

DISSENTING OPINION BY POLLACK, J.,
WITH WHOM ACOBA, J., JOINS

Today, the majority holds that a federal law has the effect of divesting Hawai'i courts of jurisdiction over a state claim brought under a Hawai'i statute. In my view, and with all due respect, the majority's holding: (1) violates the Eleventh Amendment to the United States Constitution; (2) is contrary to explicit language in the Randolph-Sheppard Act (federal RSA) and its legislative history; (3) misapprehends the "federal adjudication path" set forth in the federal RSA; (4) misinterprets the phrase "adopt rules in accordance with [Hawai'i Revised Statutes c]hapter 91" to mean that an agency can adopt rules that conflict with HRS chapter 91; (5) applies an administrative rule to divest state courts of jurisdiction in contravention of provisions of state law vesting such jurisdiction in state courts; (6) erroneously overrules Hawaii Blind Vendors Ass'n v. Dep't of Human Servs., 71 Haw. 367, 791 P.2d 1261 (1990), which had previously determined subject matter jurisdiction existed in a similar case; and (7) reaches a result that is fundamentally at odds with the uniform weight of federal and state case authority. As such, the majority holding has broad adverse consequences beyond this case.

I. INTRODUCTION

The federal RSA provides employment opportunities for the blind by granting "priority to those blind persons who desire to operate vending facilities on federal property." Tenn. Dep't

of Human Servs. v. U.S. Dep't of Educ., 979 F.2d 1162, 1163 (6th Cir. 1992) (emphasis added) (citation omitted). Responsibility for implementing and overseeing the blind vendor program is divided between state and federal agencies.

Participating states may gain access to federal property by applying to the United States Department of Education (USDOE) to participate in and administer the program. "State agencies [of participating states] must agree to set up licensing programs for blind vendors[and] match them with available contracts for vending facilities on federal property." New Hampshire v. Ramsey, 366 F.3d 1, 5 (1st Cir. 2004) (emphasis added). Once the state agency is approved, it is known as a "state licensing agency" (SLA). Any participating state also agrees to a three-step grievance process for dealing with blind licensees who are dissatisfied with the operation of the federal vending program (federal adjudication path).

In 1937, Hawai'i established its own counterpart statute to the federal RSA to provide blind persons with vending opportunities on state and county property (Hawai'i RSA). Plaintiffs claim that the City and County of Honolulu (City) failed to provide vending opportunities to blind persons on city property and that the State of Hawai'i (State) failed to enforce the requirements of the Hawai'i RSA.

The majority concludes that the federal RSA divests Hawai'i courts of jurisdiction over a claim brought under the Hawai'i RSA. The majority's interpretation transforms the

federal RSA into a monolithic statute inclusive of virtually all state and county property in the United States, far beyond its present scope and directly contrary to Congressional intent. The decision also critically undermines important concepts of federalism and creates a new standard whereby the State may be haled into federal court based on an attenuated form of statutory waiver of sovereign immunity.

II. UNDER THE ELEVENTH AMENDMENT, FEDERAL COURTS DO NOT HAVE JURISDICTION OVER PLAINTIFFS' CLAIMS BECAUSE THE STATE DID NOT WAIVE ITS SOVEREIGN IMMUNITY TO ALLOW STATE CLAIMS TO BE BROUGHT IN FEDERAL COURT

The majority holds that federal courts have exclusive jurisdiction over the Plaintiffs' claims, which are based upon alleged violations of Hawai'i state law. Actually, the opposite is true. Under well-settled authority interpreting the Eleventh Amendment to the U.S. Constitution (Eleventh Amendment), federal courts have no jurisdiction over a claim in which a citizen files suit against a state or its agencies based on violations of that state's laws. "[A] claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984).

A federal court has the power to adjudicate such a claim only when the state has expressly waived its sovereign immunity to the claim being brought in federal court. The majority's assertion that the federal courts are the proper forum

for this case directly contradicts the principles of sovereign immunity and federalism exemplified by the Eleventh Amendment.

The Eleventh Amendment reads:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI

By its express terms, the Eleventh Amendment refers only to suits against a state by out-of-state citizens. The United States Supreme Court has repeatedly held, however, that despite the limited terms of the amendment, states are also immune from suits brought in federal court by their own citizens. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996); Pennhurst, 465 U.S. at 98-99; Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944); Hans v. Louisiana, 134 U.S. 1, 15 (1890).

The Court has determined that "federal jurisdiction over suits against unconsenting states 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" Pennhurst, 465 U.S. at 98 (quoting Hans, 134 U.S. at 15). The Court has further established that:

[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State . . . and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Id. at 98-99 (quoting Ex parte State of New York, 256 U.S. 490, 497 (1921)) (emphasis in original). A state's immunity from suit

in federal courts is not absolute. Federal courts, however, must consider the Eleventh Amendment whenever a state appears as a defendant before them:

The Eleventh Amendment may be described as either creating an immunity for states or establishing a jurisdictional limitation on federal courts. . . . [T]he effect of the Eleventh Amendment must be considered sua sponte by federal courts.

Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, 810 F.2d 869, 873 n.2 (9th Cir. 1987). The Court has recognized only two circumstances under which an individual may sue a state in federal court. Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999). "First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment." Id. "Second, a State may waive its sovereign immunity by consenting to suit." Id.

"A State may waive its constitutional immunity through a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985). In each of these situations, the Court "requires an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." Id.; see also Tenn. Dep't of Human Servs., 979 F.2d at 1166.

Thus, a court will find that a state has waived its sovereign immunity through a statute or constitutional provision "only where stated by the most express language or by such

overwhelming implications from the text as will leave no room for any other reasonable construction.'" Atascadero, 473 U.S. at 239 (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)) (brackets omitted). In Kalima v. State, 111 Hawai'i 84, 101, 137 P.3d 990, 1007 (2006), this court echoed the U.S. Supreme Court's language where it held that "a statutory waiver of sovereign immunity must be clear and unequivocal and must be strictly construed."

A close inspection of the federal RSA and the Hawai'i RSA reveals nothing in either statute that would be sufficient to strip the State of its Eleventh Amendment immunity for claims made pursuant to the state statute. Based on the applicable statutes and case law, the federal courts have no jurisdiction to adjudicate claims based on the State's alleged violations of the Hawai'i RSA.

A. The Federal RSA Does Not Compel Waiver of Eleventh Amendment Immunity Over State Law Claims

Both the Third Circuit and the Ninth Circuit have held that participation in the federal RSA is conditioned on a waiver of a participating state's sovereign immunity to enforcement of arbitration awards based on violations of the federal RSA in federal court. Premo v. Martin, 119 F.3d 764, 769 (9th Cir. 1997); Del. Dep't of Health & Soc. Servs. v. U.S. Dep't of Educ., 772 F.2d 1123, 1137-38 (3d Cir. 1985).

Waiver of sovereign immunity as a condition of participation in a federal program created by federal law does not, however, affect a state's sovereign immunity against being

subjected to a lawsuit in federal court for a claim that arises from an alleged violation of a state statute. This is true even where, as in this case, the state statute is modeled after the federal statute.

The majority relies on the Ninth Circuit's analysis in Premo, 119 F.3d at 770, to conclude that the State has "implicitly surrendered its sovereign immunity to suits in federal courts" for violations of the Hawai'i RSA. Majority op. at 36 (emphasis added). The majority's interpretation of Premo inordinately expands the holding in that case, inasmuch as Premo did not address blind vendor programs on state or county property and was entirely based on violations of the federal RSA.

The majority acknowledges that the property involved in Premo was controlled by the federal government and that the issue in the case was the enforcement of arbitration awards for violations of the federal RSA. Majority op. at 35. The instant case involves neither the federal RSA nor the sections of Hawai'i law adopted by the legislature to enable the State to participate in the federal RSA. Rather, this case involves a state law that is separate and distinct from the federal law on which it is based. Thus, under the circumstances of this case, a waiver of Eleventh Amendment immunity cannot be implicit; it must be express and unequivocal. The majority, in relying on Premo, muddles the key distinction between that case and the one before this court and expands the reach of the federal courts far beyond the limits contemplated by the Ninth Circuit.

To reiterate, there is simply nothing in the federal RSA that can be read as an "unmistakably clear" statement by Congress that states which adopt their own legislation creating similar blind vendor programs for state property must waive their sovereign immunity to suit in federal court. One wonders, in fact, if Congress would have the power to condition state legislation on a waiver of claims under state law. Ultimately, this question remains rhetorical, because the federal RSA makes absolutely no mention of the existence or creation of statutes such as the Hawai'i RSA. Indeed, were the federal law repealed, the Hawai'i RSA would remain in place, as would the State's immunity to being sued in federal court on a claim arising from the Hawai'i RSA.

B. The Hawai'i RSA Does Not Waive Eleventh Amendment Immunity Over Claims Arising Under the Hawai'i RSA

There is also nothing in the text of the Hawai'i RSA or its administrative rules that can reasonably be read as providing consent for the State to be sued in federal court for a violation of the state statute. Neither HRS § 102-14 (Supp. 2005) nor HRS § 347-12.5 (1993) mentions sovereign immunity or judicial review, as a comparison between the federal and state RSA demonstrates.

Section 107-d(1)(a) of the federal RSA provides a dissatisfied licensee with a full evidentiary hearing before the state licensing agency and an opportunity to appeal the agency's decision to the USDOE for review by an arbitration panel:

If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may

file a complaint with the Secretary who shall convene a panel to arbitrate the dispute.

Pub. L. No. 93-651, § 206, 89 Stat. at 2-11, codified at 20 U.S.C. § 107d-1(a). The USDOE's arbitration decisions are made subject to judicial review in § 6(a) of the 1974 Amendment:

[T]he Secretary shall convene an ad hoc arbitration panel . . . [,] give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such title 5 [5 USCS §§ 701 et seq.].

Id., codified at 20 U.S.C.S. § 107d-2(a) (emphasis added).

Section 6(a)'s reference to chapter 7 of Title 5 is to the administrative procedures and judicial review provisions of the federal Administrative Procedures Act (APA). These provisions of the federal RSA establish the remedial scheme of the federal law.

In direct contrast, there is no reference whatsoever to the federal adjudication path in the statutory provisions of the Hawai'i RSA. In fact, neither HRS § 102-14 nor HRS § 347-12.5 mentions dispute resolution procedures. Nothing in the state statute demonstrates the clear intention of the legislature to waive the State's Eleventh Amendment immunity. Rather, the Hawai'i RSA merely provides that "[t]he department of human services . . . shall adopt rules in accordance with chapter 91, necessary for the implementation of this section[.]" HRS § 102-14(b).

The majority's particular reliance on the fund-mixing provision of HRS § 347-12.5 as evidence that the State has agreed to waive its Eleventh Amendment immunity for disputes arising from the Hawai'i RSA is plainly in error. There is nothing in

the text of HRS § 347-12.5 that can be read as providing a "clear and unequivocal" waiver of the State's Eleventh Amendment immunity. There is also nothing in the legislative history of HRS § 347-12.5 that indicates any intention on the part of the legislature to waive such immunity.¹

C. The Hawai'i Administrative Rules Do Not, and Could Not, Waive the State's Eleventh Amendment Immunity

The majority's reliance on HAR § 17-402-17(j), the vendor's complaint provision, is also misplaced. The provision states, in relevant part, as follows:

(j) Evidentiary hearings and arbitration of vendor complaints shall be provided for in the following manner:
(9) The vendor shall be informed of the right to request the [Secretary] to convene an ad hoc arbitration panel, if the vendor is dissatisfied with any action taken or decision rendered as a result of the full evidentiary hearing.

The rules adopted by Defendant-Appellant/Cross-Appellee Department of Human Services, State of Hawai'i (DHS) under the authority of HRS § 102-14(b) reference some aspects of the federal adjudication path. They do not adopt that path in its entirety. The key provisions of the federal RSA that provide for binding arbitration and judicial review are conspicuously absent from the HAR. In fact, HAR § 17-402-17(j), which the majority asserts "reflects the federal adjudication path," makes no mention of sovereign immunity or judicial review. The HAR provision also does not provide a right to appeal the arbitration decision in pointed contrast to the federal RSA.

¹ See, Sen. Stand. Comm. Rep. No. 205, in 1991 Senate Journal, at 866; Sen. Stand. Comm. Rep. No. 726, in 1991 Senate Journal, at 1023; Sen. Stand. Comm. Rep. No. 927, in 1991 Senate Journal, at 1170; Sen. Stand. Comm. Rep. No. 1189, in 1991 Senate Journal, at 1267-68.

In HAR § 17-402-17(j), the DHS expressly adopted some provisions of the federal adjudication path while omitting other provisions. The majority interprets the DHS's adoption of some aspects of the federal adjudication path as demonstrating the agency's intention to bind the State solely and exclusively to that path. Majority op. at 44-45. This interpretation, however, does not explain the DHS's omission of relevant portions of the federal adjudication path from the express language of HAR § 17-402-17(j).

The DHS's failure to include these portions of the federal adjudication path must be viewed as an intentional decision to delete those portions from the language of HAR § 17-402-17(j). Because "courts will not presume an oversight on the part of the legislature where such presumption is avoidable," this omission must be seen as intentional. See Reefshare, Ltd. v. Nagata, 70 Haw. 93, 98, 762 P.2d 169, 173 (1988); see also, Levy v. Kimball, 51 Haw. 540, 544, 465 P.2d 580, 583 (1970) (legislature's omission of portion of federal statute must be seen as intentional rather than as an oversight).

This intentional omission, moreover, must be reasonably interpreted as intending to limit, not adopt, the federal adjudication path in the context of the Hawai'i law. Under firmly entrenched principles of statutory construction, the omission must be construed as purposefully differentiating between the federal adjudication path and that to be applied to the Hawai'i RSA.

It is a generally accepted rule of statutory construction that where the legislative body adopts a law of another State all changes in words and phraseology will be presumed to have been made deliberately and with a purpose to limit, qualify or enlarge the adopted law to the extent that the changes in words and phrases imply. Moreover where portions of the statute adopted are omitted the difference in phraseology . . . may have special interpretative significance. Where . . . the legislative body adopts isolated portions of the statute of another State to the exclusion of other provisions upon the same subject matter, included in the same section from which the language adopted was taken, the statute as ultimately enacted must be given effect accordingly as such exclusions were intended to limit, qualify or enlarge the portions adopted.

Id. at 544-45, 465 P.2d at 583 (emphasis added).

The clear implication of the DHS's intentional omission of relevant portions of the federal adjudication path from the Hawai'i law is not that the agency intended to adopt that adjudication path completely and exclusively for disputes arising from the Hawai'i statute, as the majority suggests. Rather, the logical and reasonable implication is that the DHS intended to limit the reach of the federal adjudication path in the context of the Hawai'i RSA. HAR § 17-402-17(j)'s omitted reference to the federal RSA's binding arbitration and judicial review provisions must be viewed as intending to remove these provisions from the Hawai'i RSA and demonstrates the State's lack of consent to be sued in federal court for violations of the state law.

Furthermore, nothing in HAR § 17-402-17(j) provides consent "by the most express language" for a waiver of the State's sovereign immunity to suit in federal court for a violation of the state law. See Atascadero, 473 U.S. at 239. It cannot reasonably be said that the text of the Hawai'i RSA and its attendant regulations leaves "no room for any other

reasonable construction" than that the State has waived its sovereign immunity. See id.

In sum, applying established canons of construction, HAR § 17-402-17(j) allows aggrieved vendors the discretion to seek arbitration before the Secretary at their own behest without abrogating the State's sovereign immunity from suit in federal court. The majority's conception of the rule is not consistent with such canons. The majority ordains consent by the State to be sued in federal court for violations of the Hawai'i RSA, despite the fact that the word(s) "appeal," "federal court" or "waiver of immunity" do not appear in the language of HAR § 17-402-17(j).² This interpretation misapprehends both what is present in and what is absent from the agency rules.

In any event, HAR § 17-402-17(j) could not waive sovereign immunity. Only the state legislature has the authority to waive a state's Eleventh Amendment immunity. See Atascadero, 473 U.S. at 234 (holding that state may waive sovereign immunity "by a state statute or constitutional provision" if the provision explicitly specifies state's intention to subject itself to suit in federal court). The only exception is where the legislature expressly delegates this authority to an administrative agency. See The Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 962 F.

² If § 17-402-17(j) could reasonably be read as requiring appellate review in federal courts, such a requirement would be contrary to state law and well established principles of agency law. See infra Part IV.

Supp. 131, 134 (D. Ind. 1997) (legislature may expressly delegate the authority to waive immunity).

Nothing, however, in the Hawaii RSA can be read as expressly delegating to the DHS the authority to waive the State's immunity. The DHS is given only the power to "adopt rules in accordance with chapter 91," and there is nothing in chapter 91 allowing a state agency to waive sovereign immunity on behalf of the State. On the contrary, chapter 91 expressly provides that judicial review of contested cases shall take place in the state courts.³ See HRS §§ 91-14(a) and (b) (1993).

D. The Hawaii Legislature Has Explicitly Waived the State's Sovereign Immunity to Suit in State Court for a Violation of the Hawaii RSA

For the foregoing reasons, the legislature has not waived the State's sovereign immunity to a state law claim under the Hawaii RSA being filed in federal court. Therefore, contrary to the majority's holding, there is no legal doctrine that would have allowed the Plaintiffs' claim to have been originally brought in federal court.

On the other hand, Hawaii's legislature has explicitly waived the State's sovereign immunity to suit in state court for a violation of the Hawaii RSA. HRS § 661-1 (1993) provides as follows:

³ See infra Part V(B) for further discussion of the legislature's mandate that rules be adopted in accordance with chapter 91.

The several circuit courts of the State . . . shall . . . have original jurisdiction to hear and determine the following matters . . .

- (1) All claims against the State founded upon any statute of the State[.]

Section 661-1 clearly and expressly waives the State's sovereign immunity and allows the State to be sued for violations of its statutes. The statute also expressly vests jurisdiction for those claims in the circuit courts of the state.

The State's consent to being sued under HRS § 661-1, however, "does not extend consent to suits in federal courts." Office of Hawaiian Affairs v. Dep't of Educ., 951 F. Supp. 1484, 1491 (D. Haw. 1996); see also Price v. Hawaii, 921 F.2d 950, 958 (9th Cir. 1990) ("[T]hat the State has consented to being sued in its own courts . . . does not waive its Eleventh Amendment immunity."). In fact, Hawaii's legislature has made it clear that HRS § 661-1 does not extend jurisdiction to the federal courts:

[T]he intent of the legislature in amending section 661-1 and 662-3, Hawaii Revised Statutes, in 1978 to extend jurisdiction to district courts in tort actions on claims against the State and certain other claims against the State, was originally and is now to extend jurisdiction for such actions and claims against the State to state district courts, and not to extend jurisdiction for such actions and claims to federal district courts.

1984 Haw. Sess. L. Act 135, § 1 at 258 (emphasis added).

That the State may waive its sovereign immunity in its own courts while still retaining its Eleventh Amendment immunity reflects the important principle that "[a] State's constitutional interest in immunity encompasses not merely whether it may be

sued, but where it may be sued." Pennhurst, 465 U.S. at 99 (emphases in original).

This principle is of paramount importance to the instant case because while the State has given consent to being sued in state court for violations of its statutes, it has never consented to being sued in federal court for violations of the Hawai'i RSA. Therefore, according to the principles of sovereign immunity inherent in the Eleventh Amendment, the courts of the State of Hawai'i enjoy sole and exclusive jurisdiction to decide this case. The federal courts have no jurisdiction to adjudicate Plaintiffs' claims.

III. THE FEDERAL RSA EXPRESSLY LIMITS ITS SCOPE TO FEDERAL PROPERTY OR TO "OTHER PROPERTY" AS SPECIFICALLY DEFINED BY THE CODE OF FEDERAL REGULATIONS

A. The Federal RSA, on its Face, is Clearly Limited to Federal Property and "Other Property"

Only federal law can provide the underlying basis for jurisdiction in a federal court. The federal RSA explicitly limits its application to "vending facilities on any Federal property." 20 U.S.C.A. § 107(a)⁴ (emphasis added). "Federal property," in turn, is defined by 20 U.S.C.A. § 107(e).⁵ The

⁴ 20 U.S.C.A. § 107(a) provides as follows:

For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

⁵ 20 U.S.C.A. § 107(e)(3) provides as follows:

"Federal property" means any building, land, or other real

Code of Federal Regulation (C.F.R) in 34 C.F.R § 395.1⁶ provides a similar limiting definition of "Federal property." The limitation to federal property is reflected throughout the federal RSA. Section 107(b)(2), for example, provides:

"Whenever feasible, one or more vending facilities are [to be] established on all Federal property." Indeed, the chapter title of all thirteen sections of the federal RSA is "Vending Facilities for Blind in Federal Buildings." (Emphasis added.) The definitions contained in the federal RSA do not in any way encompass, as the majority would have it, state and county property.

The majority acknowledges that, on its face, the federal RSA applies only to federal property, but nevertheless concludes that the federal adjudication path must be followed even for disputes involving "non-federal property":

We fully recognize that the federal RSA . . . involves the operation of a "vending facility on any federal property." Thus on its face, it appears that DHS is obligated to comply with the federal adjudication path only with respect to claims relating to its management of vending machines on

property owned, leased, or occupied by any department, agency, or instrumentality of the United States (including the Department of Defense and the United States Postal Service), or any other instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States.

34 C.F.R. § 395.1(g) provides as follows:

"Federal property" means any building, land, or other real property owned, leased, or occupied by any department, agency or instrumentality of the United States (including the Department of Defense and the United States Postal Service), or any other instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States.

federal property. However, in our view it is the overall scheme of the federal RSA that dictates adherence to the federal adjudication path even in those situations involving non-federal property.

Majority op. at 28 (emphases in original).

The majority patently violates a "cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, [this court] is not at liberty to look beyond that language for a different meaning." State v. Haugen, 104 Hawai'i 71, 76, 85 P.3d 178, 183 (2004); see Allstate Ins. Co. v. Schmidt, 104 Hawai'i 261, 265, 88 P.3d 196, 200 (2004) ("Where the language of a statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning."); Akiba v. Waiolena, 94 Hawai'i 262, 265, 12 P.3d 362, 365 (App. 2000) ("[I]f the statute is clear on its face, we need not resort to other principles of statutory construction in interpreting it."). Here, the federal RSA clearly, unambiguously, and explicitly restricts its application to federal property and "other property" as defined in the C.F.R. Thus, this court need go no further in determining its scope.

B. The Legislative History of the Federal RSA Reveals no Intent to Expand the Act to Include Non-Federal Property

In light of the plain and unambiguous language of the federal RSA, it would be fanciful to conclude that Congress surreptitiously induced the participation of a consenting state with the intended effect of divesting state courts of jurisdiction over state claims involving state property. Plainly, Congress would not override state laws and traditional

principles of federalism by extending the reach of the federal RSA to non-federal property without expressly referencing such intent in the text of the federal statute itself or in its legislative history.

In fact, the legislative history of the federal RSA demonstrates that Congress had no such intent. The 93rd Congress generated over sixty pages of committee reports regarding the 1974 amendments of the federal RSA. See S. Rep. No. 93-937, 93rd Cong., 2d Sess. (1974); S. Rep. No. 93-1297, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6373. These two committee reports reference "federal property" and "federal buildings" scores of times.⁷ Not a single time, however, do these reports ever state that the adjudication proceedings of the federal act would apply to "non-federal property."

It is also inconceivable that Congress would create such a fundamental change in the law without referencing that change in its ample committee reports. In fact, one committee report explains in detail a comparatively minor 1954 change in the federal RSA that slightly expanded its scope from "federal buildings" to "federal property" so as to include, for example, Army posts. See S. Rep. No. 93-937, at 5-7. Given its extensive

⁷ See, e.g., S. Rep. No. 93-937, at 3 ("The bill requires that a priority be given to the establishment of blind operated vending facilities on Federal property[.]"); id. at 10 ("[T]he Randolph-Sheppard program was created to be a federal program."); id. at 12 ("The Randolph-Sheppard Act authorizes blind persons licensed by State agencies to operate vending stands on Federal property"); id. at 14 ("State agencies are urged to cooperate fully with the secretary in implementing the law and regulations and to actively seek out vending opportunities for blind licensees on all Federal property."). (All emphases added.)

analysis of this slight expansion of the law's scope, Congress would not have failed to so much as mention a change that would exponentially expand the reach of the RSA to include virtually all state and county property.⁶

In 1972, Congress asked the General Accounting Office (GAO) to determine if blind vendors were receiving a preference as the 1954 Amendments required. The GAO's subsequent report "concluded that the program was languishing at the federal level while flourishing at the state level and in the private sector." Texas State Comm. for the Blind v. United States, 6 Cl. Ct. 730, 733 (1984). The GAO report "was a major catalyst for enacting the 1974 Amendments." Id. at 732.

It is illogical to conclude that in enacting the 1974 amendments Congress intended to interfere with highly successful state programs by bringing them under the control of a poorly performing federal program. On the contrary, and consistent with the GAO report, Congress sought to improve the effectiveness of the federal RSA by making revisions to the law to improve the performance of the federal program. Congress obviously did not intend to expand the federal RSA to include state property.

The 1974 amendments included the finding that, "the potential exists for doubling the number of blind operators on Federal and other property under the Randolph-Sheppard program

⁶ According to the State's reply brief, at least forty-eight states, the District of Columbia, Puerto Rico, and the Virgin Islands have established licensing agencies under the federal RSA.

within the next five years[.]” Pub. L. No. 93-651, § 201, 89 Stat. at 2-7; see also S. Rep. No. 93-937, at 13 (amendments can allow for “doubling within five years” of their enactment.) In 1974 there were a total of 3,307 blind vending stands throughout the United States. S. Rep. No. 93-937, at 10. Only 874 of those stands were located on federal property. Id. Thus, had Congress intended to bring non-federal properties within the ambit of the federal RSA program, it would have instantaneously nearly quadrupled the size of the federal program. There would have been no need to wait five years to “potential[ly]” double the size of the program.

Congress “urged [SLAs] to cooperate fully with the Secretary in implementing the law and regulations and to actively seek out vending opportunities of blind licensees on all Federal property.” Id. at 14 (emphasis added). Officials controlling federal property were expressly admonished to “work cooperatively with [federal officials and SLAs] to foster the expansion of the Randolph-Sheppard program to its fullest potential as rapidly as possible.” Id. Congress also explicitly sought to ensure the “uniform treatment of blind vendor’s [sic] by all Federal agencies” in order to assure the program’s vitality and expansion. Id. at 27. Neither SLAs nor any federal officials were asked or told to take any action with regard to vending facilities or opportunities on state or county properties.

The legislative history of the 1974 amendments clearly demonstrates that Congress was unmistakably addressing the

resolution of vendor disputes arising from federal, not state, property. This legislative history is in perfect accord with the express language of the federal RSA.

C. No Federal or State Case Has Ever Held That the Federal RSA Applied to State and County Property

Until today, no federal or state court has ever held that a state's participation in the federal RSA divests the courts of that state of jurisdiction over state claims involving state property under a state RSA. Nor has any court ever held that the federal RSA confers jurisdiction upon federal courts for state statutory claims arising from state property. Prior precedent has uniformly described the operation of the federal RSA in precisely the opposite fashion. See, e.g., Minnesota Dep't of Jobs & Training v. Riley, 18 F.3d 606, 608 (8th Cir. 1994) (the [federal RSA] provides the framework for . . . giving blind persons licensed by state agencies priority to operate vending facilities on all federal property (citing 20 U.S.C. § 107(a)-(b)) (emphasis added).

No state decision has ever held that the federal RSA encompasses all state and county property. To the contrary, numerous state courts have exercised subject matter jurisdiction in cases involving blind vendors operating on state or county property. See infra Part VII. Furthermore, no other state court has ever dismissed a case for lack of subject matter jurisdiction over a state RSA claim involving state or county property. With all due respect, no state has held as the majority does, because

as indicated above, the majority's construction of the federal RSA has no foundation in the statute's language or legislative history but rests on an erroneous view of both.

D. The Majority's "Overall Scheme" Analysis is Faulty Under Principles of Statutory Construction

The majority "fully recognize[s] that the federal RSA . . . involves the operation of a 'vending facility on any federal property.'" Majority op. at 28. However, in the very same paragraph that this recognition is acknowledged, the majority draws an inconsistent conclusion that "it is the overall scheme of the federal RSA that dictates adherence to the federal adjudication path even in those situations involving non-federal property." Id. (emphases added).

The majority reaches this conclusion because it extends the definition of "other property," as set forth in the C.F.R., beyond its plain application. Majority op. at 42-43. Under the federal RSA, "other property" is defined as:

Property which is not federal property and on which vending machines are established or operated by the use of any funds derived in whole or in part, directly or indirectly, from the operation of vending facilities on any federal property.

34 C.F.R. § 395.1(n) (emphasis added). Thus, "other property" means that if funds derived from the operation of vending facilities on any federal property are used to establish or operate a blind vendor facility on non-federal property, then the federal RSA applies.

But in the instant case there is absolutely no evidence in the record to conclude that the City received funds from

federal property and used those funds to establish or operate vending facilities on City property. It is also undisputed that the State did not operate vending facilities on City property. Hence, any reliance by the majority on the federal RSA definition of "other property" in 34 C.F.R. § 395.1(n) is without factual basis in the record.

Additionally, the majority's reliance on the "overall scheme of the federal RSA," majority op. at 28, contradicts precise definitions in the law itself. "It is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and . . . no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." Coon v. City & County of Honolulu, 98 Hawai'i 233, 259, 47 P.3d 348, 374 (2002) (emphasis added).

The majority's holding that state courts are without subject matter jurisdiction necessarily requires a conclusion that Hawai'i's state and county properties fall within the definitional parameters of the federal RSA. This construction of the statute would render the limitations within the definitions of "federal property" and "other property" nugatory, contrary to the fundamental principle of statutory construction that no part

of a statute shall be construed as superfluous or void.⁹ Indeed, under "the entire scheme" interpretation of the majority, "federal property" would include all state and county property in all participating states.¹⁰

E. HRS § 347-12.5 Does Not Bring Hawai'i State Property Within the C.F.R.'s Definition of "Other Property"

The majority also places great reliance upon HRS § 347-12.5 as evidencing the "strong implication that the state and county properties fall within 'other property' because income generated from state and county vending facilities as well as federal facilities are deposited into one central account, from which funds may be used for the benefit of blind vendors in Hawai'i." Majority op. at 42-43. In other words, the majority contends that the enactment of HRS § 347-12.5 established that all state and county property would fall within the parameters of the federal RSA. Nothing in the legislative history of the statute indicates that the legislature intended any such effect.¹¹

⁹ Such construction would also violate the maxim of *expressio unius est exclusio alterius*. See Black's Law Dictionary 581 (6th ed. 1990) (defining "*expressio unius est exclusio alterius*" as "[w]hen certain . . . things are specified in a law, . . . an intention to exclude all others from its operation may be inferred"). Here, the intention of the definitional limitation to exclude all others would be nullified by the inclusion of all state and county property.

¹⁰ To support its "overall scheme" analysis, the majority quotes from Delaware Dep't of Health & Soc. Servs. v. U.S. Dep't of Educ., 772 F.2d 1123 (3d Cir. 1985), for the implication that the federal vending program applies "to both federal and 'other buildings in [the] state.'" Majority op. at 30. The statutory language quoted in Delaware Dep't of Health & Soc. Servs., Pub. L. No. 74-732, was repealed over fifty years ago and replaced with the terms "federal property" and "other property." See 68 Stat. 663 (1954).

¹¹ See supra note 1.

Instead, HRS § 347-12.5 merely created a revolving account. Significantly, the income generated from vending machines on state and county properties and the income generated from vending facilities on federal property must still, by law, be kept and distributed to blind vendors separately. Under the HAR, income from vending machines on federal property accrues only to blind vendors operating competing vending facilities on federal property.¹² See HAR § 17-402-17(n)(1). Likewise, income from vending machines on state property accrues only to blind vendors operating vending facilities on state property.¹³ See HAR § 17-402-17(n)(2). If income from both state and federal properties was simply comingled into one account without being separately accounted for, it would be impossible for the DHS to distribute income as required by the HAR.

¹² Section 17-402-17(n)(1) states:

Vending machine income from vending machines on federal property, which are in reasonable proximity to and in direct competition with any blind vendor, which has been disbursed to the state licensing agency, or instrumentality of the United States under the vending machine income-sharing provision of the Randolph-Sheppard Vending Stand Act shall accrue to each blind [sic] federal property in an amount not to exceed the average net income of the total number of blind vendors within the State, as determined each fiscal year

(Emphases added.)

¹³ Section 17-402-17(n)(2) states:

Vending machine income from vending machines on state, city, or county property, which are in reasonable proximity to and in direct competition with any blind vendor, shall accrue to each blind vendor operating a vending facility on such property. The state licensing agency shall retain vending machine income disbursed on all other state, city, or county property.

(Emphases added.)

The rules do not indicate in any fashion, as the majority asserts, that federal funds are used to "provide management services, maintain and replace equipment, and purchase new equipment for vending facilities on non-federal property." Majority op. at 43. Rather, the rules simply outline the acceptable uses of funds collected from vending facilities. They also expressly require that funds generated on federal property and funds generated on state property are to be accounted for, distributed, and utilized separately.

In addition, less than a year prior to the adoption of HRS § 347-12.5, this court decided Hawaii Blind Vendors. That case explicitly held that state courts had jurisdiction over claims brought under HRS § 102-14 involving state property. Id. at 370-71, 791 P.2d at 1264; see also infra Part VI. It would have been anomalous for the legislature to have enacted a fundamental change in state law, superseding the decision in Hawaii Blind Vendors and effecting a federal claim for all state and county property, without having indicated such intent in either the text of HRS § 347-12.5 or its committee reports.

But there are even more fundamental flaws with the majority's conclusion. The mingling of income into one account generated from state, county, and federal properties does not satisfy the C.F.R.'s definition of "other property." The definition of "other property" requires the property in question to be property "on which vending machines are established or operated by the use of any funds derived in whole or in part"

from the operation of vending facilities on any federal property. 34 C.F.R. § 395.1(n) (emphasis added). Here, the record shows unmistakably that the claims in this case did not involve state or county property where the state licensing agency had established or operated vending machines.

The final flaw with the majority's reliance on HRS § 347-12.5 is that, even if this statute actually had the effect of bringing state and county properties within the federal RSA, it would not affect the litigation in this case. It would only have the effect of allowing a new federal claim for the Plaintiffs herein. Absent explicit divestment of the circuit courts' jurisdiction, see supra Part II(D), HRS §§ 102-14 and 661-1 would still allow a state claim to be brought under state law in state courts. That, of course, is what the Plaintiffs did in this case.

F. The HAR's Inclusion of a Definition of "Other Property" Fails to Support the Majority's Analysis

The majority also argues that, "[i]f we were to accept the dissent's flawed theory that the federal RSA applies to federal property and the Hawai'i RSA applies to state and county property, there would have been no need for the DHS to define the phrase 'other property'." Majority op. at 44. The majority fails to recognize that HAR § 17-402-17 contains sections that apply specifically and exclusively to federal property, sections that apply specifically and exclusively to non-federal property, and sections that apply to both. Accordingly, the HAR includes a

definition of "other property" in order to distinguish federal property from non-federal property.

The inclusion of this definition, in fact, undermines the majority's argument as it demonstrates that the DHS needed to differentiate between sections of the HAR that apply to federal property and those that apply to non-federal property. Indeed, under the majority's line of reasoning, if the federal RSA applies to all properties on which blind vendor facilities are operated, there would have been no need for such a distinction.

IV. THE FEDERAL ADJUDICATION PATH, EVEN IF APPLICABLE, DOES NOT LIMIT JUDICIAL REVIEW TO FEDERAL COURTS

The majority holds that "the overall scheme of the federal RSA dictates adherence to the federal adjudication path even in those situations involving non-federal property." Majority op. at 28. This holding is at odds with the weight of authority and is not supported by state or federal law. Even if one accepts this conclusion, however, the Plaintiffs' case is still properly before this court.

As characterized by the majority, the federal adjudication path consists of: "(1) a full evidentiary hearing at the state level before the SLA; (2) an opportunity to appeal the SLA decision to the USDOE for review by an arbitration panel; and, finally, (3) judicial review of the USDOE's arbitration panel decision in the federal courts[" Majority op. at 10 (emphasis added). The majority fundamentally misapprehends both the nature and the effect of the federal adjudication path.

A. The Federal RSA Allows Judicial Review to Take Place in Any "Court of Competent Jurisdiction"

The majority maintains that judicial review under the federal RSA must take place solely and exclusively in the federal courts. Majority op. at 10. The federal RSA, however, does not limit judicial review to the federal courts. Instead, the federal RSA states merely that the arbitration decisions of the Secretary are subject to judicial review under the APA. See 20 U.S.C. § 107d-2(a). Under the APA, judicial review of agency decisions may take place in any "court of competent jurisdiction." 5 U.S.C. § 703. Judicial review, therefore, may take place in any court with jurisdiction over the claim. This includes state courts.

B. Federal Case Law Specifically Holds That Jurisdiction in State Courts is Valid Under the Federal RSA

Both the Sixth and Ninth Circuits have held that judicial review of arbitration decisions may take place in state courts. In other words, state courts are "courts of competent jurisdiction" for the purposes of the federal RSA. In Premo, the court said, "[T]he Act does not specifically designate federal courts as the proper tribunals for the enforcement of such awards. Blind vendors might be able to bring suit in state court to enforce arbitration awards." 119 F.3d at 770 (emphasis added). Similarly, the Sixth Circuit, in Tenn. Dep't of Human Servs., said of judicial review of a USDOE arbitration award, "A suit on the judgment in state court also is a possibility[.]" 979 F.2d at 1169 n.4 (emphasis added).

The Sixth and Ninth Circuits both caution that suits in state court to enforce arbitration awards under the federal RSA may bring into play state doctrines of immunity. Premo, 119 F.3d at 770, Tenn. Dep't of Human Servs., 979 F.2d at 1169 n.4. In the instant case, however, there is no issue of state immunity from suit in the state courts. As discussed in Part II(D), the State has waived its sovereign immunity to suit for alleged violations of state law under HRS § 661-1, which vests jurisdiction for such a suit in the circuit courts of our state. Therefore, the circuit courts of this state are a proper component of the federal adjudication path as outlined by the federal RSA.

C. The RSA Statutes of Several States Allow for Judicial Review of Blind Vendors' Claims to Take Place in State Courts

The Randolph-Sheppard Acts of Colorado, Kentucky, and Ohio explicitly provide that blind vendors may seek judicial review in state court if they are dissatisfied with the results of a full evidentiary hearing conducted before the SLA. These states allow aggrieved vendors to seek judicial review as an alternative to applying for arbitration before the Secretary.¹⁴

¹⁴ The relevant provisions of the Colorado regulations read:

5. If a blind operator is dissatisfied with the decision rendered after a full evidentiary hearing, he or she may request . . . that an arbitration panel be convened by filing a complaint with the Secretary of the Department of Education.

6. If a blind operator is dissatisfied with the decision rendered after a full evidentiary hearing, he or she may also apply for a judicial review by the filing of an action for review in the appropriate State District Court[.]

See 12 Colo. Code Regs. § 2513-1(9.411.2) (2006); 782 Ky. Admin. Regs 1:010 § 7(2) and (3) (2006); Ohio Admin. Code 3304:1-21-13 (2005).

Other states, in their Randolph-Sheppard Acts, also deviate from the federal adjudication path as conceived by the majority. The California RSA, for instance, mandates state-controlled arbitration procedures in certain situations involving state property.¹⁵ See Cal. Code Regs. tit. 9 § 7216 (2005). Ohio's RSA even more explicitly distinguishes between adjudication procedures for state and federal property by

12 Colo. Code Regs. § 2513-1(9.411.2) (2006) (emphasis added).

The relevant provision of the Kentucky regulations reads:

(c) A vendor who is dissatisfied with the final agency decision entered in the evidentiary hearing may seek judicial review in accordance with the provisions of KRS Chapter 13B.

782 Ky. Admin. Regs 1:010 § 7(2) (2006) (emphasis added).

The relevant provision of the Ohio regulations reads:

(n) The licensee or applicant receiving the order shall also receive a statement that the order may be appealed in accordance with section 119.12 of the Revised Code. The licensee shall also be informed that a complaint may be filed as provided by section 107d of Chapter 6A of Title XX of the U.S.C.

Ohio Admin. Code 3304:1-21-13 (2005).

¹⁵ The California RSA provides in relevant part:

(d) In the event the Director determines that any Federal agency having control of Federal property fails to comply with the applicable provisions of law and regulations and after all informal attempts to resolve the issues have failed, the Director may file a complaint with the Secretary, who may convene an arbitration panel. If the failure to comply relates to State property, the Director shall establish an arbitration panel, in accordance with Section 19627, Welfare and Institutions Code, to arbitrate the dispute.

Cal. Code Regs. tit. 9 § 7216 (2005).

expressly providing that agency decisions involving state property may be directly appealed in state court.¹⁶ Such provisions directly undermine the majority's assertion that "the overall scheme of the federal RSA . . . dictates adherence to the federal adjudication path even in those situations involving non-federal property." Majority op. at 28.

In order "to gain access to federal properties for their blind vendors to operate, [participating states] must submit a state vending facility plan that conforms with the requirements of the federal RSA and its regulations." Majority op. at 27. Section 395.4 of Title 34 of the C.F.R. mandates that all rules promulgated by an SLA must have been approved by the Secretary as part of the SLA application process and must be adequate to assure the effective conduct of the State's vending facility program.

Pursuant to this regulation, the Secretary must have reviewed and approved the sections of the Colorado, Kentucky,

¹⁶ The relevant portion of the Ohio code provides that:

If a dispute concerning the establishment of a suitable vending facility arises or if the bureau of services for the visually impaired determines that a department, agency, or governmental unit in control of governmental property has not complied with [the Ohio RSA], an administrative hearing shall be held The board's adjudication of the dispute shall be conducted in accordance with Chapter 119 of the Revised Code, and any order issued by the board shall be binding on both parties. An order issued by a board constituted under this section may be appealed in accordance with the procedure specified in section 119.12 of the Revised Code.

Ohio Rev. Code Ann. § 3304.32 (LexisNexis 2006). Ohio Rev. Code Ann. § 3304.28 defines "governmental property" as "any real property, building, or facility owned, leased, or rented by the state"

California, and Ohio regulations allowing for judicial review in state court in lieu of arbitration before the Secretary. The only logical conclusion, therefore, is that state court review of a disputed evidentiary hearing is acceptable under the federal RSA as interpreted by the USDOE. This judicial review may take place prior to, or in place of, arbitration before the Secretary.

The majority's characterization of the federal adjudication path neither accounts for nor allows for any of these various state-law permutations of allowable grievance procedures. If the majority's understanding of the federal RSA is correct, all such provisions would be rendered invalid despite the fact that there is no indication that any of these provisions has ever been challenged. Clearly, the majority's narrow conception of the adjudication procedures allowed under the federal RSA is incorrect. As the foregoing indicates, the federal RSA does not supersede state court jurisdiction of claims brought under state statutes.

V. CONFERRING JURISDICTION OF STATE CLAIMS
TO FEDERAL COURTS WOULD VIOLATE HAWAII LAW
AND WELL ESTABLISHED PRINCIPLES OF AGENCY LAW

Neither HRS § 102-14 nor HRS § 347-12.5 can be read as delegating to the DHS the authority to divest the circuit courts of their jurisdiction over claims involving state law. Nevertheless, the majority asserts that HRS § 347-5 has delegated such authority to the DHS. Majority op. at 37 n.21. Section 347-5 reads as follows:

The [DHS] may, as the agency of the State for the assistance

of blind or visually handicapped persons, do all things which will enable the State and the blind and the visually handicapped in the State to have the benefits of all federal laws for the benefit of blind and visually handicapped persons.

The majority's conclusion is flawed for three reasons:

(1) the federal RSA does not require states to follow the federal adjudication path for disputes involving vending operations on state property;¹⁷ (2) such a delegation by the legislature conflicts with the nondelegation doctrine adopted in this state; and (3) any divestment of jurisdiction by the DHS contravenes the legislature's express dictate that the DHS "adopt rules in accordance with chapter 91, necessary for the implementation of this section." HRS § 102-14(b).

A. Under the Hawaii Constitution, Only the Legislature is Empowered to Establish Subject Matter Jurisdiction for Hawaii Circuit Courts

Under the legislative power granted to it by article III, section 1 of the Hawaii Constitution, "the legislature has the power to establish the subject matter jurisdiction of our state court system."¹⁸ The legislature has utilized such power by enacting HRS § 603-21.5." Sherman v. Sawyer, 63 Haw. 55, 57, 621 P.2d 346, 348 (1980).

HRS § 603-21.5 gives the circuit court subject matter jurisdiction over civil actions and proceedings. Thus, the circuit court has jurisdiction over all civil causes of action unless precluded by the State Constitution or by statute.

¹⁷ See supra Part II. As previously discussed, Eleventh Amendment considerations and the language of the federal RSA would also preclude federal court jurisdiction over a state law RSA claim.

¹⁸ Article VI, section 1 of the Hawaii Constitution provides in relevant part that, "[t]he several courts shall have original and appellate jurisdiction as provided by law."

Id. at 57, 621 P.2d at 348-49 (emphasis added). HRS § 661-1 gives the circuit courts jurisdiction over "[a]ll claims against the State founded upon any statute of the State." Thus, it is clear that, absent express legislative action to the contrary, the circuit courts have jurisdiction over the Plaintiffs' claim. Nothing in the legislative history of the Hawai'i RSA indicates that the legislature intended to divest the circuit courts of that jurisdiction.¹⁹

There are grave doubts, moreover, about whether the legislature has the power to delegate the authority to divest the circuit courts of jurisdiction over Plaintiffs' claims. Hawai'i has adopted the non-delegation doctrine as part of its constitutional law. In re Kauai Elec. Div., 60 Haw. 166, 181, 590 P.2d 524, 535 (1978). Under this doctrine, the legislature "is not permitted to abdicate or to transfer to others the essential legislative functions" with which it has been vested by

¹⁹ See Hse. Stand. Comm. Rep. No. 431, in 1981 House Journal, at 1117-18; Hse. Stand. Comm. Rep. No. 724, in 1981 House Journal, at 1240; Sen. Stand. Comm. Rep. No. 668, in 1981 Senate Journal, at 1200-01; Sen. Stand. Comm. Rep. No. 885, in 1981 Senate Journal, at 1295; Hse. Conf. Comm. Rep. No. 45, in 1981 House Journal, at 918; Sen. Conf. Comm. Rep. No. 47, in 1981 Senate Journal, at 927-28; Sen. Stand. Comm. Rep. No. 253, in 1987 Senate Journal, at 998-99; Sen. Stand. Comm. Rep. No. 580, in 1987 Senate Journal, at 1135; Hse. Stand. Comm. Rep. No. 912, in 1987 House Journal, at 1533-34; Hse. Stand. Comm. Rep. No. 1071, in 1987 House Journal, at 1619; Sen. Stand. Comm. Rep. No. 955, in 1993 Senate Journal, at 1123; Sen. Stand. Comm. Rep. No. 1178, in 1993 Senate Journal, at 1199; Sen. Conf. Comm. Rep. No. 140, in 1993 Senate Journal, at 803; Hse. Stand. Comm. Rep. No. 388, in 1993 House Journal, at 1125; Hse. Stand. Comm. Rep. No. 713, in 1993 House Journal, at 1267; Sen. Stand. Comm. Rep. No. 2717, in 1994 Senate Journal, at 1083-84; Sen. Stand. Comm. Rep. No. 2832, in 1994 Senate Journal, at 1121; Hse. Stand. Comm. Rep. No. 319-94, in 1994 House Journal, at 980; Hse. Stand. Comm. Rep. No. 815-94, in 1994 House Journal, at 1187; Sen. Stand. Comm. Rep. No. 2362, in 1996 Senate Journal, at 1118-19; Sen. Stand. Comm. Rep. No. 2739, in 1996 Senate Journal, at 1274-75; Hse. Stand. Comm. Rep. No. 356-96, in 1996 House Journal, at 1171-72; Hse. Stand. Comm. Rep. No. 639-96, in 1996 House Journal, at 1171-72; Hse. Conf. Comm. Rep. No. 121, in 1996 House Journal, at 1019-20.

constitutional authority." Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974). The Hawai'i Constitution endows the legislature with the authority to establish subject matter jurisdiction. Sawyer, 63 Haw. at 57, 621 P.2d at 348. It is implausible that the authority to establish or divest jurisdiction is not an "essential legislative function," Nat'l Cable Television Ass'n, 415 U.S. at 342, that the legislature would be precluded from delegating to an administrative agency.

While neither the U.S. Supreme Court nor this court has specifically addressed the question of whether agency regulations may divest courts of jurisdiction granted to them by the legislature, several federal courts have held that they may not. See Miller v. FCC, 66 F.3d 1140, 1144 (11th Cir. 1995) ("It is axiomatic that Congress . . . could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction[.]"); United States v. Mitchell, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) (questioning whether the Constitution "would permit Congress to delegate such a core legislative function as its control over federal court jurisdiction to any agency or commission").

The most logical and compelling position for this court to take would be for it to hold that the legislature lacks the constitutional authority to delegate to an administrative agency the authority to establish subject matter jurisdiction. Thus, even if the legislature did intend to delegate such authority to the DHS, DHS would be unable to divest the circuit courts of

jurisdiction over the Plaintiffs' claims by virtue of constitutional law.

B. Any Agency Rule Establishing Jurisdiction in Federal Court Would be Ultra Vires and Invalid

Even if this court is unwilling to declare that agency rules may not divest state courts of statutorily-granted jurisdiction, nevertheless, the DHS lacked the authority to do so under the Hawai'i RSA. The majority asserts that HAR § 17-402-17(j) imports the federal adjudication path into state law thereby divesting state courts of jurisdiction to hear claims under the Hawai'i RSA. Majority op. at 43-45. Assuming, arguendo, that this is the actual intent of HAR § 17-402-17(j), such application of the rule would violate state law and well-established principles of agency law. The legislature, in HRS § 102-14(b), mandated that the DHS adopt rules in accordance with HRS chapter 91. Therefore, any rule adopted by the DHS that conflicts with chapter 91 must be declared invalid.

"It is axiomatic that agency rule-making authority arises from a legislative grant of power. Absent legislative authority, an agency has no power to act." Foytik v. Chandler, 88 Hawai'i 307, 316, 966 P.2d 619, 628 (1998). "[T]he court shall declare [an agency rule] invalid if it finds that it . . . exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures." HRS § 91-7(b) (1993) (emphasis added). Here, the Hawai'i RSA does not give the DHS the power to confer the circuit court's

jurisdiction on the federal district courts. Thus, if HAR § 17-402-17(j) attempts to divest the state courts of their jurisdiction, it is invalid.

There is nothing in HRS § 102-14 that indicates the legislature delegated to the DHS the authority to divest the circuit courts of subject matter jurisdiction for a claim filed under the Hawai'i RSA. Indeed, in HRS § 102-14(b), the legislature required the DHS to "adopt rules in accordance with [c]hapter 91, necessary for the implementation of this section." See also HRS § 102-14(d).

Chapter 91 specifically includes a provision that allows a claimant to appeal an adverse ruling by an agency to the circuit court. See HRS § 91-14. Thus, the legislature expressly provided that subject matter jurisdiction over a claim under the Hawai'i RSA by an aggrieved claimant would be in state circuit court. Nothing in the legislative history of the statute indicates that the legislature intended otherwise.²⁰

When the legislature authorized the DHS to promulgate rules, it could not delegate to the DHS the power to establish a rule contrary to its enabling law. "[A]n administrative rule cannot contradict or conflict with a statute it attempts to implement." Hyatt Corp. v. Honolulu Liquor Comm'n, 69 Haw. 238, 241, 738 P.2d 1205, 1206-07 (1987). Thus, the DHS was vested with the power to carry into effect the legislative will as

²⁰ See supra note 18.

expressed in the statute." Part of that express will was that regulations adopted by the DHS be in accord with HRS chapter 91. The legislature did not limit this mandate to select portions of chapter 91. Hence, any rule adopted by the DHS that contradicts the provisions of chapter 91 is invalid because it conflicts with the explicit language of HRS § 102-14(b). Id.

Moreover, "the legislature is presumed to know the law when enacting statutes[.]" Agustin v. Dan Ostrow Constr. Co., 64 Haw. 80, 83, 636 P.2d 1348, 1351 (1981). Thus, the legislature, in specifically referencing chapter 91, must be presumed to have been aware that chapter 91 contains no provision giving a state agency the power to divest the circuit courts of jurisdiction. The legislature must also have been cognizant of HRS § 91-14(a), which provides that "[a]ny person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review thereof under this chapter." (Emphasis added.) In turn, HRS § 91-14(b) provides that judicial review shall take place in the circuit court.

The legislature mandated in HRS § 102-14(b) that rules were to be adopted in accordance with chapter 91. Chapter 91 specifically provides for judicial relief in the "circuit court" for persons aggrieved by an agency declaratory ruling or a decision in a contested case. See HRS § 91-7(a). The legislature has, therefore, vested jurisdiction in the circuit court for a claim arising under the Hawai'i RSA. Any contention that HAR § 17-402-17 divests the circuit court of that

jurisdiction is in direct conflict with the plain language of the statute.

The majority argues, however, that the provisions of HRS chapter 91 can be divided into separate rule-making and adjudicatory provisions. Majority op. at 38-39. The majority then asserts that, "had the legislature intended that the adjudicatory provisions of [c]hapter 91 be followed, it would have expressly indicated such intent" Majority op. at 39. It is, however, a cardinal rule of statutory interpretation that:

[T]he starting point in statutory construction is to determine the legislative intent from the language of the statute itself. Indeed, absent any constitutional obstacles in applying the law, this court's chief duty is to ascertain and give effect to the legislature's intention to the fullest degree, which is obtained primarily from language contained in the statute itself. When a law is enacted, a presumption exists that the words in the statute express the intent of the legislature.

Morgan v. Planning Dep't. County of Kaua'i, 104 Hawai'i 173, 185, 86 P.3d 982, 994 (2004) (citations, internal quotation marks, and brackets omitted).

Also, "[t]he words of a statute are to be generally understood in their most common, general, or popular definition." Singleton v. Liquor Comm'n, County of Hawai'i, 111 Hawai'i 234, 243, 140 P.3d 1040, 1023 (2006) (citing HRS § 1-14). "Where a term is not statutorily defined[, a court] may rely upon extrinsic aids to determine such intent. Legal and lay dictionaries are extrinsic aids which may be helpful in discerning the meaning of statutory terms." Id. at 243-44, 140

P.3d at 1023-24.

"Accordance" is defined as "agreement; conformity." Random House Webster's Unabridged Dictionary 12 (2d ed. 1998). The legislature's mandate in HRS § 102-14(b) that rules be adopted "in accordance with [c]hapter 91," (emphasis added), must, therefore, be read as requiring that the rules adopted agree or conform with chapter 91. The legislature did not distinguish in HRS § 102-14(b) between the rule-making and the adjudicatory provisions of the chapter. Nor did the legislature state that the rules should be adopted in accordance with only the rule-making provisions of chapter 91 as the majority proposes. And, nothing in the legislative history of HRS § 102-14 indicates that the legislature intended to limit the scope of its mandate.²¹ Instead, on its face, the statute directs the DHS to adopt rules that agree or conform to chapter 91, which can only reasonably be construed as referring to the entire chapter, including those sections establishing adjudicatory procedures.

Nonetheless, the majority speculates that the legislature did not mean what it expressly said, but intended something different, something not stated in the statute itself. The majority lists a number of statutes where the legislature was silent as to the adoption of chapter 91's adjudicatory provisions. Majority op. at 40-41. The majority then asserts that this silence is to be read as meaning that "the agency has

²¹ See supra note 18.

the discretion to decide whether to adopt the adjudicatory provisions of HRS chapter 91 when promulgating its administrative rules." Id. To the contrary, however, in each of the listed examples the administrative agency established rules in conformity with both the rule-making and the adjudicatory provisions of chapter 91. See Hawaiian Homes Commission Act § 222 (Supp. 2005); HAR § 10-5-32; HRS § 448B-3(2) (Supp. 2005); HAR § 11-79-13f.

Finally, the majority's argument presumes that the legislature's failure to expressly mandate that the DHS adopt the adjudicatory provisions of chapter 91 automatically renders those provisions inapplicable to the Hawai'i RSA. This is simply not the case. The adjudicatory provisions of chapter 91 do not depend on the adoption of agency rules to become operative. Rather, chapter 91 expressly provides the jurisdictional route to the circuit court following a final agency decision. See HRS § 91-14(a). No "adjudicatory rule" was required to be adopted in order to enable an aggrieved party to exercise its statutory right to appeal to the circuit court pursuant to HRS § 91-14(a).

Indeed, if the majority's understanding of the relationship between chapter 91, HRS § 102-14, and HAR § 17-402-17(j) were correct, numerous state agencies would have the blanket power to eliminate an aggrieved person's right to appeal an adverse final decision to the circuit court simply by repealing or amending their rules. Additionally, the rules adopted by the DHS pursuant to HRS § 102-14(b) would not be

subject to challenge by an aggrieved person. See HRS § 91-7. A statutory interpretation that eliminates the ability to challenge in state court a state agency rule adopted pursuant to state law "produces an absurd [and] unjust result." In re Wai'ola O Moloka'i, 103 Hawai'i 401, 425, 83 P.3d 664, 668 (2004).

The plain language and legislative history of HRS § 102-14(b) neither leads to nor supports such a result. Any contention that state courts have no jurisdiction with respect to HRS § 102-14(b) is belied by chapter 91 and by fundamental principles of statutory construction.

VI. THE MAJORITY ERRONEOUSLY OVERRULES A HAWAII SUPREME COURT DECISION THAT HAD EXPRESSLY HELD THAT HAWAII COURTS HAVE JURISDICTION OVER A STATE RSA CLAIM

As in this case, Hawaii Blind Vendors involved state claims brought under the Hawai'i RSA, HRS § 102-14. In Hawaii Blind Vendors, this court ruled that state courts have jurisdiction over state RSA claims. That decision is today overruled on the grounds that "subject matter jurisdiction was never raised," and, therefore, the "court was not given the opportunity to examine the overall federal scheme and its relationship to the Hawai'i RSA." Majority op. at 54. That, however, cannot be correct.

In Hawaii Blind Vendors, Maka'ala, a non-profit corporation that gave employment preference to handicapped persons, leased airport space for a retail concession. 71 Haw. at 370, 791 P.2d at 1263-64. The DHS renewed Maka'ala's airport lease without providing notice of the vacancy or an opportunity

to apply for the vacancy to blind or visually impaired vendors. Id. The beneficiaries of the blind vendor program brought an action in the circuit court of the first circuit claiming violations of the substantive and procedural law governing the priority program. Id. at 368, 791 P.2d at 1263. The DHS contended that the beneficiaries were required to exclusively bring their action through a DHS administrative hearing and could not bring an original action in the circuit court for injunctive and declaratory relief. Id. at 370-71, 791 P.2d at 1264. The circuit court granted summary judgment against the beneficiaries and they appealed. Id. at 368, 791 P.2d at 1263.

This court concluded that it was not necessary to resolve the question of whether the beneficiaries could bring an original action in the circuit court of the first circuit for the relief sought, and stated as follows:

[W]e need not decide this issue. Under the doctrine of primary jurisdiction, when a court and agency have concurrent original jurisdiction to decide issues which have been placed within the special competence of an administrative agency, the judicial process is suspended pending referral of such issues to the administrative body for its views. Thus, the DHS agency process, if available, is the appropriate forum for an initial determination of the issues raised in this case.

Id. at 371, 791 P.2d at 1264 (emphasis added) (internal citation omitted). Accordingly, this court found that the circuit court had concurrent original jurisdiction with the DHS to resolve the action brought under HRS § 102-14 and HAR § 17-402-17. Id. Based upon the conclusion of "concurrent original jurisdiction to decide issues" with the DHS, the case was not dismissed; instead

it was duly remanded to the DHS for a full and fair agency hearing "for an initial determination of the issues raised in the case."²² Id. (emphasis added). The case was remanded for an "initial determination" precisely because following the agency decision, the circuit court would have had jurisdiction to consider an appeal from the DHS's decision.

Any contention that this court did not consider subject matter jurisdiction is belied by this court's holding that the circuit court had concurrent jurisdiction to decide the case. "Concurrent jurisdiction" is defined as follows:

The jurisdiction of several different tribunals, each authorized to deal with the same subject-matter at the choice of the suitor. Authority shared by two or more legislative, judicial, or administrative officers or bodies to deal with the same subject matter.

Black's Law Dictionary 291 (6th ed. 1990) (emphasis added).

"Subject matter jurisdiction" is defined as follows:

A court's power to hear and determine cases of the general class or category to which proceedings in question belong; the power to deal with the general subject involved in the action.

Id. at 1425 (emphasis added).

This court's conclusion that the circuit court had concurrent jurisdiction to decide the issues raised in Hawaii Blind Vendors was unequivocally a determination of subject matter jurisdiction over the case. In order to conclude concurrent jurisdiction, the court in Hawaii Blind Vendors had to have determined the question of subject matter jurisdiction and

²² In Hawaii Blind Vendors, 71 Haw. at 371-74, 791 P.2d at 1264-66, this court also determined that the ninety day time bar of HAR Rule 17-400-4(2)(G) did not bar the beneficiaries' action.

decided that the circuit court had jurisdiction over the statutory claim.

Furthermore, in order to dismiss the instant case for lack of subject matter jurisdiction, the majority is compelled to conclude that Hawaii's legislature intended to confer state jurisdiction over state claims to federal court. However, if this had been the legislative intent, then the legislature would have acted in response to this court's decision in Hawaii Blind Vendors, as HRS § 102-14 was cited as the authorizing statute for HAR § 17-402-17, which was the basis for a state administrative hearing. Cf. Gorospe v. Matsui, 72 Haw. 377, 381, 819 P.2d 80, 82 (1991) (where the legislature fails to act in response to our statutory interpretation, the consequence is that the statutory interpretation of the court must be considered to have the tacit approval of the legislature). Nothing has been enacted into law since the decision in Hawaii Blind Vendors that indicates the legislature intended to supersede the decision in that case or that the case was wrongly decided. Nevertheless, today the majority overrules that decision based upon an erroneous construction of the federal RSA as set forth herein.

VII. NO STATE COURT HAS EVER DISMISSED A CASE FOR LACK OF SUBJECT MATTER JURISDICTION OVER A STATE RSA CLAIM, AND CONVERSELY, NUMEROUS STATE APPELLATE COURTS HAVE EXERCISED JURISDICTION IN SUCH CASES

It bears repeating that only federal law can provide the basis for federal jurisdiction. As mentioned before, in the majority's view, it is the "entire scheme" of the federal RSA

that divests state courts of jurisdiction over state claims involving state property. The consequence of this ruling is that since nearly all states participate in the federal RSA program, the federal RSA governs not only all federal property, but virtually all state and county property as well. This also means that no state court would have jurisdiction to decide a state RSA claim based on state law.

As noted, no state court has ever so held. Indeed, it appears that no state appellate court has ever endorsed the proposition that it lacked subject matter jurisdiction to decide an issue under a state RSA law. Conversely, numerous state courts have exercised subject matter jurisdiction in cases involving blind vendors operating on state or county property.

Kentucky, like Hawai'i and numerous other states, has enacted a state RSA statute to establish a vending facilities program in state buildings for qualified blind persons. In Kentucky State Univ. v. Kentucky Dep't for the Blind, 923 S.W.2d 296 (Ky. App. 1996), it was undisputed that Kentucky State University fell within the purview of Kentucky's RSA statute. Id. at 297. The Kentucky Court of Appeals upheld the lower court's decision as to the program's right to product and supplier selection but reversed the circuit court's holding regarding a blind vendor's right of first refusal concerning site selection. Id. at 300. While the Court of Appeals found federal law "instructive" and turned to it "for guidance," id. at 298-99, the court definitively exercised subject matter jurisdiction over

the case in rendering its decision.

Marlar v. State of Arizona, 666 P.2d 504 (Ariz. Ct. App. 1983), involved a food service facility in the State Education Building. Under its state RSA law, Arizona had established a vending facilities program for the blind on state, county, and municipal property. Id. at 506 (citing Ariz. Rev. Stat. Ann. § 23-504.A (West 2006)). The plaintiff successfully brought suit in superior court claiming that he had been improperly transferred to another facility without his consent. Id. at 508. On appeal, the state agency defendant contended that the superior court lacked jurisdiction to consider plaintiff's complaint because plaintiff failed to join the director of the agency as a party. Id. The Arizona Court of Appeals rejected the jurisdictional challenge and ruled that the director was not an indispensable party and affirmed the judgment of the lower court, manifestly exercising subject matter jurisdiction in reaching its decision. Id.

Glanz v. McCray, 881 P.2d 766 (Okla. Civ. App. 1994), involved vending facilities at the Tulsa County Courthouse. Pursuant to Oklahoma's RSA law, local and state authorities must give priority to the blind to operate vending facilities. Id. at 767 (citing Okla. Stat. Ann. § 73 (West 2006)). The district court issued a writ of mandamus in favor of the manager of the vending facilities at the courthouse and the Department of Human Services requiring the sheriff's department to allow the blind vendor program to operate the jail commissary. Id. at 767.

Among the grounds raised on appeal was that the trial court lacked personal jurisdiction over the sheriff's department. Id. The Court of Appeals of Oklahoma ruled that the trial court did not err in denying the various challenges to personal jurisdiction. Id. at 767-68. Subject matter jurisdiction was necessarily exercised in order for the appellate court to reach its decision.

Louisiana adopted a state RSA law that required state agencies, board commissions and institutions owning, maintaining or controlling state property to give preference to blind persons in the operation of vending stands. LSA R.S. 46:333. In Copsey v. Joint Legislative Budget Council, 607 So. 2d 841 (La. App. 1992), the Court of Appeal of Louisiana held that the lower court erred in granting a writ of mandamus to a blind vendor challenging a lease of space in the state capitol in view of the plaintiff's delay in bringing suit and because injunctive and declaratory relief actions were also brought. Id. at 843. The Louisiana appellate court plainly rendered its decision on the merits.

In Gundy v. Ozier, 409 So. 2d 764 (Ala. 1981), the Alabama Supreme Court construed an Alabama RSA law that gave preference to licensed blind persons in the operation of vending machines on state property. Id. at 765 (citing Ala. Code §§ 21-1-40 and -41 (West 2006)). The dispositive question on appeal was the extent of the preference given in the statute to blind persons. Id. at 766. The Alabama Supreme Court decided the

issue by determining the legislative intent of the Alabama legislature and finding additional support for its conclusion in federal case law. Id. at 766-67.

It is significant that the majority's decision in this case results in the federal court having the sole authority to determine the intent of the Hawai'i legislature regarding the issue of statutory construction of a Hawai'i law. One impact of the majority's decision is that the Hawai'i Supreme Court would have no authority to determine whether a state law or administrative agency rule concerning the blind vendor program violated our state constitution. This is not an abstract possibility. In West Virginia v. Casey, 232 S.E.2d 349 (W.V. 1997), the Supreme Court of Appeals of West Virginia considered a West Virginia statute, W. Va. Code Ann. § 18-10G-3 (West 2006), that provided for rent-free use of state, county, and city property by the West Virginia Society for the Blind and Severely Disabled for purposes of operating food services to enlarge employment opportunities for the disabled. The court held that the statute was an unconstitutional grant of the credit of the state to, or in aid of, a private corporation. Id. at 352.

No Hawai'i citizen challenging a state statute or state rule as contrary to the Hawai'i Constitution should be compelled to bring a suit in federal court to obtain a ruling on the legality of a Hawai'i statute or rule. Nor should a Hawai'i citizen be placed in the precipitous position of trusting that the federal court will correctly determine constitutionality

under Hawai'i law.

The majority may contend that none of the decisions discussed above directly addressed subject matter jurisdiction. It is counterintuitive, however, to conclude that in all of these cases, all of the lower and appellate courts, and all of the parties and counsel overlooked the issue of lack of subject matter jurisdiction. Instead, it is far more likely that lack of subject matter jurisdiction by a state court over a state claim was determined not to be a viable issue by the parties, counsel and the courts in each of these cases.

VIII. NONE OF THE FEDERAL DECISIONS RELIED UPON BY THE MAJORITY INVOLVE A STATE CLAIM BROUGHT UNDER A STATE RSA LAW AND THEREFORE THESE CASES ARE INAPPOSITE

The majority relies on four federal cases to demonstrate that its "conclusion is consistent with federal case law, where federal courts have reviewed decisions rendered by an ad hoc arbitration panel convened by the Secretary involving certain states' blind vendors programs." Majority op. at 31. None of these cases, however, involved state claims brought under state RSA laws. Instead, they involved federal claims brought under the federal RSA where the federal adjudication path was applicable. In each of these cases the resolution of the dispute had potential effects on vendors operating on both state and federal property. It must be noted, moreover, that not a single one of these cases held that a state court would have lacked jurisdiction to adjudicate the dispute. Therefore, these cases provide no authority for determining that a state court lacks

jurisdiction over a state RSA claim based on a state law, as the majority contends.

Smith v. Rhode Island State Servs., 581 F. Supp. 566, (D. R.I. 1984), involved state rules and regulations adopted by the Rhode Island state licensing agency. Under federal regulations, an application for designation as a state licensing agency must contain a plan outlining the rules and regulations applicable to the blind vendor program that is administered by the state. Id. at 568 (citations omitted). The rules and regulations that were the basis of the controversy in Smith, involving the method of selection, transfer and promotion of vendors, had been approved by the federal government. Id. at 569. Neither a state claim under a state RSA law, nor state court jurisdiction, was at issue in Smith.

In McNabb v. U.S. Dep't of Educ., 862 F.2d 681 (8th Cir. 1988), the United States Court of Appeals for the Eighth Circuit concluded that a federal arbitration panel could not award a blind vendor retroactive money damages against Arkansas pursuant to the federal RSA, although prospective damages and equitable relief could be awarded. Id. at 683-84. In McNabb, the blind vendor followed the adjudication path provided for in 20 U.S.C. § 107d-1(a), a federal law. Id. at 682-83. The case did not involve a concurrent state court action nor did it reference any state RSA law.

Delaware Dep't of Health & Soc. Servs. also involved federal regulations promulgated pursuant to the federal RSA

requiring state licensing agencies to establish and maintain policies to govern transfer and promotion of vendors. In compliance with federal regulations, Delaware's rules set forth regulations dealing with the transfer and promotion of blind vendors. 772 F.2d at 1131-32. The application of these regulations in determining whether a particular vendor was the most senior qualified applicant formed the basis of the dispute in the case. Id. The applicant vendor prevailed during the arbitration process and was awarded compensatory damages and attorney's fees. Id. at 1132. The federal appeals court affirmed the award, reversing the district court's judgment that had vacated the award. Id. at 1140. Again, state jurisdiction over a state claim under a state RSA was not involved.

Finally, in Fillinger v. Cleveland Soc'y for the Blind, 587 F.2d 336, 337 (6th Cir. 1978), the Ohio Rehabilitation Services Commission supervised a blind vending program established pursuant to the federal RSA. In determining that the aggrieved blind vendors were required to exhaust their administrative remedies before seeking review in the district courts, the United States Court of Appeals for the Sixth Circuit interpreted only federal law. Id. at 337-38. There was no discussion whatsoever of an Ohio counterpart to the federal RSA, or of federal jurisdiction over a state claim.

In summary, none of the federal cases cited by the majority are relevant to support its conclusion that a state

court does not have subject matter jurisdiction over a claim brought under a state RSA law.

IX. THE ONLY FEDERAL DECISION THAT DISCUSSED WHETHER A STATE'S PARTICIPATION IN THE FEDERAL RSA WOULD CONFER FEDERAL JURISDICTION OVER A STATE CLAIM HAS STRONGLY INDICATED THAT IT WOULD NOT SO CONFER

The notion that a state's participation in the federal RSA, which requires creation of a state licensing agency and acceptance of the federal adjudication path, would confer federal jurisdiction over state claims involving state property under a state RSA has been, at a minimum, implicitly rejected by one federal court. In Ramsey, the United States Court of Appeals for the First Circuit addressed New Hampshire's compliance with the federal RSA's requirement that "priority" be given to blind vendors in operating vending machine operations in rest areas along federally funded interstate highways. 366 F.3d at 4.

The First Circuit noted that the case was governed by two federal statutes, the federal RSA and the Surface Transportation Assistance Act (STAA). Id. at 5-7. Under the STAA, a state cannot accept federal highway funds without entering into an agreement with the Secretary of Transportation that includes a promise to comply with a priority system for vending machines operated on the interstate highway system. Id. at 7 (citations omitted). Unlike the federal RSA, the STAA specifically includes rights-of-way on state property of the Interstate system. Id. at 7 (citing 23 U.S.C. § 111(b)).

The plaintiffs "(Blind Vendors) filed an action under 28 U.S.C. § 1331 against several New Hampshire state defendants alleging that New Hampshire was violating 23 U.S.C. § 111(b) of the STAA by failing to give them priority to vending facilities operated through the state licensing agency (SLA). Id. at 9. A similar action was also filed in a New Hampshire state court. Id. The Blind Vendors requested an injunction requiring that all existing contracts to operate vending facilities be voided and that the state grant the right to operate those facilities to licensed blind vendors. Id. The state filed a motion to dismiss arguing that the Blind Vendors had not exhausted their administrative remedies before filing a judicial action and that the Blind Vendors' claims could be more readily resolved in state court. Id. at 9-10. The First Circuit noted that in the state's motion, "the state conceded that even if the claim could not go forward in federal court, the state court proceeding could go forward." Id. at 10 (emphasis added).

The federal court dismissed the Blind Vendors' claim without prejudice finding that they had failed to exhaust their administrative remedies. Id. At the administrative hearing, the state contended that the rest areas were on "state, not federal, property and so are not subject to the [federal RSA]." Id. at 11. The Blind Vendors "did not dispute that the [federal RSA] applies only to federal land." Id. Instead, the Blind Vendors argued that § 111(b) of the STAA clearly applied to rest areas on both state and federal land. Id.

The Blind Vendors prevailed at the administrative hearing, on appeal to the USDOE arbitration panel, and in the federal district court. The First Circuit framed the issue as "whether the vending machines to which Section 111(b) refers are within the vending facility program described in the [federal RSA]." Id. at 23. The court concluded that the "vending machines" were within "the vending facility program" based on the plain language of the federal RSA and 23 U.S.C. § 111(b). Id.

The First Circuit then added the following significant footnote regarding vending facilities located on state properties:

SLAs sometimes operate vending machines outside the [federal RSA] Among those functions is the operation of vending machines on state property under the state's "mini"-R-S Act. But, to the extent that SLAs operate those machines, they do so in their general capacity as agencies of the state, not in their capacity as licensing agencies designated under the [federal RSA].

Id. at 23 n.23 (emphasis added) (internal citations omitted).

Applying the analysis of the Ramsey court to the instant case, the DHS, when administering the operation of vending machines on state property, acts in its general capacity as an agent of the state, and not in its capacity as a licensing agency designated under the federal RSA. Therefore, federal court jurisdiction under the federal RSA is not implicated in this case.

It is revealing to compare the State of New Hampshire's position in Ramsey to the State's position in the instant case. The defendants in Ramsey "conceded that even if the claim could

not go forward in federal court, the state court proceeding could go forward."²³ Id. at 10. Further, all parties in Ramsey agreed that the federal RSA did not apply to state property. Moreover, the footnote by the Ramsey court plainly indicates its agreement that the operation of vending machines on state property by a SLA is not done in the SLA's capacity as a licensing agency under the federal RSA, and therefore federal jurisdiction does not lie. The majority's holding in this case is in direct conflict with the conclusion of the Ramsey court.

X. CONCLUSION

In reaching its decision to dismiss this case for lack of subject matter jurisdiction, I believe, with all due respect, that the majority has made numerous erroneous pronouncements upon the law. These include the following holdings:

(1) The federal RSA applies to virtually all state and county property in the United States, despite explicit language in the statute itself that restricts its scope, its Congressional history to the contrary, and the uniform disagreement of state and federal courts;

(2) Eleventh Amendment immunity may be "implicitly surrendered," despite federal and state precedent that requires waiver to be express, explicit, and unequivocal, thereby setting

²³ The State in the instant case did not dispute subject matter jurisdiction until after the case had proceeded to verdict, was appealed, the appeal was dismissed for lack of finality of judgment, and the case was remanded to the circuit court. Only then did the State raise the issue of subject matter jurisdiction.

a very low bar for determining that the State has waived its sovereign immunity;

(3) A claim based on a state law cannot be brought in a state court despite federal preemption not being invoked, meaning federal courts will have exclusive jurisdiction over a state RSA claim, and the sole authority to interpret Hawaii's RSA law, the applicable state agency rules, and the Hawai'i Constitution as it relates to issues involving the Hawai'i RSA;

(4) The statutory mandate to "adopt rules in accordance with [c]hapter 91" is construed to mean that an agency can adopt adjudicatory rules or take actions that conflict with specific statutes in chapter 91, allowing numerous state administrative agencies unprecedented discretion in deciding whether to adopt the adjudicatory proceedings of HRS chapter 91 and eroding statutory rights provided to aggrieved claimants by chapter 91; and

(5) Overruling Hawaii Blind Vendors, a case that had held there was subject matter jurisdiction to decide a claim under the Hawai'i RSA, on the premise that subject matter jurisdiction was never raised in that case, although this court had specifically concluded in its decision that the circuit court had concurrent jurisdiction with DHS over the claim.

For the reasons stated above, I do not agree with the majority's holding and have great concern for the precedent established by its decision. I would conclude that this court

does have subject matter jurisdiction over Plaintiffs' claims under the Hawaii RSA and reach the merits of the appeals in this case.


Richard W. Pollak