CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I agree with the majority's conclusion that the first circuit court (the court) did not err in issuing a permanent injunction. However, I disagree with the majority's analysis inasmuch as I believe that (1) Defendants-Appellants Russ K. Saito, in his capacity as Comptroller of the State of Hawai'i (the State) and Linda Lingle, in her capacity as Governor of the State [collectively, Defendants] are collaterally estopped from asserting that Plaintiffs-Appellees Alexander Malahoff, Linda Currivan, Diane Ferreira, Hugh Folk, Vincent Linares, David Miller, and University of Hawai'i Professional Assembly (UHPA) [collectively, Plaintiffs] are mistaken in equating the pay dates to "'wages' [that] go to the heart of collective bargaining[,]" (2) payroll delays, contrary to the majority's conclusion, are a core subject of collective bargaining, and (3) insofar as Act 355 precludes collective bargaining on payroll delays, it contravenes article XIII, section 2 of the Hawai'i Constitution, which provides that "[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law," and is therefore invalid.

I.

A.

As to the first point, this court has defined collateral estoppel as "an aspect of res judicata which precludes the relitigation of a fact or issue which was previously

determined in a prior suit on a different claim between the same parties or their privies[.]" Dorrance v. Lee, 90 Hawai'i 143, 148, 976 P.2d 904, 909 (1999) (emphasis in original) (quoting Foytik v. Chandler, 88 Hawai'i 307, 314-15, 966 P.2d 619, 626-27 (1998) (quoting Morneau v. Stark Enters., Ltd., 56 Haw. 420, 423, 539 P.2d 472, 475 (1975))). See also Keahole Def. Coalition, Inc. v. Bd. of Land & Natural Res., 110 Hawai'i 419, 429, 134 P.3d 585, 595 (2006) (stating that "collateral estoppel . . . 'applies to a subsequent suit between the parties or their privies on a different cause of action and prevents the parties or their privies from relitigating any issue that was actually litigated and finally decided in the earlier action'" (emphases in original) (citing Dorrance, 90 Hawai'i at 148, 976 P.2d at 909)); Ellis v. Crockett, 51 Haw. 45, 55, 451 P.2d 814, 822 (1969) (holding that "[c]ollateral estoppel . . . precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies" (emphasis added)).

The doctrine of res judicata also applies to administrative decisions. See State v. Higa, 79 Hawai'i 1, 8, 897 P.2d 928, 935 (1995) (stating that "[t]he doctrines of res judicata and collateral estoppel also apply to matters litigated before an administrative agency" (quoting Santos v. State, 64 Haw. 648, 653, 646 P.2d 962, 966 (1982))). It has been said that "[w]here a party does not appeal a final administrative decision[,] that decision becomes final and res judicata."

Hawkins v. State, 900 P.2d 1236, 1240 (Ariz. Ct. App. 1995) (citing Guertin v. Pinal County, 875 P.2d 843, 845 (Ariz. Ct. App. 1994)); see also United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (noting that "[w]hen an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose" (citations omitted)). The doctrine of collateral estoppel "is based on the premise that a thorough fact-finding process was completed in the first proceeding." Dorrance, 90 Hawai'i at 147, 976 P.2d at 908 (quoting Flynn v. Gorton, 255 Cal. Rptr. 768, 772 (1989)).

B.

As the majority observes, in October 1999, UHPA "filed a prohibited practice complaint with the Hawai'i Labor Relations Board (HLRB), claiming that the implementation of the change in pay scheme [under Act 80] altered the terms and conditions of employment and that the anticipated change was subject to negotiation under Hawaii's collective bargaining laws." Majority op. at 7. In response, the HLRB issued order No. 1402 (HLRB's order) noting that Defendants "filed a cross-motion for summary judgment seeking a determination that the implementation of an after-the-fact payroll [under Act 80] is nonnegotiable."

After considering the arguments presented in that proceeding the HLRB decided that "payroll dates concern wages which are conditions of work and are mandatory subjects of

bargaining because they have a significant effect on the employees' working conditions." (Emphasis added.) Furthermore, the HLRB found as follows:

> The [HLRB] notes that the semimonthly paydates for public officers and employees have remained constant for decades. The five-day pay adjustment will result in the delay in the payment of wages for affected public employees who will receive one less paycheck in the calendar year in which the lag is implemented. The [National Labor Relations] Board finds that the employees who are on a strict budget or who have timely bills to pay will find a delay in pay dates to be a hardship.

The HLRB then concluded that "a delay in the receipt of wages resulting from the paylag . . . has a significant and material impact on the employees' working conditions in creating a financial hardship for the employees[,]" and that "[t]he lag will affect the compensation for the individual employees and the magnitude of the impact requires negotiations prior to the implementation of the payroll adjustment." (Emphases added.) The record does not indicate that Defendants appealed that adverse ruling by the HLRB. If this is the case, then as to the issue of the pay lag, res judicata would apply to the instant case inasmuch as "an administrative agency . . . acting in a judicial capacity . . . resolved disputed issues of fact . . . which the parties . . . had an adequate opportunity to litigate[.]" Utah Constr., 384 U.S. at 422.

C.

Following the enactment of Act 355, which in effect, legislatively attempted to "overturn[] the [HLRB] decision that a payroll lag is negotiable," Univ. of Hawaii Prof'l Assembly v.

Cayetano, 16 F. Supp. 2d 1242, 1244 (D. Haw. 1998) (UHPA I), UHPA sought a preliminary injunction and declaration from the United States District Court for the District of Hawai'i (the district court) that Act 355 unconstitutionally impaired UHPA's collective bargaining agreement (CBA). Id. In that case, Defendants argued that UHPA and other plaintiffs "are not likely to succeed because there was no substantial impairment of the [CBA]." Id. at 1245.

Contrary to Defendants' position, the district court granted UHPA relief, finding the HLRB's reasoning as to Act 80 applicable and persuasive. Id. at 1245 n.4. The district court concluded, inter alia, that "[t]he UHPA [CBA] includes the timing of payroll because it is material to the terms of employment and, at the time the [CBA] was negotiated, the timing of payroll was a negotiable matter." Id. at 1249. Furthermore, it was pointed out that substantial hardship would likely be imposed by the enforcement of Act 355:

> Act 355 would likely substantially impair the [CBA] because a five-day pay lag would likely impose a substantial hardship on many employees who would not be able to meet their financial obligations such as mortgage payments in a timely manner. Such employees may incur late fees and other penalties due to the pay lag. In some cases, a delay in payment of certain bills by even five days may affect a person's credit rating.

Id. (emphasis added). In response to Defendants' argument that the pay dates were not a part of the CBA then existing, the district court stated that "[i]t is likely that the timing of the payment of each paycheck is included in the [CBA]." Id. at 1245 (emphasis added). The district court reasoned that "[t]he obligation of a contract is the law which binds the parties to

perform their agreement," and thus, "the laws which existed at the time the contract was entered into and which affect its validity, construction, discharge and enforcement, in effect, are incorporated within the contract." Id. (citing Lafortune v. Naval Weapons Ctr. Fed. Credit Union, 652 F.2d 842, 846 (9th Cir. 1981)).

In Univ. of Hawaii Prof'l Assembly v. Cayetano, 183 F.3d 1096, 1099 (9th Cir. 1999) (UHPA II), the United States Court of Appeals for the Ninth Circuit (the court of appeals) affirmed the district court's grant of a preliminary injunction. That court approved of the district court determination "that even in the absence of any explicit terms in the [CBA] regarding specific pay days, 'it is likely that the timing of the payment of each paycheck is included in the [CBA].'" Id. at 1102 (brackets omitted) (quoting UHPA I, 16 F. Supp. 2d at 1245). The court of appeals elaborated by stating that "[f]or over twenty-five years, the State and its employees had a course of dealing under which it was understood that employees would be paid on the fifteenth and last days of every month. A course of dealing can create a contractual expectation." Id. (citing Stewart v. Brennan, 7 Haw. App. 136, 142, 748 P.2d 816, 821 (1988)).

The court of appeals also approved of the district court's ruling that "the pay dates were material to the terms of employment and, at the time the [CBA] was negotiated, the timing of the payroll was a negotiable matter." Id. It added that, "[u]nder [Hawai'i Revised Statutes] § 89-9(a), wages are a

mandatory subject for good faith negotiation, and by implication, so also is the time for payment of wages." Id. (emphasis added). Citing Nat'l Labor Relations Bd. v. Katz, 369 U.S. 736 (1962), the court of appeals stated that "employers may not unilaterally implement changes on bargainable topics." UHPA II, 184 F.3d at 1102.

The court of appeals in UHPA II explained that the ruling in UHPA I was "consistent with the law on the interpretation of [CBA]s." Id. It decided as follows:

> In construing a [CBA], not only the language of the agreement is considered, but also past interpretations and past practices are probative. We consider an employer's past practices because the [CBA] states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The custom and practice of the State had been to pay its employees on the fifteenth and last days of each month. That was the status quo at the time the [CBA] was entered into.

Id. (emphasis added) (internal citations, quotation marks, and brackets omitted). According to the court of appeals, "the timing of payment is part of the [CBA]." Id. (emphasis added).

Hence, the issue of whether pay dates are a core subject of collective bargaining has already been decided upon, not only once, before the HLRB (apparently without appeal therefrom), but also by the district court and on appeal of that decision to the court of appeals. Consistent therefore with this court's previous decision in Dorrance, Defendants are precluded from litigating the issue of whether pay dates are a core subject of bargaining, that issue having been "previously determined in a prior suit on a different claim between the same parties or their

privies." 90 Hawai'i at 148, 976 P.2d at 909 (emphasis omitted).

II.

Despite the foregoing history of the pay lag controversy, the majority states that the collateral estoppel doctrine is "inapplicable," majority op. at 25 n.16. I respectfully disagree. First, as pointed out, the HRLB, as an administrative agency, acted "in a judicial capacity and resolved disputed issues of fact [or issue,]" Utah Constr., 384 U.S. at 422, on the matter of whether pay dates are a core subject of collective bargaining. Second, it is immaterial that "the HLRB's decision was based upon the Act 80 amendment," as the majority asserts. Majority op. at 25 n.16. As stated, collateral estoppel applies despite the fact that a different cause of action was addressed in the prior proceedings. The critical inquiry is whether the same disputed fact or issue was addressed in the prior proceedings and not whether the same legislative act is in question. It cannot be disputed that the same pay lag issue was addressed in the HLRB proceeding. Third, it appears that the HLRB's decision was not appealed by Defendants and therefore "bec[a]me[] final and res judicata." Hawkins, 900 P.2d at 1240.

Apparently to distinguish the HLRB proceedings from the present one, the majority states, quoting the HLRB's order, that "the HLRB specifically relied upon the fact that 'the unambiguous language of the statute . . . does not make reference to or

supersede [HRS c]hapter 89.'"[1] Majority op. at 25 n.16 (ellipses points in original). In fact, this statement, taken in context, confirms the board's belief that chapter 89 did apply to the pay lag issue. In ruling for the Plaintiffs, the board expressly found that "[Defendants] frustrated the bargaining process and their actions were wilful as the natural consequence of the [Defendants'] refusal to negotiate was the deprivation of the [UHPA's] and [Plaintiffs-employees'] rights guaranteed under HRS [c]hapter 89." (Emphasis added.) The HLRB also concluded that "[Defendants'] actions constitute a refusal to bargain in good faith in violation of [HRS] § 89-13(a)(5)[.]" (Emphasis added.)

As the majority recognizes, in an attempt to remove Act 355 from the proscriptions of HRS chapter 89, and presumably because of the HLRB's adverse decision, the legislature qualified Act 355 to state that "[t]he implementation of the after-the-fact payroll shall not be subject to negotiation under [HRS] chapter

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[1] The majority cites to this language in the Hawai'i Labor Relations Board's January 17, 1997 order No. 1402 which granted summary judgment in favor of University of Hawai'i Professional Assembly (UHPA). In order to provide context to that citation, the full paragraph of that citation is quoted as follows:

> Based upon a review of the relevant legislative history, clearly the purpose for Act 80 was to minimize salary overpayments and to result in a one-time savings of approximately $47,000,000. The [HLRB] agrees with [Plaintiff UHPA] however, that it is difficult to ascertain whether the legislature intended the paylag to be negotiable or non-negotiable. As such, the [HLRB] relies upon the unambiguous language of the statute which does not make reference to or supersede HRS [c]hapter 89[.] When the statutes are read together then, the [HLRB] concludes that [Defendants] may implement a paylag but must comply with bargaining obligations imposed by [HRS c]hapter 89[.] The issue before the [HLRB] then, is whether under the provisions of [HRS] [c]hapter 89, the paylag is negotiable.

(Emphasis added).

89." Majority op. at 25 n.16 (quoting HRS § 78-13 (Supp. 2005)). But a legislative pronouncement that the payroll lag was not negotiable under HRS chapter 89 must still pass constitutional muster, as discussed infra. See Del Rio v. Crake, 87 Hawai'i 297, 304, 955 P.2d 90, 97 (1998) (stating that "a legislature's subsequent assertion that it in fact intended to enact an unconstitutional statute does not thereby cause that statute to pass constitutional muster" and that "the question as to the constitutionality of a statute is not for legislative determination, but is vested in the judiciary, and a statute cannot survive constitutional challenge based on legislative declaration alone").

As noted previously, the district court and the court of appeals [collectively, the federal courts] determined that payroll dates involve a core subject of collective bargaining. Despite the different causes of action brought before the federal courts and the court, the application of the collateral estoppel doctrine applies because the same pay lag issue decided by the court had already been decided in the federal courts. Moreover, the fact that subsequent to the issuance of the HLRB's decision the legislature included language in Act 355 that "[t]he implementation of the after-the-fact payroll shall not be subject to negotiation under chapter 89" does not foreclose inquiry into whether Act 355 meets constitutional muster or a determination on whether a delay in pay roll dates continues to be a subject of collective bargaining despite this pronouncement.

Focusing on the different causes of action, the majority attempts to differentiate the present appeal from the proceedings before the federal courts on the ground that "Plaintiffs sought a preliminary injunction . . . based upon their allegations that Act 355 violated the Contract Clause of the United States Constitution -- and not article XIII, section 2 of the Hawai'i Constitution[.]" Majority op. at 25 n.16. Again, this distinction is immaterial inasmuch as collateral estoppel, as earlier stated, applies despite the fact that a cause of action in the first instance differs from the second one.

Obviously, a violation of the Hawai'i Constitution was not before the federal courts. Nonetheless, as earlier discussed, the issue of whether the delay in pay dates is a subject of collective bargaining was fully litigated before the district court by the same parties involved in the present case. The district court ruled in favor of Plaintiffs and Defendants appealed that ruling. To reiterate, the issue was fully litigated by the same parties on appeal, and again Plaintiffs prevailed. In both instances, the federal courts explained their decision in detail. Hence, having litigated the pay lag issue, albeit under a "different claim," Ellis, 51 Haw. at 55, 451 P.2d at 822, collateral estoppel applies.

III.

A.

Finally, the majority appears to adopt a rule that the "grant of a preliminary injunction is 'not a final judgment

sufficient for collateral estoppel purposes.'" Majority op. at 25 n.16 (quoting Starbuck v. City & County of San Francisco, 556 F.2d 450, 457 n.13 (9th Cir. 1977)) (other citations omitted). However, it has also been said that the rule that a "grant of a preliminary injunction is 'not a final judgment sufficient for collateral estoppel purposes'" is not an absolute one for "[g]enerally, preliminary orders do not have a preclusive effect, but 'that is not always true; if a case does not go all the way to judgment, a preliminary injunction issued in it may be given collateral estoppel effect in future litigation between the parties.'" Ocean Conservancy v. Nat'l Marine Fisheries Serv., 416 F. Supp. 2d 972, 979 (D. Haw. 2006) (quoting Gjertsen v. Bd. of Election Comm'rs of the City of Chicago, 751 F.2d 199, 202 (7th Cir. 1984)). As has been stated, "[f]inality for purposes of issue preclusion is a more pliant concept than it would be in other contexts . . . [and a] final judgment with respect to issue preclusion includes any prior adjudication of an issue in another action between the parties that is determined to be sufficiently firm to be accorded conclusive effect." Dyndul v. Dyndul, 620 F.2d 409, 412 (3d Cir. 1980) (emphasis added) (parentheses and internal quotation marks omitted).

The majority concedes that the rule is not an absolute one for "the grant or denial or a preliminary injunction 'will be given preclusive effect if it is necessarily based upon a determination that constitutes an insuperable obstacle to the plaintiff's success on the merits[.]'" Majority op. at 25 n.16

(quoting Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 995 (7th Cir. 1979)). The majority further concedes that "'findings made in granting or denying preliminary injunctions can have preclusive effect if the circumstances make it likely that the findings are "sufficiently firm" to persuade the court that there is no compelling reason for permitting them to be litigated again.'" Id. at 25-26 (quoting Hawksbill Sea Turtle v. FEMA, 126 F.3d 461, 471 n.11 (3d Cir. 1997)).

While the majority cites to cases for the proposition that findings made in a prior proceeding may have preclusive effect under the doctrine of collateral estoppel when said findings are "sufficiently firm," that proposition applies with equal force as to issues of law. The Restatement (Second) of Judgments applies the general rule of collateral estoppel or issue preclusion in the following manner:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.

Restatement (Second) of Judgments § 27 (1982) [hereinafter, Restatement]. Thus, "[f]or a judgment to be 'final' for purposes of issue preclusion, it must be 'sufficiently firm' to be accorded conclusive effect." Still v. Michaels, 791 F. Supp. 248, 251 (D. Ariz. 1992). For purposes of collateral estoppel, then, "'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." Restatement, § 13

(emphasis added); see also Gonzalez Pina v. Rodriguez, 278 F. Supp. 2d 195, 203 (D. P. R. 2003) (observing that "[a] final judgment in the traditional sense is not essential to the applicability of issue preclusion" but merely "requires that the earlier adjudication [be] sufficiently firm to be accorded conclusive effect").

The Still court added that "[a] judgment is 'sufficiently firm' where the parties were fully heard, the court supported its decision with a reasoned opinion, and the decision was subject to appeal or was in fact reviewed on appeal." 791 F. Supp. at 251 (citing In re Lockard, 884 F.2d 1171, 1175 (9th Cir. 1989)); see also Restatement § 13, cmt. g (listing as factors in determining finality of a judgment for the purpose of preclusion that (1) "the parties were fully heard," (2) "the court supported its decision with a reasoned opinion," and (3) "the decision was subject to appeal or was in fact reviewed on appeal"). The Ninth circuit court in Lockard also noted that the "final judgment" requirement is somewhat more relaxed for purposes of "issue preclusion" than it is for purposes of "claim preclusion." 884 F.2d at 1175.

B.

Yet the majority asserts that "the federal preliminary injunction and the Ninth Circuit's subsequent affirmance are clearly not 'sufficiently firm' to merit preclusive effect inasmuch as the U.S. district court ultimately dismissed the preliminary injunction -- not on the merits -- but as moot in

light of changed circumstances, i.e., the expiration of the Plaintiffs' [CBA]." Majority op. at 26 n.16 (emphases added). The majority goes on to assert that "the U.S. district court dissolved the injunction and dismissed the case, clearly expressing its intention that future litigation should not be collaterally estopped." Id.

With all due respect, the majority is incorrect as to its mootness analysis and therefore simply wrong in its conclusion that the district court indicated a "clear express[ion]" that future litigation should not be collaterally estopped. The opinions of the federal courts are devoid of any language indicating that future litigation should not be collaterally estopped. In the absence of any express language in the opinion of the district court, this assertion is erroneous. Mere dismissal of the case before the district court does not amount to a clear expression of an intention to prevent the application of collateral estoppel.

First, it has been held that a case is moot "when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." Lum v. City & County of Honolulu, 732 F. Supp. 1070, 1072 (D. Haw. 1990) (quoting Fed. Sav. & Loan Ins. Corp. v. Dir. of Revenue, 650 F. Supp. 1217, 1220 (N.D. Ill. 1986)). In the present matter, the question before the federal courts was whether Defendants violated Plaintiffs' rights under the Contracts Clause of the United States Constitution. As noted, the preliminary injunction

was dissolved by the district court on the narrow ground that Plaintiffs no longer had any contract relationship with Defendants following expiration of the CBA. Therefore, inasmuch as relief under the Contracts Clause could not "have any practical effect" upon the expiration of the parties' CBA, the district court dissolved its earlier order granting preliminary injunction. Simply because the Plaintiffs' cause of action before the federal courts became moot did not undermine those courts' rulings and rationale insofar as the issue of pay dates being a core subject of collective bargaining is concerned. The district court's decision merely indicated that, upon the expiration of the CBA between the parties, no further enforcement was necessary.[2] Because those courts' decisions are sufficiently

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[2] In seeking dissolution of the preliminary injunction before the U.S. district court, Defendants attempted to argue that "even if the [collective bargaining agreement (CBA)] terms are still in effect during negotiations, they may make a unilateral change (in Plaintiffs' pay dates) because the topic of pay dates is now non-negotiable under Act 355." University of Hawai'i Professional Assembly v. Cayetano, 125 F. Supp. 2d 1237, 1242 (D. Haw. 2000). In rejecting that argument the U.S. district court stated that the cases cited by the Defendants in support of that proposition is "irrelevant to the issue of whether the injunction should be retained or vacated." Id. at 1243. The district court also noted as follows:

> A potential flaw in Defendants' logic is that to the extent the CBA terms are still in effect pending negotiation, one term of the CBA is that the payroll lag is negotiable. This fact was central to [the district court's] holding. The [district court] need not resolve this issue, however, because as explained above, the unilateral change doctrine has nothing to do with whether Plaintiffs' contract rights under the CBA remain.

Id. at 1243 n.6 (emphasis in original). As stated by that court, "[t]he only question before [the district court] is whether there are still enforceable contract rights between the parties." Id. at 1243 (emphasis added). Accordingly, that court's dissolution of the preliminary injunction is based on the ground that Plaintiffs no longer had any contract relationship with Defendants following expiration of the CBA between the parties, and, thus, the Contracts Clause of the United States Constitution was no longer implicated.

firm for the purpose of issue preclusion, Defendants are collaterally estopped from relitigating that same issue.

Second, as the majority concedes, the dissolution of the preliminary injunction was based on mootness and was not decided "on the merits." Majority op. at 26 n.16. It has been said that for purposes of preclusion, "[t]he term 'on the merits' is a term of art and does not necessarily mean that the issues were actually litigated." In re Gilson, 250 B.R. 226, 236 (Bankr. E.D. Va. 2000). Moreover, "[a] judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form." Id. (quoting Fairmont Aluminum Co. v. Comm'r of Internal Revenue Serv., 222 F.2d 622, 625 (4th Cir. 1955)). Because the district court, in terminating the preliminary injunction against the Defendants did not address the merits of the case, it did not purport to render meaningless its previously rendered reasons for, or the substance of, its grant of preliminary injunction.

Third, it follows, then, that mootness does not preclude the application of the collateral estoppel doctrine. Whether a prior proceeding was rendered moot is not controlling in determining whether a ruling made in the prior proceeding is sufficiently firm. Rather, for collateral estoppel to apply, the only requirements are that "the parties were fully heard, the court supported its decision with a reasoned opinion, and the decision was subject to appeal or was in fact reviewed on appeal." Still, 791 F. Supp. at 251. As earlier noted, the

parties involved in the federal preliminary injunction action are the same as the parties involved in the matter before this court. The issue of whether collective bargaining encompasses the alteration of pay dates was fully litigated by the parties before the district court and the court of appeals. The same statute, Act 355, was at issue. Both federal courts reached the conclusion that the delay in pay dates is a core subject of collective bargaining. Both federal courts also ruled favorably for Plaintiffs.

Thus, the instant case fits squarely within the rule that "a preliminary injunction issued in [a given case] may be given collateral estoppel effect in future litigation between the parties." Ocean Conservancy, 416 F. Supp. 2d at 979. The determinations by the district court as to the delay in pay dates, coupled with the court of appeals's subsequent affirmance, is "sufficiently firm to be accorded conclusive effect." Dyndul, 620 F.2d at 412. Applying the test as stated in Still and Lockard, it is clear that the parties were fully heard by both the district court and the court of appeals, each federal court supported their decisions with well-reasoned opinions, and the district court's opinion was reviewed on appeal and subsequently affirmed. Hence, contrary to the majority's position, the detailed decisions of the district court and court of appeals establish that the prior adjudications of the pay lag question were "sufficiently firm to be accorded conclusive effect." Id.

To reiterate, findings made in a grant or denial of an application for a preliminary injunction may be given preclusive effect "if the circumstances make it likely that the findings are 'sufficiently firm' to persuade the court that there is no compelling reason for permitting them to be litigated again." Majority op. at 26 n.16 (quoting Hawksbill, 126 F.3d at 474 n.11. Here, the determination of whether payroll dates is a negotiable matter was made by the HLRB, the district court, and the court of appeals. In all three proceedings, that determination was made in favor of Plaintiffs. It appears that this determination was made after the parties were given a full opportunity to litigate the matter. Defendants do not advance a compelling reason for relitigating the issue in this appeal. There is no indication in the record that the tribunals involved made erroneous findings. The circumstances thus demonstrate that "the findings are accurate [and] reliable[.]" Hawksbill, 126 F.3d at 474 n.11; majority op. at 26 n.16.

Hence, although the federal cases did "not go all the way to judgment, a preliminary injunction issued in [the cases] may be given collateral estoppel effect in future litigation between the parties." Ocean Conservancy, 416 F. Supp. 2d at 979.[3] The parties were afforded a full and fair opportunity to

[3] Although I cite to Ocean Conservancy v. Nat'l Marine Fisheries Serv., 416 F. Supp. 2d 972, 979 (D. Haw. 2006) for the general proposition that an order or grant of a preliminary injunction may be given preclusive effect, the majority also relies on this case by quoting the following language in support of its proposition that the determinations made by the federal courts are not sufficiently firm:

litigate the issue of whether collective bargaining encompasses the imposition of a delay in pay dates under Act 355. In the proceedings before the HLRB and the federal courts, the legal rights of Plaintiffs, particularly their right to bargain over pay dates, had been decided favorably with sufficient finality.

IV.

Turning to the second point to be made, the majority's conclusion that "it can hardly be said that the payroll delay evades one of the core subjects of collective bargaining, i.e., wages[,]" majority op. at 40, cannot be sustained, given the factual background of the instant case. The majority apparently approves of Defendants' argument that "each employee, following a payroll lag, will be paid the same amount of money for the same amount of work[,]" in stating that "Plaintiffs would receive their full paycheck for the preceding two weeks worked, albeit later than the previous practice under the predicted payroll system," id. at 44-45, and in concluding that "the Plaintiffs'

> [I]t is possible that a court may decide that a prior ruling need not be vacated because there is no possibility that it will have any collateral consequences. Although this approach is tempting, it should be easier to vacate than to make a responsible determination that there is indeed no risk of future consequences. In contrast, a court may be tempted to conclude that its findings might warrant preclusive effect in later litigation, and refuse to vacate so that later courts can employ preclusion if it seems appropriate. . . .

Majority op. at 26 n.16 (quoting Ocean Conservancy, 416 F. Supp. 2d at 979) (other citations omitted). I note that the Ocean Conservancy court made this statement in the context of a federal court vacating its own prior ruling. Thus, it appears that this proposition is inapplicable to the instant case inasmuch as no vacatur was involved with the federal courts' dispositions.

attempt to equate delayed payment with reduced payment is unpersuasive[,]" id. at 45. The conclusion the majority arrives at runs contrary to the findings made by the HLRB and the federal courts that pay dates are material to collective bargaining. As the court of appeals held:

> [The] Plaintiffs are wage earners, not volunteers. They have bills, child support obligations, mortgage payments, insurance premiums, and other responsibilities. [The] Plaintiffs have the right to rely on the timely receipt of their paychecks. Even a brief delay in getting paid can cause financial embarrassment and displacement of varying degrees of magnitude.

UHPA II, 183 F.3d at 1106.

Therefore, contrary to the majority's assertion that no injury would result because pay wages will "only be[] delayed," majority op. at 40, it has already been decided between these parties that "payroll dates concern wages which are conditions of work and are mandatory subjects of bargaining because they have a significant effect on the employees' working conditions[,]" as noted by the HLRB, and that injury would occur. The majority's contention also runs contrary to the express findings of the court in its Order Denying Defendants' Motion for Judgment on the Pleadings and Order Granting Plaintiffs' Cross-Motion for Summary Judgment, that state as follows:

> [1] Imposition of a payroll lag on [UH] faculty, by means of a one-time, once a month paycheck, would deprive [the] faculty [members] of one paycheck in the month and year of implementation, or 50% of their salary in the month of implementation and 1/24 of their salary in the year of implementation.
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> [2] This loss of income would have material and significant effect on the faculty, especially the lower-paid faculty. Such a pay loss would be of a magnitude comparable to other issues that triggered the UHPA strike of 2001. A payroll lag would likely impose a substantial hardship on

> employees, who might not be able to meet their financial obligations, such as mortgage payments or court-ordered child support payments, in a timely manner. Employee contributions to benefit funds that depend on receipt of a paycheck could be delayed, in some cases requiring the employees to dip into savings - - if any - - to maintain timely payments. Faculty may also incur late fees and other penalties due to pay lag. . . .

(Emphases added.) Defendants did not challenge the court's findings that injury would occur to Plaintiffs if the pay lag was imposed. The court's findings in this regard then must not be disturbed and, thus, the majority is incorrect. See Nakasone v. Nakasone, 102 Hawai'i 177, 181, 73 P.3d 715, 719 (2003) (explaining generally that "[u]nchallenged findings are binding on appeal" (quoting Poe v. Hawaii Labor Relations Bd., 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002)).

V.

Because it is established that the time of payment is part of the conditions of employment and "mandatory subjects of bargaining," holding otherwise would contravene article XIII, section 2 and the precepts established in United Pub. Workers, AFSCME v. Yogi, 101 Hawai'i 46, 62 P.3d 189 (2002). It was recognized in Yogi that article XIII, section 2 was ratified with the understanding that collective bargaining "entail[s] the ability to engage in negotiations concerning core subjects such as wages, hours, and other conditions of employment." Id. at 53, 62 P.3d at 196 (emphasis added).

By the terms of Act 355, the legislature precluded the issue of pay dates from collective bargaining under HRS chapter 89. See HRS § 78-13 (stating that "[t]he implementation of the

after-the-fact payroll shall not be subject to negotiation under chapter 89"). Act 355 purportedly grants the legislature absolute discretion in defining the scope of collective bargaining, contrary to the principles under Yogi. But, "[a] legislative enactment purporting to authorize that which is unconstitutional cannot stand." State v. Morris, 72 Haw. 67, 76, 806 P.2d 407, 412 (1991).

In Yogi, it was said that "[g]ranting the lawmakers absolute discretion to define the scope of collective bargaining would also produce the absurd result of nullifying the 'right to organize for the purpose of collective bargaining[,]'" as that phrase is used in article XIII, section 2. 101 Hawaii at 53, 62 P.3d at 196 (citation omitted). Inasmuch as pay dates are a "core subject of collective bargaining," and Act 355, by its terms, impinges on such a subject because it would nullify the right to collective bargaining on such a matter, I would hold, therefore, that the application of Act 355 would infringe upon Plaintiffs' right to organize for the purpose of collective bargaining under article XIII, section 2. Thus I would affirm the court's permanent injunction, but for the reasons stated above.