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SCWC-23-0000737

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

DONALD B. MARKS,

Petitioner / Petitioner-Appellant,

vs.

STATE OF HAWAI‘I,

Respondent / Respondent-Appellee.

ICA Case No. CAAP-23-0000737
(Circuit Court Case Nos. 1CPN-21-0000002 and 1PC021002410)

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS

Chief Judge Karen T. Nakasone
Associate Judge Katherine G. Leonard
Associate Judge Keith K. Hiraoka

CIRCUIT COURT OF THE FIRST CIRCUIT
Judge Trish K. Morikawa

BRIEF OF *AMICI CURIAE* ACLU OF HAWAI‘I FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER / PETITIONER-APPELLANT DONALD B. MARKS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 1.8 million members dedicated to the principles of liberty and equality embodied in the nation's federal and state constitutions and civil rights laws. The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i")—the state affiliate of the ACLU—has nearly 4,000 members in the State of Hawai'i and is also dedicated to defending and protecting civil rights and civil liberties. Preserving the separation of powers and protecting the people of Hawai'i—including people who are incarcerated—against violations of constitutional rights are at the core of the ACLU of Hawai'i's mission. And the ACLU of Hawai'i has a long history of advocating around these rights, including those implicated in the present case. Thus, ACLU *Amici* and their members have vested organizational interests in the outcome of this case and sought leave to appear as *amici curiae* in this proceeding.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Hawai'i felony cases, the sentencing decision that matters most to defendants is not made by a judge. The court imposes the maximum term that the Hawai'i Revised Statutes ("HRS") prescribe. But the Hawai'i Paroling Authority ("HPA")—an executive agency of gubernatorial appointees—decides how much of that term a person must serve before parole is even possible. As this Court has recognized, "it is the HPA, not the courts, that exercises most of the State's felony sentencing discretion." *Lewi v. State*, 145 Hawai'i 333, 348, 452 P.3d 330, 345 (2019) (citation omitted). Of the thirty-three indeterminate-sentencing states, Hawai'i is the only one that authorizes its parole board to set the minimum term.

The Hawai'i Constitution does not permit this arrangement. When the HPA sets a minimum term, it makes a core sentencing decision and does so without protections that attach

when a court sentences. The HPA need not identify or test the facts it uses, and its processes have no clear standard of proof, no protection against compelled self-incrimination, no jury findings, and no objective criteria that a person can evaluate or a court can meaningfully review.

This Court should hold that the HPA's minimum-term determination is sentencing, and that the current minimum-term framework violates the separation of powers and the rights of the accused, including their due process rights.

First, what the HPA does is sentencing. A minimum term—*i.e.*, the time a person must serve before parole is even possible—sets the floor of the punishment. This differs from deciding whether to release someone once eligible, which is a traditional executive role. The Legislature itself calls the HPA's decisions "minimum sentences." HRS § 706-669(8). And the HPA weighs the same factors the Penal Code prescribes for judicial sentencing. This Court has treated the minimum-term hearing accordingly, requiring the HPA to provide protections drawn from judicial sentencing, including access to adverse information and a written explanation of its decision.

Second, giving the sentencing power to the HPA violates the separation of powers. Imposing a sentence is the judiciary's "exclusive responsibility and function." *State v. Gaylord*, 78 Hawai‘i 127, 153, 890 P.2d 1167, 1193 (1995) (citation omitted). The Legislature cannot assign the core judicial power to fix punishment in an individual criminal case to an executive agency, and the narrow judicial review available under HRPP Rule 40 does not keep this power with the courts. Even if delegation of sentencing power were permissible, HRS § 706-669 lacks the detail and safeguards needed to comply with Hawai‘i's non-delegation doctrine.

Third, the HPA's minimum-term hearings violate defendants' rights, including Marks's. The HPA relies on facts not established by plea or verdict without identifying their source. It finds facts that enhance a defendant's sentence without any jury findings. And it interrogates defendants

without respecting the privilege against self-incrimination. These hearings also lack basic due process safeguards: this system provides insufficient notice of the minimum term the state will seek before the HPA, and the HPA applies subjective criteria, compares cases to its own unpublished decisions, and resolves disputed facts without a standard—such that neither defendants nor a reviewing court can test the result.

Because Marks's minimum term was set in violation of the Hawai'i Constitution, this Court should hold that minimum terms must be set by courts, set aside Marks's minimum term and remand for a new determination, and grant other relief as justice requires.

BACKGROUND

I. Hawai'i's Indeterminate Sentencing Scheme

The Hawai'i Revised Statutes divide the power to sentence a criminal defendant between two entities: the sentencing court and the HPA, an executive agency composed of individuals appointed by the Governor and confirmed by the State Senate. The court sets a defendant's maximum term of imprisonment. HRS §§ 706-656, -659, -660. But the HPA "fix[es] the minimum term of imprisonment to be served before the prisoner shall become eligible for parole." HRS § 706-669(1).

Hawai'i is an outlier: it is the only indeterminate-sentencing state where the parole board sets minimum terms. See *House Concurrent Resolution 23 Task Force Report* ("Task Force Report"), Haw. Corr. Sys. Oversight Comm'n 3, 8 (Jan. 21, 2025), https://hcsoc.hawaii.gov/wp-content/uploads/2025/01/House-Concurrent-Resolution-23-Task-Force-FINAL-2025.1.21.pdf [https://perma.cc/8RK9-3CSE].

In this scheme, the HPA has far more discretion than sentencing courts do. A court *must* sentence a defendant to a maximum term of life without parole, life with the possibility of parole,

twenty years, ten years, or five years based solely on the class of offense. HRS §§ 706-656, -659, -660.[1] By contrast, HPA's power is largely unfettered by statute and regulations—unlike judicial sentencing, no statutory sentencing factors constrain the HPA's authority. The HPA must "establish guidelines for the uniform determination of minimum sentences," but few constraints on the content or application of those guidelines exist. HRS § 706-669(8). The HPA can, for example, set a defendant's minimum term to match the maximum term set by the court, functionally eliminating the possibility of parole. *Williamson v. Hawai'i Paroling Auth.*, 97 Hawai'i 183, 195-96, 35 P.3d 210, 222-23 (2001).

The HPA promulgated its current Guidelines in 1989, establishing criteria designed to guide the HPA in setting minimum terms. *See* Hawai'i Paroling Authority, *Guidelines for Establishing Minimum Terms of Imprisonment* ("Guidelines") (June 1989), https://dcr.hawaii.gov/wp-content/uploads/2026/03/HPA-Guidelines-for-Establishing-Minimum-Terms-of-Imprisonment.pdf [https://perma.cc/2RCU-C22G]. Under the Guidelines, the HPA considers two primary factors in setting a minimum term of imprisonment: the maximum term imposed by the court and a tiered "level of punishment." *Id.* at 2. The HPA determines the level of punishment (I, II, or III) based on subjective criteria described in the Guidelines. *Id.* at 3-8; *see also id.* at 3 (emphasizing that the HPA's "interpretations and perceptions of the subjective criteria remain the prerogative of the Authority" (capitalization omitted)). Two of these criteria, including one that assesses the nature of the offense, "are comparative" and require HPA members to know the "offense circumstances and past [HPA] decisions." *Id.* at 3. Even within the levels of

[1] Sentencing looks slightly different when a mandatory minimum or extended-term sentencing is triggered. *See* HRS §§ 706-660.1, -660.2 (mandatory minimums); HRS §§ 706-661, -662 (extended terms). But the same relationship with the HPA exists in such cases because the HPA retains the authority to set a minimum term, so long as it remains above a statutory mandatory minimum. *Althouse v. State*, 111 Hawai'i 35, 39-40, 137 P.3d 349, 353-54 (2006).

punishment, the range of imprisonment is broad. For example, for people sentenced to life with the possibility of parole, the Level III presumptive range of punishment is twenty to fifty years. *Id.* at 2.

The HPA's broad discretion is compounded by the fact that it "may deviate from the [G]uidelines" with written justification. *Id.* at 1. *See Lewi v. State*, 145 Hawai'i 333, 348-49, 452 P.3d 330, 345-46 (2019) (requiring "written justification or explanation" whenever the HPA assigns a Level II or III punishment).

II. The History of Indeterminate Sentencing in Hawai'i

For most of the 20th century, courts set or controlled minimum terms. When the Territory of Hawai'i passed the "Indeterminate Sentence Act" in 1909, courts—not the parole board—set minimum sentences. 1909 Haw. Sess. Laws Act 45; *Territory v. Alu*, 28 Haw. 268, 269-70 (Haw. Terr. 1925) (quoting 1909 Haw. Sess. Laws Act 45, as amended). Where no statutory minimum existed, "the court imposing [a] sentence shall fix such minimum sentence." *Territory v. Lake*, 26 Haw. 764, 770 (Haw. Terr. 1923); Revised Laws of Hawai'i ("RLH") § 3843 (1915).

The purpose of indeterminate sentencing was rehabilitation. In service of this goal, the Supreme Court of the Territory of Hawai'i held that courts could not set a minimum too close to the maximum: "[A] reasonable period of time should intervene between such minimum and maximum sentences." *Lake*, 26 Haw. at 771-72.

Yet as Hawai'i adjusted to its new role as a U.S. territory post-annexation, conflicts arose between the executive branch and the territorial judiciary around questions of sentencing, including "who has the authority to fix the minimum term of imprisonment after conviction." 1931 House Journal, at 454 (Comm. on Judiciary on purpose and effect of H.B. No. 91). According to a 1931 Senate Committee on Judiciary Report, "the Board of Prison Inspectors in charge of paroles

have, in many instances, refused to grant paroles at the end of the minimum term fixed by the courts for the reason that such minimum term was wholly inadequate, thereby causing uncertainty and dissatisfaction on the part of the prisoners." 1931 Senate Journal, at 530 (Comm. on Judiciary on proposed amendment to indeterminate sentencing statute). At the same time, critics alleged that the circuit courts had a "lack of uniformity in the fixing of minimum periods of sentences." *Id.* In 1931, the Legislature tried to resolve this conflict by giving the parole board the power to "fix" minimum term sentences, subject to confirmation or modification by the courts. 1931 Haw. Sess. Laws Act 38, § 4098 at 29-30.

This push for greater executive control over sentencing may have been driven by racial and political motives. During this time, the Territory of Hawai‘i feared mainland interference in local affairs or even the declaration of martial law related to "racist hysteria" from the continent. *McGuire v. Cnty. of Hawai‘i*, 155 Hawai‘i 475, 481, 567 P.3d 180, 186 (2025) (citation omitted). *See* 70 Cong. Rec. 742 (Dec. 17, 1928), https://www.congress.gov/bound-congressional-record/1928/12/17/senate-section [https://perma.cc/F782-K9VR] ("We often hear that . . . 'it will not be long before Congress must provide some type of commission government for Hawaii because of the coming preponderance of voters of oriental ancestry.'"). The 1928 Fukunaga case[2] and the 1931 Massie affair[3] illustrate the "two-tier" system of justice that served to support the

[2] Amid threats of mob violence and media attention on the continent, Japanese American *nisei* Myles Fukunaga was sentenced to death only three weeks after the alleged murder of a *haole* child, after the Governor refused to allow a psychiatric evaluation that could have supported an insanity plea. *See generally* Jonathan Y. Okamura, *Raced to Death in 1920s Hawai‘i*: *Injustice & Revenge in the Fukunaga Case* (2019); *id.* at 207, 243-44. After his conviction, the Supreme Court of the Territory of Hawai‘i issued a writ of error, postponing his execution—although in January 1929, the court affirmed. *See Territory v. Fukunaga*, 30 Haw. 697, 735 (Haw. Terr. 1929).

[3] "The Massie affair—the trial of the 'Ala Moana Boys,' the murder of an innocent young Native Hawaiian man, and the commutation of his killers' sentences to one hour—is well-chronicled." *McGuire*, 155 Hawai‘i at 481, 567 P.3d at 186.

existing racial hierarchy.[4] Given statutory mandatory sentences and racially diverse juries, leaders hoping to preserve that "two-tier" system may have deemed it necessary to give more influence to the executive branch. In addition to granting the parole board power to "fix" minimums, the Territorial Legislature repealed all mandatory minimum statutes, handing the initial minimum sentence decision to the parole board in all cases. *See* 1931 Haw. Sess. Laws Act 39, § 1 at 30.

From 1931 until the mid-1960s, the parole board "fixed" the minimum term, but the sentencing court could "approve, reduce, or increase the minimum so fixed subject to the condition that there must be a 'reasonable period' between the maximum and minimum sentence imposed." Note, *Statutory Structures for Sentencing Felons to Prison*, 60 Colum. L. Rev. 1134, 1146 (1960); *see also* RLH § 258-52 (1955).

In 1965, the Board of Paroles and Pardons objected to the rate at which courts had overridden its decisions and advocated that minimum terms be set "by a central group." SC Rep. 316, in 1965 Senate Journal, at 969. The Legislature removed courts from the minimum sentencing equation entirely, giving the board "the *sole authority* to determine minimum terms of imprisonment." *Id.* (emphasis added); 1965 Haw. Sess. Laws Act 102; RLH 1955 § 258-52 (Supp. 1965). This arrangement persisted after the overhaul of the Hawai'i Penal Code in 1972, *see* 1972 Haw. Sess. Laws Act 9, § 669 at 82-83, and the re-naming of the Board of Paroles and Pardons to the HPA in 1976. 1976 Haw. Sess. Laws Act 92, § 8 at 148-49.

[4] While the Fukunaga case and Massie affair are the most high-profile examples, throughout the 1920s, the Territorial Governor had commuted the sentences of other *haole* defendants convicted of murdering non-*haole* victims, setting the standard for a "dual system of racial justice." Okamura, *supra* note 2, at 264.

III. Procedural History

Appellant Donald B. Marks pleaded no contest to second-degree murder in 2004. Indictment, App'x pt. 1 at 3; 2004 Judgment, App'x pt. 1 at 4-6. [5] The trial court granted the State's motion for an extended sentence and sentenced Marks to life without the possibility of parole. *Id.* But in 2018, this Court overturned Marks's sentence because the judge, rather than a jury, had found facts that led to life without parole, in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Marks v. State* ("*Marks I"*), 142 Hawai'i 466, 421 P.3d 674, 2018 WL 3153759 (June 28, 2018) (SDO). On remand, the trial court sentenced Marks to life with the possibility of parole. App'x pt. 1 at 7-8.

Marks appeared before the HPA for a minimum-term hearing on November 23, 2020, nine months after the court set his maximum term. HPA Tr. 1, App'x pt. 2 at 175; 2020 Judgment, App'x pt. 1 at 8. While the HPA is made up of five members, HRS § 353-61(b), only two members attended Marks's hearing. *See* HPA Tr. 17, App'x pt. 2 at 191. HPA board members Max Otani and Clayton Hee questioned Marks about the circumstances of his crime and probed disputed facts about Marks's behavior. HPA Tr. 8-10, App'x pt. 2 at 182-84; *see also* HPA Tr. 14-17, App'x pt. 2 at 188-91. Otani also questioned Marks about a prior conviction. HPA Tr. 7, App'x pt. 2 at 181. Five days later, the HPA designated Marks for a Level III punishment and set his minimum term at 40 years. Notice and Order Fixing Minimum Term ("Minimum Term Order"), App'x pt. 2 at 2. To justify this level of punishment, the HPA cited the nature of the offense and Marks's criminal

[5] Citations to "App'x pt. __" refer to the Appendix to Petitioner's Amended Application for Writ of Certiorari, filed in three parts at Dkts. 27, 29, and 31. "HPA Tr." refers to the transcript of Marks's November 23, 2020 minimum-term hearing. App'x pt. 2 at 175-92. PDF pagination is used when referencing the Appendix.

history, offering little detail beyond a recitation of the factors. *Id.* The HPA provided no further justification or comparative analysis.

ARGUMENT

I. The HPA's determination of a defendant's minimum term of imprisonment is "sentencing."

For purposes of the constitutional issues implicated in this appeal, the HPA's determination of a minimum term constitutes "sentencing." Hawai'i statute recognizes as much, as it requires the HPA to "establish guidelines for the uniform determination of minimum *sentences*." HRS § 706-669(8) (emphasis added).

A minimum term is part of the sentence, not part of the parole decision. At its most basic, a sentence is "the punishment imposed on a criminal wrongdoer," and a minimum sentence is "[t]he least amount of time that a convicted criminal must serve in prison before becoming eligible for parole." *Sentence*, Black's Law Dictionary (12th ed. 2024).

Parole is different. "Although paroling is closely related to sentencing, . . . the terms 'parole' and 'sentence' should not be confused with each other." *Keawe v. State*, 79 Hawai'i 281, 289, 901 P.2d 481, 489 (1995). And as this Court has recognized, "the granting of parole is generally the function of the executive branch of government, *i.e.*, the Hawai'i paroling authority." *Id.* Thus, a minimum sentence is not the same as a grant of parole—it is simply the earliest date at which a person may request that parole be considered, HRS § 706-669(1), and only after it expires does the HPA decide whether to release a person, HRS § 353-68.

When a court sets the minimum term of imprisonment, there is no question that the minimum is part of the sentence, subject to related constitutional requirements. *See Alleyne v. United States*, 570 U.S. 99, 112-113 (2013) ("It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime. . . . A fact that increases a sentencing floor, thus, forms

an essential ingredient of the offense."); *State v. Auld*, 136 Hawai‘i 244, 247-48, 361 P.3d 471, 474-75 (2015) (applying *Alleyne* under the Hawai‘i Constitution). That is because "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Alleyne*, 570 U.S. at 113 (holding that facts that increase the mandatory minimum "must be submitted to the jury").

Recent U.S. Supreme Court caselaw further underscores that an initial parole eligibility date is part of a sentence. In *Graham v. Florida*, 560 U.S. 48, 82 (2010), for example, the Court held that imposing life without parole on defendants convicted of nonhomicide offenses they committed as juveniles violates the Eighth Amendment. And in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the U.S. Supreme Court extended that rationale to homicide offenders, absent certain findings. In each of these cases, the possibility of parole makes an otherwise unconstitutional sentence (life without parole) into a permissible one (life with the possibility of parole). The HPA's minimum-term-setting authority, which allows it to determine whether and when a person is first considered for parole, *see Williamson*, 97 Hawai‘i at 195-96, 35 P.3d 210, 222-23, thus amounts to "sentencing" for the constitutional questions implicated here.

This Court's precedent and the HPA's own rules both reflect that the HPA's power to determine a minimum term is tantamount to sentencing power. The Court has observed that "it is the HPA, not the courts, that exercises most of the State's felony sentencing discretion." *Lewi*, 145 Hawai‘i at 348, 452 P.3d at 345 (citation omitted). Its rules, in turn, mirror the judicial sentencing statutes: Hawai‘i Administrative Rules ("HAR") § 23-700-23, which governs the factors the HPA shall consider in fixing a "minimum sentence," is nearly identical to HRS § 706-606, which governs the factors the court shall consider in imposing a sentence. *Compare* HRS § 706-606, *with*

HAR § 23-700-23. And the HPA's Guidelines use language very similar to HRS § 706-662, which governs criteria for extended terms of imprisonment—criteria that must be proven beyond a reasonable doubt to a jury. *Compare* Guidelines at 5-6, *with* HRS § 706-662.

Further, the Court has repeatedly imported procedural guarantees from judicial sentencing to the minimum-term hearing before the HPA. For example, the HPA must provide an incarcerated person "timely access to all of the adverse information contained in the HPA file" because a similar rule applies to sentencing courts. *De La Garza v. State*, 129 Hawai'i 429, 441-42, 302 P.3d 697, 710 (2013). Similarly, relying on judicial sentencing precedent, this Court has required the HPA to "set forth a written justification or explanation" when setting Level II and Level III terms of imprisonment. *Lewi*, 145 Hawai'i at 348, 452 P.3d at 345. In both instances, this Court cited the unusual authority and discretion afforded to the HPA, recognizing that it functionally exercises sentencing power. *Id.*; *De La Garza*, 129 Hawai'i at 441-42, 302 P.3d at 709-10.

Nothing in *Keawe v. State*, 79 Hawai'i 281, 901 P.2d 481 (1995)—on which the Intermediate Court of Appeals relied—holds otherwise. *Keawe* involved re-sentencing by a court that affected the time the defendant might spend on parole; it had nothing to do with the HPA's power to set a defendant's minimum term. *Id.* at 289 n.10, 901 P.2d 481 n.10. And *Keawe* addressed the meaning of "sentencing" as relevant to a particular statute, so it used statutory language and extrinsic aids to determine legislative intent. *See id.* at 289-90, 901 P.2d at 489-90. It did not consider HPA's minimum-term authority and did not purport to define "sentencing" as relevant to constitutional questions of separation of powers, due process, or the rights of the accused.

Moreover, since *Keawe*, the Court has recognized that "[f]rom the standpoint of a criminal defendant, the HPA's decision in setting the minimum term of imprisonment may be more

important and significant than a trial court's decision" setting the maximum term. *Lewi*, 145 Hawai'i at 348, 452 P.3d at 345 (citation omitted); *see also De La Garza*, 129 Hawai'i at 441, 302 P.3d at 709 (noting "the HPA minimum-term hearing is a critical stage of the criminal proceeding" (citation omitted)). That reality confirms that the HPA's minimum-term setting is "sentencing" for purposes of constitutional analysis.

II. The HPA's discretionary authority to set a defendant's minimum term violates the separation of powers.

The Hawai'i Constitution divides power between three co-equal branches. While the Legislature may create and empower executive agencies to exercise certain "quasi-judicial" powers, *Flores-Case 'Ohana v. Univ. of Hawai'i*, 153 Hawai'i 76, 84-85, 526 P.3d 601, 609-10 (2023), that power has limits. The HPA's power to set minimum terms of incarceration violates at least two such limits. First, sentencing power is a core judicial power that the Legislature cannot delegate to an executive agency. Second, even if the Legislature could delegate this authority, it has done so in a way that lacks sufficient standards to guide and constrain the agency.

A. Imposing a sentence, including its minimum, is a core judicial function that the Legislature cannot delegate to the executive.

Imposing a sentence, including its minimum, is a core judicial function. The judiciary has "the exclusive responsibility and function of imposing a sentence." *State v. Gaylord*, 78 Hawai'i 127, 152-53, 890 P.2d 1167, 1192-93 (1995) (citation omitted). While the Legislature "prescribes penalties for criminal offenses," *State v. Nunes*, 72 Hawai'i 521, 524, 824 P.2d 837, 839 (1992) (citation omitted), the judiciary's role is to "impose a 'fair, proper, and just sentence,' . . . based upon the crime of which the defendant was convicted." *State v. Valera*, 74 Haw. 424, 436, 848 P.2d 376, 381 (1993) (citation omitted), *abrogated by State v. Hussein*, 122 Hawai'i 495, 229 P.3d 313 (2010). That role requires each sentence to be "tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in

maximizing the offender's rehabilitative potential." *State v. Nobriga*, 56 Haw. 75, 83, 527 P.2d 1269, 1274 (1974) (citation omitted).

Because the HPA's minimum-term determination is sentencing, *see supra* § I, the question is whether the Legislature may assign that judicial function to an executive agency. It may not.

As this Court has observed, the Legislature's ability to delegate quasi-judicial powers to an agency is "*conditioned*" not only on a procedural limitation involving judicial review, but also on a substantive "*limiting principle*[]." *Alakai Na Keiki, Inc. v. Matayoshi*, 127 Hawai'i 263, 277, 277 P.3d 988, 1002 (2012) (citation omitted). This substantive limitation prevents the Legislature from ever delegating certain judicial powers to the executive. *Id.*

Hawai'i's sentencing scheme runs afoul of Hawai'i separation-of-powers doctrine because the Legislature has given the HPA a power that it cannot vest in the executive: the power to set an individual's minimum sentence. The separation-of-powers doctrine exists "'to preclude a commingling of . . . essentially different powers of government in the same hands' and thereby prevent a situation where one department would be 'controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.'" *Pray v. Jud. Selection Comm'n of State,* 75 Haw. 333, 353, 861 P.2d 723, 732 (1993) (alteration in original) (quoting *Trustees of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 168, 737 P.2d 446, 454 (1987)). This Court has previously invalidated laws that assign to one branch the powers that constitutionally belong to other branches. *See, e.g.*, *Hawaii Insurers Council v. Lingle*, 120 Hawai'i 51, 70, 201 P.3d 564, 583 (2008) (striking down law that allowed executive to exercise legislative taxing authority); *State v. Bani*, 97 Hawai'i 285, 291 n.4, 36 P.3d 1255, 1261 n.4 (2001) (rejecting legislative effort to preclude judicial review of legislation). Here, the HPA's exercise of sentencing power "amount[s] to an impermissible blurring of the distinction" between the

executive power to prosecute and the legislative and judicial power to punish. *Hawaii Insurers Council*, 120 Hawai‘i at 70, 201 P.3d 564, 583.

As discussed above, legislative history suggests that the Legislature intended to concentrate power in the executive branch when it moved minimum sentencing authority to the HPA. But this Court has only approved of similarly concentrated power under very different circumstances. Lawful agency adjudication implicates entitlements created by the state, such as the administration of crime-victim compensation awards, *Andrews v. Crime Victim Comp. Comm'n*, 136 Hawai‘i 191, 358 P.3d 760, 2015 WL 5774746 (App. Sept. 30, 2015), and determination of permit disputes, *Kona Old Hawaiian Trails Grp. By & Through Serrano v. Lyman*, 69 Haw. 81, 93, 734 P.2d 161, 163 (1987). Criminal sentencing, by contrast, involves the defendant's fundamental, pre-existing right to be free and bears no resemblance to adjudications that seek efficient administration of in the benefits context.

The powers to prosecute and to punish are separate for good reason: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary contro[l]." *Mistretta v. United States*, 488 U.S. 361, 394 (1989) (citation omitted). If the executive can both prosecute and punish crimes, the separation of powers no longer protects individuals from arbitrary control. Leaving the HPA the authority to set a defendant's minimum sentence "would permit [the Hawai‘i legislature] to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch." *Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109, 140 (2024). "That is the very opposite of the separation of powers that the [Hawai‘i] Constitution demands." *Id.*

Moreover, historically, courts—not an appointed executive agency—have exercised the power in individual criminal cases to decide an appropriate sentence within a categorical range established by the Legislature. For example, in *State v. Bernades*, 71 Haw. 485, 795 P.2d 842

(1990), the Court permitted the Legislature to set mandatory sentences within certain broad categories of criminal offenses. *Id.* at 490, 795 P.2d at 845. But the Court did not suggest that the executive (or legislature, for that matter) could exercise adjudicatory power in the sentencing context. Rather, in approving of a "'three way sharing' of sentencing power," *Bernades* described the executive's role as "determin[ing] when to release a prisoner before the expiration of his sentence," and the judicial function as exercising "broad discretion to determine what the sentence would be within a wide customary range." *Id*. As described above, *see supra* § I, the existing HPA regime does not reflect this separation of powers among the government branches.

Practice and precedent in other states confirm this point. In the few other states where parole boards exercise discretion over minimum terms, their power is being phased out or extends only to lowering a judicially set minimum term. *See, e.g.*, *In re Marler*, 33 P.3d 743, 748 (Wash Ct. App. 2001) (citing Wash. Rev. Code. § 9.95.009(2)); Del. Code Ann. tit. 11, § 4346(b). Other courts have held that probation "provisions purporting to completely delegate the setting of a condition to the probation department" violate the separation of powers because they allow a nonjudicial official to greatly burden defendants' liberty interests. *In re D.N.*, 520 P.3d 1167, 1172 n.4 (Cal. 2022) (collecting cases); *see also United States v. Esparza*, 552 F.3d 1088, 1091 (9th Cir. 2009) (holding that the trial "court impermissibly delegated judicial authority to [a] probation officer" by allowing the officer to determine whether a defendant's treatment would be inpatient or outpatient). The HPA's sentencing power likewise places immense burdens on a defendant's liberty interest and violates the separation of powers.

Finally, the availability of judicial review does not save this scheme. The State reads *Alakai Na Keiki* to allow an agency to exercise quasi-judicial powers "so long as judicial review is allowed." State's Opp. 6-7; *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855

(1986)). But *Alakai Na Keiki* recognized both "*procedural*" and "*substantive*" limits on the delegation of quasi-judicial power. *Alakai Na Keiki*, 127 Hawai‘i at 277, 277 P.3d at 1002 (citation omitted). No amount of judicial review can change the "substantive" limits on quasi-judicial power, which put certain powers wholly out of the executive's reach. *Id.* And in any event, the judicial review available in this context is narrow. Courts review HPA-set minimum terms only "where the HPA has failed to exercise any discretion at all, acted arbitrarily and capriciously so as to give rise to a due process violation, or otherwise violated the prisoner's constitutional rights." *Williamson*, 97 Hawai‘i at 195, 35 P.3d at 222. This standard leaves room for the HPA to err—including by weighing subjective criteria or conducting thin comparative analysis—in ways that escape judicial correction. *Cf. Bani*, 97 Hawai‘i at 291 n.4, 292-96, 36 P.3d at 1261 n.4, 1262-66 (disapproving of a statute that stripped judicial consideration of a defendant's privacy interest).

This case illustrates how narrow that review is. Marks argued that the HPA abused its discretion by relying on his cutting off the victim's head and arms. The ICA rejected that claim as "patently frivolous," reasoning only that the "HPA could consider that conduct under HAR §§ 23-700-23 and -25." *Marks v. State (*"*Marks II*"*)*, 158 Hawai‘i 135, 588 P.3d 738, 2026 WL 1103173, at *8 (App. Apr. 23, 2026) (SDO). Review that asks only whether the HPA was permitted to consider a factor—and not what it found or how it weighed that factor—leaves the punishment decision with the executive, not the judiciary.

B. Even if minimum-term authority can be delegated to the executive in some cases, this delegation is impermissibly broad and lacks meaningful standards.

Even if the separation of powers does not categorically bar the Legislature from delegating individual sentencing power to the HPA, the current statute delegating this power to the HPA lacks the standards constitutionally required to guide the HPA's substantial discretion. A statute delegating power to an executive agency must provide "a proper standard" with which the agency

can objectively comply. *State v. Willburn*, 49 Haw. 651, 656, 426 P.2d 626, 630 (1967). Any delegation of power to an executive agency must also have "'safeguards, procedural and otherwise, which prevent an abuse of discretion' thereby 'protecting against unnecessary and uncontrolled discretionary power.'" *Nakoa v. Governor of State*, 156 Hawai'i 416, 445, 575 P.3d 506, 535 (2025) (quoting *Beshear v. Acree*, 615 S.W.3d 780, 809 (Ky. 2020)).

HRS § 706-669 is the only statute empowering the HPA to set minimum terms, but it provides no proper standard and insufficient safeguards to constrain executive action. The HPA must "make an order fixing the minimum term of imprisonment to be served before the prisoner shall become eligible for parole." HRS § 706-669(1). The only statutory constraint on this power is that "[t]he authority shall establish guidelines for the uniform determination of minimum sentences which shall take into account both the nature and degree of the offense of the prisoner and the prisoner's criminal history and character." HRS § 706-669(8). In other words, the statute empowers the HPA to sentence and requires it to create its own standards, based on a few factors but with no guidance as to how to balance them.

The legislative delegations that this Court has approved put greater limits on the delegee. For example, in upholding the state's emergency-powers statute, the Court emphasized that "[t]he scope and duration of the emergency 'defin[e] the contours' of the governor's powers. . . . The governor may only suspend laws related to the emergency, and may only suspend those laws during the emergency period." *Nakoa*, 156 Hawai'i at 445, 575 P.3d at 535 (alteration in original) (citation omitted). Here, nothing defines the contours of the HPA's powers. Instead, the agency has broad discretion to set and follow its own sentencing standards, without any legislative standard governing how long a person must wait in prison for their initial parole eligibility.

The HPA's practices show the consequences of this open-ended delegation. From 2005 to 2023, the HPA sentenced an ever-higher proportion of people to Level III minimum terms, "result[ing] in more people spending longer periods of time in DCR custody prior to reaching eligibility for parole release." Task Force Report at 9; *see also id.* at 17 (noting that this trend intensified in 2018). Sentencing practice in Hawai‘i has thus gotten much harsher even as the Legislature—which holds "the power to determine appropriate punishment for criminal acts," *Bernades*, 71 Haw. at 490, 795 P.2d at 845 —has not changed the Penal Code.

III. The HPA minimum-term hearings violate defendants' rights as accused people and to due process.

Even if the HPA's power to set minimum sentences complied with Hawaii's separation-of-powers doctrine (and it does not), the scope and exercise of the HPA's discretion violate defendants' rights. HPA minimum-term hearings lack several protections that apply when courts sentence, and their general lack of transparency and objectiveness violates broader due-process guarantees.

A. The HPA's exercise of its sentencing power violates several rights of criminal defendants.

An HPA minimum-term hearing "is a 'critical stage of a criminal proceeding'" at which defendants' due process and other constitutional protections apply. *De La Garza*, 129 Hawai‘i at 445, 302 P.3d at 713 (citation omitted). Hawaii's Constitution guarantees defendants certain rights "[i]n all criminal prosecutions." Haw. Const. art. I, § 14; *see also id.* art. I, § 10 (providing additional defendants' rights). This Court has already expressly applied some rights of the accused to minimum-term hearings, *see, e.g.*, *De La Garza*, 129 Hawai‘i at 447, 302 P.3d at 715 (noting that the right to counsel attaches at an HPA minimum-term hearing), but the HPA's practices continue to violate article I, sections 10 and 14 in other ways.

Sentencing based on uncharged conduct. First, the HPA impermissibly considers uncharged conduct in setting minimum terms. Hawai‘i courts cannot sentence defendants based on "unsubstantiated allegation[s]" of "uncharged crimes." *State v. Vellina*, 106 Hawai‘i 441, 450, 106 P.3d 364, 373 (2005). Punishing a defendant for uncharged crimes "raises serious constitutional questions," especially when the record does not support the elements of those crimes. *State v. Nunes*, 72 Haw. 521, 525, 824 P.2d 837, 840 (1992); *see also State v. Satoafaiga*, 150 Hawai‘i 406, 421, 504 P.3d 324, 339 (2022) ("[A] court may not penalize a defendant for conduct with no support in the record. . . ."). This Court recently emphasized the gravity of this rule, holding that "a plea agreement provision that attempts to override judicial precedent prohibiting consideration of dismissed charges in sentencing seeks imposition of an illegal sentence." *State v. Gaeta*, No. SCWC-23-0000359, 2026 WL 3167617, at *11 (Haw. Oct. 22, 2026).

The HPA should be bound by the same restrictions when exercising sentencing power—and this case shows why. Marks pleaded no contest to second-degree murder under HRS § 707-701.5 and was sentenced under § 706-656. 2020 Judgment, App'x pt. 1 at 8. Because this was a "no contest" plea, *id.*, the parties did not agree on a factual basis, as no factual basis was required. *See* No Contest Plea, App'x pt. 1 at 6-7; *Gaeta*, 2026 WL 3167617, at *12 ("[I]n contrast with guilty pleas, no factual basis is required for no contest pleas.").

But in setting Marks's minimum term, the HPA relied on unestablished facts about the "nature" of the offense. Hawai‘i criminalizes "abuse of a corpse" and allows enhanced sentencing based on "heinous, atrocious, or cruel" conduct. HRS §§ 711-1108, 706-657. Neither was invoked in this case before the trial court: the State did not charge an "abuse of a corpse" offense and did

not even allege enhanced sentencing under HRS § 706-657.[6] Yet without identifying its evidence and how it used that evidence, the HPA justified its minimum-term decision in part by finding that "[t]he offender is responsible for . . . severing the victim's head and both arms." Minimum Term Order. The record does not show what the HPA relied on for that finding. Notably, the ICA remanded a related claim precisely because "[t]he record does not reflect what information was in HPA's file." *Marks II*, 2026 WL 1103173, at *6. The HPA should not have relied on these findings to increase Marks's minimum sentence without disclosing where they came from and how the HPA assessed them.

Violation of jury-trial right. Second, and for similar reasons, the HPA's actions violate the right to jury determination of certain factual issues. In Hawai‘i, a jury must find any facts that expose a defendant to "extended term" sentencing. *Flubacher v. State*, 142 Hawai‘i 109, 119, 414 P.3d 161, 171 (2018). This Court remanded Marks's case for resentencing due to *Flubacher*. Because "a judge, and not a jury, determined in 2004 that Marks's [life without parole] sentence was necessary for the protection of the public . . . Marks's extended term sentence was imposed in an illegal manner." *Marks I*, 2018 WL 3153759, at *3.

But the HPA circumvents that guarantee when it conducts its own fact-finding without a jury. When judges seek to impose a heightened mandatory maximum or minimum, those findings must be based on facts found by a jury. *See Auld*, 136 Hawai‘i at 255, 361 P.3d at 482; *Flubacher*, 142 Haw. at 118-19, 414 P.3d at 170-71. Thus, to sentence a defendant to life *without* parole, the court cannot engage in its own fact-finding. But the HPA can use its discretion to set a minimum sentence at a statutory maximum—meaning a person would *never* have a parole hearing.

[6] The State initially sought an extended-term sentence under HRS § 706-662(1), which applies to "persistent offender[s]." *Marks I*, 2018 WL 3153759, at *1.

Williamson, 97 Hawai‘i 183 at 196, 35 P.3d 210, 223; *cf. Marks I*, 2018 WL 3153759, at *3 (holding judge "illegal[ly]" sentenced Marks to life without parole). Similarly, courts have discretion to enhance a sentence for second degree murder if the jury "finds that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity." HRS § 706-657; *State v. Janto*, 92 Hawai‘i 19, 35, 986 P.2d 306, 322 (1999). But if a jury makes no such finding (as in Marks's case) or a court does not impose an enhanced sentence, the HPA can still set the minimum sentence at the statutory maximum if it decides "the offender displayed a callous and/or cruel disregard for the safety and welfare of others." Guidelines at 5 (§ IV.C.1a).

The HPA in this case relied on the precise fact that a judge unconstitutionally found in 2004: an alleged prior conviction. *See Marks I*, 2018 WL 3153759, at *1 (noting that Mr. Marks was sentenced to life without parole because the trial court found that he was a "persistent offender"); Minimum Term Order (citing "Criminal History" to support subjecting Mr. Marks to a Level III sentence). That the HPA, rather than a judge, seized the jury's power this time does not change the basic constitutional violation.

Compelled self-incrimination. Third, HPA hearings violate the right against self-incrimination. "[E]ven after a no contest plea, a defendant continues to hold a limited right against self-incrimination . . . against the making of statements that might impact sentencing . . . ." *Gaeta*, 2026 WL 3167617, at *2. This Court recently enforced the rule by prospectively forbidding sentencing courts from considering a defendant's failure to express remorse after a no contest plea. *Id.*

This case shows how the HPA violates defendants' right against self-incrimination. Marks pleaded no contest in this case. HPA Tr. 2, App'x pt. 2 at 176. His counsel acknowledged at the outset of the hearing that Marks had dismembered the victim's body. HPA Tr. 4, App'x pt. 2 at

178. But the HPA's questioning went well beyond that concession. Board members questioned Marks in detail about what he did to the body after the victim died. HPA Tr. 8-10, App'x pt. 2 at 182-84; HPA Tr. 14-17, App'x pt. 2 at 188-91. Nothing in the transcript reflects that anyone advised him he could decline to answer. The HPA then designated him a Level III offender based on that same conduct, *see* Minimum Term Order, apparently using his words to enhance his punishment.

B. The HPA's minimum-term hearings lack the notice, objectivity, transparency, and impartiality that due process requires.

"[T]he HPA [i]s obligated to comply with the due process clause of the Hawai‘i Constitution in determining [a defendant's] minimum term of imprisonment." *De La Garza*, 129 Hawai‘i at 439, 302 P.3d at 707. Because a minimum-term hearing "implicates [a defendant's] liberty interest," the hearing must "afford[] the requisite procedural safeguards of due process required by article I, section 5 of the Hawai‘i Constitution . . . ." *State v. Guidry*, 105 Hawai‘i 222, 230, 96 P.3d 242, 250 (2004). Due process demands greater procedural protections at the minimum-term hearing than exist now.

This Court has repeatedly corrected due process deficiencies in HPA minimum-term hearings. *See De La Garza*, 129 Hawai‘i at 442, 302 P.3d at 710 ("requir[ing] that the prisoner have timely access to all of the adverse information contained in the HPA file" and receive notice of the purpose of any additional hearing); *Fagaragan v. State*, 132 Hawai‘i 224, 239, 320 P.3d 889, 904 (2014) (holding that "deviating from minimum sentencing guidelines, without explanation, constitutes arbitrary or capricious action"); *Lewi*, 145 Hawai‘i at 348-49, 452 P.3d at 345-46 (requiring HPA "to set forth a written justification or explanation . . . when it determines that the minimum term of imprisonment for the felony offender is to be set at a Level II or Level III punishment"); *see also Fukusaku v. State*, 126 Hawai‘i 555, 564-65, 273 P.3d 1241 (App. 2012)

(HPA violates due process "when it increases a defendant's minimum term of incarceration after a resentencing occasioned by the defendant's successful appeal of a conviction or court-imposed sentence, without affirmatively justifying the increase in the record . . . .").

Yet the HPA's exercise of its sentencing power continues to violate article I, section 5 of the Hawai'i Constitution.

Lack of notice. First, a prisoner receives only seven-day's notice before the minimum term hearing—without any indication of what minimum term classification (Level I, II, or III) the State will seek or what facts the State will present to justify that classification. *See* HAR § 23-700-22(a). But which classification applies has dire import, as it can be the difference between spending five years in prison or *fifty*:

Maximum Term in Years/Months Imposed by the Court	Level of Punishment Range in Years/Months		
	LEVEL I	*LEVEL II*	*LEVEL III*
5 years (60 months)	1 - 2 yrs. (12 - 24 mos.)	2 - 3 yrs. (24 - 36 mos.)	3 - 5 yrs. (30 - 60 mos.)
10 years (120 months)	1½ - 3 yrs. (18 - 36 mos.)	3 - 5 yrs. (36 - 60 mos.)	5 - 10 yrs. (60 - 120 mos.)
20 years (240 months)	2 - 5 yrs. (24 - 60 mos.)	5 - 10 yrs. (60 - 120 mos.)	10 - 20 yrs. (120 - 240 mos.)
Life with Parole	5 - 10 yrs. (60 - 120 mos.)	10 - 20 yrs. (120 - 240 mos.)	20 - 50 yrs. (240 - 600 mos.)

See Guidelines at 2.

If a court, rather than the HPA, were imposing the minimum sentence, this Court's precedents would already unambiguously require the state to provide notice of the facts it will allege at the minimum-term hearing. Adequate notice requires a defendant be able to "predict with certainty" the sentence that could result from a conviction. *Alleyne*, 570 U.S. at 111 (quoting

Apprendi, 530 U.S. at 478). Thus, the Hawai‘i Constitution requires the State to give notice to a defendant *at the case's inception* if it alleges facts that increase the minimum possible sentence. *Auld*, 136 Hawai‘i at 257, 361 P.3d at 484 ("[U]nder article I, sections 5 and 10 of the Hawai‘i Constitution, the State must allege the predicate prior conviction(s) in a charging instrument in order to sentence the defendant to a mandatory minimum sentence as a repeat offender[.]"); *State v. Smith*, 157 Hawai‘i 1, 13, 575 P.3d 634, 646 (2025) ("[D]ue process is satisfied when the charging instrument gives a criminal defendant notice that a sentence enhancement will be sought if convicted under the predicate offense and contains sufficient allegations to support its application.").

But because the HPA, rather than a court, sets the minimum sentence, defendants do not receive sufficient notice to be able to "predict" their sentence before the minimum term hearing (let alone before a conviction). A prisoner cannot infer which classification the State alleges—and they may not even receive notice of all the evidence the HPA considers in making its determination. HAR § 23-700-22(g) ("An inmate *may* be afforded the opportunity, subject to security considerations, to consider and review materials the Authority has that pertain to the fixing of the inmate's minimum term." (emphasis added)); *Marks II,* 2026 WL 1103173, at *6 (holding circuit court should have held a hearing to determine truth of Marks' allegation that he "was not provided with any information HPA considered to set his minimum term").

Lack of objective standards. Second, the HPA Guidelines provide few objective standards, raising the "[r]isk of erroneous deprivation." *Bani*, 97 Hawai‘i at 297, 36 P.3d at 1267. Due process requires a statute or regulation to provide a "sufficient standard for the objective and impartial application of the law." *Territory of Hawaii v. Naumu*, 43 Haw. 66, 70 (Haw. Terr. 1958). Here, the Level III Guidelines provide only a few lines of text to guide the HPA's determination

of a defendant's "Character and Attitude . . . With Respect to Criminal Activity or Lifestyle" and "Efforts Made to live Pro-Social Life Prior to Commitment to Prison" Guidelines at 6-7. Even the two "comparative" criteria, which require the HPA to analogize a defendant's case to its previous decisions, are toothless: the HPA does not provide its comparative analysis to defendants. *Id.* at 3.

Moreover, the HPA relies heavily on the most subjective and least defined factors in its Guidelines. In the first half of 2023, the HPA most often cited "character and attitude of offender with respect to criminal activity or lifestyle" to support an elevated minimum sentence. Task Force Report at 12. This criterion asks the HPA to determine whether "future criminal activity remains possible" based on a person's "character and attitude," and does not require comparison to other individuals. Guidelines at 3, 5-6. In addition to inviting uneven application and HPA members' personal reactions, this factor risks undermining defendants' right against self-incrimination, which prevents a sentencing court from considering a defendant's remorse after a no-contest plea. *See supra* pages 21-22; *Gaeta*, 2026 WL 3167617, at *2.

The HPA relied on one of these comparative criteria, the "nature of the offense," to adjudicate Marks a Level III offender. *See* Minimum Term Order. But the agency never provided its comparative analysis, and Marks's own analysis identified nearly seventy cases similar to his with far shorter minimum terms. *See* Marks' Comparative Analysis, App'x pt. 2 at 329-48. Because the HPA's comparative analysis is not available, neither *amici*, nor this Court, nor other HPA board members can say how well-reasoned it is. To comply with due process's demands, the HPA Guidelines must be objective, and the HPA must explain the objective criteria it uses.

Inconsistent evidentiary standards. Third, the HPA lacks consistent and transparent evidentiary standards in violation of due process requirements. The HPA Guidelines offer no insight into how the Authority weighs evidence or resolves factual disputes. This Court's holding

that a defendant must "have timely access to all of the adverse information contained in the HPA file," *De La Garza*, 129 Hawai‘i at 442, 302 P.3d at 710, is meaningless if the defendant cannot know how that information will be assessed. At Marks's minimum-term hearing, HPA board member Otani asserted that Marks had taken trash bags to the dumpster the evening of the offense, which Marks denied. HPA Tr. 10, App'x pt. 2 at 184. Neither the HPA Guidelines nor the HPA's Order in this case address how the HPA resolved or weighed this disagreement, underscoring the risks of undefined evidentiary rules in the sentencing system. And the risks of opaque evidentiary standards compound the constitutional problems that arise when the HPA finds facts that are properly left to a jury. *See supra* pages 20-21.

An actual or apparent lack of impartiality. Fourth, sentences imposed by executive branch appointees raise serious impartiality concerns. The HPA is part of the executive branch, and its members are appointed by the governor. HRS § 353-61(b). Prosecution is an executive function, and the Attorney General is appointed in much the same way as HPA board members. Haw. Const. art. V, § 6. But "[d]ue process . . . call[s] for a trial before someone other than the accuser." *State v. Brown*, 70 Haw. 459, 467, 776 P.2d 1182, 1188 (1989). Moreover, even assuming the utmost good faith on behalf of HPA's members, "justice must satisfy the appearance of justice." *Id.* (quoting *Offutt v. United States,* 348 U.S. 11, 14 (1954)). Allowing the same branch of government to both prosecute offenses and mete out punishment creates a serious appearance of partiality and runs afoul of Hawai‘i's due process guarantee.

Insufficient judicial review. Finally, these deficiencies are compounded by the narrow judicial review available, under which many of the HPA's errors largely escape correction. *See supra* pages 15-16.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Intermediate Court of Appeals, hold that courts must set minimum terms, set aside Marks's minimum term and remand for a judicial determination, and grant other relief as justice requires.

DATED: Honolulu, Hawai‘i, November 16, 2026.

Respectfully submitted,

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