1025 ("the City was in fact notified that the property belonged to [plaintiff], ... when attempts to retrieve the property were made, the City took it and destroyed it nevertheless.").

Significantly, there is nothing in the record to demonstrate or even suggest that County Appellees stored or otherwise preserved Houseless Appellants' personal property (aside from some vehicles)—nothing in the Notice to Vacate mentioned storage or similar procedures. ROA 0064; Dkt. 114, FOF ¶¶ 4, 7, 8. By contrast, the presence of heavy-duty vehicles such as fork-lifts (as can be seen in ROA 0087, ROA 0088) and dump-trucks (as seen in ROA 0443, and noted in Dkt. 13, ¶ 28) alongside garbage bins and bags at the site of the sweep (as seen in ROA 0409, ROA 0297, ROA 0279, and ROA 0179), and official statements by the County ("County employees and contractors successfully removed … 8 more tons of solid waste from the area"; ROA 0001; "all remaining vehicles, property and refuse will be removed", ROA 0003) indicate that at least some, if not all, of the personal belongings on-site were summarily destroyed by the County. This—along with the absence of any evidence that the County had any procedures to store and/or return people's personal property—leaves no other conclusion than that County Appellees summarily destroyed personal property left unattended in the Kanahā Area, as the Court also found. Dkt. 114, FOF ¶ 9. Because the summary destruction of property constitutes an unreasonable seizure, *see Lavan*, 693 F.3d at 1030, County Appellees' conduct violated Houseless Appellants' Fourth Amendment and article I, section 7 rights.

ii. In conducting a sweep that violated procedural due process, the County *necessarily* also violated the U.S. Constitution's prohibition against unreasonable

seizures and the Hawai‘i Constitution’s prohibition against unreasonable seizures and invasions of privacy

In addition, or in the alternative, the County Appellees violated Houseless Appellants’ Fourth Amendment and article 1, section 7 rights by violating Houseless Appellants’ procedural due process rights while seizing their personal property. *See supra* Section IV.A.1. A property seizure that occurs in violation of procedural due process also violates the Fourth Amendment. In *Russell v. City & Cty. of Honolulu*, the court granted a preliminary injunction ordering the City to return items it seized when it summarily removed property from a sidewalk encampment and ordered it to revise its removal notice to include information on removal procedures. No. CIV. 13-00475 LEK, 2013 WL 6222714 (D. Haw. Nov. 29, 2013). Importantly, the court held that the City’s actions violated the plaintiffs’ procedural due process, and thus necessarily violated their Fourth Amendment rights: “[i]nsofar as the seizure of Russell’s and Anderson’s property violated their right to procedural due process, this Court also concludes that the seizure was unreasonable and a violation of their Fourth Amendment rights.” *Id*. at *15.

Here, there was a seizure of Appellants’ property as discussed, *supra* Section IV.A.2.i. Just as in *Russell*, notice of the sweep here was insufficient as discussed *supra* in Section IV.A.1—thereby a violation of procedural due process—and so seizure of property from a public encampment was “unconstitutional in the first instance.” *Id.* at *15 (D. Haw. Nov. 29, 2013). Therefore, County Appellees violated Houseless Appellants’ Fourth Amendment rights here. And as discussed, *supra* Section IV.A.2.i, a Fourth Amendment violation under the U.S. Constitution is also necessarily a violation of the Hawai‘i Constitution.

B. Appellees’ decision to execute the Kanahā Sweep was made upon unlawful procedure because Appellees did not provide constitutionally sufficient notice and did not hold a contested case hearing before seizing and destroying Appellants’ personal property (HRS § 91-14(g)(2))

Putting aside that it was made in violation of constitutional provisions, County Appellees' decision to execute the Kanahā Sweep was also wrong because it was "made upon unlawful procedure." HRS § 91-14(g)(2). When an agency takes action that violates interested parties' procedural due process rights, that necessarily is action "made upon unlawful procedure." *See, e.g.*, *DeBuff v. Montana Dep't of Nat. Res. & Conservation*, 2021 MT 68, ¶ 33, 403 Mont. 403, 419–20, 482 P.3d 1183, 1193 (Mont. 2021) ("An agency's order must be vacated if founded on unlawful procedure that violates a party's due process interests."); *M.F. Booker v. Bd. of Educ. of City of Chicago*, 65 N.E.3d 380, 393 (Ill. App. 2016) ("If the procedures used by an administrative agency violate fundamental fairness and a party's due process rights, the appellate court should reverse the agency's decision." (citation omitted)). Here, even though Houseless Appellants had filed a request for a contested case hearing, County Appellees denied Houseless Appellants their procedural due process rights. *See supra* Section IV.A.1. And because County Appellees violated Houseless Appellants' procedural due process rights—both before and after County Appellees made their final decision to proceed with the Kanahā Sweep—Appellees' final decision was "made upon unlawful procedure" within the meaning of HRS § 91-14(g)(2).

C. Appellees' decision to execute the Kanahā Sweep without providing constitutionally sufficient notice or a contested case hearing was clearly erroneous (HRS § 91-14(g)(5))

To the extent it involved or relied on findings of fact, County Appellees' decision to execute the Kanahā Sweep without providing constitutionally sufficient notice or a contested case hearing was clearly erroneous. HRS § 91-14(g)(5). An agency's conclusion of law that presents mixed questions of fact and law is reviewed under the clearly erroneous standard "to determine if the agency decision was clearly erroneous in view of reliable, probative, and

substantial evidence on the whole record." *Surfrider Found. v. Zoning Bd. of Appeals*, 136 Hawai‘i 95, 107, 358 P.3d 664, 676 (2015) (relying on *Poe v. Hawai‘i Labor Relations Bd*., 87 Hawai‘i 191, 195, 953 P.2d 569, 573 (1998)).

County Appellees denied Houseless Appellants a contested case hearing, or any type of due process, before taking final agency action in conducting the Kanahā Sweep. Such a decision was clearly erroneous because the agency took such action *on no record* by not holding a contested case hearing that due process required. *See* Dkt. 33, § III.B (County Appellees claiming that no record existed as "no contested case was ever conducted, nor were there any existing procedures followed in which a record was kept"). Under these circumstances, County Appellees' decision was clearly erroneous. *See, e.g.*, *Becker v. Anne Arundel Cty*., 920 A.2d 1118, 1132–33 (Md. 2007) ("A reviewing court may not uphold an agency's decision if a record of the facts on which the agency acted or a statement of reasons for its action is lacking.").

D. Appellees' decision to execute the Kanahā Sweep without providing constitutionally sufficient notice or a contested case hearing was arbitrary, capricious, an abuse of discretion, and a clearly unwarranted exercise of discretion (HRS § 91-14(g)(6))

To the extent it involved an exercise of discretion, County Appellees' decision to execute the Kanahā Sweep without providing constitutionally sufficient notice or a contested case hearing was arbitrary, capricious, an abuse of discretion, or a clearly unwarranted exercise of discretion (HRS § 91-14(g)(6)). An abuse of discretion occurs when the decisionmaker "exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party." *Bank of Hawaii v. Kunimoto*, 91 Hawai‘i 372, 387 984 P.2d 1198, 1213 (1999). County Appellees' decision to conduct the Kanahā Sweep without considering Houseless Appellants' contested case requests—while ignoring fundamental principles of constitutional due process—was arbitrary, capricious, an abuse of discretion, and a clearly unwarranted exercise of

discretion. Specifically, County Appellees had no discretion to ignore constitutional due process in making their decision. *See, e.g.*, *Churchill v. Univ. of Colorado at Boulder*, 285 P.3d 986, 1006 (Colo. 2012) (en banc) ("an administrative decision is per se arbitrary and capricious if it violates a party's constitutional rights."); *Commonwealth v. Nat'l Council on Comp. Ins.*, 385 S.E.2d 568, 571 (Va. 1989) ("[A]n exercise of discretion which results in a denial of due process constitutes an abuse of discretion."). But County Appellees did exactly that here, *see supra* Section IV.A, and to the substantial detriment to Houseless Appellants.

V. CONCLUSION

For the foregoing reasons, Houseless Appellants respectfully request that the Court:

(1) Enter an order remanding the matter for a contested case consistent with the decision of the Court (including, in this instance, a post-deprivation hearing).

(2) Enter a declaratory judgment against County Appellees that declares that:

   a. County Appellees violated Houseless Appellants' procedural due process rights under article I, section 5 of the Hawai‘i Constitution and the Fourteenth Amendment to the U.S. Constitution by failing to provide adequate notice and/or providing defective notice before executing the Kanahā Sweep;

   b. County Appellees violated Houseless Appellants' procedural due process rights by failing to hold a contested case hearing before depriving Houseless Appellants of their constitutionally protected rights to their personal property, despite having received formal, written requests for a contested case from Houseless Appellants;

   c. County Appellees violated Houseless Appellants' rights under article I, section 7 of the Hawai‘i Constitution and the Fourth Amendment to the U.S. Constitution

by searching and seizing their homes, vehicles, and personal property without a warrant, and thereby also invading their privacy, in executing the Kanahā Sweep;

d. County Appellees were required to conduct a contested case that included Houseless Appellants as parties;

e. The Kanahā Sweep was conducted upon unconstitutional procedure and in an unconstitutional manner.

(3) Enter an order requiring County Appellees, and their employees, agents, and representatives, to comply with article I, sections 5 and 7 of the Hawai‘i Constitution, and the Fourteenth and Fourth Amendments to the U.S. Constitution in conducting any future evictions or vacaturs of Houseless Appellants and other houseless people— and their shelter, vehicles, and personal property—from County of Maui property.

(4) Retain continuing jurisdiction to review County Appellees' compliance with all judgments and orders entered herein.

(5) Make such additional judicial determinations and orders as may be necessary to effectuate the foregoing.

(6) Award the costs of suit herein, including reasonable attorneys' fees; and

(7) Enter such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between the parties.

DATED: Honolulu, Hawai‘i, March 18, 2022.

Respectfully submitted,

/s/ Jongwook "Wookie" Kim
JONGWOOK "WOOKIE" KIM

ACLU OF HAWAII FOUNDATION
Attorney for Plaintiffs/Appellants

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI‘I

SONIA DAVIS, JESSICA LAU, LAURALEE B. RIEDELL, and ADAM M. WALTON, Plaintiffs/Appellants, v. MICHAEL P. VICTORINO, County of Maui Office of the Mayor, SCOTT TERUYA, County of Maui Department of Finance, and COUNTY OF MAUI, Defendants/Appellees.	Civil No. 2CCV-21-0000305 Agency Appeal CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of the document within was served via JEFS/JIMS to the following:

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