NO. SCRQ-22-0000118

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

FLORES-CASE ‘OHANA, Plaintiff, vs. UNIVERSITY OF HAWAI‘I, Defendant.	CIVIL NO. 3CCV-20-0000255 (Declaratory Judgment) PLAINTIFF-APPELLANT’S REPLY 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 REPLY BRIEF RE RESERVED QUESTION FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT, STATE OF HAWAI‘I

NATIVE HAWAIIAN LEGAL CORPORATION
1164 Bishop Street, Suite 1205
Honolulu, Hawai‘i 96813
Telephone: (808) 521-2302
Fax: (808) 537-4268

DAVID KAUILA KOPPER 9374
ASHLEY K. OBREY 9199
Attorneys for Plaintiff-Appellant
Flores-Case ‘Ohana

PLAINTIFF-APPELLANT'S REPLY BRIEF

I. INTRODUCTION

Defendant-Appellee University of Hawai‘i's ("University's") answering brief demonstrates a clear misunderstanding of the scope of this proceeding, relevant case law, as well as the affirmative nature of its own constitutional duties as a State agency.

II. THE MERITS OF THE FLORES-CASE 'OHANA'S UNDERLYING CLAIMS ARE IRRELEVNT

A. THE UNIVERSITY GOES WELL BEYOND THE SCOPE OF THE RESERVED QUESTION

The bulk of the University's brief is spent improperly challenging the merits of Plaintiff-Appellant Flores-Case 'Ohana's ("Flores-Case 'Ohana's") complaint. *See* Dkt. 21 at 4-11, 14-19. It must be ignored.

It is axiomatic that, on a reserved question, this Court only consider the specific "question of law" reserved by a lower court. *See* Hawai‘i Rules of Appellate Procedure Rule 15(a) ("A circuit court, the land court, the tax appeal court and any other court empowered by statute, may reserve for the consideration of the supreme court **a question of law arising in any proceedings before it.**") (emphasis added). Additionally, "[o]n 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) (emphasis added); *Ass'n of Apartment Owners v. Child*, 1 Haw. App. 130, 135, 615 P.2d 756, 759 (1980); *see also State v. Anderson*, 1998 OK CR 67, ¶ 2, 972 P.2d 32, 33 (noting that an appeal "on a reserved question of law does not address any part of the trial or proceedings except the precise legal issue reserved.").

The University goes well-beyond the reserved question to this Court and boldly seeks a determination on the underlying merits of the case. The **only** question before this Court is, in an Article XII, § 7 challenge to administrative rules, does the burden of proof shift to the government defendant, and if so what standards govern? *See* Dkt. 1 at 3. In much of its brief, however, the University ignores the reserved question regarding the shifting of the burden of proof and effectively asks this Court to rule on the underlying legal claim: whether the University violated Article XII § 7 when it enacted its administrative rules, Hawai‘i

Administrative Rules ("HAR") Chapter 20-26. *See* Dkt. 21 at 14-15 (asserting that the University has the authority to regulate Native Hawaiian traditional and customary practices); *id.* at 15-19 (claiming that HAR Chapter 20-26 does not exceed the University's authority); *id.* at 25 (reiterating its arguments on the underlying merits). The University cannot avoid the clear restrictions on this type of procedural posture and attempt to improperly influence this Court through impermissible arguments based on an undeveloped record and without permitting the Flores-Case 'Ohana any opportunity to fully brief these legal issues in its opening brief.

Further, the University attempts to have this Court assume facts for which the Circuit Court below made no findings.[1] In the transmitted reserved question, the Court only assumed the following facts beyond the procedural history:

- Appellant 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.
- Appellant's participation in the rulemaking process was limited to providing written and oral comments as part of the public hearing process.
- Appellant did not request a contested case hearing.
- The University is a public body corporate and an administrative agency of the State which promulgated the administrative rules subject of this action, Chapter 20-26.

Dkt. 1 at 2. The Court made no other factual findings. *See id.* The University, however, ignores the narrow scope of review and asks this Court to consider, **as part of its legal analysis**, a one-sided recitation of the University's alleged efforts expended in drafting the subject administrative rules, *see* Dkt. 21 at 15, including discussions with non-parties (including the Office of Hawaiian Affairs) about the proposed rules and other irrelevant "efforts" and "considerations" purportedly made by the University in adopting Chapter 20-26. *Id.* at 17. Aside from having absolutely no bearing on the sole legal question presented to the Court, these facts go well beyond those found

[1] The Flores-Case 'Ohana provided some factual history **for context only** and clearly acknowledges that this Court could only consider the limited facts provided in the reserved question to this Court. *See* Dkt. 8 at 2 n.1. The Flores-Case 'Ohana spent only one page of its opening brief noting some of the issues with HAR chapter 20-26, *see id.* at 5-6, and otherwise provided a brief factual synopsis merely to provide context for this case. *See id.* at 2-5.

by the Circuit Court and are precluded from being considered when deciding the subject narrow reserved question. *See Cabrinha*, 42 Haw. at 100.

Accordingly, the majority of the University's "argument" is not properly before this Court and must be ignored.[2]

B. BURDEN SHIFTING IS NECESSARY TO PROTECT ARTICLE XII § 7 RIGHTS

1. BURDEN SHIFTING IN ADMINISTRATIVE RULES CHALLENGES IS SUPPORTED BY HAWAIʻI CASE LAW

The University fails to provide any real substantive, policy, or practical reason that burden shifting should not be applied in Article XII, § 7 challenges to rule making. Its wholesale reliance on mischaracterizing the Flores-Case ʻOhana's arguments and pointing out distinguishments without real consequence fails.

The Flores-Case ʻOhana is not seeking a "change in the Court's interpretation" of any past judicial precedent. Dkt. 21 at 24. While there can be no doubt that the presented reserved question is an issue of first impression in this jurisdiction, applying a burden-shifting standard is not only consistent with established case law, the law requires it. That the University points to no prior authority prohibiting burden shifting in an Article XII § 7 challenge to an administrative rule is a concession that the reserved question is an open one.

The University avoids a deep-dive on the reserved question and chooses to only distinguish the authority cited by the Flores-Case ʻOhana by its procedural posture. *See* Dkt. 21 at 22-23. These are distinctions without differences. There is no dispute that *In re Water Use*

[2] Even if this Court could make a ruling on the merits, the University's arguments fail. It characterizes the "textually brief" provision, HAR § 20-26-3(f), as "provid[ing] clear, express, and unequivocal protection for native Hawaiian traditional and customary rights." Dkt. 21 at 16; however, the broad limitation on time, place, and manner regarding access to the public without any specific protections or exemptions for Native Hawaiian practitioners results in the unlawful restriction on those Native Hawaiian practices, *see,* e.g., *State v. Beltran*, 116 Hawaiʻi 146, 152, 172 P.3d 458, 464 (2007), as it merely restates what the Constitution provides, fails to "implement[], interpret[], or prescribe[] law[,]" Dkt. 21 at 3 (citing Hawaiʻi Revised Statutes ("HRS") § 91-1), and does not demonstrate a fulfillment of the University's "affirmative duty" to protect these rights. In response to these improper attacks on the underlying claims, the Flores-Case ʻOhana points to its Motion for Summary Judgment, which has already addressed in detail these meritless arguments. *See* Dkt. 3, #37 at 14-20.

Permit Applications, *In re Wai'ola O Moloka'i, Inc*, *In re Kukui (Moloka'i), Inc., In re 'Iao Ground Water Mgmt Area High-Level Source Water Use Permit Applications*, *Mauna Kea Anaina Hou v. Bd of Land and Natural Resources, Flores v. Board of Land and Natural Resources, and Ka Pa'akai O Ka 'Āina v. Land Use Commission* did not concern the burden of proof in challenges to rule-making.[3] *See id.* at 21-24. Instead, these landmark Hawai'i Supreme Court cases illustrate that Article XII § 7 supports taking the burden off of practitioners when it comes to agency action affecting Native Hawaiian practices and natural resources. They illustrate the paramount nature of Article XII, § 7 rights,[4] recognizing that Native Hawaiian traditional and customary rights are subject to due process, *see 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), *Kaleikini v. Thielen*, 124 Hawai'i 1, 43, 237 P.3d 1067, 1109 (2010), and upholding the State's affirmative duty to preserve and protect them. *See Ka Pa'akai O Ka 'Āina v. Land Use Comm'n*, 94 Hawai'i 31, 45-46, 7 P.3d at 1082-83; *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n,* 79 Hawai'i 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1989); *cf. In re Water Use Permit Applications,* 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000); *see also* Dkt. 8 at 13-15. Because 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, it is reasonable to impose that burden in cases like these—where

[3] However, as the Flores-Case 'Ohana pointed out in its opening brief, 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* Dkt. 8 at 16; HRS § 91-1; *Ching v. Case*, 145 Hawai'i 148, 178, 449 P.3d 1146, 1176 (2019) ("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.").

[4] As the Flores-Case 'Ohana stated in its opening brief, Article XII § 7 is significant. *See* Dkt. 8 at 1. This constitutional provision affirms and permits the exercise of Native Hawaiian traditional and customary practices and 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. *See id.* at 12-15; *see also Pele Def. Fund v. Paty,* 73 Hawai'i 578, 614, 837 P.3d 1247, 1268 (1992).

administrative rules promulgated by a State agency unreasonably regulate Native Hawaiian rights.

That Article XII § 7 is "subject to the right of the State to regulate such rights" does not mean that the State can infringe on those rights without consequence. *See* Dkt. 21 at 8, 14-16. The State's right to regulate Native Hawaiian traditional and customary practices does not bestow upon it the blanket authority to regulate these rights out of existence; it must still be held accountable to its legal duty to protect them. *See,* e.g., *Ka Pa'akai,* 94 Hawai'i 31, 7 P.3d 1068; *PASH,* 79 Hawai'i at 451, 903 P.2d at 1272 ("[T]he State does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence."). Requiring burden shifting is more so important in light of the State's ability to ***reasonably*** regulate those rights. Because it is the State that already has the kuleana to reconcile and balance competing interests, it is the State that in the best position to articulate the steps it took to preserve and protect Native Hawaiian rights and practices and those interests it attempted to balance. For example, the University here claims to have "committed to, pursued, and achieved" such balance "with respect to the rule-making process for HAR Chapter 20-26[,]" Dkt. 21 at 15. Therefore, it should have no problem justifying its rules in the context of Article XII, § 7 before the Circuit Court and bear the burden of proof.

The University fails to explain how forcing the Flores-Case 'Ohana to articulate how an administrative rule comports with an agency's affirmative duties is not an improper delegation of those duties. In the context of Article XII § 7 challenges to an administrative rule, requiring a plaintiff to guess at the interests the State sought to balance and the efforts expended in doing so and then rebut those assumed considerations is not only impractical, its an improper delegation of the State's burden in creating rules. *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.).

The University made no attempt to refute that reallocating the burden of proof for administrative rule challenges under Article XII § 7 is consistent with the nature of actions brought under HRS § 91-7, which are not subject to the same checks and balances of a quasi-judicial hearing and are subject to invalidation by "any interested person" 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). This lower standard under HRS chapter 91 indicates that State agencies would be the party best equipped to bear the burden of proof.

2. BURDEN SHIFTING IS ALSO SUPPORTED BY FEDERAL LAW

This burden shift is also consistent with federal law where a challenged statute or rule affects another fundamental constitutional right. *See* Dkt. 8 at 8-9 (citing *Berger v. City of Seattle,* 569 F.3d 1029, 2035 (9th Cir. 2009); *City of Cincinnati v. Discovery Network, Inc.,* 113 U.S. 1505, 1510 n.12 (1993) *Reynolds v. Middleton,* 779 F.3d 222, 224 (4th Cir. 2015); *Deegan v. City of Ithaca*, 444 F.3d 135, 142 (2nd. Cir. 2006); *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S. Ct. 1195, 1199 (1981); *see also ICEEED 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.").

The University misreads the federal court's recitation and application of various constitutional balancing tests for evidentiary standards. *See* Dkt. 21 at 19-21. Those cases stand for the proposition that shifting the burden of proof from the plaintiff to the government is necessary to protect a constitutional right. Indeed, federal case law clearly illustrates that, where regulations that may unduly limit constitutionally-protected rights are challenged, the entity that enacted those regulations has the duty to justify the rules and demonstrate that they did not improperly limit protected conduct—not unlike the affirmative duty placed on the State to protect Native Hawaiian traditional and customary rights. The various balancing tests (that the University mistakes for an evidentiary standard) is not pertinent here as this Court has already established the required balancing under Article XII § 7 as well as the evidentiary standard in challenges to administrative rules.

C. THE STATE MUST DEMONSTRATE ITS COMPLIANCE WITH ARTICLE XII § 7 BEYOND A REASONABLE DOUBT

Because the State bears the burden of establishing compliance with Article XII § 7 during rulemaking, it must establish compliance "beyond a reasonable doubt."

There should be no dispute that Hawai'i's well-accepted rule that "beyond a reasonable doubt" is the proper evidentiary standard for constitutional challenges to administrative rules.

See Dkt. 21 at 12-14 (citing *State v. Mallan,* 86 Hawai‘i 440, 446, 950 P.2d 178, 184; *Pray v. Judicial Selection Comm’n,* 75 Hawai‘i 333, 340, 861 P.2d 723, 727 (1993); *Sifagaloa v. Bd. Of Trustees of Employees’ Retirement Sys.,* 74 Haw. 181, 191, 840 P.2d 367, 371 (1992); *Blair v. Cayetano*, 73 Haw. 536 P.2d 1066, 1069 (1992)); Dkt. 8 at 8 (citing *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)).

The University implies that the “beyond a reasonable doubt” standard only applies to challengers of statutes and administrative rules, and not the government agency itself, due to deference owed to the agency. *See* Dkt. 21 at 3 (citing *City and County of Honolulu v. Ariyoshi,* 67 Haw. 412, 419, 689 P.2d 757, 763 (1984). However, agencies are never entitled to deference where constitutional rights are implicated. *See Aged Hawaiians v. Hawaiian Homes Comm’n*, 78 Hawai‘i 192, 202, 891 P.2d 279, 289 (1995) (“Deference to an agency is particularly inappropriate in cases like this one, in which the constitutionality of the agency’s rules and procedures is challenged and questions are raised as to whether the agency has acted within the scope of its authority.”). For that reason, the same evidentiary standard should apply regardless of which party bears the burden.

III. CONCLUSION

The State’s existing duties under Hawai‘i law and public policy require 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. The University’s attempt to convince this Court otherwise is unpersuasive.

DATED: Kailua-Kona, Hawai‘i, August 22, 2022.

/s/ ASHLEY K. OBREY
DAVID KAUILA KOPPER
ASHLEY K. OBREY
ATTORNEYS FOR PLAINTIFF-APPELLANT FLORES-CASE ‘OHANA