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SCRQ-22-0000118

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

FLORES-CASE ‘OHANA , Plaintiff-Petitioner, v. UNIVERSITY OF HAWAI‘I, Defendant-Respondent.	CIVIL NO. 3CCV-20-0000255 COURT’S ORDER FOR RESERVED QUESTION PURSUANT TO RULE 15, HAWAI‘I RULES OF APPELLATE PROCEDURE, APPENDIX 1-3, filed March 11, 2022 CIRCUIT COURT OF THE THIRD CIRCUIT, STATE OF HAWAI‘I HONORABLE ROBERT D.S. KIM, Judge

AMICUS CURIAE BRIEF OF
ATTORNEY GENERAL HOLLY T. SHIKADA

CERTIFICATE OF SERVICE

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AMICUS CURIAE BRIEF OF
ATTORNEY GENERAL HOLLY T. SHIKADA

I. INTRODUCTION

The Attorney General submits this amicus brief to, among other things, bring to this Court's attention a published Hawai'i Supreme Court case that *directly considered* a facial challenge to administrative rules made pursuant to Article XII, Section 7 of the Hawai'i Constitution—the exact situation in this case. In *State v. Armitage*, 132 Hawai'i 36, 319 P.3d 1044 (2014), which is controlling here, the petitioners had been convicted of violating administrative rules prohibiting access to state land on Kaho'olawe without agency permission but asserted that those rules were facially unconstitutional for abridging their rights to engage in traditional and customary practices. This Court did not shift burdens of proof or persuasion onto the State. This Court did not do a deep dive into the history behind the rules or the specific rule-making process followed by the agency. This Court did not fault the agency, sitting in a rule-making capacity, for failing to issue the findings of fact required in certain quasi-judicial administrative proceedings by *Ka Pa'akai O Ka 'Aina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d 1068 (2000). Instead, this Court held that the petitioners failed to establish facial invalidity because the rules on their face provided a process for an interested person to apply for a permit from the agency to exercise traditional and customary rights on Kaho'olawe, which the petitioners failed to avail themselves of.

The answer to the reserved question is in *Armitage*: that in legal proceedings addressing a facial constitutional challenge to an administrative rule pursuant to Article XII, Section 7 of the Hawai'i Constitution, the burden does not shift to the government to prove the constitutionality of its own rules based upon the ambiguous, rootless standards suggested by the plaintiff. The legal principles underpinning *Armitage*, in turn, are likewise dispositive: That there are

fundamental differences between facial and as-applied challenges and between quasi-legislative rule-making and quasi-judicial contested-case hearings. That in facial constitutional challenges to laws and rules, the challenger bears a heavy burden to establish unconstitutionality. That an Article XII, Section 7 analysis involves a factual balancing of interests between the specific traditional and customary right at issue and the State's own constitutional right to regulate such rights. And, significantly, that this Court has repeatedly emphasized that establishing entitlement to Article XII, Section 7 relief is a burden borne not by the government, but by a person seeking to enforce a traditional and customary right.

This Court should answer the reserved question in the negative: in proceedings on a facial constitutional challenge to an administrative rule pursuant to Article XII, Section 7 of the Hawai‘i Constitution, the burden does not shift to the government to prove the constitutionality of its own rules. Instead, the challenger must establish beyond a reasonable doubt that no set of circumstances exists under which the rule would be valid.

II. BRIEF FACTUAL AND PROCEDURAL BACKGROUND[1]

The University of Hawai‘i is a state "department" and fulfills a unique role as the "state university," which is headed by an executive board, the Board of Regents. Haw. Const. art. X, §§ 5–6; Hawaii Revised Statutes ("HRS") § 26-4. The members of the Board of Regents, like executives of other agencies, are appointed by the Governor, with the advice and consent of the Senate. Haw. Const. art. X, § 6. The University of Hawai‘i, pursuant to the constitution, has

[1] As discussed in section III *infra*, this case presents a pure question of law, and the briefing of the parties delves far deeper into facts than is permissible, which obscures the legal issue. The purpose of this background section is solely to provide bare context to understand the scope of the reserved question—and, importantly, to demonstrate what is actually before this Court and what is not.

"the power to "formulate policy," subject to the Legislature's power to "enact laws of statewide concern." *Id.*

In 2009, the Legislature enacted HRS § 304A-1903, which provides that the Board of Regents "may adopt rules pursuant to chapter 91 to regulate public and commercial activities on Mauna Kea lands[,]" subject to certain additional requirements. Pursuant to this rulemaking authority, the University of Hawai'i adopted a new chapter of rules—Hawai'i Administrative Rules ("HAR") Chapter 20-26—at a meeting of the Board of Regents held on November 6, 2019, following several days of public hearings. ROA 56 at 41.[2] These rules generally regulate public and commercial activities at the Mauna Kea Science Reserve. *See generally id.* On their face, the rules provide that "Native Hawaiian traditional and customary rights as recognized and protected under article XII, section 7, of the Hawai'i State Constitution shall not be abridged" and provide that individuals may apply for a variety of permits, including special-use permits. HAR §§ 20-26-3(f), 20-26-63. The Governor approved the rules on January 13, 2020. *Id.*

On June 29, 2020, unidentified members of a family, the "Flores-Case 'Ohana" (hereinafter, "Plaintiff"), filed the underlying Complaint, contending that HAR Chapter 20-26 "unreasonably prevents and restricts" the Plaintiff's traditional and customary rights. ROA 1 at 9, ¶¶ 76–83. Plaintiff does not contend that the rules are being unconstitutionally *applied*, but instead seeks to strike down the entire chapter of rules on the grounds that they are *invalid* under several disparate theories, including theories that the University's rulemaking process violated Article XII, Section 7 of the Hawai'i Constitution; that the University exceeded its statutory rulemaking authority; and that the rules are "inconsistent and incomprehensible." *Id.* at 10–12.

[2] Citations to the Record on Appeal shall be styled as "ROA [Dkt. #] at [PDF page #]." Citations to the Supreme Court docket shall be syled as "SC [Dkt. #] at [PDF page #].

Before trial, the circuit court issued the Court's Order for Reserved Question Pursuant to Rule 15, Hawai'i Rules of Appellate Procedure, which poses the following questions:

> In a challenge to the constitutionality of administrative rules based on a violation of Article XII, Section 7, of the Hawai'i State Constitution, does the burden of proof shift to the government defendant to prove that the rules are reasonable and do not unduly limit the constitutional rights conferred in Article XII, Section 7? If so, what standards govern its application?

SC 1 at 4. This Court accepted the question. SC 6.

III. STANDARD OF REVIEW FOR A RESERVED QUESTION

A reserved question necessarily presents a question of law. *State v. Jess*, 117 Hawai'i 381, 391, 184 P.3d 133, 143 (2008). This Court "may not express an opinion on a question of law by assuming certain facts as to which the circuit judge has made no finding." *Cabrinha v. Am. Factors Ltd.*, 42 Haw. 96, 100 (Terr. 1957).

Here, the circuit court reported no findings of fact to this Court, and the reserved question before this Court raises pure questions of law. Yet, the parties' briefing devotes a significant number of pages to the specific facts surrounding the lawsuit, which raises legal issues that are not covered by the reserved question—and which this Court should therefore not address—such as whether the University of Hawai'i violated the terms of the Legislature's statutory delegation of rulemaking authority or whether HAR Chapter 20-26 is unconstitutionally vague.

This Court's proceeding on the reserved question is not an appropriate forum for debating the underlying merits of the case, and the Attorney General urges this Court to address only the reserved question before it. The Attorney General submits this brief because the reserved question before this Court raises general issues of law, and this Court's answers could directly affect entire branches of government and impact areas of law that have nothing to do with land

management or the Mauna Kea Science Reserve. The only issues for resolution are pure questions of law.

IV. DISCUSSION

The burden does not shift to state agencies to prove that its presumptively valid rules are constitutional, lest they be struck down, whenever someone asserts a facial constitutional claim to rules pursuant to Article XII, Section 7. First, although this Court's decision in *Armitage* is already directly on point, this brief sets the stage by addressing the nature of an agency's quasi-legislative rule-making power. Second, the burden is not on the government, but upon the one challenging constitutional validity of rules: she must establish beyond a reasonable doubt that no set of circumstances exists under which the rule would be valid. Third, the plain language of Article XII, Section 7; the history of the 1978 Constitutional Convention; and this Court's precedent, including *Armitage*, all establish that the burden is borne by the facial challenger. Finally, Plaintiff's attempt to jam precedent arising from quasi-judicial contested-case hearings into quasi-legislative rule-making is not only legally incorrect but unreasonable in practice.

A. Agency Rulemaking Is an Exercise of Quasi-Legislative Power

The government of the State of Hawai‘i is a "tripartite government in which the sovereign power is equally divided among the branches." *League of Women Voters of Honolulu v. State*, 150 Hawai‘i 182, 192, 499 P.3d 382, 392 (2021). The political branches of government are the Legislature and the Governor, which are constitutionally vested with the "legislative power" and "executive power" of the State of Hawai‘i, respectively. Article III, Section 1 of the Hawai‘i Constitution provides:

> The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

Haw. Const. art. III, § 1. The pure "executive power" of government is vested in the Governor, where such powers include the "faithful execution of the laws[,]" service as "commander in chief" of Hawaii's armed forces, and the granting of pardons. Haw. Const. art. III, §§ 1, 5. All members of the Legislature and the Governor are duly elected by the people of the State of Hawai‘i. Haw. Const. art. III, § 4 & art. V, § 1.

State agencies—"executive and administrative offices, departments and instrumentalities of the state government"—exercise powers and duties "allocated by law." Haw. Const. art. V, § 6. Such agencies are, in turn, headed by an executive who is nominated and appointed by the Governor, by and with the advice and consent of the Senate, and who "shall be under the supervision of the governor[.]" *Id.*; *see also* HRS § 26-4 (the "Structure of Government").

Although state agencies fall under the executive branch of government, the Legislature can, pursuant to law, delegate power to state agencies to enact "rules," which have "the force and effect of law." *State v. Kotis*, 91 Hawai‘i 319, 331, 984 P.2d 78, 90 (1999) ("Administrative rules, like statutes, have the force and effect of law."). When state agencies act in a rule-making capacity, they act as "quasi-legislatures" and promulgate "quasi-legislation" (i.e., rules). *See* 73 C.J.S. *Public Administrative Law & Proc.* § 34 (2022).

This Court has held that "rule-making is essentially legislative in nature because it operates in the future[.]" *In re Application of Hawaiian Elec. Co., Inc.*, 81 Hawai‘i 459, 467, 918 P.2d 561, 569 (1996). Indeed, by definition, a "rule" is generally defined as "each agency statement of general or particular applicability and *future effect* that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency." HRS § 91-1(4) (emphasis added).

The procedures and policies underpinning agency rule-making are analogous to those applicable to the lawful passage of legislation. To make rules, agencies adhere to the Hawai‘i Administrative Procedures Act ("HAPA"), HRS Chapter 91, which sets forth specific statutory processes an agency must follow to create valid rules. Among other things, HAPA provides that the agency shall "[g]ive at least thirty days' notice for a public hearing" and "[a]fford all interested persons opportunity to submit data, views, or arguments, orally or in writing." HRS § 91-3(a)(1), (2). The agency "shall fully consider all written and oral submissions respecting the proposed rule." HRS § 91-3(a)(2). Like legislation, the adoption of rules by a state agency "shall be subject to the approval of the governor." HRS § 91-3(d); *compare* Haw. Const. art. III, § 16 (laws)*, with* HRS § 91-3(d). The statutory procedural requirements for agency rulemaking under HAPA have the effect of providing the public with notice of the quasi-legislative proceedings and of allowing the public to participate in the rulemaking process, which serve analogous purposes as certain constitutional procedural requirements regarding legislative power.[3]

State agency rule-making is analogous to legislative law-making in form, function, and process. This is why, as shown in the next section, administrative rules are entitled to the same broad deference and protection against facial constitutional challenges as laws.

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[3] For instance, this Court has held that one of the purposes of Article III, Section 15 of the Hawai‘i Constitution, which provides that "[n]o bill shall become law unless it shall pass three readings in each house on separate days[,]" is to "provide[] the public with notice and an opportunity to comment on proposed legislation." *League of Women Voters*, 150 Hawai‘i at 196, 499 P.3d at 396.

B. The Challenger Bears a Heavy Burden When Asserting a Facial Challenge to a Rule: She Must Establish Beyond a Reasonable Doubt that No Set of Circumstances Exists Under Which the Rule Would be Valid

It is the challenger who bears the heavy burden when asserting that either a statute or administrative rule is invalid. In Hawai‘i,

> where it is alleged that the legislature has acted unconstitutionally, this court has consistently held that every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt. The infraction should be plain, clear, manifest, and unmistakable.

State v. Lee, 75 Haw. 80, 90–91, 856 P.2d 1246, 1253–54 (1993) (cleaned up; citation omitted). The presumption of validity and the burdens placed upon the challenging party when asserting claims against statutes apply equally to laws and quasi-legislation, like rules and ordinances. *See Pray v. Judicial Selection Comm'n*, 75 Haw. 333, 340–41, 861 P.2d 723, 727 (1993) (regarding the constitutionality of rules); *State v. Kamal*, 88 Hawai‘i 292, 294, 966 P.2d 604, 606 (1998) (regarding the constitutionality of ordinances). This makes sense: rules are legislative in character, *In re Application of Hawaiian Elec.*, 81 Hawai‘i at 467, 918 P.2d at 569, are construed the same as statutes, *Int'l Brotherhood of Elec. Workers v. Hawaiian Tele. Co.*, 68 Haw. 316, 323, 713 P.2d 943, 950 (1986), and have the force and effect of law. *Kotis*, 91 Hawai‘i at 331, 984 P.2d at 90. And, indeed, treating statutes and rules the same when their validity is challenged is not unique to Hawai‘i—it is hornbook law. *See* 2 Am. Jur. 2d *Administrative Law* § 221.

When an administrative rule is subject to a facial constitutional challenge,[4] the challenger must establish that no set of circumstances exists under which the rule would be valid. In

[4] "Unlike an as-applied challenge, which attacks the application of a [law or rule] to a specific set of facts, a facial challenge is a challenge to an entire legislative enactment or provision. *JP*

Hawai‘i, when a party claims that a statute is invalid because it is facially unconstitutional, courts apply the federal standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987): "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *A.A. v. B.B.*, 139 Hawai‘i 102, 114, 384 P.3d 878, 890 (2016) (quoting *Salerno*, 481 U.S. at 745).[5] Another way of articulating this standard is that a "facial challenge must fail where the statute has a plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citation omitted; internal quotation marks omitted).

Since this Court's first express application of the *Salerno* "no set of circumstances" standard in the 2016 *A.A.* case, there does not appear to have been another published case regarding a facial challenge to an administrative rule. But in previous facial challenges to administrative rules, this Court utilized law regarding facial challenges to statutes and rules interchangeably. *See Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Hawai‘i 159, 166, 172 P.3d 471, 478 (2007) (facial challenge to DCCA administrative rules). And, in any event, the application of the *Salerno* "no set of circumstances" standard to administrative rules is the national standard. The U.S. Supreme Court has clearly held that to prevail in a facial challenge

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Morgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC, 200 F. Supp. 3d 1141, 1157 (D. Nev. 2016) (citation omitted; internal quotation marks omitted).

[5] The Supreme Court of California clearly articulates the standard for facial challenges:

> To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute. Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.

Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 1084 (Cal. 1995) (citation omitted).

to a regulation, the challenger "must establish that no set of circumstances exist under which the regulation would be valid." *Reno v. Flores*, 507 U.S. 292, 301 (1993) (quoting *Salerno*, 481 U.S. at 745; brackets omitted); *Cachil Dehe Band of Wintun Indians v. Zinke*, 889 F.3d 584, 599 (9th Cir. 2018) (quoting *Reno*). And so have state courts. *See, e.g.*, *T.H. v. San Diego Unified Sch. Dist.*, 122 Cal. App. 4th 1267, 1281 (Cal. Ct. App. 2004) (applying "no set of circumstances" test to regulations); *563 Grand Medical PC v. N.Y. State Ins. Dept.*, 787 N.Y.S.2d 613, 616 (N.Y. Sup. Ct. 2004) ("A plaintiff may prevail only if he or she can establish that no set of circumstances exists under which the regulation would be valid." (citing cases)); *In re Mountain Top Inn & Resort*, 238 A.3d 637, 646–47 (Vt. 2020) (in facial challenge, "a litigant argues that no set of circumstances exists under which a statute or regulation could be valid" (citation omitted; brackets omitted)). Therefore, in Hawai‘i, when an administrative rule is subject to a facial constitutional challenge, a challenger must overcome "the most difficult challenge to mount successfully": he must establish beyond a reasonable doubt that no set of circumstances exists under which the rule would be valid.

C. No Burden Shifts to the State Agency When a Rule is Subject to a Facial Constitutional Challenge Brought Pursuant to Article XII, Section 7 of the Hawai‘i Constitution

The text and history of Article XII, Section 7 do not support Plaintiff's position that the burden shifts to the government to reaffirm the validity of its rules whenever someone asserts a facial Article XII, Section 7 challenge to a rule in court. Nor does this Court's precedent, which in fact affirmatively establishes that the challenger, not the government, bears the burden of establishing a constitutional right to relief under Article XII, Section 7. Plaintiff's application of contested-case precedent into rule-making is both wrong and impracticable, for the reasons discussed below. We will address these points in that order.

1. The Text and History of Article XII, Section 7 of the Hawai‘i Constitution Establish That Traditional and Customary Rights Must Be Balanced Against the State's Own Constitutional Right of Regulation

When interpreting the Hawai‘i Constitution, this Court observes basic principles of construction:

> Because constitutions derive their power and authority from the people who draft and adopt them, we have long recognized that the Hawaii Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent. This intent is to be found in the instrument itself.
>
> The general rule is that, if the words used in a constitutional provision are clear and unambiguous, they are to be construed as they are written. In this regard, the settled rule is that in the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them.
>
> Moreover, a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it.

Hanabusa v. Lingle, 105 Hawai‘i 28, 31–32, 93 P.3d 670, 673–74 (2004).

The clear and unambiguous language of Article XII, Section 7 of the Hawai‘i Constitution establishes that traditional and customary rights are "subject to the right of the State to regulate such rights":

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Haw. Const. art. XII, § 7. There is an inherent tension in Article XII, Section 7: the State "reaffirms" and "shall protect" traditional and customary rights of certain ahupua‘a tenants, but such individual rights are "subject" to the *State's own constitutional right* to regulate those very same individual rights. This is why this Court has held that not only is "[t]he privilege afforded

for native Hawaiian practices . . . not absolute," but that the constitution "requir[es] consideration of the facts and circumstances surrounding the conduct." *State v. Pratt*, 127 Hawai'i 206, 307–08, 277 P.3d 300, 307–08 (2012). There is a *fact-dependent balancing* that must occur where traditional and customary rights are weighed against the State's regulatory interest.

All of this is borne out in the history of the 1978 Constitutional Convention, where Article XII, Section 7 was first adopted. The Standing Committee, for instance, stated:

> [Y]our Committee decided to provide language which gives the State the power to regulate these rights. Your Committee did not intend these rights to be indiscriminate or abusive to others. While your Committee recognizes that, historically and presently, native Hawaiians have a deep love and respect for the land called aloha 'aina, reasonable regulation is necessary to prevent possible abuses as well as interference with these rights.

Standing Comm. Rep. No. 57 in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 639 (1980). At the debate on Article XII, Section 7, delegates spoke about the State's right to regulate. For instance, Delegate Hoe stated: "This proposal merely protects rights that are established; it does not create new rights. It specifically states that the rights referred to are to be subject to the State's right to regulate. Both aspects then are today within the law." Comm. of the Whole Debates in 2 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 434 (1980). Delegate Ontai stated: "[T]his proposal is 'subject to the right of the State to regulate the same.' What this means is that *the legislature will then put it under the microscope, ax here, ax there, and I think it will come out as something everybody can live with.*" *Id.* at 437 (emphasis added).

The balancing of the individual and governmental policy interests—the exercise of traditional and customary constitutional rights and the State's own constitutional right to regulate these individual rights—is the hallmark of this Court's jurisprudence. *See Pratt*, 127 Hawai'i at

217, 277 P.3d at 311. Necessarily, a constitutional analysis is fact-specific and not founded upon absolutes capable of surefire regulatory determination at a policy level.

2. This Court's Precedent Directly Contradicts Plaintiff's Arguments: the Burden in Constitutional Challenges Based Upon Article XII, Section 7 Rests Squarely Upon the Challengers

This Court has expressly articulated that the burden of proof for establishing an entitlement to Article XII, Section 7 relief rests on the person claiming constitutional protection. *See State v. Hanapi*, 89 Hawai'i 177, 970 P.2d 485 (1998); *State v. Pratt*, 127 Hawai'i 206, 277 P.3d 300 (2012). *See generally* Native Hawaiian Law: A Treatise 801–03 (Melody Kapilialoha MacKenzie et al. eds. 2015) ("Burdens of Proof"). All of these cases are *criminal*, where the government bears the highest burden of proof that it ever bears, including "the burden of proving all the elements of the offense *and* negativing a defendant's statutorily defined defense, beyond a reasonable doubt." *Hanapi*, 89 Hawai'i at 182, 970 P.2d at 490 (emphasis in original). Yet, this Court still held that because of the inherent indeterminate nature of Article XII, Section 7 rights, it is the individual seeking constitutional protection who must prove entitlement to relief.

This Court's precedent, in fact, directly contradicts *every aspect* of Plaintiff's position that the State bears the burden of proof "to establish, beyond a reasonable doubt, that a challenged administrative rule does not prohibit the reasonable exercise of a traditional and customary right[.]" *See* SC at 26. In *State v. Hanapi*, a criminal trespass case, this Court held:

> As a practical matter, it would be unduly burdensome to require the prosecution to negative any and all native Hawaiian rights claims regardless of how implausible the claimed right may be. To hold otherwise would be to create a rule that all conduct is presumptively protected under the Constitution. We therefore hold that it is the obligation of the person claiming the exercise of a native Hawaiian right to demonstrate that the right is protected.

Hanapi, 89 Hawai'i at 184, 970 P.2d at 492 (citation omitted; internal quotations omitted). (This language actually says that it is the *State, not the defendant*, who would be "unduly burdened" by

placing the burden of proof on the government). *Compare with* SC 1 at 4 (reserved question whether the government bears the burden of establishing that regulations "do not unduly limit" constitutional rights). Instead, the *Hanapi* court held that a criminal defendant asserting the "native Hawaiian privilege" as a defense to a criminal conviction must "at a minimum" prove:

(1) the defendant must be "native Hawaiian" according to [specific criteria];

(2) the claimed right must be "constitutionally protected as a customary or traditional native Hawaiian practice"; and

(3) the conduct must occur on undeveloped property.

Pratt, 127 Hawai'i at 215–216, 277 P.3d at 309–10 (summarizing *Hanapi*).

This Court next held that when dealing with a traditional-and-customary-rights defense, if a criminal defendant meets his three-part evidentiary burden in *Hanapi*, he must establish that a balancing of a Native Hawaiian practitioner's rights against the state's interest in regulation weighs in his favor. *Pratt*, 127 Hawai'i at 216–18, 277 P.3d at 310–12. In *Pratt*, the criminal defendant was convicted for residing in a closed area of a state park. After concluding that even where the plaintiff meets the three *Hanapi* factors, courts must conduct a balancing test, "applying the totality of the circumstances test to the facts of this case[.]" *Id.* at 218, 277 P.3d at 312. The Court concluded that, on balance, because procedures were available for visiting anywhere with a proper permit, which he did not attempt to obtain, he could not assert a valid native Hawaiian defense to prosecution:

> While Pratt has a strong interest in visiting Kalalau Valley, he did not attempt to visit in accordance with the laws of the State. Those laws serve important purposes, including maintaining the park for public use and preserving the environment of the park. The outcome of this case should not be seen as preventing Pratt from going to the Kalalau Valley; Pratt may go and stay overnight whenever he obtains the proper permit. He may also apply to the curatorship program to work together with the DLNR to take care of the heiau in the Kalalau Valley. The trial court did not err in determining that Pratt's interest

> in conducting his activities without a permit did not outweigh the State's interest in limiting the number of visitors to Kalalau Valley; Pratt's activities, therefore, do not fall under constitutional protection.

Id. at 218, 277 P.3d at 312.

Finally, *Armitage* integrates the principles articulated in *Hanapi* and *Pratt* into the analysis of facial challenges to administrative rules. *State v. Armitage*, 132 Hawai‘i 36, 319 P.3d 1044 (2014). In *Armitage*, the petitioners had been convicted of violating HAR § 13-261-10, which prohibits people from entering or attempting to enter Kaho‘olawe without specific authorization by, or written agreement with, Kaho‘olawe Island Reserve Commission ("KIRC") pursuant to HAR § 13-261-11. HAR § 13-261-11(b), in turn, provides: "Entrance into and activities within the reserve requested by applicants seeking to exercise traditional and customary rights and practices compatible with the law, shall be approved or disapproved by the commission after review and consultation with cultural practitioners."

First, this Court, citing to *Hanapi* and *Pratt*, performed a *fact-specific balancing* of interests and held that even assuming that the petitioners could establish all three of the *Hanapi* factors, they could not establish an entitlement to the native Hawaiian privilege defense: petitioners "made no attempt to avail themselves of the applicable procedures to obtain lawful entry into the Reserve" and, therefore, "did not reasonably exercise their constitutionally protected native Hawaiian rights because they did not apply for authorization from the commission." *Armitage*, 132 Hawai‘i at 54–55, 319 P.3d at 1062–63 (internal citations and quotation marks omitted).

Then, the Supreme Court addressed a *facial challenge* to the rules pursuant to Article XII, Section 7—*the exact situation here*. The Supreme Court notes in the opinion that the district court concluded that *the petitioners* bore the burden of proof of establishing unconstitutionality:

> HAR §§ 13-261-10 or 13-261-11 are presumptively constitutional[.] Petitioners have made no showing that either HAR §§ 13-261-10 or 13-261-11 have clear, manifest, and unmistakable constitutional defects, and they certainly have failed to prove that the rules are unconstitutional beyond a reasonable doubt

Id. at 43–44, 319 P.3d at 1051–52 (internal brackets and citations omitted). The Supreme Court did not repudiate the district court's articulation of the burden, and instead held:

> This court has constructed the right to engage in traditional and customary native Hawaiian practices as "an attempt on the part of the framers of HRS § 1-1 to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law." *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 10, 656 P.2d 745, 751 (1982). Kalipi further stated that "the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area." *Id.* Accordingly, in *Ka Pa'akai O Ka 'Aina*, it was held that the State and its agencies "may not act without independently considering the effect of their actions on Hawaiian traditions and practices." 94 Hawai'i at 46, 7 P.3d at 1083.

Id. at 58, 319 P.3d at 1066 (brackets omitted). Then, applying these principles to the rules, the Supreme Court held that because there was a permit procedure available to exercise traditional and customary rights on Kaho'olawe and considering the petitioners' fact-specific failure to apply for a permit, the facial challenge failed as a matter of law:

> In this case, the KIRC did consider the effect of its actions on Hawaiian traditions and practices when it promulgated HAR §§ 13-261-10 and -11. This consideration is apparent in the exception in HAR §§ 13-261-10 and -11 specifically mentioning "[e]ntrance into and activities within the reserve requested by applicants seeking to exercise traditional and customary rights and practices compatible with the law[.]" HAR § 13-261-11. Further, as discussed *supra*, with respect to Petitioners' "privilege defense," the State's interest as balanced against the potential harm to Petitioners' ability to engage in native Hawaiian traditional and customary practices weighs in favor of the State. **As a result, Petitioners cannot claim that HAR §§ 13-261-10 or -11 is unconstitutional on this basis.**

Id. (emphasis added).

Armitage is dispositive of the reserved question. This Court specifically noted that the district court concluded that the burden of proof rested with the petitioners to establish the invalidity of administrative rules vis-à-vis Article XII, Section 7, and it did not revisit this conclusion. The Court did not ask the State to defend its rules, delve into the history of the rule-making process, or even suggest that a unique standard of review applies to a facial challenge brought under Article XII, Section 7. Instead, the Court ruled that the KIRC rules were plainly constitutional because there was a process in place for traditional and customary rights to be addressed at a fact-specific level.[6] Further, the Court did not question where the agency's *Ka Pa'akai* findings were, even though it cited to *Ka Pa'akai*. The Court's analysis in *Armitage*, which clearly does not support Plaintiff's position, is entirely consistent with all of the Court's precedent concerning the case-by-case analysis required by the Article XII, Section 7 and the traditional standard for establishing unconstitutionality of a law or rule: the challenger must establish that no set of circumstances exists under which the law or rule would be valid. *See A.A.*, 139 Hawai'i at 114, 384 P.3d at 890.

Despite all of this—and without citation to *Armitage*—Plaintiff cites to federal case law largely concerning regulation of First Amendment fora for the proposition that the burden should shift to the State to prove the validity of its own rules. As an initial matter, Plaintiff fails to acknowledge that this Court has repeatedly emphasized that First Amendment challenges uniquely affect the analysis of laws for facial validity. *See, e.g.*, *State v. Manzo*, 58 Haw. 440,

[6] The *Armitage* court stated that the availability of the permitting process evidenced that KIRC "did consider the effect of its actions on Hawaiian traditions and practices[.]" 132 Hawai'i at 58, 319 P.3d at 1043. This is not new: considering the views of the public at large is a feature of the rule-making process: "Where an administrative agency seeks to promulgate a rule, it must consider the views of interested persons[.]" *Vega v. Nat'l Union Fire Ins. Co.*, 67 Haw. 148, 155, 682 P.2d 73, 78 (1984) (citation omitted; cleaned up).

445, 573 P.2d 945, 949 (1977) ("But where the First Amendment is involved an exception to this rule has been created (the overbreadth doctrine) pursuant to which it is sufficient, in order to establish facial invalidity, merely to show that the challenged statute is broad enough in its terms to suppress protected speech, without the need of showing that the specific conduct before the court is protected." (citation omitted)); *State v. Bumanglag*, 63 Haw. 596, 620, 634 P.2d 80, 95–96 (1981) ("the involvement of arguably protected first amendment freedoms makes the facial validity of [the statute], rather than a particular application thereof, our primary concern"). The absolute protection of First Amendment free-speech rights is not at all analogous to the fact-specific balancing of interests found in the Article XII, Section 7 analysis. Indeed, the Ninth Circuit case of *Berger v. City of Seattle*, which Plaintiff prominently relies upon, establishes an analytical chasm—the *Berger* case states that "[a] permitting requirement is a prior restraint on speech and therefore bears a 'heavy presumption' against its constitutionality." 569 F.3d 1029, 1037 (9th Cir. 2009). Compare this to *Armitage* where the availability of a permitting regime affirmatively established that plaintiff's facial challenge to administrative rules based upon Article XII, Section 7 ***failed as a matter of law***. *See also Pratt*, 127 Hawai'i at 217, 277 P.3d at 311 (when analyzing claims that have traditional and customary rights at their heart, this Court has eschewed "legal presumptions" in favor of a "totality of the circumstances" standard); *Jou*, 116 Hawai'i at 166, 172 P.2d at 478 ("A facial challenge, by nature, implicates no facts in particular as it is purely a question of law"). Finally, unlike virtually every other constitutional provision, the plain language of Article XII, Section 7 provides that the State has its own "right"

to regulate the personal right sought to be vindicated. It is evident that the burden does not shift to the government to establish the constitutionality of its own rules.[7]

3. Quasi-Legislative Rule-Making is Not a Quasi-Judicial Contested-Case Hearing

In its analysis of Hawai‘i law, Plaintiff largely relies upon case-law applicable in contested-case hearings and, in particular, argues that the State must show that the State "performed the required *Ka Pa‘akai* analysis prior to promulgating" rules. SC at 26. These arguments conflate the disparate concepts of rule-making and contested cases and must be rejected.

Rules and contested cases serve distinct purposes, just like the legislative and judicial powers wielded by the Legislature and the courts do: rules apply generally and in the future like laws, while agencies in contested-case hearings disseminate orders that create legally enforceable rights at the individual level, like court orders and judgments. While a "rule" is "each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency[,]" the "contested case" is "a proceeding in which the legal rights, duties, or

[7] A conclusion that the burden in facial challenges remains with the challenger does not mean that a private individual has no way to obtain relief on a case-by-case basis. In addition to special-use permitting requirements and other forms of permission at the agency level, there is a statutory right of interested persons to "petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency[,]" the decisions of which are appealable. HRS § 91-8; *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals*, 114 Hawai‘i 184, 196–97, 159 P.3d 143, 155–56 (2007) (HRS § 91-8 "is meant to provide a means of seeking a determination of whether and in what way some . . . agency rule . . . *applies* to the factual situation raised by an interested person" (emphasis in original)); *Lingle v. HGEA*, 107 Hawai‘i 178, 185–86, 111 P.3d 587, 594–95 (2005) (orders disposing of petitions for declaratory review are appealable). And there are as-applied constitutional challenges that, depending on the circumstances, may be asserted. All of these methods are wholly consistent with the Hawai‘i Constitution and the intent of the Framers of Article XII, Section 7, while facial challenges presumptively invalidating government action are not.

privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HRS § 91-1. The contested-case process involves notice served on specific parties, an opportunity for the presentation of "evidence," a litigation-style record, an adversarial structure, the right of cross-examination, rules of evidence, and the issuance of court-style orders. HRS §§ 91-9 to 91-11. The party initiating the contested-case hearing bears "the burden of proof, including the burden of producing evidence as well as the burden of persuasion[,]" which is a preponderance of the evidence. HRS § 91-10(5). The agency issues a decision or order, in writing, which "shall be accompanied by separate findings of fact and conclusions of law." HRS § 91-12. There is a whole body of law specifically dealing with the judicial review of agency decisions and orders arising from contested-case hearings pursuant to HRS § 91-14, while there is no comparable right of appeal from the adoption of rules. These distinctions give rise to major differences in the constitutional analysis of the two primary forms of agency action—for instance, "[q]uasi-legislative decisions that affect large numbers of unspecified persons and are not directed at specific individuals do not give rise to the constitutional procedural due process requirement of prior notice," while providing due process to specific parties is at the heart of contested-case jurisprudence. *Compare In re Applications of Herrick*, 82 Hawai‘i 329, 344, 922 P.2d 942, 957 (1996) (rules)*, with Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai‘i 376, 380–81, 363 P.3d 224, 228–29 (2015) (contested cases).

Findings of fact are the fruits of adversarial evidentiary proceedings with closed evidentiary records. In Hawai‘i courts, findings of fact can be made by juries in the form of special verdicts or by judges in bench trials. HRCP 49(a), 52. As with litigation, it is black-letter law that findings of fact are required in quasi-judicial contested-case hearings; on the other hand, "[f]indings of fact are not necessary where the agency proceeding is not essentially

adjudicatory, or where a legislative function is being performed by an agency, except where the legislature requires such findings to be made." 73A C.J.S. *Public Administrative Law & Proc.* § 329. Consistent with the black letter, in Hawai'i, findings of fact are only required when issuing final orders in contested-case hearings. HRS § 91-12.

Requiring findings of fact regarding the assessment of traditional and customary rights may work in the contested-case setting, but it does not in the rule-making setting. In *Ka Pa'akai*, this Court promulgated a prophylactic legal requirement applicable to the Land Use Commission sitting in a quasi-judicial capacity:

> [T]he LUC, in its review of a petition for reclassification of district boundaries, must—*at a minimum*—make specific findings and conclusions as to the following: (1) the identity and scope of "valued cultural, historical or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.

94 Hawai'i at 47, 7 P.3d at 1084 . The resolution of the *Ka Pa'akai* analysis and the making of factual findings depends on record evidence. For instance, when considering the appeal from the Board of Land and Natural Resources's granting of the Thirty Meter Telescope conservation district use application, which arose from perhaps the largest contested-case hearing in Hawai'i history, this Court rejected the petitioners' arguments that the Board violated *Ka Pa'akai* based upon the Board's assessment of the hearing record. *See In re Conservation District Use Application HA-3568*, 143 Hawai'i 379, 395–98, 431 P.3d 752, 768–771 (2018). But there is no "evidentiary record" in a rule-making proceeding; instead, the essence of rule-making—like law-making—is the consideration of views of interested persons on matters of policy and personal opinions, concerns, approvals, and disapprovals. *See Vega*, 67 Haw. at 155, 682 P.2d at 78.

The reserved question in this case raises a general question of law, and Plaintiff's contention that agencies need to make *Ka Pa'akai* findings of fact when sitting in a quasi-legislative capacity would have broad implications. To illustrate, the Department of Land and Natural Resources alone manages

> nearly 1.3 million acres of State lands, beaches, and coastal waters as well as 750 miles of coastline (the fourth longest in the country). It includes state parks; historical sites; forests and forest reserves; aquatic life and its sanctuaries; public fishing areas; boating, ocean recreation, and coastal programs; wildlife and its sanctuaries; game management areas; public hunting areas; and natural area reserves.

See https://dlnr.hawaii.gov/about-dlnr/ (last accessed Aug. 14, 2012). The Department has promulgated all manner of rules intended to be protective of the environment, including (just as examples) rules applicable to all state waters regarding fishing licenses, certain types of fishing gear, and those regulating the take of certain species of fish (HAR Chapters 13-74, 13-75, 13-95); rules regulating activities in forest reserves and game bird and mammal hunting (HAR Chapter 13-104, 13-122, 13-123); rules governing all conservation-district lands in the state (HAR Chapter 13-5); and rules governing the jewels of state land, the Natural Area Reserves System (HAR Chapter 13-209). Some DLNR rules have effect in every ahupua'a on each island and theoretically could affect any practitioner of traditional and customary rights who lives in the state. Plaintiff's proposal that the State must perform a judicially reviewable *Ka Pa'akai* analysis and make findings of fact is fundamentally unreasonable in a rule-making context where there is no evidentiary record and nobody's rights, duties, or privileges are judicially determined.[8]

[8] It further incentivizes private individuals to not disclose specific concerns during the rule-making process, only to ambush state agencies after rules are promulgated. Alternatively—if it is Plaintiff's contention that this would not be acceptable—it would impose a duty upon anyone

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The agencies of the state of Hawai‘i take their duty to protect traditional and customary rights seriously. And these agencies fulfill their duties in a myriad of ways, the vast majority of which are unseen by this Court because they are widely accepted and not controversial. *See generally* Suzanne Case, *Implementing PASH and Its Progeny Within DLNR*, 43 Univ. of Haw. L. Rev. 420 (2021).

But as this Court has consistently recognized, the Article XII, Section 7 constitutional analysis involves a balancing of interests, which logically means that there are limitations on both the regulation of traditional and customary rights and the expression of such rights. This is akin to the Court's robust precedent in the realm of environmental protection. For instance, in reviewing determinations regarding environmental impact statements, this Court adopted federal precedent, which states:

> The court should not be used as a quasi-legislative or quasi-executive forum by those who are dissatisfied with policy decisions made by governing bodies. The environmental laws were neither meant to be a "crutch" for chronic fault-finding, nor as a means of delaying the implementation of properly accepted projects.

Price v. Obayashi Haw. Corp., 81 Hawai‘i 171, 182 n.12, 914 P.2d 1364, 1375 n.12 (1996) (citation and internal brackets omitted). The same must be said of traditional and customary rights within the context of validly implemented regulation, where the Framers' expressed intent is that the touchstone of Article XII, Section 7 should be balance, not supremacy of either private or governmental interests.

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theoretically impacted by proposed rules to come forward with specific theoretical concerns, lest such concerns be waived.

V. CONCLUSION

This Court should answer the reserved question in the negative: in proceedings on a facial constitutional challenge to an administrative rule pursuant to Article XII, Section 7 of the Hawai‘i Constitution, the burden does not shift to the government to prove the constitutionality of its own rules. Instead, consistent with this Court's precedent and the text and history of Article XII, Section 7, the challenger must establish beyond a reasonable doubt that no set of circumstances exists under which the rule would be valid.

DATED: Honolulu, Hawai‘i, August 31, 2022.

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CERTIFICATE OF SERVICE

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