IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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HO'OMOANA FOUNDATION,
Respondent/Respondent/Appellant-Appellee,

vs.

LAND USE COMMISSION, STATE OF HAWAI'I
Respondent/Petitioner/Appellee-Appellant,

and

PU'UNOA HOMEOWNERS ASSOCATION, INC.; AND COURTNEY L. LAMBRECHT,
Petitioners/Respondents/Appellees-Appellees.

SCWC-17-0000181

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000173 consolidated with CAAP-17-0000181;
CIV. NO 16-1-0160)

MARCH 10, 2023

DISSENTING OPINION BY McKENNA, J.,
IN WHICH RECKTENWALD, C.J., JOINS

I. Introduction

Today, the majority chooses to overrule Maha'ulepu v. Land Use Commission, 71 Haw. 332, 790 P.2d 906 (1990).[1]

In doing so, the majority avoids our own stare decisis jurisprudence. Maha'ulepu was decided more than thirty years ago. Whether or not we agree with its reasoning, we have repeatedly held that where the legislature fails to act in response to our statutory interpretation, that statutory interpretation must be considered to have the legislature's tacit approval. See, e.g., State v. Hussein, 122 Hawai'i 495, 529, 229 P.3d 313, 347 (2010) (citing Gray v. Admin. Dir., 84 Hawai'i 138, 143 n.9, 931 P.2d 580, 585 n.9 (1997)); State v. Dannenberg, 74 Haw. 75, 83, 837 P.2d 776, 780 (1992) (citations omitted), superseded by statute on other grounds as stated in State v. Klie, 116 Hawai'i 519, 174 P.3d 358 (2007). In addition, we have held that when we decide a matter of statutory interpretation, and the legislature does not alter what we have done, "[c]onsiderations of stare decisis have special force[.]" See State v. Garcia, 96 Hawai'i 200, 206, 29 P.3d 919, 925 (2001) (quoting Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991)). These principles govern this case.

[1] Maha'ulepu held that golf courses, which are deemed an impermissible use on class A and B agricultural lands by Hawai'i Revised Statutes ("HRS") § 205-4.5(a)(6) (1985), can still be authorized by special permit pursuant to HRS §§ 205-4.5(b) (1985) and 205-6 (1985). Maha'ulepu, 71 Haw. at 336-37, 790 P.2d at 908-09.

The majority holds that because Hoʻomoana Foundation's ("the foundation") "proposed campground project includes a public or private recreational overnight camp use, the project requires a district boundary amendment." Majority op. at Introduction. The majority thus acknowledges that with respect to unsheltered persons,[2] the foundation's proposed project is not a "recreational" use prohibited by HRS § 205-4.5(a)(6) (Supp. 2015), which would require a district boundary amendment based on the majority's overruling of Mahaʻulepu. Even with respect to "recreational" overnight campers, however, HRS § 205-4.5(a)(14) (Supp. 2015) specifically permits "agricultural tourism activities, including overnight accommodations of twenty-one days or less[.]"

But the foundation was precluded from fully explaining why a district boundary amendment is not required because the Land Use Commission ("LUC") denied the foundation's intervention petition as moot after granting Puʻunoa Homeowners Association and Devonne Lane's (collectively, "the homeowners")[3] petition for

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[2] As I said in my dissent in State v. Keanaaina, 151 Hawaiʻi 19, 508 P.3d 814 (2022) (McKenna, J., dissenting), "I use the term 'unsheltered persons' to mean those 'without traditional housing.' I avoid the terms 'homeless' and 'houseless' because for an increasing number of our citizens, tent-like structures have become their homes and houses." 151 Hawaiʻi at 29 n.1, 508 P.3d at 824 n.1.

[3] Like in the Majority opinion, reference to "the homeowners" includes Devonne Lane until Ross Scott, and then Courtney L. Lambrecht, were substituted for Devonne Lane during the proceedings before the ICA and this

a declaratory order. The foundation is not precluded from submitting a revised proposal. But because the majority chooses to overrule Maha'ulepu while ignoring our precedent on stare decisis principles, and chooses to do so in this case, I respectfully dissent.

II. Discussion

A. Overruling Maha'ulepu violates our stare decisis precedent

Our foremost obligation in interpreting HRS § 205-4.5(a)(6) is "to ascertain and give effect to the intention of the legislature[.]" See Gillan v. Gov't Emps. Ins. Co., 119 Hawai'i 109, 115, 194 P.3d 1071, 1077 (2008) (citation omitted). We have held that "[w]here the legislature fails to act in response to our statutory interpretation, the consequence is that the statutory interpretation of the court must be considered to have the tacit approval of the legislature and the effect of legislation." Hussein, 122 Hawai'i at 529, 229 P.3d at 347 (citation omitted).

Also, when this court decides a matter of statutory interpretation, and the legislature does not alter what we have done, "[c]onsiderations of stare decisis have special force[.]" Garcia, 96 Hawai'i at 206, 29 P.3d at 925 (citation omitted).

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court; it then includes the respective substituted parties. See Majority op. at note 3.

"While there is no necessity or sound legal reason to perpetuate an error under the doctrine of stare decisis, . . . a court should not depart from the doctrine of stare decisis without some compelling justification." Id. (cleaned up). Stare decisis "maintain[s] public faith in the judiciary as a source of impersonal and reasoned judgments." 96 Hawai'i at 205, 29 P.3d at 924 (citation omitted).

This court decided Maha'ulepu over thirty years ago. In Maha'ulepu, we interpreted chapter 205 and held it provides authority for the issuance of special use permits for golf courses on class A and B rated agricultural lands. See 71 Haw. at 336-37, 790 P.2d at 908-09. We reviewed HRS § 205-4.5(a)(6), which provides that golf courses, along with dragstrips, airports, drive-in theaters, golf driving ranges, country clubs, and overnight camps, are not a permitted use on class A and B agricultural lands. See id.; HRS § 205-4.5(a)(6). We stated that "Section 205-4.5(b) nonetheless allows those uses for which special permits may be obtained under § 205-6." Maha'ulepu, 71 Haw. at 336, 790 P.2d at 909.[4] Maha'ulepu thus held that uses expressly deemed impermissible under HRS § 205-4.5(a)(6),

[4] Maha'ulepu also addressed whether the authority to issue a special use permit for golf courses on class B lands was negated by language in HRS § 205-2 (1985). See Maha'ulepu, 71 Haw. at 337-39, 790 P.2d at 909-10.

including overnight camps, can be authorized by a special use permit. See id.

Whether or not this reasoning was faulty, our precedent clearly states the legislature is "presumed to be aware" of this court's interpretation of HRS § 205-4.5(a)(6) in Maha'ulepu. See State v. Nesmith, 127 Hawai'i 48, 60, 276 P.3d 617, 629 (2012). The legislature then "has had abundant opportunities to amend the statute if it intended" for the uses expressly excluded from subsection (a)(6) to not be available through special use permits. See id.

Since 1990, the legislature has amended the relevant sections of chapter 205 dozens of times.[5] And although the

[5] Since this court published the Maha'ulepu opinion in 1990, the legislature has made the following amendments to HRS § 205-4.5: 1991 Haw. Sess. Laws Act 281, § 3 at 674-75; 1997 Haw. Sess. Laws Act 258, § 11 at 572-73; 2005 Haw. Sess. Laws Act 205, § 3 at 670-71; 2006 Haw. Sess. Laws Act 237, § 4 at 1052-53; 2006 Haw. Sess. Laws Act 250, § 2 at 1082-83; 2006 Haw. Sess. Laws Act 271, § 1 at 1124-26; 2007 Haw. Sess. Laws Act 159, § 3 at 295-96; 2007 Haw. Sess. Laws Act 171, § 1 at 332-34; 2008 Haw. Sess. Laws Act 145, § 3 at 388-90; 2009 Haw. Sess. Laws Act 53, § 1 at 93-96; 2011 Haw. Sess. Laws Act 217, § 3 at 703-05; 2012 Haw. Sess. Laws Act 97, § 7 at 211-13; 2012 Haw. Sess. Laws Act 113, § 3 at 409-11; 2012 Haw. Sess. Laws Act 167, § 2 at 592-95; 2012 Haw. Sess. Laws Act 329, § 4 at 1113-16; 2014 Haw. Sess. Laws Act 52, § 1 at 133-36; 2014 Haw. Sess. Laws Act 55, § 3 at 144-47; 2015 Haw. Sess. Laws Act 228, § 3 at 661-65; 2016 Haw. Sess. Laws Act 173, § 3 at 551-55; 2017 Haw. Sess. Laws Act 12, § 1 at 20; 2018 Haw. Sess. Laws Act 49, § 4 at 174-78; 2021 Haw. Sess. Laws Act 77, § 2 at 247-52; 2022 Haw. Sess. Laws Act 131, § 3 at 308-12.

In addition, since 1990, the legislature has made the following amendments to HRS § 205-2 (which classifies the four major agricultural land districts): 1991 Haw. Sess. Laws Act 191, § 1 at 462; 1991 Haw. Sess. Laws Act 281, § 2 at 674; 1995 Haw. Sess. Laws Act 69, § 8 at 105-06; 2005 Haw. Sess. Laws Act 205, § 2 at 669-70; 2006 Haw. Sess. Laws Act 237, § 3 at 1051-52; 2006 Haw. Sess. Laws Act 250, § 1 at 1081-82; 2007 Haw. Sess. Laws Act 159, § 2 at 294-95; 2008 Haw. Sess. Laws Act 31, § 2 at 138-39; 2008 Haw. Sess. Laws Act 145, § 2 at 387-88; 2011 Haw. Sess. Laws Act 217, § 2 at 702-

legislature amended chapter 205 to specifically disallow golf courses on agricultural lands, it did not do so for other unpermitted uses in HRS § 205-4.5(a).[6] In other words, none of

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03; 2012 Haw. Sess. Laws Act 97, § 6 at 209-11; 2012 Haw. Sess. Laws Act 113, § 2 at 407-09; 2012 Haw. Sess. Laws Act 167, § 1 at 591-92; 2012 Haw. Sess. Laws Act 329, § 3 at 1112-13; 2014 Haw. Sess. Laws Act 55, § 2 at 143-44; 2015 Haw. Sess. Laws Act 228, § 2 at 660-61; 2016 Haw. Sess. Laws Act 173, § 2 at 550-51; 2017 Haw. Sess. Laws Act 12, § 15 at 28-30; 2017 Haw. Sess. Laws Act 129, § 2 at 500-02; 2018 Haw. Sess. Laws Act 49, § 3 at 174; 2022 Haw. Sess. Laws Act 131, § 2 at 306-08.

Finally, since 1990, the legislature has made the following amendments to HRS § 205-6 (which authorizes special use permits): 1998 Haw. Sess. Laws Act 237, § 6 at 815-16; 2005 Haw. Sess. Laws Act 183, § 5 at 589; 2021 Haw. Sess. Laws Act 153, § 8 at 584.

[6] The LUC argues that the legislature's 2005 and 2006 amendments to chapter 205 rejected Maha'ulepu.

The 2005 and 2006 amendments clearly established that golf courses and driving ranges are prohibited on all classes of agricultural lands, except for legacy golf courses and driving ranges approved before July 1, 2005. See 2005 Haw. Sess. Laws Act 205, §§ 2-3 at 669-71; 2006 Haw. Sess. Laws Act 250, § 1 at 1082. The 2005 amendment amended HRS § 205-2(d) to include the following sentence: "For the purposes of this chapter, golf courses and golf driving ranges are prohibited in agricultural districts, except as provided in section 205-4.5(d)." 2005 Haw. Sess. Laws Act 205, § 2 at 670. It also added a new subsection (d) to HRS § 205-4.5: "(d) Notwithstanding any other provision of this chapter to the contrary, golf courses and golf driving ranges approved by a county before July 1, 2005, for development within the agricultural district shall be permitted uses within the agricultural district." Id. § 3 at 671. In 2006, the legislature amended HRS § 205-2(d) to read in part: "Agricultural districts shall not include golf courses and golf driving ranges, except as provided in section 205-4.5(d)." 2006 Haw. Sess. Laws Act 250, § 1 at 1082.

Even though the amendments expressly addressed only golf courses and driving ranges, and not the other excluded uses in HRS § 205-4.5(a)(6), the LUC contends the amendments show the legislature's disapproval of all the excluded uses in subsection (a)(6), including overnight camps. The LUC invokes the maxim noscitur a sociis, which means "words of a feather flock together," or, "the meaning of a word is to be judged by the company it keeps." See State v. Aluli, 78 Hawai'i 317, 321, 893 P.2d 168, 172 (1995) (quoting State v. Deleon, 72 Haw. 241, 244, 813 P.2d 1382, 1384 (1991)).

The maxim noscitur a sociis falls flat here. The plain language of the 2005 and 2006 amendments addresses only golf courses and driving ranges, not overnight camps — overnight camps do not "keep company" with golf courses in the amendments. See id. "[T]he contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that

the amendments rejected Maha'ulepu's statutory interpretation that the list of uses expressly excluded from permitted open area recreational uses in HRS § 205-4.5(a)(6) could be authorized through a special use permit. Thus, although legislative inaction can be a poor barometer of legislative intent,[7] in this case, the nature and sheer number of post-Maha'ulepu legislative amendments buttress the legislature's tacit approval of this court's statutory interpretation. See

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the latter was not intended to be included within the statute." State v. Choy Foo, 142 Hawai'i 65, 74, 414 P.3d 117, 126 (2018) (quoting Int'l Sav. & Loan Ass'n v. Wiig, 82 Hawai'i 197, 201, 921 P.2d 117, 121 (1996)). Here, we must infer that if the legislature intended to prohibit the authorization of overnight camps through a special use permit as well as golf courses and driving ranges, it would have done so. See id. Maha'ulepu's reasoning applied to all the uses excluded in HRS § 205-4.5(a)(6), and we must presume the legislature knew this. See Nesmith, 127 Hawai'i at 60, 276 P.3d at 629.

Moreover, the legislative history indicates the legislature was specifically concerned with golf courses and driving ranges as part of its efforts to address "gentlemen's estates" and other luxury estates developed on agriculturally-zoned lands under the guise of permitted "farm dwellings." A House Conference Committee Report, for example, indicates, "[t]he original intent of this bill is primarily to prohibit luxury estates[] on agriculturally classified lands[.]" H. Conf. Comm. Rep. No. 135, in 2005 House Journal, at 959. And a Senate Standing Committee Report noted the bill would protect "Hawaii's farmers and agricultural lands from increased land speculation and development of fake farms or gentlemen's estates[.]" S. Stand. Comm. Rep. No. 1278, in 2005 Senate Journal, at 1637. Indeed, an earlier draft of the 2005 amendment established a rebuttable presumption that subdivisions are not agricultural, and do not consist of farm dwellings, if they include certain enumerated features, including a golf course or private country club facilities. See H.B. 109, H.D. 1, 23rd Leg., Reg. Sess. (Haw. 2005). It is clear that in making the foregoing 2005 and 2006 amendments, the legislature was not concerned with rejecting Maha'ulepu's statutory interpretation — or primarily concerned with special use permits at all.

[7] "[L]egislative inaction is a notoriously poor barometer of legislative intent--even when we can assume the legislature is aware a statute is being misinterpreted." Goran Pleho, LLC v. Lacy, 144 Hawai'i 224, 250, 439 P.3d 176, 202 (2019) (citation omitted).

Hussein, 122 Hawai'i at 529, 229 P.3d at 347. Maha'ulepu therefore has the effect of legislation. See id.

B. The foundation was precluded from fully explaining why a district boundary amendment is not required

The foundation was precluded from fully explaining why a district boundary amendment is not required because the LUC denied the foundation's intervention petition as moot after granting homeowners' petition for declaratory order. Perhaps the foundation could have made the following arguments.

1. A campground for unsheltered persons is not a "recreational" use

The majority's holding and LUC's declaratory order are premised on HRS § 205-4.5(a)(6), which restricts class A and B agricultural lands to, inter alia, "[p]ublic and private open area types of recreational uses, including day camps, picnic grounds, parks, and riding stables, but not including dragstrips, airports, drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps[.]" (Emphases added.) The majority holds that "[b]ecause the foundation's proposed campground project includes a public or private recreational overnight camp use, the project requires a district boundary amendment." Majority op. at Introduction.

According to the LUC's findings of facts, the foundation's proposed project consists of "an overnight campground for

homeless and commercial campers with an agricultural field for possible future uses by the campers[.]"

An overnight campground for unsheltered persons is not a "recreational" use. See HRS § 205-4.5(a)(6). The majority acknowledges that with respect to unsheltered persons, the foundation's proposed project is not a "recreational" use prohibited by HRS § 205-4.5(a)(6). See Majority op. at Section III.B (holding the foundation's project cannot be authorized by a special permit because it "includes a recreational use" by commercial overnight campers).

In this regard, "the fundamental starting point for statutory interpretation is the language of the statute itself." Ito v. Invs. Equity Life Holding Co., 135 Hawai'i 49, 61, 346 P.3d 118, 130 (2015) (quoting Haw. State Tchrs. Ass'n v. Abercrombie, 126 Hawai'i 318, 320, 271 P.3d 613, 615 (2012)). "[W]here the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning." Id. "In conducting a plain meaning analysis, 'this court may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined.'" State v. Guyton, 135 Hawai'i 372, 378, 351 P.3d 1138, 1144 (2015) (quoting State v. Pali, 129 Hawai'i 363, 370, 300 P.3d 1022, 1029 (2013)).

The phrase "recreational uses" in HRS § 205-4.5(a)(6) is clear and unambiguous. See id. As such, "its plain language must control." See id. (citations omitted). Oxford Advanced Learner's Dictionary defines "recreational" as "connected with activities that people do for pleasure when they are not working[.]" Recreational, Oxford Advanced Learner's Dictionary (10th ed. 2020) (emphasis added).[8]

Shelter is a basic human necessity; it is not used for "pleasure." See id. Tent-like shelters used as house and homes for living are no more "recreational" than traditional homes, regardless of how they are structured or labeled, or whether located on a "campground." Thus, if the project consisted purely of campgrounds for unsheltered persons, it would not be a "recreational" "overnight camp[]" excluded by HRS § 205-4.5(a)(6).

Based on the limited factual record before the LUC,[9] however, the commercial camping aspect of the foundation's project appears to constitute a recreational overnight camp. The LUC found "there is no . . . current requirement placed upon

[8] Similarly, Webster's Unabridged Dictionary defines "recreation" as "a pastime, diversion, exercise, or other resource affording relaxation and enjoyment." Recreation, Random House Webster's Unabridged Dictionary (2d ed. 2005).

[9] See Majority op. at note 6 (explaining that the homeowners presented only excerpts of the foundation's special permit application as an exhibit before the LUC).

the campers to engage in agricultural pursuits." The foundation did not challenge this finding on appeal, so we are bound by it. See In re Doe, 99 Hawai'i 522, 538, 57 P.3d 447, 463 (2002) ("Unchallenged findings are binding on appeal." (quoting Poe v. Haw. Lab. Rels. Bd., 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002))).

2. Even for commercial campers, "agricultural tourism" is expressly allowed

With respect to recreational overnight campers, subsection (a)(14) of HRS § 205-4.5 expressly permits:

> Agricultural tourism activities, including overnight accommodations of twenty-one days or less, for any one stay within a county; provided that this paragraph shall apply only to a county that includes at least three islands and has adopted ordinances regulating agricultural tourism activities pursuant to section 205-5; provided further that the agricultural tourism activities coexist with a bona fide agricultural activity. For the purposes of this paragraph, "bona fide agricultural activity" means a farming operation as defined in section 165-2[.]

(Emphasis added.)[10]

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[10] Under its plain language, HRS § 205-4.5(a)(14) applies to Maui County.

HRS § 165-2 (2011 & Supp. 2012) defines a "farming operation" as:

> [A] commercial agricultural, silvicultural, or aquacultural facility or pursuit conducted, in whole or in part, including the care and production of livestock and livestock products, poultry and poultry products, apiary products, and plant and animal production for nonfood uses; the planting, cultivating, harvesting, and processing of crops; and the farming or ranching of any plant or animal species in a controlled salt, brackish, or freshwater environment. "Farming operation" includes but shall not be limited to:
>
> > (1) Agricultural-based commercial operations as described in section [205-2(d)(15)];

Hence, subsection (a)(14) expressly permits "overnight accommodations" of 21 days or less in connection with agricultural tourism. Id. HRS § 205-4.5(a) does not prohibit commercial camping where the camping qualifies as agricultural tourism in compliance with subsection (a)(14). Webster's Unabridged Dictionary defines "accommodations" broadly as "lodging." Accommodations, Random House Webster's Unabridged Dictionary, supra. It defines "lodging," in turn, as "a temporary place to stay; temporary quarters." Lodging, Random House Webster's Unabridged Dictionary, supra. Pursuant to the plain language of the statute, tent-like structures can be "overnight accommodations." See HRS § 205-4.5(a)(14); Guyton, 135 Hawai'i at 378, 351 P.3d at 1144.

3. A modified version of the project could comply with chapter 205

The foundation was not given a full opportunity to make these types of arguments due to the denial of its petition for intervention. But a modified version of the foundation's project could potentially comply with chapter 205. The

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(2) Noises, odors, dust, and fumes emanating from a commercial agricultural or an aquacultural facility or pursuit;
(3) Operation of machinery and irrigation pumps;
(4) Ground and aerial seeding and spraying;
(5) The application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and
(6) The employment and use of labor.

majority's opinion does not prohibit the foundation from amending and resubmitting its proposal. The majority merely reverses the ICA's June 24, 2022 judgment on appeal and, consequently, reinstates the LUC's March 3, 2016 declaratory order that the project as constituted cannot be permitted by a special use permit. See Majority op. at Part IV. The foundation could present a modified project consisting only of campgrounds for unsheltered persons, but not commercial campers. A special use permit application could be authorized because, as explained above, the proposed use would not be a "recreational" use under HRS § 205-4.5(a)(6). If a modified proposal includes uses expressly permitted by section 205-4.5(a), that portion of the project should not require a district boundary amendment or a special use permit. Thus, if the foundation proposes a campground with bona fide agricultural activity, commercial camping in the same project area could potentially comply with subsection (a)(14) as agricultural tourism. See HRS § 205-4.5(a)(14).

III. Conclusion

Today, the majority overrules Mahaʻulepu while ignoring important stare decisis principles. It does so in a case involving a proposed overnight campground development for unsheltered people in our community brought by adjoining homeowners, some of whom asserted "not in my backyard"

concerns.[11] Respectfully, in my view, our resolution of this case should be guided by the motto enshrined in the Constitution of the State of Hawaiʻi, "Ua mau ke ea o ka ʻāina i ka pono."[12]

For all these reasons, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Sabrina S. McKenna

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[11] Homeowner testimony before the LUC on the petition for declaratory order included statements such as "we feel that [the proposed development is] very detrimental to our property values, and to our safety."

[12] The Preamble to the Constitution of the State of Hawaiʻi provides:

> We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, "Ua mau ke ea o ka aina i ka pono."
>
> We reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.
>
> We reaffirm our belief in a government of the people, by the people and for the people, and with an understanding and compassionate heart toward all the peoples of the earth, do hereby ordain and establish this constitution for the State of Hawaii.