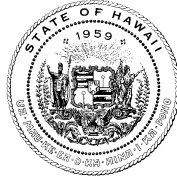


DAVID Y. IGE
GOVERNOR



HOLLY T. SHIKADA
ATTORNEY GENERAL

VALERIE M. KATO
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

January 20, 2022

The Honorable Ronald D. Kouchi
President of the Senate
Thirty-First State Legislature
State of Hawai'i
State Capitol, Room 409
415 South Beretania Street
Honolulu, Hawai'i 96813

The Honorable Scott K. Saiki
Speaker of the House of Representatives
Thirty-First State Legislature
State of Hawai'i
State Capitol, Room 431
415 South Beretania Street
Honolulu Hawai'i 96813

RE: Standard for Germaneness of Bill Amendments Under
Article III, Section 15 of the Hawai'i Constitution

Dear President Kouchi and Speaker Saiki:

This letter responds to your request for a formal legal opinion regarding the germaneness standard that the Hawai'i Supreme Court has held is implicit in the three-readings requirement of article III, section 15 of the Hawai'i Constitution.

I. ISSUE PRESENTED

In *League of Women Voters of Honolulu v. State*, 150 Hawai'i 182, 499 P.3d 382 (2021), the Hawai'i Supreme Court held that the constitutional requirement that a bill must pass three readings in each house "begin[s] anew after a non-germane amendment changes the object or subject of a bill so that it is no longer related to the original bill as introduced." *Id.* at 205, 499

P.3d at 405. Under what circumstances is an amendment to a bill properly regarded as "germane," and how should that standard be applied in practice?

II. SHORT ANSWER

Under article III, section 15, an amendment to a bill is "germane" if the amended bill retains a "common tie" or "close alliance" to the bill as it stood prior to the amendment, determined with reference to the bill's subject and general purpose, broadly conceived. See *League of Women Voters of Honolulu v. State*, 150 Hawai'i 182, 499 P.3d 382 (2021); *Schwab v. Ariyoshi*, 58 Haw. 25, 33, 564 P.2d 135, 140 (1977). An amendment is likely to be considered germane if it leaves intact a bill's subject and "object" (i.e., its general purpose)—even if the amendment extends or limits the bill's scope, alters the details governing how a bill's general purpose is achieved, or makes other incidental changes to the bill.

By contrast, an amendment is not germane if it introduces "new and independent matter" that "embrace[s] [a] dissimilar and discordant subject[] that by no fair intendment can be considered as having any legitimate connection" to the bill, *Schwab*, 58 Haw. at 33, 564 P.2d at 140, or if the amendment alters the "substance of the bill" in a way that fundamentally changes its general purpose. *League of Women Voters*, 150 Hawai'i at 186, 199-207, 499 P.3d at 386, 399-407 (2021) (quotation omitted).

Applying these principles, we understand existing case law as requiring a two-step inquiry to determine whether a non-germane amendment has been added to a bill. First, does the amendment fall outside the scope of the subject of the bill as expressed by its title? Second, does the amendment alter the bill in a way that fundamentally changes the bill's general purpose? If the answer to either of these questions is "yes," we believe the amendment would not be germane for purposes of the three-readings requirement of article III, section 15.

III. DISCUSSION

In *League of Women Voters of Honolulu v. State*, 150 Hawai'i 182, 499 P.3d 382 (2021), the Hawai'i Supreme Court held that the three-readings provision of article III, section 15 includes within it an implicit requirement that a bill's three readings in each house must "begin anew" if "a non-germane amendment changes the object or subject of a bill so that it is no longer related

to the original bill as introduced." 150 Hawai'i at 205, 499 P.3d at 405. You have requested a formal legal opinion expressing our views on how the "germaneness" requirement will be applied by Hawai'i courts in the context of challenges under article III, section 15.¹

In answering your question, we begin by summarizing the core principles that govern challenges to the lawmaking process under the Hawai'i Constitution, including the general principles applicable to germaneness challenges as developed in the context of the single-subject and subject-in-title requirements of article III, section 14. We then outline how we believe the relevant legal principles are likely to be applied by the Hawai'i courts in the context of article III, section 15.

A. Germaneness is a broad concept that balances the need for informed deliberation with the need for flexibility in crafting and revising legislation.

The Hawai'i Constitution vests the Legislature with "legislative power"—"the power to enact laws and to declare what the law shall be[.]" *Sherman v. Sawyer*, 63 Haw. 55, 57, 621 P.2d 346, 348 (1980); Haw. Const. art. III, § 1. The Constitution also establishes certain structural limitations on the lawmaking process. For example, the single-subject and subject-in-title provisions of article III, section 14 require that "[e]ach law shall embrace but one subject, which shall be expressed in its title." Haw. Const. art. III, § 14. The three-readings rule, which provides that "[n]o bill shall become law unless it shall pass three readings in each house on separate days," Haw. Const. art. III, § 15, operates as a further constitutional restriction on the lawmaking process.

The requirement that a bill receives at least three readings in each house before becoming law helps "ensure[] that each house of the legislature has given sufficient consideration to the effect of [a] bill," *League of Women Voters*, 150 Hawai'i at 199, 499 P.3d at 399 (quotation omitted), and encourages informed deliberation, *id.* at 196, 499 P.3d at 396.² In this regard, "the

¹ Our opinion is limited to article III, section 15. We do not intend to express a view on any other constitutional provisions, or on any provisions of the Legislature's rules.

² Specifically, the Hawai'i Supreme Court has explained that "the three readings requirement serves three important purposes: it (1) provides the opportunity for full debate on proposed

purpose behind the single subject and subject-in-title requirements is similar to the purpose of the three readings requirement in that both are directed at providing notice to legislators and the public." *Id.* at 201, 499 P.3d at 401.

In *League of Women Voters of Honolulu v. State*, the Hawai'i Supreme Court held that the three-readings requirement of article III, section 15 includes an implicit requirement regarding the germaneness of amendments. The Court reasoned that "if the body of [a] bill is so changed as to constitute a different bill, then it is no longer the same bill[.]" *Id.* at 199-200, 499 P.3d at 399-400. Accordingly, "the substance of a bill must bear some resemblance" to "the previous versions" of the bill as previously read, or else the three readings must "begin anew[.]"

To implement the requirement that a bill "retain some common attributes" during its three constitutionally required readings in each chamber, the Court in *League of Women Voters* held that "the same germaneness standard" applies under the three-readings requirement as under challenges to legislation under the single-subject and subject-in-title provisions of article III, section 14. *Id.* at 201, 499 P.3d at 401. Thus, the Court explained, a bill's three readings must "begin anew after a non-germane amendment changes the object or subject of a bill" in a way that leaves the amended bill "no longer related to the original bill" as it stood before the amendment. *Id.* at 205, 499 P.3d at 405.

As developed in case law applying the single-subject and subject-in-title rules, the concept of "germaneness" requires that the parts of a bill be sufficiently "connected and related to each other, either logically or in popular understanding, as to be parts of or germane to" the "general subject" expressed in a bill's title. *Schwab*, 58 Haw. at 33, 564 P.2d at 140. Put another way, an amendment to a bill is "germane" if the amended bill retains a "common tie" or "close alliance" to the bill as it stood before the amendment, determined with reference to the bill's overall subject, broadly conceived. *See League of Women Voters*, 150 Hawai'i 182, 499 P.3d 382 (2021); *Schwab*, 58 Haw. at 33, 564 P.2d at 140.³ Relying on a leading case from the

legislation; (2) ensures that members of each legislative house are familiar with a bill's contents and have time to give sufficient consideration to its effects; and (3) provides the public with notice and an opportunity to comment on proposed legislation." *Id.*

³ Other definitions of the term "germane" applied in similar contexts include "in close relationship, appropriate, relative,

Minnesota Supreme Court, the Hawai'i Supreme Court has elaborated on the concept of germaneness:

All that is necessary is that act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.

Schwab, 58 Haw. at 33, 564 P.2d at 140 (quoting *Johnson v. Harrison*, 50 N.W. 923, 924 (Minn. 1891)).⁴ When assessing the germaneness of a provision to the subject of a bill, "[t]he term 'subject' . . . is to be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters having a logical or natural connection." *Id.* (quotation omitted). A provision is not germane if the provision addresses a "dissimilar and discordant subject[] that by no fair intendment can be considered as having any legitimate connection with or relation to each other." *Id.* at 33, 564 P.2d at 140 (emphasis added).

Under article III, section 14, a bill's "subject," as expressed in its title, may be broad. See *Schwab*, 58 Haw. at 34-35, 564 P.2d at 141 ("If no portion of the bill is foreign to the subject of the legislation as indicated by the title, however general the latter may be, it is in harmony with the constitutional mandate."); *Otto v. Wright Cty.*, 910 N.W.2d 446, 457 (Minn. 2018) (explaining that "a subject may be expressed generally"). Conversely, if the Legislature chooses to adopt a more narrow and particularized title for a bill, "[t]he Courts cannot enlarge the scope of the title" and "it is no answer to say that the title might have been made more comprehensive, if in fact the Legislature have not seen fit to make it so." *Hyman Bros. v. Kapena*, 7 Haw. 76, 78 (Haw. Kingdom 1887).

pertinent," or "[r]elevant or closely allied." *Calzone v. Interim Comm'r of Dep't of Elementary & Secondary Educ.*, 584 S.W.3d 310, 317 (Mo. 2019) (quoting *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 327 (Mo. 2000); *Black's Law Dictionary* (6th ed. 1990)).

⁴ Like the Hawai'i courts, Minnesota courts have long applied this same germaneness definition. See *Otto v. Wright Cty.*, 910 N.W.2d 446, 457-58 (Minn. 2018) (explaining that "[t]he concept of germaneness was captured best by [this passage in *Johnson*]," and highlighting "the broad view we have taken of germaneness").

Consistent with the principles outlined above, and as we have previously opined, "[w]here the title to any act expresses a single general subject or purpose, all matters which are naturally and reasonably connected with it, or any measures which will further its purpose, will be held to be germane." *Validity of Budget Proviso, Section 164, Act 300, 1985 Session Laws of Hawaii*, Haw. Att'y Gen. Op. No. 86-8, 1986 WL 80016, at *4 (Mar. 6, 1986). By contrast, an amendment is not germane under article III, section 14 if it introduces "new and independent matter," *Territory v. Kua*, 22 Haw. 307, 313 (Haw. Terr. 1914), of a sort that "embrace[s] [a] dissimilar and discordant subject[] that by no fair intendment can be considered as having any legitimate connection" to the bill. *Schwab*, 58 Haw. at 33, 564 P.2d at 140.

The concept of germaneness developed under article III, section 14 reflects "a liberal construction of this constitutional requirement[.]" *Schwab*, 58 Haw. at 34, 564 P.2d at 141 (citing cases); *accord Territory v. Miguel*, 18 Haw. 402, 408 (Haw. Terr. 1907) (emphasizing the need to avoid "unwarrantably frustrat[ing] the exercise of legislative power"); *Territory v. Dondero*, 21 Haw. 19, 26 (Haw. Terr. 1912) ("Sound policy and legislative convenience dictate a liberal construction of the title and subject-matter of enactments to maintain their validity."). In other words, the requirement of germaneness is "not designed to inhibit the normal legislative processes in which bills are combined and additions necessary to comply with the legislative intent are made." *Calzone v. Interim Comm'r of Dep't of Elementary & Secondary Educ.*, 584 S.W.3d 310, 317 (Mo. 2019) (quotation omitted).

The deferential character of germaneness review is reinforced by the high burden of proof applicable to such challenges: Because "every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt," to invalidate a provision on non-germaneness grounds, "the infraction should be plain, clear, manifest, and unmistakable." *Schwab*, 58 Haw. at 31, 564 P.2d at 139; *id.* at 39, 564 P.2d at 144 ("The power of the legislature should not be interfered with unless it is exercised in a manner which plainly conflicts with some higher law.").

Having outlined the concept of germaneness generally, we next turn to the application of that concept in the context of the three-readings requirement of article III, section 15.

B. Evaluating germaneness in the context of the three-readings requirement of article III, section 15 involves a two-step inquiry.

In *League of Women Voters of Honolulu v. State*, the Hawai'i Supreme Court held that it would "apply the same germaneness standard to the three readings requirement as we do to the single subject and subject-in-title requirements[.]" 150 Hawai'i at 201, 499 P.3d at 401. Although the same standard—germaneness—applies under both section 14 and section 15, certain specifics associated with the application of this standard are necessarily different because the germaneness standard must be applied in the distinct doctrinal context of article III, section 15. In particular, while challenges under section 14 focus on "the degree of similarity between different parts of a bill ('but one subject') and between those parts and the title ('which shall be expressed in its title')," *id.* at 209, 499 P.3d at 409 (Recktenwald, C.J., dissenting), challenges under section 15 call on a reviewing court to assess whether "a non-germane amendment changes the object or subject of a bill so that it is no longer related to the original bill[.]" *Id.* at 205, 499 P.3d at 405 (majority opinion).

The Hawai'i Supreme Court's case law recognizes this distinction. In *League of Women Voters*, the Court explained that "focus[ing] on whether" a particular amendment is "within the scope of [a] bill's original title" was "a logical first step to determining whether an amendment is germane[.]" 150 Hawai'i at 201 n.28, 499 P.3d at 401 n.28 (emphasis added). This is a crucial first step because the Hawai'i Constitution mandates that "[e]ach law shall embrace but one subject, which shall be expressed in its title." Haw. Const. art. III, § 14. The title of a bill thus provides a meaningful reference point when "determining whether an amendment is germane to the original bill's subject[.]" *League of Women Voters*, 150 Hawai'i at 201 n.28, 499 P.3d at 401 n.28. "However, that is not the end of the inquiry[.]" *Id.* The nature of the article III, section 15 inquiry means that a second step to the analysis exists: A reviewing court considers whether an amendment "changes the purpose of a bill" to such an extent "that it is no longer related to the original bill as introduced." *Id.* at 186, 205, 499 P.3d at 386, 405 (discussing the need to consider whether a "non-germane amendment changes the [1] object or [2] subject of a bill so that it is no longer related to the original bill as introduced" (emphasis added)). If an amendment alters the "substance of [a] bill" in a way that transforms the bill's

“object”—*i.e.*, the bill’s general purpose⁵—then the amendment is not germane.

The Court’s decision in *League of Women Voters of Honolulu v. State* illustrates this second step. At issue in that case was a “gut and replace” amendment to a bill that fundamentally changed “the substance of the bill[.]” 150 Hawai‘i at 186, 205, 499 P.3d at 386, 405 (2021). The “gut and replace” amendment, the Court explained, had the effect of turning a “recidivism reporting bill” into a “hurricane shelter bill” that was “unrelated to the original recidivism reporting bill.” *Id.* at 186-87, 205, 499 P.3d at 386-87, 405. As a result, the substance of the bill at issue—Senate Bill No. 2858, “A Bill for an Act Relating to Public Safety” (S.B. 2858)—was radically changed. *Id.* at 186-87, 189, 499 P.3d at 386-87, 389.

Although S.B. 2858 remained, as its title suggested, “relat[ed] to public safety”⁶ throughout the lawmaking process, the “gut and replace” amendment had transformed S.B. 2858’s overall purpose. Before the “gut and replace” amendment, S.B. 2858 had the general purpose of “improv[ing] the efficacy of the State’s corrections program.”⁷ After the amendment, this original purpose was abandoned and the general purpose of S.B. 2858 instead became promoting hurricane safety. To achieve the general purpose of promoting hurricane safety, S.B. 2858

⁵ See *Loc. No. 1644, Am. Fed’n of State, Cty. & Mun. Emp., AFL-CIO v. Oakwood Hosp. Corp.*, 116 N.W.2d 314, 320 (Mich. 1962) (“Numerous cases have held that the ‘object’ of a statute is the general purpose or aim of the enactment.”).

⁶ See Hawai‘i Legislature, 2018 Archives, *SB2858 SD2 HD1 CD1, Relating to Public Safety*, https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=SB&billnumber=2858&year=2018 (last visited Jan. 19, 2022).

⁷ See Hawai‘i Legislature, 2018 Archives, Stand. Comm. Rep. No. 2714, S.B. No. 2858, S.D. 2, https://www.capitol.hawaii.gov/session2018/CommReports/SB2858_SD2_SSCR2714.htm (last visited Jan. 19, 2022) (“The purpose and intent of this measure is to improve the efficacy of the State’s corrections program.”); see also Hawai‘i Legislature, 2018 Archives, Stand. Comm. Rep. No. 1255-18, S.B. No. 2858 S.D. 2 H.D. 1, https://www.capitol.hawaii.gov/session2018/CommReports/SB2858_HD1_HSCR1255-18.htm (last visited Jan. 19, 2022) (similar; “The purpose of this measure is to improve the efficacy of the State’s corrections program.”).

“require[d] the design of all state buildings constructed on or after July 1, 2018, to include a shelter room or area that is capable of protecting individuals from Category 3 hurricanes.”⁸ Comparing the text and legislative history⁹ of the versions of S.B. 2858 that existed before and after the “gut and replace” amendment, the Court held that the pre-amendment and post-amendment versions of the bill did not share a “common tie” to an overarching general purpose. *League of Women Voters*, 150 Hawai‘i at 206, 499 P.3d at 406 (quotation omitted). Because the amendment was not germane, S.B. 2858 had not received three readings in each house and a constitutional defect existed. *Id.*

Unlike the non-germane “gut and replace” amendment at issue in *League of Women Voters*, many other types of amendments—even amendments that make significant and substantive changes to a bill—are germane. The Court’s decision in *League of Women Voters* underscores this principle. In addition to the “gut and replace” amendment discussed above, the Supreme Court also applied its article III, section 15 germaneness test to a second amendment that was added to S.B. 2858. This second amendment, which was introduced by the conference committee, significantly changed how S.B. 2858 would have achieved its general purpose of promoting hurricane safety.

The conference committee removed the provisions of S.B. 2858 that “requir[ed] the design of all state buildings constructed on or after July 1, 2018, to include a shelter room or area that is capable of protecting individuals from Category 3 hurricanes[.]”¹⁰ The committee instead “[i]nser[ed] language to require the State to consider hurricane resistant criteria when designing and constructing new public schools for the capability of providing shelter refuge[.]”¹¹ This amendment changed the means by which S.B. 2858 would have achieved its general purpose of promoting

⁸ Hawai‘i Legislature, 2018 Archives, https://www.capitol.hawaii.gov/session2018/CommReports/SB2858_HD1_HSCR1912-18_.htm (last visited Jan. 19, 2022).

⁹ Text and legislative history are both relevant to this inquiry because “in determining the purpose of [a] statute, [courts] are not limited to the words of the statute to discern the underlying policy which the legislature seeks to promulgate but may look to relevant legislative history.” *State v. Wells*, 78 Hawai‘i 373, 376, 894 P.2d 70, 73 (1995) (cleaned up; quotation omitted).

¹⁰ Hawai‘i Legislature, 2018 Archives, https://www.capitol.hawaii.gov/session2018/CommReports/SB2858_CD1_CCR93-18_.htm (last visited Jan. 19, 2022).

¹¹ *Id.*

hurricane safety. The amendment also significantly changed the scope of the bill: The amended bill only dealt with schools, not all State buildings, and it only required the State to "consider" hurricane resistant criteria, rather than requiring all new state buildings to include a hurricane shelter.

Despite the major changes made to S.B. 2858 by the conference committee, the *League of Women Voters* Court held that the conference committee's amendment was germane: "[T]here [was] a 'common tie' and 'close alliance,'" the Court explained, between the versions of S.B. 2858 that existed before and after the conference committee's amendment. 150 Hawai'i at 206 n.37, 499 P.3d at 406 n.37. See generally *id.* at 200, 499 P.3d at 400 ("common tie" may be found by comparing pre-amendment and post-amendment bills and assessing "tendency . . . to promote the object and purpose of the act" (quotation omitted)).

The crucial difference between S.B. 2858's non-germane "gut-and-replace" amendment and its germane conference committee amendment was that although the conference committee amendment changed how the bill would achieve its general purpose, it kept the bill's general purpose—promoting hurricane safety—intact. In contrast, the "gut-and-replace" amendment transformed the broad, overarching purpose of the bill: The original purpose, "improving the efficacy of the State's corrections program," was abandoned and replaced with an entirely different purpose, promoting hurricane safety.

We believe the Hawai'i Supreme Court's decision in *League of Women Voters* teaches that an amendment is germane if it leaves a bill's subject and general purpose intact—even if the amendment significantly extends or limits the scope of the bill¹² or changes the specific means by which the bill's general purpose is achieved.¹³ This reflects the recognized distinction between "the general purpose of [a] bill" and the "details through which and by which that purpose is manifested and effectuated." *Calzone*, 584 S.W.3d at 317. Indeed, even "[p]rovisions wholly discordant from the text may be . . . inserted by way of amendment, provided the main purpose and essential character of the original are not

¹² *Calzone*, 584 S.W.3d at 317 ("[A]lterations that bring about an extension or limitation of the scope of the bill are not prohibited, provided the changes are germane." (quotation omitted)).

¹³ *Cf. League of Women Voters*, 150 Hawai'i at 201 n.28, 499 P.3d at 401 n.28.

The Honorable Ronald D. Kouchi
The Honorable Scott K. Saiki
January 20, 2022
Page 11

necessarily impaired or modified." *Hood v. City of Wheeling*, 102 S.E. 259, 263 (W. Va. 1920) (cited and quoted with apparent approval in *League of Women Voters*, 150 Hawai'i at 201 & n.28, 499 P.3d at 401 & n.28. Similarly, incidental changes to a bill—such as adding or removing exceptions and provisos, adding or removing penalties and remedies, or revising an effective date—are also very likely to be considered germane.

Accordingly, we understand existing case law as requiring a two-step inquiry to determine whether a non-germane amendment has been added to a bill. First, does the amendment fall outside the scope of the subject of the bill as expressed by its title? Second, does the amendment alter the bill in a way that fundamentally changes the bill's general purpose? If the answer to either of these questions is "yes," we believe the amendment would not be germane under article III, section 15.

IV. CONCLUSION

Based on the foregoing assessment, we understand article III, section 15 and case law interpreting that provision as requiring a two-step inquiry to determine whether a non-germane amendment has been added to a bill. If the amendment (1) falls outside the scope of the subject of the bill as expressed by its title or (2) alters the bill in a way that fundamentally changes the bill's general purpose, we believe the amendment would not be germane under article III, section 15.

Very truly yours,



Nicholas M. McLean
Deputy Attorney General

APPROVED:



Holly T. Shikada
Attorney General