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 FLORES-CASE ‘OHANA’S RESPONSE TO AMICUS CURIAE BRIEF OF ATTORNEY GENERAL HOLLY T. SHIKADA FIRST CIRCUIT COURT Judge: Honorable Robert D.S. Kim

PLAINTIFF-APPELLANT FLORES-CASE ‘OHANA’S RESPONSE TO AMICUS CURIAE BRIEF OF ATTORNEY GENERAL HOLLY T. SHIKADA

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I. INTRODUCTION

The Attorney General of the State of Hawai‘i adds her voice in support of Defendant-Appellee University of Hawai‘i—another State entity[1]—in ways that ignores the only question before this Court and decades of well-settled law interpreting this fundamental constitutional provision and how it applies. The State’s second brief is unpersuasive as it (1) confuses its obligation to balance competing rights and interests with unfettered discretion to enact administrative rules with no forethought or consequence, (2) argues for a drastic change in Hawai‘i jurisprudence through limiting the reach of Article XII § 7 of the Hawai‘i Constitution, and (3) relies on irrelevant decisions made in the criminal context in this matter arising from a declaratory action regarding the constitutionality of administrative rules.

II. THE STATE’S ABILITY TO BALANCE COMPETING INTERESTS WITH ARTICLE XII § 7 RIGHTS SUPPORTS BURDEN SHIFTING

That the State must balance competing rights and interests when acting to preserve Native Hawaiian traditional and customary practices supports the need for burden shifting in administrative rule challenges under Article XII § 7. *See* Dkt. #34 at 11-13.

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[1] To the extent that the Attorney General’s arguments could have been raised by the University within the page limits of and by the filing deadline for its own answering brief, the Flores-Case ‘Ohana request that the Court place less value on her brief. The University of Hawai‘i is an agency of the State. *See* Dkt. #34 at 2-3 (recognizing that the University is “a state ‘department’” and has “the power to “formulate policy,” subject to the Legislature’s power to “enact laws of statewide concern.”); Dkt. #1 at 2, n.3 (“Defendant University of Hawai‘i . . . is a public body corporate and an administrative agency of the State of Hawai‘i.”). Suits against state agencies are suits against the State. *See,* e.g., *Makanui v. Dep’t of Educ*., 6 Haw. App. 397, 406, 721 P.2d 165, 171 (1986) (“A suit against a state’s agencies or against its officers or agents in their official capacities is a suit against the state[.]”). Therefore, the Office of the Attorney General—which filed its amicus curiae brief “**to present the State’s legal position** on the reserved question[,]” Dkt. #27 at 5 (emphasis added)—is clearly not operating merely as a friend of this Court; it **is** also acting on behalf of the State, who is already a party. Because the University has already filed its answering brief, Dkt. #21, the AG’s brief (which is nearly the same number of pages as the University’s) serves as the State’s second bite at the apple. *See Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) (“The term ‘amicus curiae’ means friend of the court, not friend of a party.”); *Goldberg v. City of Philadelphia*, 1994 U.S. Dist. LEXIS 9392 (E.D. Pa. 1994) (recognizing that it is inappropriate for a party to appear as amicus curiae if it is acting in concert with one of the parties). It should not be given persuasive weight.

Balancing competing rights and interests does not translate to an un-checked ability to enact administrative rules without justification as the Attorney General implies. *See id.* at 12. This Court has already declared that "the State does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence." *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 451, 903 P.2d 1246, 1272 (1995); *see also id*. at 450 n.43, 903 P.2d at 1271 n.43 (recognizing that "the State's power to regulate the exercise of customarily and traditionally exercised Hawaiian rights . . . necessarily allows the State to permit development that interferes with such rights in certain circumstances . . . . Nevertheless, the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible."); *see* 2009 Haw. Sess. Laws Act 132 §1 (mandating that the University, in enacting administrative rules managing Mauna Kea, must ensure that "[a]ccess for traditional and customary native Hawaiian cultural and religious purposes ***shall be accommodated***.") (emphasis added). While citing to Article XII § 7 to support the State's right to regulate Native Hawaiian rights, the Attorney General simultaneously (and erroneously) implies that the reach of this provision stops when it comes to crafting policy. Dkt. #34 at 11. Neither the law nor reason supports this illogical conclusion. *See infra* Section III. Given the importance of protecting Native Hawaiian rights and interests when laws are being crafted, agencies cannot hide behind its authority to "balance" rights on the one hand and then punt "a constitutional analysis" of its balancing at the "policy level." Dkt. #34 at 13.

The need for the State to balance native Hawaiian rights and practices with its ability to reasonably regulate such practices underscores why the State must be required, in an HRS § 91-7 challenge, to establish that it complied with its duties under Article XII § 7 and *Ka Pa'akai 'o Ka 'Āina v. Land Use Comm'n,* 94 Hawai'i 31, 50-52, 7 P.3d 1068, 1087-89 (2000). Requiring Native Hawaiian practitioners to stand in the shoes of an agency, guess the interests the State sought to balance, and then rebut those assumed considerations, places the government's constitutional duties to do such balancing on both practitioners and the courts. In fact, it is for that reason that federal courts shift the burden to the government to prove that it properly balanced competing interests where fundamental rights are involved. *See,* e.g., *Deegan v. City of Ithaca*, 444 F.3d 135, 142 (2nd. Cir. 2006) (holding that "[t]he entity that enacted a challenged regulation has the burden to demonstrate that the interest served justifies the restriction imposed").

The State's ability to reasonably regulate Native Hawaiian practices—which it also derives from Article XII § 7—is not an invitation to draft rules without consequence. This Court must not be mislead by the State's twisting of the article's meaning and effect in its favor.

III. THE STATE'S DUTY TO PRESERVE AND PROTECT TRADITIONAL AND CUSTOMARY PRACTICES DO NOT DISAPPEAR DURING RULE MAKING

The Attorney General argues that State agencies need not consider the effects of its rules on Native Hawaiian traditional and customary practices and the mitigation of those effects during the rule making process. Dkt. #34 at 19-23. She argues that such duties are limited to when the State acts in a quasi-judicial capacity. *Id.* This attempt to reduce the protections provided by Article XII § 7 must be ignored.

First, the Attorney General's argument goes well beyond the scope of this reserved question. Before this Court is whether to apply a burden-shifting standard in challenges to administrative rule—not whether to upend settled law regarding the State's constitutional duties. *See* Dkt. #1. That the Attorney General believes that agencies have no duty to preserve and protect traditional and customary practices in rulemaking—and wishes to convince this Court of the same—is an issue of first impression that deviates from this Court's precedent and has no relevance to this action.

Second, her position has no legal basis as Article XII § 7 applies beyond the bounds of contested case hearings, including rulemaking.[2] Because an agencies' authority to enact rules is derived from statute, it cannot avoid its obligation to act to preserve and protect rights and practices under Article XII § 7 just because it is engaged in rulemaking:

> An agency's statutory duties must be performed in a manner that is consistent with the Hawai'i Constitution. . . . With respect to the Hawai'i Constitution, an agency's obligation is twofold: the agency must not only avoid infringing upon protected rights to the extent feasible**, but it also must execute its statutory duties in a manner that fulfills the State's affirmative constitutional obligations.**

[2] That the Flores-Case 'Ohana's rights are property interests protected by the due process clause of Article I, § 5 of the Hawai'i Constitution that may legally require contested case hearings in certain circumstances, *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)), does not limit the application of Article XII § 7 to those types of proceedings.

Id. at 413, 363 P.3d at 261 (emphasis added). Hawai‘i Revised Statutes ("HRS") Chapter 91 itself forecloses the State's argument: § 91-7 requires that agencies 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").

Third, 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. Again, 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; *cf. Ching v. Aila*, 145 Hawai‘i 148, 178, 449 P.3d 1146 1176 (2019) ("The 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.") (emphasis added); *Mauna Kea Anaina Hou,* 136 Hawai‘i at 413, 363 P.3d at 261. Landmark cases from this Court illustrate that Article XII § 7 supports taking the burden off practitioners when it comes to agency actions affecting Native Hawaiian practices and natural resources. *See In re Water Use Permit Applications*, 94 Hawai‘i 97, 143, 9 P.3d 409, 455 (2000) ("*Waiāhole"*); *In re Wai‘ola o Moloka‘i, Inc*., 103 Hawai‘i 401, 409, 83 P.3d 664, 672 (2004); *In re ‘Īao Ground Water Mgmt. Mauna Kea Anaina Hou,* 136 Hawai‘i at 413-14, 363 P.3d at 261-62; *Flores v. Bd. of Land and Nat. Res.,* 143 Hawai‘i 114, 125-26, 424 P.3d 469, 480-81 (2018). It does not matter whether the agency acts in rulemaking capacity or as the adjudicator of a contested case hearing in a quasi-judicial context. *See Ka Pa‘akai,* 94 Hawai‘i at 46, 7 P.3d at 1083 ("In order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable.").

There is no practical reason to adopt a new exemption from Article XII § 7, as the Attorney General urges this Court to do. To say that rulemaking does not provide an opportunity to develop a record or make findings ignores the explicit statutes governing rule making.[3] Like

[3] The Attorney General's argument that requiring the State to consider Article XII § 7 and *Ka Pa‘akai* in rulemaking "further incentivizes private individuals to not disclose specific concerns during the rulemaking process, only to ambush state agencies after rules are promulgated[,]" Dkt. #34 at 22 n.8, is speculative at best. This is not a reason to shirk constitutional kuleana. And as for its argument that this would also "impose a duty upon anyone theoretically impacted by proposed rules to come forward with specific theoretical concerns, lest such concerns be waived[,]" *id.,* the Attorney General clearly ignores HRS § 91-7(a), which provides that "judicial declaration as to the validity of an agency rule . . . may be maintained whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question." HRS §91-7(a).

when sitting in a quasi-judicial capacity, agencies in rulemaking must provide notice of rulemaking, *see* HRS § 91-3(a)(1), as well as afford an opportunity to interested persons to "submit data, views, [and] arguments." HRS § 91-3(a)(2). The agency might also be required to "issue a concise statement of the principal reasons for and against its determination" if requested by an interested person. HRS § 91-3(a)(2). Appendix 1 to the Court's Order for Reserved Question is an example of the robust record often created during rulemaking; the Hearing Officers' Consolidated Report For Proposed Chapter 20-26, Hawai'i Administrative Rules, Public and Commercial Activities on Mauna Kea Lands includes 100 pages worth of "information related to the public hearings and written submissions received for the period between the public notice . . . and the extended time for submitting written testimony[.]" Dkt. #1 at 10.[4]

It is inaccurate to claim that "nobody's rights, duties, or privileges" are determined when rules are made. Dkt. #34 at 22. Hawai'i appellate courts have recognized that "it is generally accepted that the distinguishing characteristic of rule-making is the **generality** of effect of the agency decision," *Foster Vill. Cmty. Ass'n v. Hess*, 4 Haw. App. 463, 475-76, 667 P.2d 850, 856-57 (1983) (emphasis added), explaining that "th[e] distinction between rule-making and adjudication reflects the consideration that in rule making policy is dominant, rather than accusatory or disciplinary elements." *Id.* at 476, 667 P.2d at 857 (citing Note, "*Rule Making," "Adjudication" And Exemptions Under The Administrative Procedure Act*, 95 U. Pa. L. Rev. 621 (1946-47). This means that rule making certainly affects the rights and interests of individuals:

> One of the most helpful definitions of rule making is that of Professor Fuchs, who concludes that rule making should be defined as "the issuance of regulations or the **making of determinations** which are addressed to indicated but unnamed and unspecified persons or situations." Another definition is that of Mr. Dickinson: **"What distinguishes legislation from adjudication is that the former *affects the rights of individuals* in the abstract and must be applied in a further proceeding before the**

[4] These characteristics of rulemaking proceedings, plainly set forth in Chapter 91, are also expressly acknowledged by the Attorney General, whose recognition of the same was made only to erroneously claim that the deference afforded administrative rules takes priority over constitutional duties, *see* Dkt. #34 at 7, which is patently false. *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.").

> **legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity."**

Id. at 476-477, 667 P.2d at 857-58 (citing 1 Davis, *Administrative Law Treatise* § 5.01 (1958) (emphases added). Rulemaking involves many considerations, including the rights of those affected by the rule and State's duty to those affected. All these considerations must be made within the scope of the agency's statutory authority to promulgate those rules. *See* HRS § 91-7 ("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.").

The arguments in the Amicus Brief are inconsistent. Like the University, who claims to have "committed to, pursued, and achieved" regulatory balance "with respect to the rule-making process for HAR Chapter 20-26[,]" Dkt. 21 at 15, the Attorney General claims that the State must be able to balance "the exercise of traditional and customary constitutional rights and the State's own constitutional right to regulate these individual rights." Dkt. #34 at 11-12. However, **this balance is inherent in the *Ka Pa'akai* analysis** which both State entities apparently believe is irrelevant and unnecessary in the context of rulemaking. *See* Dkt. #34 at 19-22; Dkt. #21 at 3, 24. The *Ka Pa'akai* Court's "analytical framework" was "an effort to effectuate the State's obligation to **protect native Hawaiian customary and traditional practices *while reasonably accommodating competing private interests***." *Ka Pa'akai*, 94 Hawai'i at 46-47, 7 P.3d at 1083-84 (emphases added). It is impossible to balance Article XII § 7 rights with those of the state without first identifying the extent to which "valued cultural, historical, or natural resources", including traditional and customary native Hawaiian practices, are exercised in the area affected by proposed rules, the extent to which those resources and practices will be affected by the rules, and the feasible action, if any, to protect those rights. *Id.* at 46, 7 P.3d at 1084.

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.[5] Consideration of Native Hawaiian traditional and customary rights must happen during legislative and rulemaking procedures to head off

[5] 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.

disastrous consequences on native rights 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*, 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 considering feasible protections and accommodations, could be at risk 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 obligation as the promulgator of rules.

Forcing Native Hawaiian practitioners to shoulder the burden of proof amounts to a *de facto* improper delegation of the State's duty to take those precautionary and affirmative steps, which exists at all levels of decisionmaking. *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 simply because a legal challenge has been initiated.

IV. BURDEN SHIFTING DOES NOT CONFLICT WITH ESTABLISHED PRECEDENT

The Attorney General conflates a practitioner's burden to establish that his or her rights are protected under Article XII § 7 relief with the allocation of the burden of proof for the constitutional challenge itself. *See* Dkt. #34 at 13 (citing *State v. Hanapi,* 89 Hawai'i 177, 970 P.2d 485 (1998); *State v. Pratt,* 127 Hawai'i 206, 277 P.2d 300 (2012)); *see also id.* at 10. These are not one and the same.

First, as the Attorney General concedes, the cases she cites to for this proposition are criminal cases.[6] In *Hanapi* and *Pratt*, Article XII § 7 was raised as part of the defendants'

[6] The federal cases cited by the Attorney General are also unpersuasive, as they merely reiterate a standard of proof that the Flores-Case 'Ohana has not opposed. *See* Dkt #34 at 8-10. They do not address challenges to rules or statutes where another fundamental constitutional right is at stake and consequently do not address burden shifting. *See id.* Instead, the federal authority cited by

affirmative defense to criminal charges. *See* Dkt. #34 at 14 (noting that "**a criminal defendant** asserting the 'native Hawaiian privilege' **as a defense to a criminal conviction**" must meet the evidentiary standard set forth in *Hanapi* and "when dealing with a traditional-and-customary rights **defense**[,]" *Pratt* requires an additional totality of the circumstances test) (emphases added). And in *Hanapi* and *Pratt*, the "burden" borne by the practitioners was to prove that their practices were genuine and reasonable and therefore constitutionally protected; they did not have the added burden of proving the State's conduct was unreasonable. Neither of these cases addressed the legal question regarding burden shifting in the posed to this Court. While Article XII § 7 has teeth in all contexts, a defendant's burden in raising an affirmative defense in a criminal case should not be mistaken for a plaintiff's burden in a challenge under HRS § 91-7. That the practitioner, when facing criminal charges, must demonstrate that it has a constitutional right at stake is not determinative of whether challenged rules violate those rights.

Second, *State v. Armitage*—also a criminal case—is not dispositive. *See* Dkt. #34 at 1, 15. In *Armitage,* the State filed complaints against three Native Hawaiians who entered into the Kahoʻolawe Reserve in violation of Hawaiʻi Administrative Rules ("HAR") § 13-261-10. As a defense, the defendants challenged the constitutionality of the rule, arguing, among other things, that it "abridged their fundamental right[] to . . . engage in traditional and customary practices[.]" *State v. Armitage*, 132 Hawaiʻi 36, 56, 319 P.3d 1044, 1064 (2014). However, like *Hanapi* and *Pratt, Armitage* never addressed the sole legal question before this Court—that is, whether, in an Article XII, § 7 challenge to administrative rules, the burden of proof shifts to the government defendant, and if so, what standards govern. It does not expound on the meaning and effect of that constitutional provision at all. Further, the rules at issue in that case outlined a permitting scheme that explicitly authorized the exercise of Native Hawaiian traditional and customary practices. *See id.* at 58, 319 P.3d at 1066 ("In this case, the [Kahoʻolawe Island Reserve Commission] 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

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Flores-Case ʻOhana 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. *See* Dkt. #8 at 8-9, 20. This duty is not unlike the affirmative duty placed on the State to protect Native Hawaiian traditional and customary rights.

requested by applicants seeking to exercise traditional and customary rights and practices compatible with the law[.]'") (citing HAR § 13-261-11). However, in the instant case, it is undisputed that HAR Chapter 20-26 contains no such permitting scheme.

Third, declaratory challenges to administrative rules have lesser "standing" requirements than the criminal matters the Attorney General relies on. In declaratory actions filed pursuant to HRS § 91-7, "[a]ny interested person"—or anyone 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)—"may obtain a judicial declaration as to the validity of an agency rule[.]" HRS § 91-7(a).

Ultimately, the case law on point that addresses agency action and Article XII § 7 supports shifting the burden off of practitioners when their traditional and customary rights are at stake. *See Ka Pa'akai 'o Ka 'Āina,* 94 Hawai'i at 50-52, 7 P.3d at 1087-89; *Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455; *In re Wai'ola o Moloka'i, Inc*., 103 Hawai'i 401, 409, 83 P.3d 664, 672 (2004) (holding that the Commission on Water Resource Management ("Commission") failed adequately to discharge its public trust obligation under Article XII, § 7 and that the user of the resource 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 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*, 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); *see also Mauna Kea Anaina Hou,* 136 Hawai'i at 413-14, 363 P.3d at 261-62 ("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."); *see also* Dkt. #8 at 9-16; Dkt. # 30 at 4-7. 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 administrative rules promulgated by a State agency unreasonably regulate Native Hawaiian rights.

V. 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 State's attempt to convince this Court otherwise is unpersuasive.

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