DISSENTING OPINION BY ACOBA, J.

I respectfully disagree that this court may refashion the statutory framework of Hawai'i Revised Statutes (HRS) chapter 368 by directing that an employer who appeals a final order of the Hawai'i Civil Rights Commission (HCRC or commission) is entitled to a jury trial. See majority opinion at 27. In doing so, the majority subverts the entire statutory framework for disposition of civil rights claims, an action that will have a domino effect in the law.

The disposition the majority renders is not a judicial decision, but a legislative act. The majority does not construe legal language, fill in the interstices of the law, see Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (noting that "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions"), or fashion a traditional judicial remedy. It prescribes, without any legal antecedent or inherent power, see State v. Augafa, 92 Hawai'i 454, 470, 992 P.2d 723, 740 (App. 1999), what are in effect statutory amendments to HRS § 368-16 (1993). See majority opinion at 28 n.12. It thus exceeds the boundaries of judicial power, encroaches upon legislative and executive prerogatives, and violates the principle of separation of powers that guarantees to the people that no branch of

government will arrogate to itself those functions and powers vested by the constitution in the other branches. The conciliation and compromise necessary in the resolution of public policy issues falls clearly within the primary venue of the legislative and executive branches. We, however, must decide the questions as they are presented to us. In effect, in circumventing the legal questions raised by the parties in this appeal, the majority fails to exercise and, thus, diminishes our power of judicial review.

Facing the questions raised on appeal, I would hold that HRS § 368-12 (1993),[1] which permits an employee who brings a discrimination complaint to the commission to request removal of the case to court, satisfies strict scrutiny and therefore also rational basis review and, thus, is not in violation of the equal protection clause of the Hawaiʻi State Constitution. Under rational basis review, HRS § 368-12 furthers a legitimate government interest in preventing discrimination. Under a strict scrutiny analysis, HRS § 368-12 unquestionably satisfies a

[1] HRS § 368-12 reads:

> **Notice of right to sue.** The [HCRC] may issue a notice of right to sue upon written request of <u>the complainant</u>. Within ninety days after receipt of a notice of right to sue, the complainant may bring a civil action under this chapter. The commission may intervene in a civil action brought pursuant to this chapter if the case is of general importance.

(Boldfaced font in original.) (Emphasis added.) Nothing in chapter 368 allows a respondent to request and to receive a notice of right to sue.

compelling state interest in that respect, and is narrowly-tailored to that purpose. Because there is no equal protection violation, HRS chapter 368 does not infringe on an employer's right to a jury trial under article I, section 13 of our State constitution. Accordingly, I would vacate the contrary judgment of the first circuit court. Prior to his retirement, Justice Mario Ramil, who heard oral argument in this case, expressed his joinder with this position.

Finally, while not central to my position, I do not concur with the majority's narrow view of the public rights doctrine.[2]

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[2] No party raises the question of whether a mandatory arbitration agreement concerning discrimination claims such as that in this case contravenes HRS chapter 368. Our current case law appears to support the proposition that a valid arbitration agreement waives all statutory and constitutional rights. See Brown v. KFC Nat'l Mgmt. Co., 82 Hawai'i 226, 921 P.2d 146, reconsideration denied, 86 Hawai'i 360, 922 P.2d 973 (1996).

However it is expressly stated that the purpose of chapter 368 is "to provide a mechanism which provides for a uniform procedure for the enforcement of the State's discrimination laws." HRS § 368-1 (1993) (emphasis added). The chapter is inclusive, "preserv[ing] all existing rights and remedies under such laws." Id. (emphasis added). Thus, an arbitration award rendered outside of HRS chapter 368 may arguably violate the public policy establishing HRS chapter 368 as the procedure for deciding discrimination cases. See Inlandboatmen's Union v. Sause Bros., Inc., 77 Hawai'i 187, 194, 881 P.2d 1255, 1262 (App. 1994); cf. Ingle v. Circuit City Stores, Inc., __ F.3d __, No. 99-56570, 2003 WL 21058241, __ (9th Cir. May 13, 2003) (concluding that an arbitration "agreement is wholly unenforceable" as to an employment discrimination claim as the agreement is "unconscionable under California contract law"); Swenson v. Management Recruiters Int'l, Inc., 872 F.2d 264, 266 (8th Cir. 1989) (recognizing that "any arbitration award regarding a discrimination claim could not be enforced since it would be against public policy"); Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1307 (8th Cir. 1988) (noting that "arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII"); but see Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (holding that a mandatory arbitration agreement is valid for claims under the Age Discrimination in Employment Act).

I.

The majority adopts the proposition that a respondent employer (employer) may appeal a final order from the HCRC adverse to it and "is entitled to a [de novo] jury trial on any claims that form the basis for an award of common law damages by the HCRC." Majority opinion at 27-28. Several deleterious effects on the policy and procedure of HRS chapter 368 follow from this proposition.

First, under the majority's decision, only an employer is entitled to a second trial if it is unsuccessful in the administrative process now in effect. Thus the majority's decision grants to the employer a second proverbial bite at the apple not afforded to an employee. HRS § 368-16(a) presently states that both a "complainant and a[n employer] shall have a right to appeal from a final order of the commission[.]" Obviously, the provision does not provide that one party as opposed to another is entitled to a new proceeding if dissatisfied with the commission's decision.

Second, as in court trials, the purpose of having a single dispositive administrative proceeding as allowed under HRS chapter 368 is to compel the parties to "take the first trial seriously" and to protect "a victorious party against oppression by a wealthy, wishful, or even paranoid adversary." C. Wright, A. Miller, and E. Cooper, 18 Federal Practice and Procedure:

Jurisdiction and Related Matters, § 4403, at 14 (1981) [hereinafter, Federal Practice]. Because, under the majority's rule, the outcome before the commission is always potentially subject to a retrial at the employer's behest, the administrative hearing before the commission, see HRS § 368-14 (1993), will not provide a means of formally ending the dispute. Rather, the majority's rule invites a "second ordeal[,]" see Federal Practice, supra, at 15, by way of a jury trial. Accordingly, the majority's holding poses the probability that an employee who prevails before the commission will again have to "endure the harrowing ordeal of litigation[.]" Federal Practice, supra, at 13.

Third, allowing duplicative adjudication increases the burden upon litigants and the judicial system, contrary to the express policies of this court. What was tried in the administrative hearing before the commission will again be retried before a jury in court. See Moss v. American Int'l Adjustment Co., 86 Hawai'i 59, 65, 947 P.2d 371, 377 (1997) (noting that this court "has recognized the importance of the efficient use of judicial resources" (citations omitted)); cf. Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai'i Ltd., 76 Hawai'i 277, 294, 875 P.2d 894, 911 (1994) (noting that a purpose of res judicata is to "dispense with the delay and expense of two trials on the same issue" (citations omitted)); Tradewind Ins.

Co. v. Stout, 85 Hawaiʻi 177, 184, 938 P.2d 1196, 1203 (App. 1997) (observing that the purpose of preventing duplicative litigation is "to protect litigants from the burden of relitigating an identical issue with the same party . . . [and to] promote[] judicial economy by preventing needless litigation"); Montana v. United States, 440 U.S. 147, 153 (1979) (explaining that a function of res judicata is "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate[,] protects their adversaries from the expense and vexation attending multiple lawsuits, [and] conserves judicial resources").

Fourth, contrary to HRS § 368-16(b), which states that "[a] complainant and an employer shall have a right of appeal from a final order of the commission[,]" allowing only the employer to obtain a retrial deprives the employee of judicial review of the commission's order as prescribed in HRS § 368-16(b). Thus the majority, in effect, repeals that statutory provision. In retrial before a jury, the determinations made by the commission are legally jettisoned, becoming irrelevant in the court trial and in any resulting appeals from the trial.

Fifth, the provision in HRS § 368-1 that expressly provides that there shall be a uniform procedure for enforcement, is violated. As mentioned, under the majority's approach, the present system is converted into one that extends an employer two

opportunities to prevail on the outcome. Significantly, it is not unforeseeable that a jury verdict may conflict with a prior decision of the commission. Accordingly there will be two opposing decisions rendered in separate contested proceedings in the same case. Such a consequence will breed public distrust in the ultimate disposition of discrimination cases.

Sixth, under the system now created by the majority, an employee may have to endure an administrative hearing, a de novo trial, and any subsequent appeals with all the attendant extra costs and delay before any disposition is obtained. The majority's approach will increase the expenses borne by an employee, even though the statute was designed to minimize such expenses.

Seventh, under HRS § 368-3 (Supp. 2001), the commission's responsibility "[t]o receive, investigate, and conciliate complaints alleging any unlawful discriminatory practice" without charge to the complainant is subverted. However, under the majority's decision, an employee will be wisely advised to hire an attorney for the administrative proceeding in anticipation that such legal representation will be necessary in a subsequent jury trial. "Such an outcome would waste time, monies, and lead to inconsistent and unpredictable application of the law, results which would hamper, not further, the aforementioned public policies." Moss, 86 Haw. at 65, 947

P.2d at 377. The majority's formulation is distinctly at odds with the legislative intent of HRS § 368-3, namely to resolve complaints in an expeditious and less costly manner through an administrative hearing process.

Eighth, the majority effectively abrogates the powers and functions of the HCRC granted under HRS § 368-3(5) to "order appropriate legal and equitable relief or affirmative action when a violation is found[,]" (emphases added), and under HRS § 368-17 (Supp. 2001) to award "compensatory and punitive damages and legal and equitable relief[.]"[3] As indicated, the majority holds that an employer is "entitled to a jury trial on any claims that form the basis for an award of common law damages [i.e., legal damages] by the HCRC." Majority opinion at 27-28. The majority has in effect repealed the statutory grant of power to the commission to award legal damages, because any such award may be superceded by a jury verdict.

In addition, the majority states that the trial court shall hold an entirely new trial, thus indicating that any

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[3] "Where a party does not appeal a final administrative decision that decision becomes final and *res judicata*." Hawkins v. State, 900 P.2d 1236, 1240 (Ariz. Ct. App. 1995) (quoting Guertin v. Pinal County, 875 P.2d 843, 845 (Ariz. Ct. App. 1994)); see also United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) ("When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." (Citations omitted)); State v. Higa, 79 Hawai'i 1, 8, 897 P.2d 928, 935 ("'The doctrine of res judicata and collateral estoppel also apply to matters litigated before an administrative agency.'" (Quoting Santos v. State, 64 Haw. 648, 653, 646 P.2d 962, 966 (1982).)), reconsideration denied, 79 Hawai'i 1, 897 P.2d 928 (1995).

equitable determinations made by the commission will be subject to reversal, again implicitly overruling the commission's authority to make equitable awards. See majority opinion at 28 n.12 (explaining that "the whole action is tried de novo in the circuit court[;]" and "[w]hen a jury is called upon to make findings in connection with both legal and equitable matters resting upon the same set of facts, the trial court is bound by the jury's findings of fact when making its equitable determinations[]" (quoting Lee v. Aiu, 85 Hawai'i 19, 29, 936 P.2d 655, 665 (1997) (citations omitted)). Thus the majority has created an anomalous situation--if the commission renders only a decision requiring equitable relief, no right to a jury trial is allowed; on the other hand, if the commission awards any legal damages, any companion equitable award by the commission is subject to a jury trial.

The folly of appending a jury trial right to an existing framework is patent. The majority contends a "drastic course is unnecessary" and cites Lavelle v. Massachusetts Comm'n Against Discrimination, 688 N.E.2d 1331, 1335 (Mass. 1997) as "persuasive[.]" Majority opinion at 28. The primary question is not whether Lavelle is less "drastic," for multiple solutions can come to mind when we are faced in any case with a legal dispute. The crux is not the desirability of a particular course, but

whether we are empowered to take it. Plainly, in my view, as to the course chosen by the majority, we are not.

Nor do I find Lavelle "persuasive[.]" Significantly, that decision did not confront the separation of powers issue. Lavelle is couched and qualified with speculation about the consequences flowing from it. In whatever way that decision is used to rationalize or the majority justifies the nullification of HRS chapter 368, it will not diminish the adverse effects on those the statute was designed to protect.

II.

The majority's modification of the statute is plainly outside the scope of this court's authority.[4] It is the legislature that is empowered to enact, or to rewrite a statute. See State v. Bloss, 64 Haw. 148, 166, 637 P.2d 1117, 1130 (1982) ("It is not the role of the courts to rewrite statutes or ordinances in order to cure constitutional defects. That would be an unconstitutional exercise of legislative power." (Citations omitted.)); State v. Rodrigues, 63 Haw. 412, 416 n.7, 629 P.2d 1111, 1114 n.7 (1981) ("Judicial legislation should be practiced only interstitially." (Citing Hayes v. Gill, 52 Haw.

[4] It is apparent that footnote 12 on page 28 of the majority's opinion prescribes new law. For instance, there is no foundation in HRS chapter 368 or any other statute for the proposition that "[b]y electing to seek a jury trial . . . the respondent waives his or her right to appellate review of the HCRC's final order in the circuit court, and the whole action is tried de novo in the circuit court." Majority opinion at 28 n.12.

251, 254, 473 P.2d 872, 875 (1970).)); State v. Abellano, 50 Haw. 384, 386, 441 P.2d 333, 335 (1968) ("For this court to attempt to rewrite the ordinance to cure the constitutional defect would be an unconstitutional exercise of legislative power."); cf. Biscoe v. Tanaka, 76 Hawai'i 380, 383, 878 P.2d 719, 722 (1994) (recognizing that "the separation of powers doctrine applies to the Hawaii state government" and concluding that a department "may not exercise powers not so constitutionally granted . . . unless such powers are properly incidental to the performance by it of its own appropriate functions" (citations omitted)); Pray v. Judicial Selection Comm'n, 75 Haw. 333, 353, 861 P.2d 723, 732 (1993) (noting that the separation of powers doctrine is intended "'to preclude a commingling of . . . essentially different powers of government in the same hands' and thereby prevent a situation where one department is 'controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments'" (citations omitted) (ellipsis points in original)); Augafa, 92 Hawai'i at 470, 992 P.2d at 739 (holding that a court does not have the authority to direct the legislature to adopt a statute because such "action is not 'reasonabl[ly] necessary to effectuate [the court's] judicial power[,]'" (citation omitted), and is in violation of the separation of powers doctrine).

Fundamentally, this court avoids rewriting statutes for both constitutional and practical reasons. As to the former, it

is recognized that the "constitution is violated where one branch invades the territory of another, regardless of whether the encroached-upon branch approves the encroachment." 1 N. Singer, Sutherland Statutory Construction § 3.06, at 55 (5th ed. 1992-94). Thus, "neither the courts nor the administrative agencies are empowered to rewrite statutes to suit their notions of sound public policy when the legislature has clearly and unambiguously spoken." Sutherland Statutory Construction, supra at 55.

The California Supreme Court addressed the separation of powers issue in Kopp v. Fair Political Practices Comm'n, 905 P.2d 1248 (Cal. 1995). In Kopp, the California court emphasized that "it is impermissible for a court to reform by supplying terms that disserve the Legislature's or electorate's *policy* choices." Id. at 1284 (underscored emphasis added, italicized emphasis in original). In a concurrence, Justice Mosk reasoned that "courts have no general authority by virtue of the judicial power to rewrite a statute, even to salvage its validity. Rewriting would amount to amendment." Id. at 1292 (Mosk, J., concurring). He noted that as a policy matter, "enactment of a statute would not be [the] end of the legislative process but only the beginning; it would not render order but only invite chaos." Id. at 1292.

Moreover, as a practical matter, this court is not suited to handle the myriad details involved in amending or

modifying a statute. Over a period of decades, the legislature has, after long experience, created a detailed statutory scheme to discourage discriminatory conduct. Our proceedings do not allow for the participatory input of the public and other interested groups. We do not cultivate the expertise necessary to resolve matters of policy involved in creating a new statutory scheme.

Under either analysis, the majority lacks the constitutional authority to rewrite HRS chapter 368 in a fashion that ignores the legislative intent and policy factors which underlie that chapter. As stated infra, the legislative intent was to create a system that is accessible, expeditious, and cost efficient. The majority's rule, however, diminishes access, delays the process, and increases the costs.

III.

Turning to the merits of the case, the employers-Plaintiffs in this case argue that HRS § 368-12 and Hawaiʻi Administrative Rules (HAR) § 12-46-20 (1993),[5] which allow a

[5] HAR § 12-46-20 states:

Notice of right to sue.
(a) A notice of right to sue shall authorize:
(1) A complainant alleging violations of chapters 368, 378 [regarding illegal discriminatory employment practices], or 489 [addressing discrimination in public accommodations], HRS, to bring a civil suit pursuant to section 368-12, HRS, within ninety days after receipt of the notice;

(continued...)

person who files a complaint with the HCRC and who receives a "notice of right to sue" to "bring a civil action under . . . chapter [368]," HRS § 368-12, but does not provide the same procedure to an employer, violates their right to equal protection of the laws inasmuch as it impinges upon the fundamental right to a jury trial.[6] Accordingly, they submit that HRS § 368-12 should be ruled unconstitutional.

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[5](...continued)

> . . . .
> (b) A request, in writing, may be made to the executive director to issue a notice of right to sue:
> > (1) At any time after the filing of a complaint with the commission, and no later than three days after the conclusion of the scheduling conference provided for in section 12-46-19, <u>by a complainant alleging violations of chapters 368</u>, 378, or 489, HRS;
> > . . . .
>
> (c) The commission's executive director <u>shall issue a notice of right to sue</u> provided that the commission has not:
> > (1) Previously issued a notice;
> > (2) Entered into a conciliation agreement to which the complainant is a party; or
> > (3) Filed a civil action.
>
> (d) <u>The commission's executive director shall issue a notice of right to sue</u>:
> > (1) Upon dismissal of the complaint pursuant to section 12-46-11; or
> > (2) Where the commission has entered into a conciliation agreement to which the complainant is not a party pursuant to section 12-46-15(d).

(Boldfaced font in original.) (Emphases added.)

[6] Article I, section 13 of the Hawaiʻi Constitution reads:

> In suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

IV.

Under the equal protection doctrine, HRS chapter 368 must satisfy either strict scrutiny or rational basis review. This court has held that "[w]henever a denial of equal protection of the laws is alleged, as a rule our initial inquiry has been whether the legislation in question should be subjected to 'strict scrutiny' or to a 'rational basis' test."[7] Baehr v. Lewin, 74 Haw. 530, 571, 852 P.2d 44, 63 (1993) (quoting Nakano v. Matayoshi, 68 Haw. 140, 151, 706 P.2d 814, 821 (1985)). Strict scrutiny is ordinarily applied where laws involve suspect classifications or fundamental rights, and rational basis review is traditionally applied in all other situations.

> This court has applied strict scrutiny analysis to laws classifying on the basis of suspect categories or impinging upon fundamental rights expressly or impliedly granted by the constitution, in which case the laws are presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications, and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights.
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> By contrast, where suspect classifications or fundamental rights are not at issue, this court has traditionally employed the rational basis test. Under the rational basis test, we inquire as to whether a statute rationally furthers a legitimate state interest. Our inquiry seeks only to determine whether any reasonable justification can be found for the legislative enactment.

Id. (emphases added) (citations, quotation marks and brackets omitted). Thus, strict scrutiny review applies to HRS § 368-12

[7] The United States Supreme Court has also formulated an intermediate "substantial relationship" test in an equal protection analysis and applied it to gender-based classifications. See, e.g., Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976).

if it either 1) discriminates against a suspect class or 2) violates a fundamental right.

Similar to federal case law, our decisions hold that "[a] suspect classification is one where the class of individuals formed has been 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" State v. Hatori, 92 Hawai'i 217, 225, 990 P.2d 115, 123 (App. 1999) (quoting State v. Sturch, 82 Hawai'i 269, 276 n.8, 921 P.2d 1170, 1177 n.8 (App. 1996); see also In re Application of Herrick, 82 Hawai'i 329, 346 n.14, 922 P.2d 942, 959 n.14 (1996). The removal provision differentiates only between complainants and employers in HCRC proceedings. Plainly, Plaintiffs, as employers in the HCRC proceeding, did not belong to a suspect class, nor do they claim such status.

With respect to whether HRS § 368-12 impinges on a fundamental right, the question is whether the right is central to traditional notions of liberty:

> [I]n a concurring opinion [in Griswold v. Connecticut, 381 U.S. 479 (1965)], Justice Goldberg observed that judges "determining which rights are fundamental" must look not to "personal and private notions," but
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> > to the "traditions and collective conscience of our people" to determine whether a principle is "so rooted there . . . as to be ranked as fundamental." . . . The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice

> which lie at the base of all our civil and political institutions' . . . ."
> Id. at 493 (Goldberg, J., concurring) (citations omitted).

Baehr, 74 Haw. at 556, 852 P.2d at 57 (brackets omitted) (ellipses points in original) (emphasis added). It is easily confirmed that the right to a jury trial is a fundamental right. See Haw. Const., art. I, § 13 ("The right of trial by jury as given by the Constitution or a statute of the State or the United States shall be preserved to the parties inviolate."); see also Mehau v. Reed, 76 Hawai'i 101, 110, 869 P.2d 1320, 1329 (1994) ("The right to jury trial is inviolate in the absence of an unequivocal and clear showing of a waiver of such right either by express or implied conduct." (Citations and brackets omitted.)). Hence, Plaintiffs maintain that the removal procedure infringes upon their right to a jury trial. The "right" involved, however, is not the right to a jury trial; rather the procedure challenged is the opportunity afforded to employees to remove the case from an administrative proceeding to a judicial forum.

V.

A.

First, it should be clear that the exercise of the removal provision by a complainant does not automatically or inevitably result in a jury trial. Under HRS § 368-12, the complainant is entitled to make a request for the right to sue in

court. While in many cases a complainant making the request may elect a jury to hear the court case, he or she could instead choose a trial before a judge only. Manifestly, then, resort to the removal provision does not outright grant the right to a jury trial to the complainant and deny it to an employer. Therefore, it is not the right to a jury trial per se that is afforded the complainant, but the opportunity to choose a different forum.

B.

If a complainant does not remove the case from the HCRC agency process, as is the case here, both the complainant and the employer will be afforded the same rights in the HCRC proceedings. On the other hand, if a complainant chooses to remove the case, either the complainant or the employer may elect to have a jury proceeding in the circuit court. Thus, once a complainant exercises his or her “right to sue,” the complainant and employer(s) in HCRC proceedings alike have the opportunity to request a jury trial -- either or both may exercise their rights to a jury trial (when a complainant chooses to transfer the case to court) or both cannot do so (when a complainant chooses an administrative hearing). The question then is not whether Defendants-Appellants Darryllynne Sims and Tammy Quinata have been denied access to a jury trial, but whether the option to choose a particular forum is a fundamental constitutional right.

In that regard, it cannot be said that the right to choose a particular forum "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" Baehr, 74 Haw. at 556, 852 P.2d at 57 (quoting Griswold, 381 U.S. at 493 (Goldberg, J., concurring).

VI.

Hence, inasmuch as HRS § 368-12 involves the removal of the case from an administrative proceeding to a judicial one rather than the right to select a jury trial, a rational basis test is applicable. The rational basis test involves two parts:

> We apply a two-step test to determine whether a statute passes constitutional scrutiny under the rational basis test. [See] Del Rio v. Crake, 87 [Hawai'i] 297, 305, 955 P.2d 90, 98 (1998). "First, we must ascertain whether the statute was passed for a legitimate governmental purpose." Id. (citations omitted). Second, if the purpose is legitimate, the court must determine whether the statute rationally furthers that legitimate government interest. [See] [i]d. In making that inquiry, "a court will not look for empirical data in support of the statute. It will only seek to determine *whether any reasonable justification can be conceived to uphold the legislative enactment*." Id. ([italicized] emphasis in original) (citing Housing Fin. & Dev. Corp. v. Castle, 79 [Hawai'i] 64, 86, 898 P.2d 576, 598 (1995)). In other words, could "the Legislature have rationally believed that the statute would promote its objective." Del Rio, 87 [Hawai'i] at 305, 955 P.2d at 98.

State v. Friedman, 93 Hawai'i 63, 73-74, 996 P.2d 268, 278-79 (2000) (emphases added) (brackets and ellipsis points omitted); see also Sturch, 82 Hawai'i at 276, 921 P.2d at 1177 (explaining that, under the rational basis test, "'[t]he test of constitutionality is whether [the] statute has a rational

relation to a legitimate state interest'" (quoting Maeda v. Amemiya, 60 Haw. 662, 669, 594 P.2d 136, 141 (1979))).

Applying the rational basis test, it is evident that the prevention of discrimination and the enforcement of anti-discrimination laws embodies a legitimate government purpose. Cf. Pollard v. E. I. DuPont de Nemours, Co., 213 F.2d 933, 946 (6th Cir. 2000) (characterizing the making of "reasonable damages available to all other victims of intentional discrimination without being forced to limit the damages already available to victims of racial and ethnic discrimination" as a "legitimate purpose"), reversed on other grounds by, Pollard v. E. I. DuPont de Nomours & Co., 532 U.S. 843 (2001). Moreover, as HRS chapter 368 meets the higher standards of strict scrutiny, see infra Parts VII. & VIII., it a fortiori satisfies a rational basis test.

VII.

A.

Assuming, arguendo, that the choice of forum under HRS § 368-12 must be subjected to a strict scrutiny analysis, the removal procedure both serves a compelling state interest and is narrowly-tailored to meet that interest. In applying a strict scrutiny analysis, this court presumes such laws "to be unconstitutional unless the state shows compelling state

interests which justify such classifications, and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights." Baehr, 74 Haw. at 571-72, 852 P.2d at 63-64 (citations, brackets and internal quotation marks omitted) (emphases added). To satisfy the strict scrutiny test, then, it must be demonstrated that (1) HRS § 368-12 fulfills a compelling state interest, and (2) this statute is narrowly drawn.

B.

Without a doubt,[8] the prevention of discrimination in the State of Hawaiʻi serves a compelling state interest. The Hawaiʻi Constitution mandates that an individual will not "be denied the enjoyment of the person's civil rights or be discriminated against[.]" Haw. Const. Art. I § 5. In consonance with this guarantee, the legislature adopted HRS chapter 368 to provide "a forum [in the form of the HCRC] which is accessible to any [person] who suffers an act of discrimination". Stand. Comm. Rep. No. 372, in 1989 House Journal, at 984. The intent was to "establish a strong and viable commission with sufficient . . . enforcement powers to effectuate the State's commitment to preserving the civil rights of all individuals." Stand. Comm. Rep. No. 372, in 1989 House Journal, at 984.

[8] No party contends that the prevention of discrimination is not a compelling state interest. Even Plaintiffs "do not dispute that the prevention of unlawful discrimination could qualify as a 'compelling state interest[.]'"

Hawaii's consistent legislative efforts to eliminate discrimination have been repeatedly recognized by this court. See Hyatt Corp. v. Honolulu Liquor Comm'n, 69 Haw. 238, 244, 738 P.2d 1205, 1209 (1987) (commenting on Hawaii's anti-discrimination laws and stating that "[t]he strength of this expressed public policy . . . is beyond question"); Furukawa v. Honolulu Zoological Soc'y, 85 Hawaiʻi 7, 17, 936 P.2d 643, 653, ("As a remedial statute designed to enforce civil rights protections and remedy the effects of discrimination, Chapter 368 should be liberally construed in order to accomplish that purpose." (Quoting Flores v. United Air Lines, 70 Haw. 1, 757 P.2d 641 (1988).)), reconsideration denied, 85 Hawaiʻi 196, 940 P.2d 403 (1997).

The legislature enacted HRS chapter 368 "to more effectively enforce the State's discrimination laws," Stand. Comm. Rep. No. 1190, in 1989 House Journal, at 1269, and to "establish[] a uniform procedure for the handling of discrimination complaints by the commission which ensures expeditious processing while protecting due process rights and access to justice for all complainants." Stand. Comm. Rep. No. 739, in 1989 Senate Journal, at 1085. The chapter itself expressly states that it creates a "mechanism which provides for a uniform procedure for the enforcement of the State's discrimination laws[.]" HRS § 368-1 (emphasis added).

In that regard, it is plain that HRS § 368-12 rationally furthers the objective of preventing discrimination. The legislative history of that section is silent as to the removal procedure. But where, as here, the legislative history of a statute does not expressly address the statute, "we may consider how the legislature would have intended the legislation to be applied." Sturch, 82 Hawaiʻi at 278, 921 P.2d at 1179. HRS chapter 368 was enacted as a response to a perceived ineffectual enforcement of discrimination laws.

> Presently, statutorily mandated enforcement responsibilities for the State's discrimination laws are divided primarily among several agencies within the department of commerce and consumer affairs. Enforcement of discrimination laws is only one of many other important functions of these departments and the enforcement programs must compete with other departmental programs for priority status. Typically, the enforcement agencies are hampered in their delivery of services because of limited fiscal and personnel resources.

Conf. Com. Rep. No. 289, in 1988 Senate Journal, at 717 (emphasis added.) In that light, several rational justifications for the provision can be perceived as furthering the overall purpose of the statute.

For example, as HCRC argues, it may reasonably be posited that the legislature intended that only complainants should have the right to remove cases because: (1) employers could transfer cases to court, burdening complainants with the financial demands of court litigation and excluding from a remedy those complainants who would be unable to bear litigation

expenses; (2) complainants should have the benefit of an administrative complaint-investigation-screening-conciliation process that would more speedily resolve claims; (3) if given the reciprocal right, employers may choose to remove the case at an early stage, thwarting the legislative objective of resolving the case in a more efficient and less expensive procedure than that obtainable in court litigation; and (4) frivolous civil rights complaints that might otherwise overburden the court could be administratively screened. Thus, HRS § 368-12 rationally furthers several legitimate state interests in providing a uniform, economical, and speedy resolution of civil rights complaints.

VIII.

Plaintiffs allege that HRS § 368-12 is not narrowly drawn inasmuch as it "completely denies the right to jury trial to an [employer] if the complainant chooses not to seek a right to sue letter."[9] (Emphasis in original.) This assumes that an employee is entitled to a jury trial upon filing of a complaint with the commission. The statute operates exclusively in the area of discrimination and mandates that any discriminated party

[9] Plaintiffs also argue that HCRC cited to evidence in its opening brief regarding this issue that was not been presented to the trial court at the time the court considered the summary judgment motion but, rather, that such evidence was submitted subsequently, at the motion to stay injunction. Because it is unnecessary to consider such evidence in rendering a decision in this case, whether HCRC cited to inappropriate evidence is immaterial.

file first with the commission. See HRS §§ 368-11 & 368-12 (1993). Hence, all complaints must be administratively initiated and no right to a judicial action under HRS § 368-12 exists, except in HRS § 515-9 (1993) proceedings involving housing discrimination, where one is expressly given.[10] In the event the complainant does not remove the case, plainly there is no discrimination inasmuch as none of the parties would have a jury trial and the clear intent of the statute was to give preference to an administrative disposition.

A.

The removal provision is narrowly drawn, in light of the compelling state interest involved. As argued by the HCRC, the administrative agency mechanism encourages individuals with meritorious, but lower value claims, to initiate and pursue a discrimination complaint.[11] On the other hand, allowing individuals with strong liability cases to file in court encourages the vigorous enforcement of state anti-discrimination laws and creates a body of case law that guides employer-employee

[10] See discussion infra, Part X.

[11] This system has been very effective in handling and resolving complaints. HCRC attests that in 1999-2000 the commission considered 660 complaints of discrimination and issued 44 determinations that cause existed. Thus, a majority of the complaints were resolved by the HCRC, presumably through a determination that no cause existed, mediation, or pre-determination settlements. These statistics serve to illustrate the effectiveness of the current system. As noted infra, other approaches have been tried by the legislature, but have failed.

interactions.

As the legislature implicitly found, allowing an employer to choose the forum would allow employers to transfer a case to circuit court in a situation where an employee could not afford the time or expense necessary to litigate a claim in court. At trial, the HCRC Executive Director attested that “few private plaintiffs’ attorneys specialize in discrimination cases” and those that do often require substantial client deposits, which are unaffordable by most civil rights complainants. Thus, any other approach would frustrate the compelling state interest behind HRS § 368-12 and would not be “narrowly drawn.”[12] See Baehr, 74 Haw. at 571, 852 P.2d at 821.

B.

As mentioned, prior to the enactment of HRS chapter 368, the legislature found that previous statutory schemes had failed to effectively enforce anti-discrimination laws. See

[12] SCI cites the Federal Equal Employment Opportunity Commission (EEOC) as an example of a model that protects public interests, while also allowing an employer access to a jury trial. Under federal law, should settlement efforts by the EEOC fail against a private employer, then the EEOC may initiate a lawsuit against the employer in the United States district court. See 42 U.S.C. § 2000e-5(f)(1) (1994). A complainant has a right to intervene in this litigation.

There is, however, nothing to demonstrate the similarity between this national statute and the decades of experience that Hawaiʻi has had in addressing discrimination, particularly in light of express legislative findings that previous efforts had failed as a result of the burden and expense of litigation. To follow an EEOC approach would force the HCRC and the claimant, if he or she wishes representation in the suit, to bear the expense of litigation. This goes directly against the purported objectives of the HCRC.

Legislative Auditor of Hawaiʻi, Rep. No. 89-8, A Study on Implementation of the Civil Rights Commission, 15-16 (1989) [hereinafter, Auditor's Report] (finding that agencies lacked the resources to investigate and prosecute discrimination claims properly). Similar to this case, in McCloskey v. Honolulu Police Dept., 71 Haw. 568, 577-79, 799 P.2d 953, 958-59 (1990), this court recognized that ineffective prior methods of investigating drug use could not be categorized as less restrictive for purposes of a fundamental right. In McCloskey, a police officer argued that a mandatory urine drug testing program violated "her right of privacy as guaranteed by article I, section 6[] of the Hawaii Constitution." Id. at 573, 799 P.2d at 956. This court concluded that drug testing was the least restrictive manner to curb drug use because "[i]n the past, the traditional method of investigation by direct observation ha[d] proven to be ineffective . . . [and] also ineffective was the use of criminal investigations." Id. at 577, 799 P.2d at 958.

As the legislature has noted, and previous history has demonstrated, prior approaches failed to protect employees against discrimination. Thus, those approaches cannot be considered more "narrowly drawn[,]" Baehr, 74 Haw. at 571, 852 P.2d at 821, under the circumstances as they do not accomplish the compelling state interest of reducing and eliminating discrimination.

IX.

Citing Baehr, 74 Haw. at 581, 852 P.2d at 67, Plaintiffs argue that statutes that "den[y] different classes of persons *disparate access to a fundamental civil right*" do not allow for the equal enjoyment of substantive rights. (Italicized and underscored emphasis in original). But Baehr itself is distinguishable inasmuch as it focused on the suspect classification prong of the strict scrutiny test, rather than the fundamental rights question. In any event, any holding in Baehr regarding fundamental rights is not applicable to the instant case because, as discussed supra, removal to a judicial forum from a HCRC administrative proceeding is not a fundamental right.

Moreover, as alluded to before, Plaintiffs are not denied equal access to a jury trial. Upon an exercise of the right to sue, both Plaintiffs and Defendants have the same opportunity to request a jury trial. What Defendants are granted is the opportunity to continue pursuing their claims in an administrative setting or to bring their cases in court. That legislative dispensation afforded Defendants employees is supported by rational objectives underlying HRS § 368-12. See discussion supra.

X.

Plaintiffs urge that HRS § 368-12 is overinclusive because it prevents employers in HCRC proceedings from opting out of the process, even where the complainant can afford the costs of a circuit court trial. "In those cases," Plaintiffs argue, "the purported policy justification for the denial of the constitutional right to [employers] is not served[,]" resulting in a failure to meet the strict scrutiny test.

Plaintiffs' argument, however, pays heed to only one aspect of the policy underlying HRS chapter 368. That chapter also intended to ensure efficient and uniform, i.e. consistent, enforcement of the state's anti-discrimination laws. The inclusion of complainants who may be able to afford the expenses of court litigation would not be inconsistent with such goals. Plaintiffs also maintain that the statute is underinclusive because it does not include housing discrimination respondents in HRS § 515-9 proceedings[13] in the group precluded from opting out.

It is unclear how the claimed underinclusiveness in fact violates Plaintiffs' own equal protection rights. In any event, "[a] statute does not violate the equal protection clause

[13] HRS § 515-9 provides that "[t]he civil rights commission has jurisdiction over the subject of real property transaction practices and discrimination made unlawful by this chapter." It also states that "[c]hapter 368 to the contrary notwithstanding, after a finding of reasonable cause, [HCRC has the power] to notify the complainant, respondent, or aggrieved person on whose behalf the complaint was filed, that an election may be made to file a civil action in lieu of an administrative hearing." HRS § 515-9(3).

merely because it could have included other persons, objects, or conduct within its reach." State v. Freitas, 61 Haw. 262, 273, 602 P.2d 914, 923 (1979) (citing James-Dickenson Co. v. Harry, 273 U.S. 119, 125 (1927). This is because,

> "[t]he legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest." Miller v. Wilson, 236 U.S. 373, 384 (1915). And "if the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." Id.

Id. at 273-74, 602 P.2d at 923 (some parentheses omitted). By attacking the classification, Plaintiffs bear the burden of showing that it is arbitrary and capricious. See id. at 272, 602 P.2d at 922 ("[B]ecause a statute is presumed to be constitutional, the party challenging the constitutionality of a statute on equal protection grounds bears the heavy burden of showing that the statute is arbitrary and capricious, and as such, objectionable." (Footnote and citations omitted.)). They have failed to do so here.

Moreover, citing Standing Committee Report No. 627-92, in 1992 House Journal, at 1126, HCRC explains that, unlike HRS chapter 368, HRS § 515-9 was created "to conform [c]hapter 515 with the federal Fair Housing Amendments Act, thereby avoiding decertification of the HCRC by [the federal] H[ousing and] U[rban] D[evelopment agency]." Indeed, the stated purpose of the statute "is to conform real estate transactions law to the Federal Fair Housing Amendments Act of 1988, which protects the

disabled from housing discrimination." Stand. Com. Rep. No. 627-92, in 1992 House Journal, at 1126. Thus, Plaintiffs have failed to establish how the refusal to apply the complainant-only removal provision to chapter 515 cases was arbitrary and capricious.

XI.

Although not dispositive to my analysis, I believe the majority errs in holding that the "public rights" doctrine would not be applicable to the immediate case. The United States Supreme Court has held that there is no right to a jury trial under the Seventh Amendment where Congress has assigned the adjudication of "public rights" to a government agency. Thus,

> [i]f a claim that is legal in nature asserts a "public right," as we define that term . . . , then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency . . . of equity. The Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of "private right."

Granfinanciera v. Nordberg, 492 U.S. 33, 42 (1989) (citations omitted). In Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977) (holding that, when Congress enacted the Occupational Safety and Health Act of 1970 and provided for civil penalties for its enforcement, thereby creating new "public rights," and then assigned adjudications of their enforcement to an administrative agency, lack of a jury

trial at the proceedings did not violate the Seventh Amendment), the Court explained that,

> [a]t least in cases in which "public rights" are being litigated, e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact[,] <u>the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible</u>.

<u>Id.</u> at 450 (emphasis added.). The <u>Atlas Roofing</u> court concluded that, "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" <u>Id.</u> at 455. In <u>Granfinanciera</u>, the Court clarified what it meant by "public rights" as opposed to a "private right":

> Although we left the term "<u>public rights</u>" undefined in <u>Atlas</u>, we cited <u>Crowell v. Benson</u>, 285 U.S. 22 (1932) approvingly. In <u>Crowell</u>, we <u>defined "private right" as "the liability of one individual to another under the law as defined</u>," <u>id.</u> at 51, <u>in contrast to cases that "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments</u>." <u>Id.</u> at 50, 52.

<u>Granfinanciera</u>, 492 U.S. at 51 n.8 (emphases added). It pointed out that, "[i]n certain situations, of course, Congress may fashion causes of action that are closely <u>analogous</u> to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable." <u>Id.</u> at 52 (emphasis in original) (citations

omitted). However, "[u]nless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial." Id. at 53.

Thus a private dispute may be subject to a comprehensive regulatory scheme in which the government is involved. In Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985), the Court examined "whether Article III of the Constitution prohibits Congress from selecting binding arbitration . . . as the mechanism for resolving disputes among participants in [the] F[ederal] I[nsecticide,] F[ungicide, and] R[odenticide Act]'s [(FIFRA)] pesticide registration scheme." Id. at 571. The Court determined that it did not. See id. Justice Brennan, in his concurring opinion (which is repeatedly cited to in Granfinanciera), explained that

> the dispute arises in the context of a federal regulatory scheme that virtually occupies the field. . . . This case, in other words, involves not only the congressional prescription of a federal rule of decision to govern a private dispute but also the active participation of a federal regulatory agency in resolving the dispute. Although a compensation dispute under FIFRA ultimately involves a determination of the duty owed one private party by another, at its heart the dispute involves the exercise of authority by a Federal Government arbitrator in the course of administration of FIFRA's comprehensive regulatory scheme. As such, it partakes of the characteristics of standard agency adjudication.

Id. at 600 (Brennan, J., concurring) (emphases added) (citation omitted).

The majority contends that the public rights doctrine does not apply in this case because the HCRC sought monetary damages and is seeking to enforce a private right in the adjudication of liability between one individual and another. In deciding civil rights cases in the past, this court has looked to the federal courts for guidance. See Furukawa, 85 Hawaiʻi at 13, 936 P.2d at 650 (noting that while federal law and "a federal court's interpretation . . . [of that law] is not binding on this court's interpretation of civil rights laws, it can be a useful analytical tool"). Plainly, in the present case, a public right is involved. In Equal Employment Opportunity Com'n v. Waffle House, Inc., 534 U.S. 279 (2002), the United States Supreme Court held that the fact that an employee had signed a mandatory arbitration agreement does not preclude the Equal Employment Opportunity Commission (EEOC) from seeking different types of relief, even victim-specific relief. See id. at 295. The Supreme Court reasoned that "the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief. To hold otherwise would undermine the detailed enforcement scheme created by Congress[.]" Id. at 296 (emphasis added). Thus, contrary to the majority's position, the HCRC is enforcing public rights even when it seeks monetary damages to be awarded one individual from another.

In light of the purpose and provisions of HRS chapter 368, see supra, the rationale set forth in Atlas Roofing, Waffle House, and Granfinanciera is applicable. Applying it to the instant case, HRS chapter 368 obviously pertains to "public rights." In enacting HRS chapter 368, the legislature acted for a valid legislative purpose, that of ensuring the consistent and effective enforcement of civil rights. See discussion supra. The enactment of chapter 368 was manifestly within the legislative power. See Haw. Const. Art. III, § 1 ("The legislative power of the State shall be vested in a legislature[,] . . . [s]uch power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.") Chapter 368 is concerned with government enforcement of public discrimination laws and not strictly with "private rights" such as "the liability of one individual to another."

Under chapter 368, the State, through the HCRC, is authorized to sue persons to enforce public rights in connection with enforcing anti-discrimination laws, an executive function. See Furukawa, 85 Hawai‘i at 17, 936 P.2d at 654 ("The Commission provides the mechanism for enforcement of discrimination law in Hawai‘i. As a remedial statute designed to enforce civil rights protections and remedy the effects of discrimination, Chapter 368

should be liberally construed in order to accomplish that purpose." (Citations omitted.)).

Consequently, article I, section 13 of the Hawaiʻi Constitution would not "prohibit [the legislature] from assigning the fact finding function and initial adjudication to an administrative forum," Atlas Roofing, 430 U.S. at 449, rather than to a court. In that respect, the right to jury trial in the Hawaiʻi Constitution does not preclude the legislature "from assigning their resolution to a forum in which jury trials are unavailable." Id. Were "private rights" involved, however, the right to jury trial, as embodied in our constitution, would prevail.

As in Thomas, HRS chapter 368 requires HCRC's active participation in the context of a comprehensive state regulatory scheme in resolving the dispute between Defendants and Plaintiffs. Although the procedures involve a determination of the duty owed by one party to another, the regulatory scheme involves the exercise by HCRC of its powers in administering HRS chapter 368. Accordingly, contrary to the majority's view, the right to a jury trial may be deemed incompatible with the comprehensive regulatory scheme that the legislature has established for vindicating anti-discrimination "public rights."

XII.

Accordingly, I must respectfully dissent from the majority's disposition and analysis in this case. I would vacate the court's final judgment issued on July 25, 2001, and remand the case for further proceedings consistent with this opinion.