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)

DEFENDANT-APPELLEE UNIVERSITY OF HAWAII'S **ANSWERING BRIEF** RE RESERVED QUESTION FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT, STATE OF HAWAI'I; CERTIFICATE OF SERVICE

THIRD CIRCUIT COURT

HONORABLE ROBERT D.S. KIM

DEFENDANT-APPELLEE UNIVERSITY OF HAWAII'S ANSWERING BRIEF RE RESERVED QUESTION FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT, STATE OF HAWAI'I

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I. INTRODUCTION

Defendant-Appellee UNIVERSITY OF HAWAI'I ("University"), by and through its attorneys, CARRIE K. S. OKINAGA, University General Counsel, JOSEPH F. KOTOWSKI, III, University Associate General Counsel, hereby submits this Answering Brief to the Opening Brief by Plaintiff-Appellant FLORES-CASE 'OHANA ("Appellant"), filed on May 16, 2022 [Dkt. No. 8].

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?

[Dkt No. 1 at 3].

The burden of proof with respect to a constitutional challenge to a *statute's* validity on its face is clear, and has been stated in multiple decisions of this Court:

> [W]e have long held that: (1) legislative enactments are presumptively constitutional; (2) a party challenging a statutory scheme has the burden of showing unconstitutionality beyond a reasonable doubt; and (3) the constitutional defect must be clear, manifest, and unmistakable.

State v. Mallan, 86 Hawai'i 440, 446, 950 P.2d 178, 184 (1998); *Pray v. Judicial Selection Comm'n*, 75 Haw. 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, 542, 836 P.2d 1066, 1069 (1992).

The issue for the Court is whether this standard, or some other standard, applies in evaluating the constitutional validity of a Hawai‘i Administrative Rule ("HAR"). Based on established standards of construction and this Court's prior decisions, the presumptions and burden of proof set forth in the paragraph above also apply to HARs, including HAR Chapter 20-26, which is at issue in this case. *See Int'l Bhd. of Elec. Workers v. Hawaiian Tel. Co.*, 68 Haw. 316, 323, 713 P.2d 943, 950 (1986) ("The general principles of construction which apply to statutes also apply to administrative rules."); *Pray*, 75 Haw. at 340, 861 P.2d at 727 ("[W]e must construe and interpret the parameters of a rule…pursuant to a constitutional delegation of rule-making power. In this regard, the standard for determining the constitutionality of such a rule is analogous to the standard applicable to that employed in determining the constitutionality of a legislative enactment.").

By analogy to the decisions in *Blair*, *Sifagaloa*, *Pray*, and *Mallan*, it is the Appellant who has the burden of demonstrating, beyond a reasonable doubt, that HAR Chapter 20-26, which is presumptively constitutional, is plainly, clearly, manifestly, and unmistakably unconstitutional. For this Court to hold otherwise would go against its established precedents – several of which were decided before statehood – and would result in a reversal of the presumption that statutes and rules are constitutional.[1] This would be treacherous new ground for courts in having to second-guess executive policy, not just process, behind (law and) administrative rules, given the monumental effort, time and expense required to draft rules, to consult with multiple public and agency stakeholders regarding draft rules, to conduct public hearings regarding draft rules, and

[1] *See, e.g., State v. Jess*, 117 Hawai‘i 381, 399-400, 184 P.3d 133, 151-52 (2008) ("[S]uch a reading would contravene the doctrine of 'constitutional doubt,' which dictates that, 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is adopt the latter[.]'") (quoting *In the Interest of Doe*, 96 Hawai‘i 73, 81, 26 P.3d 562, 570 (2001)).

then to get the rules reviewed and approved not just by the agency itself (in this case the Board of Regents as well as University administration), but also by the Department of the Attorney General, and finally the Governor. It is not surprising, then, that administrative rules have been afforded by this Court (and other courts) the weight and deference that is afforded statutes. To change the current standard is not just providing a second or third bite at the proverbial apple, on top of the relief provided in HRS Chapter 91, but would result in never-ending legal challenges to rules (and citations for violations thereof) established for decades by State and county agencies, and Appellant advocates for a standard that, to the University's knowledge, no other Court has adopted.

To be clear, the University's has embraced its stewardship responsibilities under Article XII, § 7. As discussed below, and suggested by Appellant, *Ka Pa'akai O Ka 'Aina v. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000) ("*Ka Pa'akai*") provides a framework that applies to permits, including those granted under HARs. However, the Appellant would like agencies to apply that standard before any permit has been issued, and the exercise of any actual right has been attempted or denied. HARs, by their very nature, are an "agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency." *See* HRS § 91-1. It is difficult to conceive how any rule could capture all possible permutations that may or may not affect individual and specific rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes that may or may not be practiced by specific persons qualified to make that claim under Article XII, § 7.

II. STATEMENT OF THE CASE

While the University believes the reserved question can and should be answered without delving into the factual background of the underlying case, the University must respond to the factually inaccurate allegations presented in the Appellant's Opening Brief, especially those that suggest that the University did not constitutionally promulgate HAR Chapter 20-26, or that the University failed to consult with and incorporate the opinions of stakeholders in the native Hawaiian community. It should be noted also that HAR Chapter 20-26 has been in effect and implemented for two and a half years, and the only challenge to HAR Chapter 20-26 is the instant facial challenge; no one has ever complained that application of HAR Chapter 20-26 has resulted in a constitutional violation or deprivation of constitutional rights, native Hawaiian or otherwise.

A. Act 132

On June 18, 2009, Governor Linda Lingle signed HB1174 HD3 SD2 CD1 into law as Act 132 ("Act 132"), which granted the University "authority to manage and control public and commercial activities on the Mauna Kea lands by granting express authority to the University of Hawai‘i to adopt rules relating to public and commercial activities permitted or occurring on the Mauna Kea lands." [Dkt. No. 3, #46 at 2]. The purpose of Act 132 was to authorize the Board of Regents of the University to, among other things, "adopt rules pursuant to Chapter 91 to regulate public and commercial activities on Mauna Kea lands." HRS § 304A-1903.

In adopting these rules, the statute required the University to:

> (1) Strive for consistency with the administrative rules of the division of forestry and wildlife of the department of land and natural resources related to forest reserves and natural area reserves;
> (2) Consult with the office of Hawaiian affairs to ensure that these

> rules shall not affect any right, 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; and
> (3) Hold at least one public hearing, in addition to the public hearing at which decision-making on the proposed rule is made, on the island of Hawaii.

Id.

As set forth in greater detail herein, the University engaged in extensive consultation, including with the Office of Hawaiian Affairs ("OHA"), and held multiple public hearings, in order to promulgate rules that have never been challenged in terms of their application or enforcement.

B. <u>Mauna Kea Comprehensive Management Plan ("CMP")</u>

While the narrowness of the question before the Court limits the University's ability to explain in full detail its stewardship and management framework, of which HAR Chapter 20-26 is just one piece, because the Appellant on page 4 of its Opening Brief suggests that the CMP somehow is evidence of constitutional overreach, it is critical that the Court understand what the CMP is and what it is not. It does not have the force and effect of law, and is the University's plan (approved by the State Board of Land and Natural Resources ("BLNR"), as to how to protect natural and cultural resources, addressing impacts of human activity, on conservation lands as set forth in more detail herein.

On April 8, 2009, the BLNR approved the University's Mauna Kea CMP, subject to certain conditions. [Dkt. No. 3, #40]. The CMP was intended to provide a guide for managing existing and future activities and uses, and to ensure ongoing protection of Mauna Kea's cultural and natural resources. [Dkt. No. 3, #40 at iii].

In and through the CMP, the University recognized that, "Mauna Kea is a living resource

where Native Hawaiians exercise traditional and customary practices either within the UH Management Areas[2] or access through Mauna Kea's trail system to gather and hunt on surrounding lands." *Id*. at iv. In and through the CMP and its implementation, the University embraced this Court's decision in *Ka Pa'akai*. The *Ka Pa'akai* decision provided government agencies "an analytical framework to ensure the protection and preservation of valued cultural, historical and natural resources." [Dkt. No. 3, #40 at iv].

The University's CMP addressed and honored the *Ka Pa'akai* framework through the following process:

> (1) The CMP identifies the valued cultural, historical and natural resources, including traditional and customary practices exercised within the UH Management Areas. These include both traditional and customary practices, i.e. gathering of cultural resources, family burials, prayers, ceremonial rituals, using the water of Lake Waiau to the more contemporary practices of accessing Mauna Kea trails system for subsistence hunting and gathering. Chapter 5 provides a comprehensive identification of these valued resources.
>
> (2) The CMP describes the threats or impacts to these valued resources by uses and activities within the UH Management Areas. Many of the human use impacts are unintentional, caused by uneducated visitors and facilitated by loose regulation and minimally managed access. Threats from various user groups vary in type and intensity and are factors that are being considered in the management recommendations. Other threats, such as climate change, act over a longer time frame and are more difficult to quantify and correlate with specific impacts. Chapter 6 provides a description of the threats to the valued resources.

[2] The management area covered by the CMP begins at approximately 9,200 ft (2,804 m) on Mauna Kea and extends to the summit, at 13,796 ft (4,205 m), encompassing three distinct areas: the Mauna Kea Science Reserve, the mid-level facilities at Hale Pōhaku, and the Summit Access Road. These areas are collectively referred to as the "UH Management Areas." The UH Management Areas on Mauna Kea are classified in the resource subzone of the state conservation district lands. [Dkt. No. 3, #40 at 3-1].

> (3) The third step of the *Ka Pa'akai* analysis is the "feasible actions" or in this case the management actions to be taken by the stewards of the land to reasonably protect these valued resources. Management actions being considered have been grouped into a series of specific management actions. The management actions consistently recommend an approach that emphasizes education and orientation as cost effective tools, as well as information gathering, management measures, and regulations and enforcement. Many of the management actions can be implemented as conditions on a Department of Land and Natural Resources (DLNR) Conservation District Use Permit (CDUP) or on an OMKM permit. **However other actions will require the adoption of administrative rules to implement and enforce**. Section 7 contains the detailed summary of each of the recommended management actions to ensure that the valued cultural and natural resources are protected to the extent feasible. **All authorizations to permit uses and activities, including but not limited to CDUP or other permits, shall include as a condition on their permits the specific recommendations noted in Section 7 that address the *Ka Pa'akai* requirements to preserve and protect cultural, historical and natural resources, and traditional and customary practices**.

Id. (emphasis added).[3] No administrative rule could identify with the amount of detail the mitigation measures and management actions called for in the CMP, and the CMP is not an "exemption, accommodation or separate regulatory scheme" as Appellant argues.

C. HAR Chapter 20-26 Adopted Following Years of Consultation with Multiple Stakeholders, Including OHA

On June 7, 2018, pursuant to and in accordance with HRS Chapters 91 and 304A, the University Board of Regents authorized a request to Governor David Ige to allow the University to hold public hearings regarding proposed HAR Chapter 20-26 entitled "Public and Commercial Activities on Maunakea Lands." [Dkt. No. 3, #52 at 3]. As part of this process, the University

[3] In every section and every part of the CMP and its implementation, the University's focus on preservation and protection of cultural, historical and natural resources, as well as traditional and customary practices, is evident.

consulted with the Office of Hawaiian Affairs ("OHA"). [Dkt. No. 3, #37 at 8]. This fact is reflected in the Minutes of the Board of Regents meeting held on June 7, 2018. [Dkt. No. 3, #89, Ex. 1]. Specifically, the Minutes note that "[a]dministration clarified that section 20-26-21 of the proposed HARs, 'Traditional and customary rights' resulted from consultation with OHA staff, which had indicated verbal approval of the provision." [Dkt. No. 3, #89, Ex. 1 at 14].

Indeed, the evidence in this case reveals that even before the June 7, 2018 Board of Regents meeting, the University had been consulting with OHA regarding proposed Chapter 20-26. In a letter dated June 20, 2011 from then-OHA Chief Executive Officer Clyde W. Nāmuʻo to Stephanie Nagata from the OMKM, Mr. Nāmuʻo wrote that OHA appreciated the time, effort and resources that the University and OMKM had expended to seek input pursuant to Act 132. Mr. Nāmuʻo wrote that OHA was "pleased with OMKM's commitment to provide OHA with updated drafts and spend time with our staff to answer questions." [Dkt. No. 3, #89, Ex. 2 at 1]. Mr. Nāmuʻo also wrote that, "[w]hen possible, **OHA urges adoption of policies that allow for broad interpretations of what is permissible to ensure traditional and customary rights are not abridged**…OHA understands that OMKM will continue to take these issues into consideration as it moves forward with drafting the rules…OHA commends OMKM for prioritizing the protection of Native Hawaiian traditional and customary rights in its future management of Mauna Kea." (emphasis added) [Dkt. No. 3, #89, Ex. 2 at 3].

Additionally, in his written testimony submitted for the June 7, 2018 Board of Regents meeting, OHA's CEO in 2018, Kamanaʻopono Crabbe, wrote that OHA appreciated outreach meetings with OMKM staff and the dialogue that the meetings provided. Dr. Crabbe also wrote that OHA understood that the meetings were undertaken to satisfy the requirement that the Board "consult with [OHA] to ensure that [the Maunakea administrative rules] shall not affect any

right, 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." [Dkt. No. 3, #89, Ex. 3 at 3]. A letter with similar language was sent by Dr. Crabbe to University President David Lassner on September 11, 2018. [Dkt. No. 3, #89, Ex. 4 at 2].

On October 11, 2018, the University released its first "Hearing Officers' Consolidated Report For Proposed Chapter 20-26, Hawai‘i Administrative Rules Public and Commercial Activities on Mauna Kea Lands." [Dkt. No. 3, #89, Ex. 5]. The report detailed the four public hearings that took place with respect to proposed Chapter 20-26 from September 24, 2018 to September 28, 2018. [Dkt. No. 3, #89, Ex. 5 at 1]. The hearings were conducted pursuant to HRS §§ 91-3 and 304A-1903. *Id*.

On March 13, 2019, Gregory Chun, Senior Advisor on Mauna Kea, wrote to Dr. Crabbe to follow up on the status of the proposed rules for Public and Commercial Activities on Mauna Kea Lands. [Dkt. No. 3, #89, Ex. 6]. In his letter, Dr. Chun informed Dr. Crabbe of the following, with respect to a revised draft of the rules for public comments:

> You will note that the posted draft does not include the version of Section 20-26-21 that was drafted in consultation with your staff. That section intended to address OHA's concern that native Hawaiian rights are not expressly protected. However, **during the public hearing process, there was strong opposition to this section, due in part to the perception that it regulated native Hawaiian culture. Consequently, the section was removed in the posted draft. This was supported in our most recent outreach with native Hawaiian groups who agreed but desired instead to have Article XII, Section 7 of the Hawaii Constitution referenced**. We will make that change.

[Dkt. No. 3, #89, Ex. 6 at 2] (emphases added).[4]

On August 15, 2019, the University released its second "Hearing Officers' Consolidated Report For Proposed Chapter 20-26, Hawai'i Administrative Rules Public and Commercial Activities on Mauna Kea Lands." [Dkt. No. 3, #89, Ex. 8]. The report detailed the four public hearings that took place with respect to proposed Chapter 20-26 from June 3, 2019 to June 7, 2019. [Dkt. No. 3, #89, Ex. 8 at 1]. The hearings were conducted pursuant to HRS §§ 91-3 and 304A-1903. *Id*.

On November 6, 2019, the University Board of Regents held a special meeting. [Dkt. No. 3, #55]. At the meeting, the Board of Regents voted to approve adoption of HAR Chapter 20-26 and transmit that to Governor Ige. [Dkt. No. 3, #55 at 7-10]. It is worth noting that the minutes of the meeting reflect key discussions regarding the scope and impact of the rules. First, University of Hawai'i at Hilo Chancellor Bonnie Irwin "emphasized that the proposed rules are not intended to hamper cultural practices." [Dkt. No. 3, #55 at 7]. Second, in briefing the Board, Associate General Counsel Jesse Souki noted that Lake Waiau is not part of the University Management Area. [Dkt. No. 3, #55 at 8]. Third, Mr. Souki also noted that the rules do not define or regulate culture, no permits are required to access University management areas, and the rules are consistent with existing Natural Area Reserves (NAR) and Forest Reserve (FR) rules. *Id*. Fourth, Dr. Gregory Chun, the Executive Director of Mauna Kea Stewardship, "noted that the rules were intended to be agnostic to the purpose of the activity" and focused "more on the potential impact to the resource[.]" *Id*.

On January 13, 2020, after approval by the Attorney General, Governor Ige approved HAR Chapter 20-26, which took effect ten days after filing with the Office of the Lieutenant

[4] A matrix of the University's consultations with OHA is located at Dkt. No. 3, #89, Ex. 7.

Governor on January 13, 2020. [Dkt. No. 3, #56].

D. Procedural History

On June 29, 2020, Appellant filed its Complaint containing a single count against the University alleging that HAR Chapter 20-26 is invalid for violating Article XII, § 7. [Dkt. No. 3, #1]. On July 20, 2020, the University filed its Answer. [Dkt. No. 3, #13]. By order dated July 6, 2021, trial was set for October 12, 2021. [Dkt. No. 3, #33, 35].

On July 7, 2021, Appellant filed a motion for summary judgment. [Dkt. No. 3, #37-58]. The University filed its opposition on August 19, 2021 [Dkt. No. 3, #89], and Appellant filed its reply on August 24, 2021. [Dkt. No. 3, #91]. On September 8, 2021, the Court entered its order denying Appellant's motion for summary judgment. [Dkt. No. 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. No. 3, #108]. The parties filed their respective briefs on October 1, 2021. [Dkt. No. 3, #117, 119]. **Both parties agreed that the evidentiary standard for constitutional challenges to administrative rules is the "beyond a reasonable doubt" standard**, but Appellant argued that the standard should not apply in this case. [Dkt. No. 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. No. 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. No. 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. No. 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. [Dkt Nos. 1 and 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?

[Dkt No. 1 at 3].

IV. LEGAL STANDARDS

A. Reserved Questions

The issue presented by the reserved question is a question of law, and questions of law are reviewable under the right/wrong standard. *State v. Nakata*, 76 Hawai‘i 360, 365, 878 P.2d 699, 704 (1994). "On a reserved question, [the Hawai‘i Supreme Court is] required to answer a question of law based on facts reported to [it] by the circuit judge. [The Hawai‘i Supreme 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. American Factors, Ltd.*, 42 Haw. 96, 100 (1957).

B. Burden of Proof in Constitutional Challenges to Administrative Rules

As stated above, the burden of proof with respect to a constitutional challenge to a statute's validity is clear, and that burden of proof has been stated in multiple decisions of this Court:

> [W]e have long held that: (1) legislative enactments are presumptively constitutional; (2) a party challenging a statutory

> scheme has the burden of showing unconstitutionality beyond a reasonable doubt; and (3) the constitutional defect must be clear, manifest, and unmistakable.

State v. Mallan, 86 Hawai‘i 440, 446, 950 P.2d 178, 184 (1998); *Pray v. Judicial Selection Comm'n*, 75 Haw. 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, 542, 836 P.2d 1066, 1069 (1992).

"Every enactment of the legislature carries a presumption of constitutionality and should be upheld by the courts unless it has been shown to be, beyond all reasonable doubt, in violation of the constitution." *City and County of Honolulu v. Ariyoshi*, 67 Haw. 412, 419, 689 P.2d 757, 763 (1984) (citing *State v. Petrie*, 65 Haw. 174, 649 P.2d 381 (1982)); *Bishop v. Mahiko*, 35 Haw. 608, 641 (1940); *In re Mott-Smith*, 29 Haw. 343, 346 (1926) ("It is a fundamental rule of construction that courts are never to declare an Act void unless the nullity and invalidity of the Act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of legislative action and the Act sustained.") (internal quotations and citations omitted).

The issue for the Court is whether this standard, or some other standard, applies in evaluating the constitutional validity of an HAR. It is the University's position that, based on established standards of construction and this Court's prior decisions, the presumptions and burden of proof set forth in the paragraph above also apply to HARs, such as HAR Chapter 20-26, which is at issue in this case. *See Int'l Bhd. of Elec. Workers v. Hawaiian Tel. Co.*, 68 Haw. 316, 323, 713 P.2d 943, 950 (1986) ("The general principles of construction which apply to statutes also apply to administrative rules."); *Pray*, 75 Haw. at 340, 861 P.2d at 727 ("[W]e must construe and interpret the parameters of a rule…pursuant to a constitutional delegation of rule-making power. In this regard, the standard for determining the constitutionality of such a rule is

analogous to the standard applicable to that employed in determining the constitutionality of a legislative enactment.").[5]

Thus, by analogy to the decisions in *Blair*, *Sifagaloa*, *Pray*, and *Mallan*, it is the Plaintiff who has the burden of demonstrating, beyond a reasonable doubt, that HAR Chapter 20-26, which is presumptively constitutional, is plainly, clearly, manifestly, and unmistakably unconstitutional. For this Court to hold otherwise would go against its established precedents – several of which were decided before statehood – and would result in a reversal of the presumption that statutes and rules are constitutional. Such a standard would lead to endless challenges against valid laws and rules, overwhelming the courts. It is also a standard that, to the University's knowledge, no other Court has adopted.

V. ARGUMENT

A. The Constitutional Protection Afforded Native Hawaiian Traditional and Cultural Practices is Expressly Qualified by the Right of the State to Regulate Such Practices

Appellant's challenge is essentially rooted in its plea for this Court to ignore the language of Article XII, § 7 of the Hawai'i Constitution in its entirety. Article XII, § 7 of the Hawai'i Constitution plainly states:

> 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 (emphases added). Not all constitutional protections have such express recognition of the right of the State to regulate the protected activity, and this Court has paid

[5] In the underlying case, **both parties agreed that the evidentiary standard for constitutional challenges to administrative rules is the "beyond a reasonable doubt" standard**, but Appellant argued that the standard should not apply in this case. [Dkt. No. 3, #117].

special heed to this constitutional provision in its entirety.

In *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n ("PASH")*, 79 Hawai'i 425, 903 P.2d 1246 (1995), this Court recognized that "[t]he 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[.]" *PASH*, 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43. *See also Ka Pa'akai*, 94 Hawai'i at 45-46, 7 P.3d at 1082-83 (acknowledging same).

In *State v. Pratt*, 127 Hawai'i 206, 277 P.3d 300 (2012), this Court acknowledged that:

> The privilege afforded for native Hawaiian practices, as expressed in our State constitution and statute, **is not absolute**. The language of the provisions protecting customary native Hawaiian practices display a textual commitment to preserving the practices while remaining mindful of competing interests. For example, the constitutional language protecting the right to traditional and customary practices is qualified by the phrase "subject to the right of the State to regulate such rights."

Pratt, 127 Hawai'i at 213, 277 P.3d at 307 (emphases added).

The language of *Pratt*, *PASH*, *Ka Pa'akai*, and Article XII, § 7 itself all illustrate the balance that Chief Justice Richardson acknowledged and discussed in *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982). It is that balance that the University has committed to, pursued, and achieved with respect to the rule-making process for HAR Chapter 20-26. *See, e.g.,* [Dkt. No. 3, #40 at 6-11 through 6-17 and 7-7, 7-8] (Mauna Kea Comprehensive Management Plan's discussion of native Hawaiian cultural resources and reducing the impacts of the following: (1) threats to resources; (2) cultural site disturbances; (3) habitat disturbance; (4) air pollution; (5) contaminants; (6) erosion; (7) debris; (8) noise pollution; (9) invasive species; (10) population decline of native plants and animals; (11) fire; and (12) climate change).

B. HRS Section 304A-1903 Expressly Authorizes the University to Regulate

Activities on Mauna Kea, and HAR Chapter 20-26 Does Not Exceed that Authority

The University is authorized by HRS Section 304A-1903 "to adopt rules pursuant to Chapter 91 to regulate public and commercial activities on Mauna Kea lands."[6] The statute also requires the University to "[c]onsult with the office of Hawaiian affairs to ensure that these rules shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupuaa 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." HRS § 304A-1903(2). HRS § 304A-1903 also required the Board of Regents to hold at least one public hearing on the island of Hawai'i. HRS § 304A-1903(3). The University has fulfilled these obligations.[7]

Contrary to what Appellant argues hypothetically could happen, HAR Chapter 20-26 contains no provisions expressly restricting native Hawaiian traditional and customary rights or practices. In fact, it is important for the Court to recognize that HAR Chapter 20-26 contains only one provision about such protected rights and practices; and while textually brief, that provision provides clear, express, and unequivocal protection for native Hawaiian traditional and customary rights. HAR Chapter 20-26-3(f) states:

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[6] *See Paul's Electrical Service, Inc. v. Befitel*, 104 Hawai'i 412, 417, 91 P.3d 494, 499 (2004) ("To the extent that the legislature has authorized an administrative agency to define the parameters of a particular statute, that agency's interpretation should be accorded deference.") (citing *In re Gray Line Hawai'i Ltd.,* 93 Hawai'i 45, 53, 995 P.2d 776, 784 (2000)).

[7] *See id*., 104 Hawai'i at 419, 91 P.3d at 502 ("[A]n appellant seeking to overturn an agency's determination made within the agency's sphere of expertise has a high burden to demonstrate that the agency abused its discretion. A "high burden," a "heavy burden," and "deference" are all ways of expressing this same concept: that a determination made by an administrative agency acting within the boundaries of its delegated authority will not be overturned unless "arbitrary, or capricious, or characterized by ... [a] clearly unwarranted exercise of discretion.") (citing HRS § 91-14(g)(6)).

> **Native Hawaiian traditional and customary rights as recognized and protected under article XII, section 7, of the Hawai‘i State Constitution shall not be abridged.**

HAR Chapter 20-26-3(f) (emphasis added).

To "abridge" means "to shorten in duration or extent" or "reduce in scope."[8] Thus, by its very language, HAR Chapter 20-26-3(f) prevents the reduction or curtailment of native Hawaiian traditional and customary rights, while simultaneously acknowledging that such rights are protected under the Hawai‘i State Constitution. In fact, by stating that such rights "shall not be abridged," the rule actually allows for the free interpretation, and even expansion, of what such rights may mean to an individual practitioner. And again, after over two years of enforcement of HAR Chapter 20-26, Appellant can cite to no actual restriction on protected practices, and the University is unaware of any such complaints.

As discussed above, the University specifically did not seek to regulate native Hawaiian traditional and customary rights, largely in part because of input from the native Hawaiian community itself. As illustrated by the letter dated June 20, 2011 from then-OHA Chief Executive Officer Clyde W. Nāmu‘o to Stephanie Nagata from the OMKM, Mr. Nāmu‘o wrote that OHA appreciated the time, effort and resources that the University and OMKM had expended to seek input pursuant to Act 132. Mr. Nāmu‘o wrote that OHA was "pleased with OMKM's commitment to provide OHA with updated drafts and spend time with our staff to answer questions." [Dkt. No. 3, #89, Ex. 2 at 1]. Mr. Nāmu‘o also wrote that, "[w]hen possible, **OHA urges adoption of policies that allow for broad interpretations of what is permissible to ensure traditional and customary rights are not abridged**…OHA understands that OMKM

[8] Merriam Webster, available at https://www.merriam-webster.com/dictionary/abridge

will continue to take these issues into consideration **as it moves forward** with drafting the rules[.]" [Dkt. No. 3, #89, Ex. 2 at 3]. Interestingly, the very words that Mr. Nāmuʻo used in his letter—"not abridged"—are the very same words that ended up in the final version of HAR Chapter 20-26-3(f).

Likewise, on March 13, 2019, Gregory Chun, Senior Advisor on Mauna Kea, wrote to then-OHA CEO Kamanaʻopono Crabbe, to follow up on the status of the proposed rules for Public and Commercial Activities on Mauna Kea Lands. [Dkt. No. 3, #89, Ex. 6]. In his letter, Dr. Chun informed Dr. Crabbe of the following, with respect to a revised draft of the rules for public comments:

> You will note that the posted draft does not include the version of Section 20-26-21 that was drafted in consultation with your staff. That section intended to address OHA's concern that native Hawaiian rights are not expressly protected. However, **during the public hearing process, there was strong opposition to this section, due in part to the perception that it regulated native Hawaiian culture. Consequently, the section was removed in the posted draft. This was supported in our most recent outreach with native Hawaiian groups who agreed but desired instead to have Article XII, Section 7 of the Hawaii Constitution referenced**. We will make that change.

[Dkt. No. 3, #89, Ex. 6 at 2] (emphases added).

As indicated in Dr. Chun's letter, the University conducted outreach with native Hawaiian groups with respect to the language of Chapter 20-26 concerning traditional and customary rights. As a result of that outreach, the University learned that many native Hawaiian groups actually opposed language that they perceived as regulating native Hawaiian culture. Additionally, Dr. Chun's letter notes that native Hawaiian groups desired to have Article XII, § 7

referenced as part of the rule. Thus, as with Mr. Nāmuʻo's suggestion in 2011, the University incorporated language suggested by OHA's leadership into the final version of the rules.

C. Appellant's Argument that the Burden of Proof Should Shift to the University is Without Any Support or Authority

The authorities quoted, cited and discussed in Section IV.B., *supra*, are all the precedent and authority needed by this Court to decide the reserved question before it. However, Appellant's Opening Brief contains citations and quotations to many authorities that Appellant believes support a change in this Court's long-standing precedent regarding the interpretation and construction of statutes and administrative rules. As will be discussed below, none of those authorities support or require the change in this Court's jurisprudence for which Appellant is advocating; none of the authorities cited would require the government to defend a challenge to the constitutionality of a rule by meeting a "beyond a reasonable doubt" standard, especially when the constitutional provision being relied upon expressly and on its face provides for reasonable regulation, and the government agency (in this case the University) has express authority in statute to propound regulation.

1. Appellant's Federal Authorities Are Inapplicable to the Present Issue

In the only part of the Opening Brief that actually attempts to address the issue posed by the reserved question, Appellant cites to cases decided in federal courts for the proposition that "[c]ourts shift the burden of proof to the government to establish the constitutionality of regulations when certain fundamental or affirmative rights are implicated." Opening Brief at 8. None of these cases stand for the principle that the burden of proof shifts to the government to defend, beyond a reasonable doubt, the constitutional validity of an administrative rule.

Appellant's first case, *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009), involved a street performer's challenge to a rule as applied governing the conduct of visitors to the Seattle

Center, an 80-acre park and entertainment complex. *Berger*, 569 F.3d at 1034. Among other things, the rules prevented active solicitation of funds by street performers, and prohibited any communication by anyone within thirty feet of visitors to the center who were standing in line, attending an event, or sitting in a spot available for eating and drinking. *Id*. The city argued that the regulations imposed valid "time, place, or manner" restrictions on the actions of street performers and other park goers. *Id*. While the Ninth Circuit did state that the government bore the burden of justifying the regulation of expressive activity at the center, and ultimately ruled in favor of the street performer, the court did not impose a "beyond a reasonable doubt" standard on the city. Rather, the court affirmed that, "a municipality may issue reasonable regulations governing the time, please or manner of speech," i*d*. at 1036 (internal quotation omitted). *Id*.

Appellant next cites to *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), a case involving enforcement of a city ordinance prohibiting distribution of commercial handbills on public property. *City of Cincinnati*, 507 U.S. at 412-14. In that case, the U.S. Supreme Court held that the ban on commercial handbills was not a "reasonable fit" between the city's legitimate interest in safety and aesthetics and the means chosen to serve that interest. The Court did not impose a "beyond a reasonable doubt" standard on the city in reaching its decision in this challenge to enforcement of a statute.

Similar to *City of Cincinnati*, the Ninth Circuit in *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) also imposed a "reasonable fit" standard to a city ordinance restricting possession of large-capacity magazines that the challenger claimed violated the Second Amendment. *Fyock*, 779 F.3d at 994, 1000. The appellants in *Fyock* were appealing a decision of the lower court that denied their motion for preliminary injunction on the grounds that they were not likely to succeed on the merits. *Id*. at 994. The Ninth Circuit agreed with the lower court, upholding the

denial of the motion for preliminary injunction. *Id*. at 1001.

Appellants' reliance on *Deegan v. City of Ithaca*, 444 F.3d 135 (2nd Cir. 2006) and *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) is also unavailing. In *Deegan*, a preacher brought a § 1983 action challenging the constitutionality of the city's noise regulations. *Deegan*, 444 F.3d at 137. In that case, the court applied a "narrowly tailored" test to invalidate the regulation. *Id*. at 142. In *Kirchberg*, the U.S. Supreme Court invalidated a Louisiana statute that openly discriminated against women with respect to the disposition of jointly-owned marital property. *Kirchberg*, 450 U.S. at 459. In that case, the Court held that the statute could not survive because it did not substantially further an important government interest. *Id*. at 461.

Lastly, in *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015), another time, place, and manner case, the court examined the validity of a county ordinance that prohibited solicitation within county roadways. *Reynolds*, 779 F.3d at 224. At the outset of its analysis, the court began by discussing the burden of proof. *Id*. at 226. The court noted that **the plaintiff** bore "the initial burden of proving that speech was restricted by the governmental action in question." *Id*. Only after the plaintiff makes her initial showing does the burden then fall on the government to prove the constitutionality of the speech restriction. *Id*. Ultimately, the court applied a "narrowly tailored" test in ruling that the challenged regulation was invalid. *Id*. at 232.

Again, neither Hawaii case law nor the federal case law to which Appellant cites support or require the "beyond a reasonable doubt" standard for which Appellant advocates.

2. Appellant's Reliance on this Court's Decisions Involving Native Hawaiian Rights is Misplaced Because Those Cases Do Not Support a Change in the Established Burden of Proof Concerning Challenges to the Validity of Statutes and Rules

Appellant's Opening Brief is full of authorities regarding this Court's pronouncements on matters involving native Hawaiian rights, water law, contested case hearings, and land use and

development, but nowhere in the collection of case law that Appellant relies on is there one case on point with respect to the reserved question before the Court. Many of the cases that Appellant relies on are distinguishable on their facts, do not involve the rule-making process, or only contain rulings on discrete issues of law that are not at issue in this case.

Beginning with Appellant's reliance on the four cases of *In re Water Use Permit Applications*, 94 Hawai'i 97, 9 P.3d 409 (2000), *In re Wai'ola o Moloka'i, Inc.*, 103 Hawai'i 401, 83 P.3d 664 (2004), *In re Kukui (Moloka'i), Inc.*, 116 Hawai'i 481, 174 P.3d 320 (2007), and *In re 'Īao Ground Water Mgmt Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 287 P.3d 129 (2012), all of these cases dealt with interpretations of the state water code. None of these cases involved rule-making, three of them were contested case hearings (*In re Water Use Permit Applications*, *In re Wai'ola o Moloka'i*, and *In re 'Īao Ground Water Mgmt*); and most importantly, none of them contain any discussion about shifting the burden of proof to the government with respect to a challenge to the validity of a statute or administrative rule.

Appellant's reliance on *Mauna Kea Anaina Hou v. Board of Land & Natural Resources*, 136 Hawai'i 376, 363 P.3d 224 (2015), is also misplaced. At issue in *Mauna Kea Anaina Hou* was whether the BLNR violated the appellants' due process rights by issuing a CDUP authorizing construction of the Thirty Meter Telescope ("TMT") before holding a contested case hearing on the matter. *Mauna Kea Anaina Hou*, 136 Hawai'i at 379-81, 363 P.3d at 227-29. This Court ruled that "[b]y voting on the permit before the contested case hearing was held, the Board denied the Appellants their due process right to be heard at 'a meaningful time and in a meaningful manner.'" *Id*. at 380, 363 P.3d at 228 (quoting *Sandy Beach Def. Fund v. City & County of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989)). In reaching its conclusion,

the Court did not discuss shifting of any burden of proof to the government with respect to challenges to administrative rules. Instead, the Court was concerned with the fact that "the decisionmaker [BLNR] appeared to have already decided and prejudged the matter at the outset." *Id*. at 391, 363 P.3d at 239.

Appellant also relies on *Flores v. Board of Land and Natural Resources*, 143 Hawai‘i 114, 424 P.3d 469 (2018), in support of its argument regarding shifting the burden of proof. In *Flores*, the University requested that the BLNR consent to a sublease that the University intended to enter into for the construction of the TMT. *Id*. at 116, 424 P.3d at 471. Mr. Flores orally requested that the BLNR hold a contested case hearing prior to making a decision on the matter. *Id*. Flores subsequently filed a written petition for a contested case hearing, which the BLNR denied. *Id*. On appeal, this Court ruled that the BLNR was not required to hold a contested case hearing prior to consenting to the sublease. *Id*. at 117, 424 P.3d at 472. The Court reasoned that Flores' constitutional right to due process was not violated because he had had already participated in a separate contested case hearing on the CDUP and was afforded a full and fair opportunity to express his views and concerns as to the effect that the sublease and TMT's construction would have on his interest in engaging in traditional native Hawaiian cultural practices on Mauna Kea. *Id*. at 128, 424 P.3d at 483. Most important, the Court also found that to require BLNR to hold another contested case hearing "would require BLNR to shoulder duplicative administrative burdens and comply with additional procedural requirements that would offer no other protective value." *Id*. (emphasis added). Thus, in *Flores*, this Court demonstrated its ability to analyze a native Hawaiian appellant's constitutional rights without having to resort to imposing a "beyond a reasonable doubt" burden on the government.

Lastly, Appellant heavily relies on this Court's decision in *Ka Pa‘akai*. In *Ka Pa‘akai*,

this Court held that the State Land Use Commission ("LUC") improperly delegated to a private developer its constitutional obligation to preserve and protect customary and traditional rights of native Hawaiians. *Ka Pa'akai*, 94 Hawai'i at 50-52, 7 P.3d at 1087-89. In reaching its decision, the Court provided an "analytical framework" in an effort to "effectuate the State's obligation to protect native Hawaii customary and traditional practices **while reasonably accommodating competing private interests**[.]" *Id*. at 46-47, 7 P.3d at 1083-84 (emphases added). The framework required the LUC, in a review of a petition for reclassification of district boundaries, to "make specific findings and conclusions" as to the following:

> (1) the identity and scope of " valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.

Id.

It is worth noting that nowhere in the "framework" is anything mentioned about burden shifting or imposing a "beyond a reasonable doubt" standard on the state agency. Furthermore, there is an issue as to whether *Ka Pa'akai* is distinguishable on its facts because the University is not a private actor, and unlike in *Ka Pa'akai*, the University did not delegate any of its responsibilities to a private actor. *See, e.g., Kaleikini v. Yoshioka*, 128 Hawai'i 53, 86-87, 283 P.3d 60, 93-94 (2012) (distinguishing *Ka Pa'akai*).

VI. CONCLUSION

In this case, Appellant has chosen to ignore years of this Court's established precedent by arguing for a change in the Court's interpretation and construction of statutes and administrative rules that no other Court has adopted. Appellant has cited to no authority that holds that the

"beyond a reasonable doubt" standard should be borne by the legislative/administrative body that promulgated the subject statute or rule. The University respectfully submits that this fact alone should result in this Court answering the reserved question in the negative, and re-affirming this Court's long-standing precedent concerning the interpretation and construction of statutes and administrative rules.

In addition, however, the constitutional protections relied upon by Appellant in Article XII, § 7 of the Hawai'i Constitution are expressly subject to the right of the State to regulate the protected activity, and HRS Section 304A-1903 provides the University with express statutory authority to regulate public and commercial activity on Mauna Kea. The University adhered to the letter and spirit of HRS Chapter 91 and Section 304A-1903 in its multi-year quest to have the Governor adopt rules so that it could properly steward the precious natural and cultural resources on Mauna Kea. And at the end of the day, HAR Chapter 20-26 is silent as to native Hawaiian traditional and customary rights and practices, except to state unequivocally in HAR Chapter 20-26-3(f):

> **Native Hawaiian traditional and customary rights as recognized and protected under article XII, section 7, of the Hawai'i State Constitution shall not be abridged.**

The University respectfully requests that the Court affirm that a constitutional challenge to a statute's or administrative rule's validity on its face must be reviewed in accordance with long-held precedent:

> (1) legislative enactments are presumptively constitutional; (2) a party challenging a statutory scheme has the burden of showing unconstitutionality beyond a reasonable doubt; and (3) the constitutional defect must be clear, manifest, and unmistakable.

State v. Mallan, 86 Hawai'i 440, 446, 950 P.2d 178, 184 (1998); *Pray v. Judicial Selection Comm'n*, 75 Haw. 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, 542, 836 P.2d 1066, 1069 (1992).

DATED: Honolulu, Hawai'i, July 27, 2022.

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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) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was duly served upon the following parties via JEFS electronic service and/or e-mail:

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