NO. SCRQ-22-0000118

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

FLORES-CASE ‘OHANA, Plaintiff-Appellant, vs. UNIVERSITY OF HAWAI‘I, Defendant-Appellee.	CIVIL NO. 3CCV-20-0000255 (Declaratory Judgment) PLAINTIFF-APPELLANT’S OPENING BRIEF RE RESERVED QUESTION FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT, STATE OF HAWAI‘I FIRST CIRCUIT COURT Judge: Honorable Robert D.S. Kim

PLAINTIFF-APPELLANT’S OPENING BRIEF RE RESERVED QUESTION FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT, STATE OF HAWAI‘I

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

The duty to preserve and protect Native Hawaiian traditional and customary practices follows State agencies into the courtroom.

This Court is asked to determine whether, in a challenge to an administrative rule under Article XII, § 7 of the Hawai‘i State Constitution, the burden of proof shifts to the government defendant to prove that the challenged rules are constitutional. To give full meaning to this provision, the question must be answered in the affirmative.

Article XII § 7 is significant. It affirms and permits the exercise of Native Hawaiian traditional and customary practices. It also obligates the State to preserve and protect those practices. It was adopted out of a concern that Native Hawaiian subsistence, religious, and cultural practices that formed the basis of Hawaiian identity were being regulated out of existence. To stem the tide of that loss, the State was called upon to act to ensure that these practices would be preserved and protected.

Ill-conceived administrative rules which regulate access and use of land can threaten further loss of cultural identity. State agencies must act with diligence and foresight when adopting regulations to ensure that rights, customs, and practices are preserved and protected.

Requiring the State to carry the burden to prove that a challenged rule is constitutional under Article XII § 7 is necessary to give meaning to the intent of that provision. It would be inconsistent with well-settled law to delegate the State's duty to enforce the protections of this provision to practitioners. It is the State that has the duty to act to preserve and protect Article XII § 7 rights; therefore, it is best suited to prove that it complied with its affirmative mandate. To require otherwise would force practitioners and the public to guess what steps the State did or did not take to identify, preserve, and protect effected practices and what interests the State sought to balance.

The State is tasked with being a "primary defender" of Native Hawaiian rights and practices. It must be held accountable for the discharge of this duty. The burden must be placed on the State and its agencies to establish that a law challenged under Article XII § 7 is constitutional.

II. STATEMENT OF THE CASE[1]

A. MANAGEMENT OF MAUNA KEA

Mauna Kea, the target of the University of Hawai‘i’s administrative rules that are subject of the underlying action, has long been regarded as one of the most sacred places in Hawai‘i by Native Hawaiians. *See* Dkt. 3 #38 at v, 96; Dkt. 3 #40 at 5-3; Dkt. 3 #41 at 2-14.[2] The tallest mountain in the world when measured from its base on the ocean floor to its peak, it is the “*piko kapu*, or sacred center [or origin point], of the island.” Dkt. 3, #40 at i. Given its physical prominence and position nearest to the heavens, Mauna Kea is likened to a sacred altar and its upper region a sacred domain. *See id.* at 1-3, 5-3, 6-1, #41 at 2-7 to 2-8. The number, variety, and significance of the historic and cultural sites on Mauna Kea is unparalleled elsewhere in Hawai‘i and evidences its historical and cultural status as a sacred mountain and a site of pilgrimage. *See* Dkt. 3, #40 at 5-10, 5-22. Mauna Kea is a living cultural resource considered a realm of great cultural and spiritual importance where Native Hawaiians continue to exercise traditional and customary practices. *See id.* at iv, 7-2

Since 1968, the University of Hawai‘i has been responsible for managing the area of Mauna Kea beginning at approximately 9,200 feet and extending to the summit at 13,796 feet. *See* Dkt. 3, #40 at 3-1. Designated as state conservation lands, the lands under University management are located within the ahupua‘a of Ka‘ohe, which was designated Hawaiian Kingdom Government lands in the Māhele Act of 1848.[3] *See* Dkt. 3 #38 at vii-viii. There has been a long history of negative impacts to Mauna Kea’s natural and cultural resources from observatory use, scientific research, lack of law enforcement, and visitor disturbance during the University’s tenure as manager. *See id.* at 3-7, 6-11 to 6-17; Dkt. 3 #41 at 4-17; Dkt. 3 #44 at 15.

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[1] Except where otherwise noted, the factual history of this dispute is provided for context as to the circumstances and procedures that led to the current procedural posture of this matter and could be used in considering the hypothetical effects of an answer to the subject reserved question. *See infra* Section IV.

This history is as Plaintiff-Appellant Flores-Case ‘Ohana lays out in its Motion for Summary Judgment, filed July 7, 2021, and is largely based on Appellee’s own written reports. *See* Dkt. 3. #37-57 (Motion for Summary Judgment and Exhibits). For further context, this Court may review the filings in support of and opposition to Appellant’s Motion for Summary Judgment below. *See id.*

[2] Citations to the Record on Appeal can be found in Docket 3 (“Dkt. 3”) of SCRQ-22-000118. Each docket in the underlying circuit court proceedings is identified herein by a # and page numbers are noted.

[3] The areas governed by the challenged administrative rules are a part of the ceded lands trust, lands which are held “as a public trust for native Hawaiians and the general public.” *Ching v. Case*, 145 Hawai‘i 148, 177, 449 P.3d 1146, 1175 (2019).

Out of growing concerns over the protection of Mauna Kea's natural environment, the Hawai'i State legislature requested an audit of the management of Mauna Kea in 1997. Additional audits in 1998 and 2005 resulted in a recommendation to promulgate administrative rules to protect natural and cultural resources. *See* Dkt. 3 #44-45.

In 2009, the legislature—recognizing that "[a]dministrative rules governing public and commercial activities on the Mauna Kea lands are necessary to provide effective protection of cultural and natural resources from certain public activities"—passed Act 132, which granted the University rulemaking authority. *See* 2009 Haw. Sess. Laws Act 132 ("Act 132"), § 1 at 362; Dkt. 3 #46. According to the Act, "[e]xamples of public and commercial activities that could be covered by administrative rules" include: "(1) General access to sensitive resource areas, such as specific cultural features and identified natural resource habitat areas; (2) Traffic and off-road vehicle management and control; (3) Alcohol consumption; (4) Recreational activities; and (5) Commercial tour activities. Act 132, § 1 (emphasis added). Act 132 does not authorize the University to restrict traditional and customary practices; rather, it limits the University's rulemaking authority consistent with the Act's practical purpose by mandating that "[a]ccess for traditional and customary native Hawaiian cultural and religious purposes ***shall*** **be accommodated**." Act 132, § 1 (emphasis added).[4]

That same year, the University drafted the Comprehensive Management Plan ("CMP"). *See* Dkt. 3 #40. The CMP was intended to be "the 'approved management plan' for any future land use[, and] all activities and uses within the UH Management Areas will be consistent with the management actions described in the CMP." *Id*. Within those plans, the University recognized the many traditional and customary practices that occur in the UH Management areas and proposed accommodations and protections for Native Hawaiian traditional and customary practices. *See id.* at i, 1-1, 4-11 – 4-12.

Follow up audits in August 2014 and July 2017 criticized the University for its failure to enact rules to protect Mauna Kea's cultural and natural resources. *See* Dkt. 3 #50-51.

[4] As a law of this jurisdiction, this Court should take judicial notice of Act 132's mandate. *See* HRS chapter 626, Hawai'i Rules of Evidence Rule 202.

B. HAWAIʻI ADMINISTRATIVE RULES CHAPTER 20-26

In June 2018, the University Board of Regents authorized a request to Governor David Ige to begin holding public hearings regarding proposed Hawai‘i Administrative Rules ("HAR") Chapter 20-26 for the lands it manages on Mauna Kea ("Chapter 20-26") and scheduled public hearings to receive testimony regarding the rules. *See* Dkt. 3 #52-54. After revising Chapter 20-26, the University held a second round of public hearings on Hawai‘i Island, Maui, and O‘ahu beginning in June 2019, making further revisions to the rules thereafter. *See* Dkt. 3 #55 at 7-10. On November 6, 2019, the University's Board of Regents voted to adopt the rules, *see id.,* and on January 13, 2020, Governor David Ige signed them into law. *See* Dkt. 3 #56.

Chapter 20-26 purports to apply "to all public activities and commercial activities in the UH Management areas." HAR § 20-26-3(a). "Public activities" includes "activities of the general public that are not governed by contract or other legal agreement with the university[.]" HAR § 20-26-2. Although the rules contain a system of individualized exemptions for the University and astronomy observatories' personnel and contractors, no exemption, accommodation, or separate regulatory scheme—as envisioned in the CMP—exists for Native Hawaiians engaging in traditional and customary practices. *See* HAR § 20-26-3(b).[5] Therefore, Chapter 20-26 treats Native Hawaiian traditional and customary practices as nothing more than "public activities." HAR § 20-26-3.

Chapter 20-26 lists a number of prohibited activities without any exemption, accommodation, or a separate regulatory scheme for Native Hawaiian traditional and customary practices. It bans public activities, including Native Hawaiian traditional and customary practices, in any area used for "educational or research purposes," HAR § 20-26-22(3), as well as on pu‘u outside of trails. HAR § 20-26-21(10). The rules prohibit the construction of structures regardless of the location, nature, or cultural purpose. HAR § 20-26-21(9). The rules forbid "[i]ntroducing any form of plant or animal life[,]" HAR § 20-26-21(2), or "any materials from outside the UH management areas, including . . . natural items[,]" HAR § 20-26-21(11), and penalizes "leaving or abandoning any items," including offerings left on ahu, HAR § 20-26-24(1) & (4), which necessarily impacts Native Hawaiians' ability to leave offerings. The Chapter

[5] The rules contain one ambiguous provision addressing practices: "Native Hawaiian traditional and customary rights as recognized and protected under article XII, § 7, of the Hawai‘i State Constitution shall not be abridged." HAR § 20-26-3(f).

also prohibits "[r]emoving . . . any natural feature or resource[,] including basalt and water from Waiau.[6] HAR § 20-26-21(3). Additionally, Chapter 20-26 restricts public access to "daylight hours (30 min before sunrise and 30 min after sunset)," even for those engaging in traditional and customary practices. HAR § 20-26-38. It also gives the University discretion to close UH Management Areas to the public, including Native Hawaiians, while allowing continued access to University and astronomy observatories' personnel and contractors. *See* HAR § 20-26-38. Further, the penalties imposed for violating these rules include criminal and/or quasi criminal penalties and substantial monetary fines. *See* HAR §§ 20-26-71 to -77.

C. THE FLORES-CASE 'OHANA

Plaintiff-Appellant Flores-Case 'Ohana ("Flores-Case 'Ohana") is an unincorporated association of a Kanaka Maoli (also identified as a Native Hawaiian) family who descends from the aboriginal people who occupied and exercised sovereignty in the area that is now occupied by the State of Hawai'i prior to 1778, resides on Hawai'i Island, and engages in traditional and cultural practices throughout Mauna Kea, including on lands managed by the University of Hawai'i.[7] *See* Dkt. 3, #37, Flores Dec. ¶¶1-7. The Flores-Case 'Ohana fears the repercussions of inadvertently breaking chapter 20-26 while taking part in its traditional practices. *See id.* ¶¶21, 30. These practices originate in the traditional Native Hawaiian culture and community, including, but not limited to: pilgrimages to the summit of Mauna Kea; cultural protocols involving chants, hula, and prayers; gathering of plant material, water, snow, and pōhaku (stones) for ceremony; constructing ahu (altars); and conducting ceremonies and astronomical observations at various times throughout the day and night. *See id*. ¶¶8-9, 12-20. Other Native Hawaiians also exercise similar traditional and customary practices in the UH Management Areas throughout the day and night. *See id* ¶22, 33. Appellant filed this action due to its belief that Chapter 20-26 unjustly subjects its members and others like them engaging in Native Hawaiian traditional and customary practices to sanctions, fines, penalties, and costs for enforcement proceedings. *See id.* ¶¶29-30. Flores-Case 'Ohana claims that Chapter 20-26

[6] Waiau is widely revered for its role in spiritual, religious, and healing practices. Its water is collected for a variety of healing and other ritual uses. *See* Dkt. 3 #40 at iv. 1-3, 5-12, 7-7; Dkt. 3 #41 at 4-11. Depositing piko at Waiau is another traditional practice. *See id.*

[7] The circuit court reported this specific fact in its reserved question, and thus it must be assumed to be true for purposes of this reserved question.

unreasonably prevents and restricts the members of the Flores-Case ʻOhana and others like them from engaging in Native Hawaiian traditional and customary practices.[8] *See id.* ¶¶21-31.

D. PROCEDURAL HISTORY

On June 29, 2020, Flores-Case ʻOhana filed its Complaint containing a single count against the University alleging that Chapter 20-26 is invalid for violating Article XII § 7, in part because it (1) does not fulfill its constitutional duty to protect traditional and customary practices and (2) leaves basic policy matters for resolution to those enforcing the rules on an *ad hoc* and subjective basis. *See* Dkt. 3 #1. On July 20, 2020, the University filed its Answer. Dkt. 3 #13.

By order dated July 6, 2021, trial was set for October 12, 2021. Dkt. 3 #33, 35.

On July 7, 2021, Flores-Case ʻOhana filed its motion for summary judgment. Dkt. 3 #37-58. The University filed its opposition on August 19, 2021, Dkt. 3 #89, and the Flores-Case ʻOhana filed its reply on August 24, 2021. Dkt. 3 #91.

While the Flores-Case ʻOhana's motion for summary judgment was pending, on July 20, 2021, it filed a motion to continue trial date. Dkt. 3 #66. The University also filed a joinder to Flores-Case ʻOhana's motion to continue trial on July 28. Dkt. 3 #72. The hearing on the motion to continue was held on August 4, 2021, at which time the Court re-set trial for December 14, 2021. Dkt. 3 #84. The Court entered its First Amended Order Setting Jury-Waived Trial Date and Pre-Trial Deadlines on August 9, 2021. Dkt. 3 #85.

The Court denied the Flores-Case ʻOhana's motion for summary judgment at an August 27, 2021 hearing. Dkt. 3 #97. The order denying the motion was entered on September 8, 2021. Dkt. 3 #104.

On September 17, 2021, the Court held a discovery conference, where it requested that the parties research and brief the burden of proof imposed for challenges to the constitutionality of administrative rules. Dkt. 3 #108. The parties filed their respective briefs on October 1, 2021. Dkt. 3 #117, 119. Although both parties agreed that the evidentiary standard for constitutional challenges to administrative rules is beyond a reasonable doubt, because constitutionally-protected Native Hawaiian traditional and customary practices are at stake, Flores-Case ʻOhana argued that the burden necessarily shifts to the state to demonstrate beyond a reasonable doubt

[8] In the underlying action, the Flores-Case ʻOhana seeks to protect the "constitutional rights of others who may desire to engage in such activities but refrain from doing so rather than risk prosecution. *See State v. Beltran*, 116 Hawaiʻi 146, 149, 172 P.3d 458, 461 (2007) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 n.8(1983)).

that Chapter 20-26 does not improperly regulate its members' rights guaranteed by Article XII, §7. Dkt. 3 #117.

The Court reviewed the parties' briefs on the burden of proof and, at a status conference on October 22, 2021, shared its intent to file a motion, pursuant to Hawai'i Rules of Appellate Procedure ("HRAP") Rule 15, to reserve a question of law on what the Court deemed a dispositive issue in this case. Dkt. 3 #128. The University orally moved to stay all pretrial deadlines, which the Court granted orally and later in writing on November 9, 2021. Dkt.3 #129. At a further status conference on January 7, 2022, the Court noted that the trial would be on hold until there is a decision from the Hawai'i Supreme Court. Dkt. 3 #132.

The Circuit Court entered and transmitted its Order for Reserved Question on March 14, 2022, which this Court accepted on April 5, 2022. Dkts. 1 & 6.

III. RESERVED QUESTION

The reserved question before this Court is:

> 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?

See Dkt. 1 at 3.

IV. LEGAL STANDARD

A. RESERVED QUESTIONS

Where a reserved question presents a question of law, the question is "reviewable *de novo* under the right/wrong standard of review.'" *State v. Jess*, 117 Hawai'i 381, 391, 184 P.3d 133, 143 (2008) (citing *Roes v. FHP, Inc.*, 91 Hawai'i 470, 473, 985 P.2d 661, 664 (1999)) (quoting *Francis v. Lee Enters., Inc.*, 89 Hawai'i 234, 236, 971 P.2d 707, 709 (1999)). "On a reserved question, [the Court is] required to answer a question of law based on facts reported to this court by the circuit judge. [The 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*, 42 Haw. 96, 100 (1957).

B. BURDEN OF PROOF IN CONSTITUTIONAL CHALLENGES TO ADMINISTRATIVE RULES

Actions seeking to declare an administrative rule invalid are governed by Hawai‘i Revised Statutes ("HRS") § 91-7:

> **§91-7 Declaratory judgment on validity of rules.** (a) Any interested person may obtain a judicial declaration as to the validity of an agency rule as provided in subsection (b) by bringing an action against the agency in the circuit court or, if applicable, the environmental court, of the county in which the petitioner resides or has its principal place of business. The action may be maintained whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.
>
> (b) The court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures.

"Any interested person" is one who "may be affected by the validity of the regulation." *Asato v. Procurement Policy Bd*, 132 Hawai‘i 333, 343, 322 P.3d 228, 238 (2014) (emphasis added).

The general rule is that the party raising a constitutional challenge to an administrative rule bears the burden of proving its unconstitutionality beyond a reasonable doubt. *See,* e.g., *State v. Calaycay*, 145 Hawai‘i 186, 197, 449 P.3d 1184, 1195 (2019) (citing *State v. Gaylord*, 78 Hawai‘i 127, 137-38, 890 P.2d 1167, 1177-78 (1995)); *Pray v. Judicial Selection Comm'n*, 75 Hawai‘i 333, 340, 861 P.2d 723, 727 (1993).

Courts shift the burden of proof to the government to establish the constitutionality of regulations when certain fundamental or affirmative rights are implicated. *See Berger v. City of Seattle,* 569 F.3d 1029, 2035 (9th Cir. 2009) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("[t]he government bears the burden of justifying the regulation of expressive activity in a public forum[.]"); *City of Cincinnati v. Discovery Network, Inc.,* 113 U.S. 1505, 1510 n.12 (1993) (imposing the burden on the city of Cincinnati to prove that it's law banning distribution of commercial publications through freestanding news racks on public property was constitutional, explaining that the government "bears the burden of justifying its restrictions, [and] it must affirmatively establish the reasonable fit we require."); *Reynolds v. Middleton,* 779 F.3d 222, 224 (4th Cir. 2015) (requiring a county to bear the burden of proving the constitutionality of an ordinance prohibiting solicitation within county roadways where a homeless citizen had shown that it inhibited his ability to collect donations); *Deegan v. City of Ithaca*, 444 F.3d 135, 142 (2nd. Cir. 2006) (imposing the burden on the government to prove that

the municipal noise ordinance preventing a Christian minister from preaching in a public pedestrian mall was constitutional and holding that "[t]he entity that enacted a challenged regulation has the burden to demonstrate that the interest served justifies the restriction imposed"); *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (2nd amendment challenge); *Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S. Ct. 1195, 1199 (1981) (noting that, for challenges brought under the Equal Protection Clause of the Fourteenth Amendment, "the burden remains on the party seeking to uphold a statute[.]").

V. ARGUMENT

Article XII § 7 of the Hawai'i State Constitution was adopted to reaffirm, preserve and protect traditions and customs fundamental to the cultural identity of Native Hawaiians and placed an affirmative duty on the State and its agencies to be the primary defender of those rights. The State's obligations under this constitutional provision are especially necessary during agency rulemaking. Therefore, in an action brought to declare an administrative rule invalid for violating Article XII § 7, the State must bear the burden to prove, beyond a reasonable doubt, that the challenged rule does not prohibit the reasonable exercise of a traditional and customary right, and that the agency satisfied the "*Ka Pa'akai"* framework prior to promulgating the rule.

A. PROTECTIONS AND AFFIRMATIVE DUTIES UNDER ARTICLE XII § 7

It is well settled that Article XII § 7 provides protection in at least two ways: (1) it reaffirms and permits the reasonable exercise of traditional and customary rights and practices on land of another, and (2) it requires the state agencies to make specific efforts to identify, preserve and protect those rights and practices when it acts.

1. Article XII § 7 Was Adopted To Preserve Traditional And Customary Native Hawaiian Practices Critical To Cultural Identity

Important differences in Hawai'i's law and its historical development provide context for analyzing any Article XII § 7 claim.

As this Court has recognized, the traditional Hawaiian concept of 'āina use and ownership was "markedly different from Western notions of ownership embodied in the common law." *Omerod v. Heirs of Kainoa Kupuna Kaheananui*, 116 Hawai'i 239, 246, 172 P.3d 983, 990 (2007) (citing *Pub. Access Shoreline Haw. v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 442, 903 P.2d 1246, 1263 (1995) ("*PASH*"); *In re Boundaries of Pulehunui*, 4 Haw. 239, 240-41 (1879)). The rights of Native Hawaiians to engage in traditional and

customary practices on surrounding ʻāina is deeply rooted in the ancient land tenure system of Hawaiʻi. Each island was divided geographically into moku, or district. *See* E.S. CRAIGHILL HANDY AND ELIZABETH GREEN HANDY WITH THE COLLABORATION OF MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, & ENVIRONMENT 53 (1972). Within each moku, there was a further division of land into ahupuaʻa. *See Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 6, 656 P.2d 745, 748 (1982). The ahupuaʻa functioned to provide native tenants with access to ʻāina necessary for traditional life. *See id.* at 7, 656 P.2d at 749 (citing *Palama v. Sheehan*, 50 Haw. 298, 301, 440 P.2d 95, 97 (1968)).[9]

> The use of ʻāina went beyond utility. Indeed:
>
> ʻĀina was not a commodity and could not be owned or traded. Instead, it belonged to the Akua (gods and goddesses), and the Aliʻi (the chiefs and chiefesses who were the human embodiment of the Akua) were responsible for assiting ka poʻe Hawaiʻi (the people of Hawaiʻi) in the proper management of the ʻĀina.
>
> This system of joint responsibility and accountability maintained balance through an adherence to traditional principles. Precontact Hawaiians honored the natural life forces, which took many forms. . . . The islands were believed to be the offspring of Papa (the earth mother) and Wākea (the sky father). . . . This moʻolelo (history) illustrates the concept and practice of Mālama ʻĀina, or caring for the land, which is the basis of the Hawaiian system of land tenure. Hawaiians nurtured and respected the ʻĀina as an older sibling, which in turn provided protection, sustenance, and security. The ʻĀina was not a commodity to be owned or traded, because such actions would disgrace and debase one's family and oneself. The Hawaiians were said to have had an "organic relationship" with the ʻĀina, and the ʻĀina was part of the ʻohana (extended family) that connected individuals with each other.

JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAIʻI?11-12 (UH Press 2007) (internal citations omitted). Today, Native Hawaiians continue this practice, maintaining connection to the land:

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[9] As another decision confirmed:

> A principle very largely obtaining in these divisions of territory was that a land should run from the sea to the mountains, thus affording to the chief and his people a fishery residence at the warm seaside, together with the products of the high lands, such as fuel, canoe timber, mountain birds, and the **right of way to the same**, and all the varied products of the intermediate land as might be suitable to the soil and climate of the different altitudes from sea soil to mountainside or top.

Pulehunui, 4 Haw. at 241.

> **The health and well-being of the [n]ative [H]awaiian people is intrinsically tied to their deep feelings and attachment to the land.' Aina, or land, is of crucial importance to the [n]ative Hawaiian [p]eople -- to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. Aina is a living and vital part of the [n]ative Hawaiian cosmology, and is irreplaceable**. The natural elements -- land, air, water, ocean -- are interconnected and interdependent. **To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians**. The aina is part of their ohana, and they care for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.

Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., 117 Hawai'i 174, 214, 177 P.3d 884, 924 (2008) (footnotes omitted) (emphases added.).

The rights of Native Hawaiians to engage in traditional and customary practices are reserved by statute, including HRS §§ 7-1[10] and 1-1.[11] "HRS § 7-1 contains two types of rights: gathering rights, which are specifically limited and enumerated, and rights to access and water which are framed in general terms[,]" *Pele Def. Fund v. Paty*, 73 Haw. 578, 617-18, 837 P.2d 1247, 1270 (1992) ("*PDF v. Paty*") (citing *Kalipi*, 66 Haw. at 5, 656 P.2d at 748) (internal quotations omitted). The "Hawaiian usage" clause of HRS § 1-1 also establishes certain customary rights beyond those found in HRS § 7-1. *See id.* at 218, 837 P.2d at 1270.

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[10] HRS § 7-1 provides:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

HRS § 7-1.

[11] According to HRS § 1-1:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

HRS § 1-1.

While statute confirms the existence and enforceable nature of traditional rights, the State constitution not only reaffirms and permits the exercise of those rights, it establishes the state's "obligation to preserve and enforce such traditional rights." *Kalipi*, 66 Haw. at 4, 656 P.2d at 748. Article XII, § 7 of the Hawai'i Constitution provides:

> 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. As a result of this constitutional safeguard, "those persons who are 'descendants of native Hawaiians who inhabited the islands prior to 1778' and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1 are entitled to protection regardless of their blood quantum." *PASH,* 79 Hawai'i at 449, 881 P.2d at 1270 .

The type and number of practices affirmed, permitted, and protected by Article XII § 7 are not limited. The drafters of this constitutional amendment carefully "emphasized that ***all*** such rights were reaffirmed and that they did not intend for the provision to be narrowly construed." *PDF v. Paty*, 73 Haw at 619, 837 P.2d at 1271(emphasis in original).[12] Accordingly, Article XII, § 7 affirms and protects the *reasonable* exercise of ancient Hawaiian usage by Native Hawaiians on lands of another. *See PASH*, 79 Hawai'i at 441-42, 903 P.2d at 1262-63 (1995). A traditional practice should be presumed to be reasonable, especially on public land, as they are, in their very nature, self-regulating. S*ee id.* at 451, 903 P.2d at 1272.[13]

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[12] The framers of Article XII § 7 "intended this provision to protect the broadest possible spectrum of native rights." *PDF v. Paty*, 73 Haw. at 619, 837 P.2d at 1271. According to the committee report:

> Your Committee also decided that it was important to eliminate specific categories of rights so that the courts or legislature would not be constrained in their actions. Your Committee did not intend to remove or eliminate any statutorily recognized rights or any rights of native Hawaiians from consideration under this section, but rather your Committee intended to provide a provision in the Constitution to encompass all rights of native Hawaiians, such as access and gathering. Your Committee did not intend to have the section narrowly construed or ignored by the Court. Your Committee is aware of the courts' unwillingness and inability to define native rights, but in reaffirming these rights in the Constitution, your Committee feels that badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.

Id. at 620, 837 P.2d at 1271 (citing Stand. Comm. Rep. No. 57, *reprinted in* 1 *Proceedings of the Constitutional Convention of Hawaii of 1978* at 640).

[13] At minimum, whether a practice or right is reasonable is determined by the "balance of interests and harms[,]" which is based on the circumstances of the case and should consider whether the right is being practiced in a reasonable or unreasonable manner. *See PASH,* 79 Hawai'i at 438, 903 P.2d at 1259.

There is no question that Native Hawaiian rights "are a matter of great public concern in Hawai'i." *PDF v. Paty,* 73 Hawai'i at 614, 837 P.3d at 1268. This Court has held that these rights are property interests protected by the due process clause of Article I, § 5 of the Hawai'i Constitution. *See*, e.g., *Flores v. Bd. Of Land and Nat. Res*., 143 Hawai'i 114, 125-26, 424 P.3d 469, 480-81 (2018) (citing *Mauna Kea Anaina Hou v. Bd of Land & Natural Res*., 136 Hawai'i 376, 390-91, 363 P.3d 224, 238-39 (2015) (recognizing "the substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea, [and] the risk of an erroneous deprivation" and holding that "due process requires that the parties be given a meaningful opportunity to be heard"); *Kaleikini v. Thielen*, 124 Hawai'i 1, 43, 237 P.3d 1067, 1109 (2010) (as recognized in the concurrence, "Petitioner's hearing was 'required by law' under [her] constitutional due process right as a Native Hawaiian practicing the native and customary traditions of protecting iwi"). Indeed:

> ***Article XII, section 7's mandate grew out of a desire to "preserve the small remaining vestiges of a quickly disappearing culture [by providing] a legal means by constitutional amendment to recognize and reaffirm native Hawaiian rights."*** Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 640. The Committee on Hawaiian Affairs, in adding what is now article XII, section 7, also recognized that "***sustenance, religious and cultural practices of native Hawaiians are an integral part of their culture, tradition and heritage, with such practices forming the basis of Hawaiian identity and value systems."*** Comm. Whole Rep. No. 12, in 1 Proceedings of the Constitutional Convention of 1978, at 1016.

Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 45, 7 P.3d at 1082 (emphases added).

2. State Agencies Are Under an Affirmative Duty to Preserve and Protect Traditional and Customary Native Hawaiian Practices

In addition to permitting and reaffirming traditional and customary practices, Article XII § 7 imposes upon the State "an **affirmative duty**" to "protect these rights and to prevent any interference with the exercise of these rights," and as prohibits the State from acting "without independently considering the effect of their actions on Hawaiian traditions and practices." *Id.* at 45-46, 7 P.3d 1068, 1082-83 (2000) (emphasis added); *see also PASH*, 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43 ("[T]he State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.")*; cf. In re Water Use Permit Applications,* 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000) ("*Waiāhole I")* (holding that

the State "must not relegate itself to the role of a mere umpire passively calling balls and strikes for adversaries appearing before it, but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process[.]").[14] The State's affirmative duty requires its agencies to ensure that these rights and practices are not "regulated out of existence." *PASH*, 79 Hawai'i at 451, 903 P.2d at 1272. As this Court recognized in *Mauna Kea Anaina Hou*, "an agency is often the primary protector of constitutional rights and perhaps is in the best position to fulfill the State's affirmative constitutional obligations. ***Consequently, an agency bears a significant responsibility of assuring that its actions and decisions honor the constitutional rights of those directly affected by its decisions."*** *Mauna Kea Anaina Hou,* 136 Hawai'i at 413-14, 363 P.3d at 261-62 (internal citation omitted) (emphasis added).

The *Ka Pa'akai* case set forth an analytical framework to effectuate the State's obligation to protect and facilitate Native Hawaiian traditional and customary practices while reasonably accommodating competing private interests. *See Ka Pa'akai,* 94 Hawai'i at 35, 7 P.3d at 1072. In that case, the Plaintiffs, Native Hawaiian organizations and community members, challenged the Land Use Commission's grant of a petition reclassifying over 1,000 acres of "Conservation District" to "Urban District" in Ka'ūpūlehu, Kona. *See id.* at 34, 7 P.3d 1068, 1071 (2000). This Court determined that Article XII § 7 places an affirmative duty on the State and its agencies to preserve and protect traditional and customary Native Hawaiian rights, which cannot be delegated. *See id.* at 50, 7 P.3d at 1087. An agency's failure to condition its action upon the protection of Native Hawaiian traditional and customary practices is sufficient grounds to invalidate that agency's decision. *See id.* at 50-52, 7 P.3d at 1087-89.

The *Ka Pa'akai* Court's framework, which implements Article XII, § 7, requires that the State, "—at a minimum—make specific findings and conclusions as to:

> (1) the identity and scope of "valued cultural, historical, or natural resources" in the … 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

[14]Native Hawaiian practices are also a protected public trust purpose under Article XI § 1 of the Hawai'i Constitution. *See Waiāhole I*, 94 Hawai'i at 137, 9 P.3d at 449 ("[W]e continue to uphold the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose.") (citing Haw. Const. art. XII, § 7, Kalipi, 66 Haw. 1, 656 P.2d 745, and *PASH*, 79 Hawai'i 425, 903 P.2d 1246). However, in light of the strong protections afforded Native Hawaiian traditional and customary practices under Article XII §7—including the affirmative duty imposed on the State— this Court need not specifically address the public trust in answering the reserved question.

> proposed action; and (3) the feasible action, if any, to be taken by the [State] to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 47, 7 P.3d at 1084 (emphasis in original). This framework has provided critical guidance for implementing the State's constitutional obligations. The Hawai'i Supreme Court has consistently applied the *Ka Pa'akai* analysis to review the constitutionality of State actions. *See*, e.g., *In re Wai'ola o Moloka'i, Inc*., 103 Hawai'i 401, 409, 83 P.3d 664, 672 (2004) ("*Wai'ola"*) (holding that the Commission on Water Resource Management ("Commission") failed adequately to discharge its public trust obligation to protect Native Hawaiians' traditional and customary gathering rights, as guaranteed by article XII, § 7 of the Hawaii Constitution and that the permit applicant bears the burden to "demonstrate affirmatively" that the proposed project would not affect Native Hawaiians' rights); *In re Kukui (Moloka'i), Inc*., 116 Hawai'i 481, 486, 174 P.3d 320, 325 (2007) ("*Kukui*") (holding that that the Commission "impermissibly shifted the burden of proving harm" to individuals claiming traditional gathering rights); *In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications* ("*Nā Wai 'Ehā*"), 128 Hawai'i 228, 248-49, 287 P.3d 129, 149-50 (2012) (holding that the Commission "did not discharge its duty with regard to the feasibility of protecting native Hawaiian rights" and remanding to the Commission for further consideration of the effect that interim instream flow standards will have on Native Hawaiian practices). In so doing, this Court has made clear that the State's failure to meet its affirmative duty is always sufficient to overturn a decision impacting Native Hawaiian traditional and customary practices.

3. An Agency's Affirmative Duty Does Not Disappear During Administrative Rulemaking

Agencies must discharge their affirmative duty whether engaged in rulemaking or adjudicating contested-case hearings in a quasi-judicial context. *See Ka Pa'akai,* 94 Hawai'i at 45-46, 7 P.3d at 1082-83.

Article XII § 7's obligations do not disappear during rulemaking. It is well-settled that agencies must comply with the State constitution in adopting administrative rules. *See* HRS § 91-7 ("The court shall declare the rule invalid if it finds that it violates constitutional or statutory provision"). Because agencies must function as a "primary protector" of Native Hawaiian rights and practices and have a "significant responsibility" to ensure that these practices are not "regulated out of existence[,]" those obligations must be present when regulations are created and adopted. *Mauna Kea Anaina Hou,* 136 Hawai'i at 413-14, 363 P.3d at 261-62 (internal

citation omitted) (emphasis added). That much of this Court's precedent establishing the state's duties under Article XII § 7 involved Chapter 91 appeals from contested case hearings is of no consequence; those procedures were created by statute, and the State's constitutional obligations exist independently of the Hawai'i Administrative Procedure Act's categorization of agency actions as contested cases *or* rulemaking proceedings. *See* HRS § 91-1; *Ching*, 145 Hawai'i at178, 449 P.3d at1176 ("State's constitutional public trust obligations exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other legal duty.").

Ultimately, an ill-drafted administrative rule or regulation concerning public use of land can be no less insidious to the practice of Native Hawaiian rights and practices than an agency's decision to issue a permit to develop a project.[15] An ounce of prevention is worth a pound of cure; Native Hawaiian traditional and customary rights must be considered and protected during legislative and rulemaking procedures to head off disastrous consequences before they occur. If an agency fails to "take the initiative in considering, protecting, and advancing" rights protected by Article XII § 7 when engaged in rulemaking, *Waiāhole I,* 94 Hawai'i at 143, 9 P.3d at 455, especially concerning the use of property, a cultural practice, which could be reasonably protected through feasible accommodations, is under threat of being regulated out of existence. Therefore, an agency's duty to identify traditional customary practices, determine how those interests will be affected by a proposed rule, and to take feasible action to reasonably protect them, applies not only when it sits in a quasi-judicial capacity; it bears the same obligations when it acts to adopt rules. *See Ka Pa'akai,* 94 Hawai'i at 47, 7 P.3d at 1084.

[15] E. Kalani Flores, a member of the "Flores-Case 'Ohana, has previously—and successfully—challenged an administrative rule that prohibited access to Mauna Kea, including for traditional and customary practices, in *Flores v. BLNR, et al.*, Civ No 15-1-267K.

B. THE STATE BEARS THE BURDEN OF PROOF IN CHALLENGES BROUGHT PURSUANT TO ARTICLE XII § 7

Shifting the burden to the State to prove that a challenged administrative rule does not prohibit the reasonable exercise of a traditional and customary right, and that the State agency satisfied the required *Ka Pa'akai* framework prior to promulgating the rule, is necessary to give meaning and effect to Article XII, § 7.

Burden shifting honors the letter and spirit of Article XII § 7. This constitutional provision was adopted in recognition that Native Hawaiian cultural identity was "quickly disappearing" without legislative and judicial guidance, and that meaningful government assistance was necessary to stop the loss of "sustenance, religious and cultural practices of native Hawaiians" that were fundamental in "forming the basis of Hawaiian identity and value systems." *Ka Pa'akai*, 94 Hawai'i at 45, 7 P.3d at 1082. Without allocating the burden of proof to the State, cultural practitioners would bear the obligation to ensure that administrative regulations are valid and do not overreach into protected traditions and customs—the very situation that required constitutional overhaul at the 1978 Constitutional Convention. Burden shifting has been effective in giving meaning to Article XII § 7 in contested case matters involving Native Hawaiian practices and the public trust. *See id.* at 45-46, 7 P.3d at 1082-83; *PDF v. Paty,* 73 Hawai'i at 614, 837 P.3d at 1268 ("It is undisputed that the rights of native Hawaiians are a matter of great public concern in Hawaii."); *Mauna Kea Anaina Hou,* 136 Hawai'i at 413-14, 363 P.3d at 261-62 (internal citation omitted) (emphasis added) ("[A]n agency bears a significant responsibility of assuring that its actions and decisions honor the constitutional rights of those directly affected by its decisions."); *cf. Waiāhole I*, 94 Hawai'i at 142-143, 9 P.3d at 454-455 ("[T]he burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust")[16]; *Wai'ola*, 103 Hawai'i at

[16] In reaching this conclusion, the Hawai'i Supreme Court relied upon the following cases: *Marcon, Inc. v. Commonwealth Dep't of Envtl. Resources*, 462 A.2d 969, 971 (Pa. Cmwlth. Ct. 1983) (maintaining that, given the "special concerns involved in this area of the law," *i.e.,* the public trust, the petitioner and the agency had the duty to justify the permit); *Commonwealth Dep't of Envtl. Resources v. Commonwealth Pub. Util. Comm'n*, 18 Pa. Commw. 558, 335 A.2d 860, 865 (Pa. Cmwlth. Ct. 1975) (holding that, once adverse impact to the constitutional public trust is raised, "the applicant's burden is intensified," and the agency and reviewing court "must be satisfied that the [relevant constitutional test] is met"); *Superior Public Rights, Inc. v. State Dep't of Natural Resources*, 263 N.W.2d 290, 294 (Mich. Ct. App. 1977) (deciding, in the absence of direction from the relevant statutes or rules, that party applying for use of public trust lands for private commercial purposes bore the burden of proof); *Robinson v. Ariyoshi*, 65 Hawai'i, 641, 649 n.8, 658 P.2d 287, 295 n.8 (noting that, under the common law, "the

442, 83 P.3d at 705; *see also Kukui*, 116 Hawai‘i at 509, 174 P.3d at 348; *CEEED v. Cal. Coastal Zone Conservation Com*., 43 Cal. App. 3d 306, 330 (1974) ("[A]llocation of the burden of proof often serves as an effective tool for shaping social policies, and since it is imperative that the need for environmental protection and conservation be adequately reflected in the law, the consumer of natural resources should bear the responsibility for justifying his actions."). It would be no less effective at ensuring the preservation and protection of Native Hawaiian rights when employed to determine whether an administrative regulation threatens to regulate those rights out of existence. *See supra* Section V.A.3.

Requiring Native Hawaiian practitioners to stand in the shoes of an agency, guess the actual considerations made and actions taken in enacting the challenged rule, and then rebut those assumed considerations, amounts to a *de facto* improper delegation of the State's duty to take those precautionary and affirmative steps. *See Ka Pa‘akai*, 94 Hawai‘i at 52, 7 P.3d at 1089 ("The power and responsibility to determine the effects on customary and traditional native Hawaiian practices and the means to protect such practices may not validly be delegated by the LUC to a private petitioner who, unlike a public body, is not subject to public accountability. . . . ***After all, once a project begins, the pre-project cultural resources and practices become a thing of the past.***") (emphasis added). The State's affirmative duty does not cease to be theirs because a legal challenge has been initiated.

As a practical matter, the burden of proof is best born by the State. It is the State agency that can articulate (1) the steps it took to identify, consider, and protect Native Hawaiian rights and practices, and (2) the competing interests it identified and balanced to determine whether practices could be exercised in a reasonable manner. Because the State is already obligated to make such a determination when it promulgates an administrative rule, *see id.* at 47, 7 P.3d at 1084, it should be of no consequence for the State to carry the burden of proof in a judicial challenge to its administrative rules. If others were forced to carry that burden, there is no assurance that the State's actual actions and considerations in adopting the challenged rule would be presented to the Court for its determination as to whether the agency met its burden. This would risk courts making decisions based on improper *post hoc* justifications. *See Williams v.*

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burden of demonstrating that any transfer of water was not injurious to the rights of others rested wholly upon those seeking the transfer").

Lane, 646 F. Supp. 1379, 1407 (N.D. Ill. 1986) ("Without question defendants 'have exaggerated their response to purported considerations' of 'internal order and security' [related to important penological objectives]—they are really **post hoc rationalizations** for their unconstitutional conduct."); *NAACP v. City of Phila*., 834 F.3d 435, 446-47 (3d Cir. 2016) (noting the City's after-the-fact justifications provides no support for its unconstitutional practices); *Dills v. Marietta*, 674 F.2d 1377*,* 1378 (11th Cir. 1982) ("[A]ll encompassing statements tend to frustrate judicial inquiry into the real purposes of a governmental entity in instituting a restriction on protected activity. They permit after the fact rationalizations for regulations thereby allowing circumvention of the mandate that such measures be defended only on the basis of considerations actually contributing to their enactment."). Burdens of proof should be allocated to agencies as the parties who would be reasonably expected to be best to bear them.[17] In Article XII §7 challenges, that party is the State. *See Mayo v. Wis. Injured Patients & Families Compensation Fund,* 383 Wis. 2d 1, 42, 914 N.W.2d 678, 698 (2018) ("Imposing a burden of proof heavily weighted in favor of the [lawmaker] on matters of constitutional interpretation is an abdication of [the court's] judicial powers to exercise impartial judgment in cases and controversies and to say what the law is.").

Allocating the burden of proof for administrative rule challenges under Article XII §7 is consistent with the nature of actions brought under HRS § 91-7. Unlike contested case matters, administrative rules are not subject to the same rigorous checks and balances of an adversarial quasi-judicial proceeding. Further, suits to invalidate agency rules may be brought by "any interested person", as opposed to the higher "injury in fact" standard for actions brought under HRS § 632-1. Instead, HRS § 91-7 plaintiffs need only show that they "may be affected by the validity of the regulation." *Asato*, 132 Hawai'i at 343, 322 P.3d at 238. Coupled with the State's affirmative duties under Article XII § 7, HRS § 91-7's lower barrier to entry strongly suggests that State agencies would be the party best equipped to bear the burden of proof.

[17] This practical necessity is especially pronounced in situations such as this, where a regulation that restricts Native Hawaiian traditional and customary practices also implements a system of individualized exemptions that permits the restricted conduct by certain classes of individuals. Such regulations receive the highest level of scrutiny by federal courts. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993); *Emp't Div. v. Smith*, 494 U.S. 872, 885 (1990). Especially in these situations, agencies must be required to prove that a rule which permits some to do what Native Hawaiians engaging in traditions and customs cannot passes constitutional muster.

Applying burden shifting to constitutional challenges of administrative rules that regulate or restrict the exercise of traditional and customary practices is consistent with federal case law shifting the burden where government regulates the exercise of constitutionally protected rights. *See supra* Section IV. For example, in *Berger v. City of Seattle*, a street performer challenged the constitutionality of regulations concerning the use of the Seattle Center – "a central venue for Seattle's civic, cultural, and social life"—which, among other things, barred street performers from soliciting donations, limited street performance to designated locations, and prohibited all visitors (but not employees or licensed concessionaires) from engaging in "speech activities within 30 feet of a captive audience." *Berger,* 569 F.3d at 1035. There, the Court held that it was the city's duty to justify the rules and demonstrate that they did not improperly regulate protected conduct. *See id.* In invalidating the challenged rules, the *Berger* court recognized that such restrictions should be scrutinized "with care," and noting that constitutional protections are "robust, yet at the same time fragile and precious." *Id.* at 1059. The rights affirmed and protected under Article XII are fundamental to Native Hawaiian cultural identity and are as susceptible to being "regulated out of existence" by time, place, and manner restrictions as other rights, including speech. They are no less deserving of the utmost care in judicial proceedings.

V. CONCLUSION

The State's existing duties under Hawai'i law and public policy requires the State to bear 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 and that the State agency performed the required *Ka Pa'akai* analysis prior to promulgating the rule. This Court should answer the reserved question in the affirmative.

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