IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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PUEO KAI McGUIRE,
Plaintiff-Appellant,

vs.

COUNTY OF HAWAI'I; MITCHELL D. ROTH; KELDEN WALTJEN;
KATE PERAZICH; and SYLVIA WAN,
Defendants-Appellees.

SCCQ-24-0000165

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I
(CASE NO. 23-00296 JAO-KJM)

April 8, 2025

CONCURRING OPINION BY GINOZA, J.

This 42 U.S.C. § 1983 case was filed in the U.S. District Court for the District of Hawaii (**U.S. District Court**), where it remains pending. The defendants filed a motion to dismiss in which one of several grounds asserted for dismissal was that they are entitled to sovereign immunity. For this defense, they assert that in prosecuting cases, county

prosecutors function as state, not county, officials. The U.S. District Court concluded that this sovereign immunity argument depends on an interpretation of state law and thus certified the following question to this court:

> Under Hawaiʻi law, does a county Prosecuting Attorney and/or Deputy Prosecuting Attorney act on behalf of the county or the state when he or she is preparing to prosecute and/or prosecuting criminal violations of state law?

I agree with this court's answer, that the county prosecutors act on behalf of the county when preparing to prosecute and/or prosecuting criminal violations of state law.

However, I respectfully disagree with several aspects of Section VI in the majority opinion. First, I disagree with relying on § 1983's historic roots to answer the state law question before us. The U.S. District Court certified its question to this court to resolve a state law question pertinent to sovereign immunity. In answering the state law question, the majority opinion considered well the history of prosecutorial power in Hawaiʻi under the Hawaiʻi Constitution, Hawaiʻi statutes, the Hawaiʻi County Charter and Hawaiʻi case law. The majority then proceeds in Section VI to discuss the purpose and history of § 1983, stating that the federal law's "historic and legal roots animate our state law considerations" and by holding that county prosecutors function as county officials under state law "we fulfill section 1983's intent." Given the certified

question, there is no need nor propriety in analyzing the history of § 1983 to animate state law considerations or to fulfill the intent of § 1983. To the extent this means the purpose of § 1983 somehow impacts the interpretation of our state law, I disagree with that approach. There is no indication that the pertinent provisions of the Hawai'i Constitution, Hawai'i statutes, and the Hawai'i County Charter were enacted with § 1983 in mind. Nor was the relevant Hawai'i case law on prosecutorial power affected by considerations about § 1983.

Second, Section VI delves into whether county prosecutors would have protection under absolute and qualified immunity. In my view, this encroaches on the U.S. District Court's authority to address these separate defenses in this case. With regard to absolute immunity, the defendants have asserted this defense in their motion to dismiss, which is pending in the U.S. District Court. Absolute immunity is not pertinent to the question certified to this court and is an issue for the U.S District Court to address and resolve.

With regard to qualified immunity, the majority opinion broadly questions the propriety of this defense and puts its thumb on the scale for an issue that very well could arise in the U.S. District Court. Qualified immunity is not relevant

to the question certified to us. Even more perplexing is the fact that this court has recognized and applied the qualified immunity defense against § 1983 claims. See, e.g., Gordon v. Maesaka-Hirata, 143 Hawai'i 335, 353-55, 431 P.3d 708, 726-28 (2018) (holding that a defendant was entitled to qualified immunity against a § 1983 claim); Brown v. Thompson, 91 Hawai'i 1, 14-16, 979 P.2d 586, 599-601 (1999) (holding that two defendants had qualified immunity against the plaintiff's § 1983 claim).

Moreover, the discussion in Section VI on absolute immunity and qualified immunity is based primarily on federal law, not state law. The U.S. District Court did not seek our guidance on federal law.

Generally, we "may answer a certified question (1) that concerns the law of Hawai'i, (2) that is determinative of the cause, and (3) for which there is no clear controlling Hawai'i precedent." Lima v. Deutsche Bank Nat'l Tr. Co., 149 Hawai'i 457, 463, 494 P.3d 1190, 1196 (2021); see also Hawai'i Revised Statutes (**HRS**) § 602-5(a)(2) (2016); Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 13(a).

This court has also expressed leeway in how it addresses a certified question. See Flores-Case 'Ohana v. Univ. of Haw., 153 Hawai'i 76, 78–79, 526 P.3d 601, 603–04 (2023)

(noting that the same principles used in answering certified questions apply to reserved questions, and that the court "may reformulate the relevant state law questions as it perceives them to be, in light of the contentions of the parties" (citations omitted)); Miller v. Hartford Life Ins. Co., 126 Hawai'i 165, 173, 268 P.3d 418, 426 (2011) ("Ultimately, the District Court's 'phrasing of the question[s] should not restrict [this court's] consideration of the problems and issues involved. [This court] may reformulate the relevant state law questions as it perceives them to be, in light of the contentions of the parties.'" (quoting Allstate Ins. Co. v. Alamo Rent-A-Car, Inc., 137 F.3d 634, 637 (9th Cir. 1998))).

This court has declined, however, to address issues that go beyond the scope of the question or are inappropriate for certification under HRAP Rule 13. See, e.g., Pac. Radiation Oncology, LLC v. Queen's Med. Ctr., 138 Hawai'i 14, 16, 375 P.3d 1252, 1254 (2016) (reformulating the question, but confining answer to "law of Hawai'i that is determinative of the cause" and declining to address part of a question related to federal law); Davis v. Four Seasons Hotel Ltd., 122 Hawai'i 423, 428 n.12, 228 P.3d 303, 308 n.12 (2010) (declining to address an argument by plaintiffs because it was "beyond the scope of the certified

question"); Matsuura v. E.I. du Pont de Nemours & Co., 102 Hawai'i 149, 168, 73 P.3d 687, 706 (2003) (determining that "insofar as the third certified question does not appear to be 'determinative of the cause,' it was inappropriate for certification under HRAP Rule 13" and thus the court declined to answer it).

In Richardson v. City & Cnty. of Honolulu, this court elected to go beyond the scope of the certified question where the federal court had

> indicated unambiguously, in the course of settling the precise language of the certified question, that it intended
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> > the question to be as broad as is appropriate because it did not want the Supreme Court to decide the issue, have the matter then go to the Ninth Circuit Court of Appeals, have someone make the argument that . . . there is still another issue, send it back down to the federal court . . . because it hasn't been decided, . . . and the parties are right back at square one again.

76 Hawai'i 46, 53-54, 868 P.2d 1193, 1200-01 (1994) (brackets omitted). That is not the case here.

Here, although the U.S. District Court included the customary statement from certifying courts that it did not "intend the form of the question to limit the Hawai'i Supreme Court's consideration of the issues relevant to disposing of this matter," it did not express a broad intent to its question like in Richardson. See id.

Therefore, for the reasons expressed above, I concur with the answer to the certified question, but respectfully decline to join in Section VI.

/s/ Lisa M. Ginoza