

**Electronically Filed
Supreme Court
SCAP-22-0000368
21-OCT-2022
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SCAP-22-

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

SONIA DAVIS, JESSICA LAU,
LAURALEE B. RIEDELL, and ADAM M.
WALTON

Petitioners/Plaintiffs-Appellees,

v.

MICHAEL P. VICTORINO, County of Maui
Office of the Mayor, SCOTT TERUYA,
County of the Maui Department of Finance,
and COUNTY OF MAUI,

Respondents/Defendants-Appellants.

ORIGINAL PROCEEDING
Civil No. 2CCV-21-0000305 (1)

APPEAL FROM THE ORDER GRANTING
IN PART AND DENYING IN PART
DEFENDANT’S MOTION TO DISMISS
NOTICE OF APPEAL (CIR. DKT. 114),
FILED ON MARCH 16, 2022

SECOND CIRCUIT COURT, STATE OF
HAWAI‘I

HON. KIRSTIN M. HAMMAN

APPELLATE PROCEEDING

CAAP-22-0000368
INTERMEDIATE COURT OF APPEALS,
STATE OF HAWAI‘I

PETITIONERS/PLAINTIFFS-APPELLEES’ APPLICATION FOR TRANSFER

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Pursuant to Hawai‘i Revised Statutes (HRS) § 602-58 and Hawai‘i Rules of Appellate Procedure (HRAP) Rule 40.2, Petitioners/Plaintiffs-Appellees SONIA DAVIS, JESSICA LAU, LAURALEE B. RIEDELL, and ADAM W. WALTON (“**Houseless Petitioners**”)¹ respectfully petition for transfer from the Intermediate Court of Appeals. Transfer to this Court is warranted because this case involves questions of imperative and fundamental public importance and novel legal issues concerning whether and how constitutional due process applies before a government agency may seize and destroy the personal property of houseless people in Hawai‘i.

This matter is before this Court because of the final decision by Respondents/Defendants-Appellants MICHAEL P. VICTORINO, County of Maui Office of the Mayor, SCOTT TERUYA, County of Maui Department of Finance, and COUNTY OF MAUI (“**Maui County Respondents**”) to conduct a sweep of the Pu‘uhonua o Kanahā encampment at Kanahā Beach Park in September 2021. During that sweep, Maui County Respondents seized and destroyed Houseless Petitioners’ (and others’) belongings without constitutionally adequate notice and—significantly—without addressing Houseless Petitioners’ filed requests for a contested case hearing. The extraordinary basis for Maui County Respondents’ disregard of constitutional due process is their official position that, because Houseless Petitioners and their property were located in a public space allegedly in violation of the law, Houseless Petitioners forfeited *all* constitutional protections for their property. But constitutional due process should not—and, more importantly, *does* not—turn on whether one is housed in a structure with four walls and a roof. Government actors are bound to respect due process principles for everyone, at all times. Because this case involves constitutional due process issues that may affect thousands of houseless people in Hawai‘i, Houseless Petitioners respectfully request transfer.

¹ Houseless Petitioners were Plaintiffs/Appellants in the Second Circuit Court agency appeal.

I. PRIOR PROCEEDINGS

On October 20, 2021, Houseless Petitioners filed a Chapter 91 agency appeal challenging the Maui County Respondents' decision to execute the forced eviction of houseless people from the Pu'uhonua o Kanahā encampment near Kanahā Beach Park in Kahului, Maui, as well as the seizure and destruction of their personal belongings. Cir. Dkt. 1.²

On November 9, 2021, Maui County Respondents moved to dismiss the appeal under Rule 12(b)(1) of the Hawai'i Rules of Civil Procedure ("HRCPP"), arguing that the court did not have subject matter jurisdiction over the appeal because Houseless Petitioners did not have constitutionally protected property interests that would entitle them to a contested case hearing. Cir. Dkt. 33 at 4-5.

On November 29, 2021, Houseless Petitioners filed their opposition brief. Cir. Dkt. 37. They argued that the Circuit Court had jurisdiction over the agency appeal. Houseless Petitioners had each filed valid requests for a contested case with Maui County Respondents. And by ignoring these requests, Maui County Respondents effectively denied their request, thus giving rise to Circuit Court jurisdiction. Houseless Petitioners also argued that their chattels undeniably were property interests protected by due process under both the Hawai'i and U.S. constitutions.

On December 7, 2021, the Circuit Court held a hearing on the motion to dismiss.

On January 31, 2022, at the Circuit Court's request, the parties filed further briefing regarding the second step of the two-step analysis used to evaluate the due process right to a hearing. Maui County Respondents continued to assert that constitutional due process did not require a contested case hearing. Cir. Dkt. 97. Houseless Petitioners, on the other hand, argued that they had a constitutional right to a contested hearing both because they had constitutionally

² "Cir. Dkt." refers to 2CCV-21-0000305. "ICA Dkt." refers to CAAP-22-0000368.

protected property interests and because, in any event, the three-factor analysis weighed strongly in their favor: their private interest was significant and weighty; the procedures actually used presented a serious risk of erroneous deprivation, and additional safeguards would have provided tremendous value; and the governmental interest and burdens were overstated.

On February 22, 2022, the Circuit Court held a further hearing.

On March 16, 2022, the Circuit Court entered an order granting in part and denying in part Maui County Respondents' motion. Cir. Dkt. 114. The Circuit Court made findings of fact related to the sweep, including that Maui County Respondents directly "proceeded to destroy the personal property . . . that [they] had seized, during the Kanahā Sweep"; that several Houseless Petitioners lost personal property during the sweep; and that Maui County Respondents received, but did not respond to, Houseless Petitioners' filed contested case hearing requests. *Id.* at 2-4. The Circuit Court also made conclusions of law, including that the court had jurisdiction over the agency appeal because that all four jurisdictional requirements were present, and that a contested case hearing was "required by law" because constitutional due process required such a hearing. *Id.* at 4-10. As to the due process analysis, the Circuit Court concluded that "[Houseless Petitioners'] personal property and vehicles are property within the meaning of the due process clauses of the U.S. and Hawai'i constitutions," and that, contrary to Maui County Respondents' assertions, their property did not "lose[] protections under constitutional due process by virtue of being maintained on public property allegedly 'in violation of criminal statutes.'" *Id.* at 6-7.

On March 18, 2022, Maui County Respondents applied for leave to take an interlocutory appeal of the Circuit Court's order. On May 3, 2022, the Circuit Court granted such leave.

On May 31, 2022, Maui County Respondents noticed their appeal in the Intermediate Court of Appeals. On September 28, 2022, Maui County Respondents filed their Opening Brief.

II. FACTUAL BACKGROUND

On September 1, 2021, Respondent/Defendant-Appellant County of Maui (“County” or “County of Maui”) issued a press release advising the public that it would be conducting a sweep, at a future date, on public lands surrounding the Kanaha Pond Wildlife Sanctuary and Wailuku-Kahului Wastewater Treatment Plant. Cir. Dkt. 114 at 2. That press release also included a statement from Respondent/Defendant-Appellant Mayor Victorino that, “[o]nce the unsheltered residents [residing in the area] have settled into new accommodations, we will start the clean-up.” Cir. Dkt. 1 at 9.

Houseless Petitioners were houseless individuals who were residing in the area at the time, some of whom received, on or around September 14, 2021, a Notice-to-Vacate from the County of Maui that stated that the area “will be cleared of personal property and vehicular access will be restricted” from September 20, 2021 through September 22, 2021. Cir. Dkt. 114 at 2. The Notice to Vacate stated that “All campsites, personal property, and vehicles must be removed from these Premises by or before the above date and time. Any person who remains on the ‘Premises’ during this time may be cited for Trespassing under Hawaii Revised Statutes section 708-815.” Dkt. 114 at 3.

Between September 6, 2021 and September 20, 2021, Houseless Petitioners filed “Request[s] for a Contested Case” with Maui County Respondents. Dkt. 114 at 4. In their requests, Houseless Petitioners each argued that “I have a property interest in my shelter and belongings” and that they “must be afforded procedural due process before the County may permanently deprive” such property. Dkt. 114 at 4. Although they had received Houseless Petitioners’ contested case requests, Maui County Respondents did not respond to the contested

case requests, and did not conduct a contested case hearing (or any other hearing) before conducting the sweep. Dkt. 114 at 4.

From September 20, 2021 to September 22, 2021, Defendants conducted the sweep of Kanahā area, during which they seized, discarded, or impounded at least 54 vehicles and 58 tons of personal property. Cir. Dkt. 1 at 13. Several Houseless Petitioners lost personal property during Maui County Respondents' sweep, including vehicles, tents, clothing, cooking supplies, baby supplies, and electronics, among other items. Cir. Dkt. 114 at 4.

III. POINTS OF ERROR

As Appellees in this matter before the Intermediate Court of Appeals, Houseless Petitioners assign no error to the Circuit Court's November 9, 2021 Order (Cir. Dkt. 33) that is the subject of this appeal and contend that the order should be affirmed.

IV. STATUTORY QUALIFICATIONS FOR TRANSFER

This Court is authorized to adjudicate applications for both mandatory and discretionary transfer of cases from the Intermediate Court of Appeals. *See* HRS § 602-58. Transfer is mandatory when a case involves a “question of imperative or fundamental public importance.” HRS § 602-58(a)(1). Transfer is discretionary when an appeal presents a “question of first impression or novel legal question.” HRS § 602-58(b)(1). Here, both mandatory and discretionary transfer is warranted. Transfer is mandatory because this case raises questions of imperative or fundamental public importance: whether houseless people forfeit constitutional protections over their property simply by virtue of living in public spaces, and whether such people are constitutionally entitled to a contested case hearing under under HRS § 91-14 when they seek to protect their property interests before a government agency conducts a sweep that

permanently deprives them of their personal property. Because this case also presents novel questions of first impression, the Court should also grant transfer.

A. This Case Involves Issues of Imperative or Fundamental Public Importance

This case involves at least two issues of imperative or fundamental public importance:

1. Do houseless people living in public spaces have property interests that are protected by constitutional due process under Article I, Section 5 of the Hawai‘i State Constitution and/or the Fourteenth Amendment to the U.S. Constitution?
2. Are houseless people living in public spaces constitutionally entitled to a contested hearing under HRS § 91-14 when they seek to protect their property interests before a government agency conducts a sweep that permanently deprives them of their personal property?

As to the first issue, throughout the proceedings below, Maui County Respondents have taken the *extraordinary* position that Houseless Petitioners do not have constitutionally protected property interests in their chattels and other personal property. The apparent foundation for this position is Maui County Respondents’ belief that, if one’s property is “violating the law” in some way, that property is not protected by due process.³ In Maui County Respondents’ view, Houseless Petitioners, by virtue of living in a public beach park, are “in violation of criminal statutes against trespassing.” Cir. Dkt. 39 at 2; *see also* ICA Dkt. 30 at 7-9. And because Houseless Petitioners are continuously “trespassing,” *all* of their personal property *immediately* loses constitutional protection—and can be seized and destroyed by Maui County Respondents without any modicum of due process.

³ *See, e.g.*, Cir. Dkt. 33 at 4 (“Appellants Had No Property Interest in Violating the Law”); Cir. Dkt. At 2 (“Appellants did not have a property interest”); ICA Dkt. 30 (“Plaintiffs-Appellees did not have a cognizable property interest”).

But whether someone has constitutional rights does not depend on whether that person is housed. Houseless Appellants undoubtedly had constitutionally protected property interests in their chattels.⁴ And they absolutely did not forfeit those protections by virtue of residing in a public space allegedly in violation of law. The Ninth Circuit’s decision in *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012)—a case that also involved the unconstitutional sweeps of houseless people and their chattels from public property—is particularly instructive. There—as Maui County Respondents similarly do here—the City of Los Angeles attempted to circumvent due process protections by recharacterizing the right being asserted by the houseless individuals as the “right to leave possessions unattended on public sidewalks.” *Id.* at 1031. The Ninth Circuit rejected that attempt, affirming that the houseless individuals’ “interest in the continued ownership of their personal possessions” was “the most basic of property interests encompassed by the due process clause[.]” *Id.* The Ninth Circuit also held that due process protections applied even if the subject property was momentarily unattended, or was being stored in public spaces, stating that, “[e]ven if [the houseless plaintiffs] had violated a city ordinance, their previously-recognized property interest is not thereby eliminated.” *Id.* at 1032 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982)). In fact, the Ninth Circuit stated that “[t]he City demonstrates that it completely misunderstands the role of due process by its contrary suggestion that homeless persons instantly and permanently lose any protected property interest in their possessions by leaving them momentarily unattended in violation of a municipal ordinance.” *Id.*

⁴ 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)).

As to the second issue, Maui County Respondents also appear to take the position that the normal procedures applicable under Chapter 91 of the Hawai‘i Revised Statutes do not apply to houseless people. As the record reflects, Houseless Petitioners filed contested case hearing requests, each arguing that they “ha[d] a property interest in my shelter and belongings and must be afforded procedural due process before [Maui] County may permanently deprive” that property. Cir. Dkt. 114 at 4 (Order on Motion to Dismiss). But—just as they ignored that houseless people have constitutionally cognizable property interests—Maui County Respondents “did not respond to the contested case requests, and did not conduct a contested case hearing (or any other hearing)” before they seized and destroyed Houseless Petitioners’ belongings. *Id.* It is impossible to imagine that Maui County Respondents would be similarly unresponsive if a real estate developer filed a contested case request before Maui County made plans to acquire the developer’s building by eminent domain.

Maui County Respondents appear to be taking the position that Hawai‘i courts should create an exception to the requirements of constitutional due process for houseless people. In other words, houseless people—and *only* houseless people—do not have a constitutional right to be heard before the government permanently deprives them of their property.

The issues raised in this case are undoubtedly of imperative and fundamental public importance. After all, Maui County Respondents are not the only government agencies that are engaging in the destructive practice of sweeping houseless people from public spaces and seizing and destroying their personal property along the way. Every day, agencies across Hawai‘i engage

in similar practices: The State does this.⁵ The City and County of Honolulu does this.⁶ Hawai‘i County does this.⁷ Kaua‘i County does this.⁸

And there is an immense number of people in Hawai‘i whose constitutional rights will be affected by how Hawai‘i courts resolve this case. Based on the most recent official count of houseless people, on any given night, there are approximately 5,973 houseless individuals in Hawai‘i, of whom 3,749 are unsheltered (meaning they live in places not meant for human habitation, such as cars, parks, sidewalks, and streets).⁹ Indeed, Hawai‘i has long had one of the highest rates of houselessness in the United States, with 45 out of every 10,000 residents experiencing houselessness.¹⁰ And these numbers do not even account for the thousands more people who might, due to job loss or medical emergency, become houseless.¹¹

⁵ See Christina Jedra, *Hawaii Increases Funding For Homeless Sweeps*, Honolulu Civil Beat (June 26, 2020), <https://www.civilbeat.org/2020/06/hawaii-increases-funding-for-homeless-sweeps> (noting that State budgeted \$7 million in to “clear homeless people off state lands”).

⁶ See Asha DuMonthier, *Decriminalizing Houselessness in Hawai‘i*, ACLU of Hawai‘i (Nov. 2021), at 13, <https://www.acluhi.org/en/decriminalizing-houselessness-hawaii> (describing how the City and County of Honolulu conducted 1,634 sweeps of houseless encampments on Oahu during the 12-month period from July 1, 2019 to June 30, 2020); Cassie Ordonio, *Why It’s So Hard For Homeless People To Collect Seized Belongings On Oahu*, Honolulu Civil Beat (Nov. 19, 2021), <https://www.civilbeat.org/2021/11/why-its-so-hard-for-homeless-people-to-collect-seized-belongings-on-oahu> (describing houseless people’s experiences with Honolulu’s sweeps).

⁷ See Big Island Video News, *20 People Sheltered After Kona Sweep* (May 21, 2022), <https://www.bigislandvideonews.com/2022/05/21/20-people-sheltered-after-kona-sweep>.

⁸ See Ryan Collins, *Homeless Camp Cleared*, The Garden Island (Apr. 25, 2019), <https://www.thegardenisland.com/2019/04/25/hawaii-news/homeless-camp-cleared> (describing “an islandwide homeless encampment sweep” by government agencies in Kaua‘i County).

⁹ State of Hawaii Statewide Office on Homeless and Housing Solutions, *Homelessness and Housing Data Clearinghouse* (last accessed: Oct. 21, 2022), <https://homelessness.hawaii.gov/data>.

¹⁰ See Meghan Henry et al., *2019 Annual Homeless Assessment Report (AHAR) to Congress*, U.S. Dept. Housing & Urban Development (2020), <https://www.huduser.gov/portal/sites/default/files/pdf/2019-AHAR-Part-1.pdf>.

¹¹ See Hawai‘i Housing Finance and Development Corporation, *Hawai‘i Housing Planning Study* (2019) at 57, https://dbedt.hawaii.gov/hhfdc/files/2020/01/FINAL-State_Hawaii-Housing-

In sum, if Maui County Respondents' dangerous approach is condoned by Hawai'i courts, thousands of Hawai'i residents will forfeit foundational constitutional rights simply because they have no other choice but to live in public spaces. Just as the Ninth Circuit "reject[ed] the City's suggestion that [the court] create an exception to the requirements of due process for the belongings of homeless persons[.]" *Lavan*, 693 F.3d 1022 at 1024, 1033, this Court should grant transfer and reject Maui County Respondents' argument that due process protections do not apply to houseless people or their belongings.

B. This Case Involves Novel Legal Questions of First Impression

This case also presents novel legal questions which have not yet been addressed by the Hawai'i Supreme Court. Many other courts have opined on how the U.S. Constitution applies to houseless people's property. This includes the Ninth Circuit Court of Appeals. *See Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027 (9th Cir. 2012) (holding that "The Fourth and Fourteenth Amendments protect homeless persons from government seizure and summary destruction of their unabandoned, but momentarily unattended, personal property."). This also includes other federal district courts within the Ninth Circuit. *See, e.g., Terry Ellis v. Clark County Department of Corrections*, CASE NO. 15-5449 RJB, 2016 WL 4945286 (D. Wash. 2016) (granting houseless plaintiffs summary judgment because county's "failure to provide pre-deprivation process violated [their] rights under the Fourteenth Amendment").

But, to Houseless Petitioners' knowledge, neither this Court nor the Intermediate Court of Appeals has ever addressed the application of the Hawai'i State Constitution (or the U.S. Constitution) to the property of houseless people living in public spaces. The same can also be

[Planning-Study.pdf](#) (describing how 25% of Hawai'i households were at risk of being forced out of their homes after two months or less of sustained income loss).

said for the narrower question of whether the Circuit Court had jurisdiction to hear a Chapter 91 agency appeal under the circumstances presented in this case.

Accordingly, the Court’s analysis as to these novel questions would provide important and relevant guidance, not just to houseless people living in Hawai‘i, but also to government agencies who are conducting (or considering conducting) sweeps.

V. CONCLUSION

Houseless Petitioners respectfully request that the Hawai‘i Supreme Court grant their application for transfer to address the fundamental and novel issues of public importance raised in this case.

DATED: Honolulu, Hawai‘i, October 21, 2022.

Respectfully submitted,

/s/ Jongwook “Wookie” Kim
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