IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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FLORES-CASE ʻOHANA,
Plaintiff-Appellant,

vs.

UNIVERSITY OF HAWAIʻI,
Defendant-Appellee.

SCRQ-22-0000118

RESERVED QUESTION FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT,
STATE OF HAWAIʻI
(CASE NO. 3CCV-20-0000255)

MARCH 15, 2023

NAKAYAMA AND EDDINS, JJ., WITH McKENNA, J.,
CONCURRING IN PART AND DISSENTING IN PART

OPINION BY EDDINS, J.

In a challenge to the constitutionality of administrative rules based on a violation of Article XII, Section 7 of the Hawaiʻi 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?

Burden-shifting makes no sense to our fact-intensive article XII, section 7 balancing framework, where both the individual and the government bear a burden. So I answer no to the reserved question.

The Chief Justice reimagines the reserved question. Cf. Pac. Radiation Oncology, LLC v. Queen's Med. Ctr., 138 Hawaiʻi 14, 16, 375 P.3d 1252, 1254 (2016) (reformulating a certified question to clarify who the parties are). And conjures policy inharmonious with rulemaking.

Plaintiff Flores-Case ʻOhana and the Chief Justice believe that an agency must satisfy the Ka Paʻakai O Ka ʻAina v. Land Use Comm'n, 94 Hawaiʻi 31, 7 P.3d 1068 (2000) contested case framework before promulgating a rule. I reject this approach.

Ka Paʻakai does not fit the rulemaking context. Ka Paʻakai's strong protections facilitate rigorous fact findings and legal conclusions based on a full evidentiary record, fleshed out by adversarial parties. By its nature, rulemaking cannot achieve this specificity and rigor. Also, frontloading Ka Paʻakai to the general rulemaking context risks weakening the protections for Native Hawaiians in contested case hearings and criminal prosecutions.

What standards govern? Our legislature has provided a comprehensive statutory structure for agency rulemaking. This

court should not depart from the Hawaiʻi Administrative Procedure Act.

I.

The legislature has empowered the University of Hawaiʻi to promulgate administrative rules governing access to the summit of Mauna Kea. See 2009 Haw. Sess. Laws Act 132, § 1 at 362-65; HRS § 304A-1901 (2020).

Nearly ten years after the legislature delegated this rulemaking authority, the University of Hawaiʻi started the rulemaking process. Per the Hawaiʻi Administrative Procedure Act, the University published a notice of proposed rulemaking, held public hearings on Oʻahu, Maui, and the Island of Hawaiʻi, received comments, circulated a new draft of the proposed rules for comment, conducted a second round of inter-island public hearings, and received more comments.

Then, in November 2019, the University of Hawaiʻi Board of Regents adopted the final administrative rules by unanimous vote. And in January 2020, Governor David Ige signed the administrative rules into law. See Hawaiʻi Administrative Rules (HAR) § 20-26, et seq. (2020).

Plaintiff Flores-Case ʻOhana (FCO) sued Defendant University of Hawaiʻi (UH), moving for declaratory and injunctive relief in the Circuit Court of the Third Circuit. The June 2020 complaint

identifies Flores-Case ʻOhana as: "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 Hawaiʻi prior to 1778, resides on Hawaiʻi Island, and engages in traditional and cultural practices throughout Mauna Kea, including on lands managed by the University of Hawaiʻi." FCO's complaint asks the circuit court to invalidate the administrative rules, HAR § 20-26.

The case proceeded in the usual ways. Then, in September 2021, the circuit court requested briefing from FCO and UH covering "burden-shifting" in article XII, section 7 challenges to the constitutionality of administrative rules. Later, in March 2022, per Hawaiʻi Rules of Appellate Procedure Rule 15(a) (2010), the circuit court filed an order for reserved question.

The court's order for reserved question court informed us that FCO had filed an action against UH "to declare Title 20, Chapter 26 of the Hawaiʻi Administrative Rules[] unconstitutional, pursuant to Article XII, Section 7[], of the Hawaiʻi State Constitution." The court order also advised that FCO's "participation in the rulemaking process was limited to providing written and oral comments as part of the public hearing process" and that FCO had not requested a contested-case

hearing. The court attached the parties' burden-shifting memos to its order.

We accepted the court's reserved question.

II.

The first part of the reserved question asks whether, in a challenge to the constitutionality of administrative rules based on a violation of article XII, section 7 of the Hawaiʻi Constitution, the burden of proof shifts 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.

The answer is no.

This court decides article XII, section 7 cases with fact-dependent balancing, not inflexible presumptions. In State v. Pratt, we were confronted with competing articulations of the proper test when a criminal defendant asserts Native Hawaiian rights under article XII, section 7. Two Intermediate Court of Appeals judges placed the burden of proof on the defendant to show the reasonableness of his conduct under the circumstances; the third held that the State had a burden to show that the defendant's conduct resulted in actual harm. We rejected *both* approaches.

Our reason? "[T]his court's practice of applying totality of the circumstances tests, as opposed to legal presumptions, in

the context of [N]ative Hawaiian rights." 127 Hawaiʻi 206, 217, 277 P.3d 300, 311 (2012). This balancing dates to our first major article XII, section 7 case. See Kalipi v. Hawaiian Tr. Co., Ltd., 66 Haw. 1, 10, 656 P.2d 745, 751 (1982) ("[W]e believe that the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area."); Ka Paʻakai, 94 Hawaiʻi at 35, 7 P.3d at 1072 (this court seeks "to maintain a careful balance between [N]ative Hawaiian rights and private interests").

Under our balancing framework, to speak of burden shifting is unhelpful. This follows naturally from the language of article XII, section 7 itself. We have observed that the privilege afforded to customary and traditional Native Hawaiian practices is "not absolute." Pratt, 127 Hawaiʻi at 213, 277 P.3d at 307. Our constitution qualifies that right with the phrase, "subject to the right of the State to regulate such rights." Haw. Const. art. XII, § 7.

If our framework must be put in terms of burdens, it would be most accurate to say that the State and the person invoking article XII, section 7 *both* bear a burden, and the same burden at that. The individual must show their usage is reasonable, just as the State must show its regulation of that usage is

reasonable. See Pub. Access Shoreline Haw. by Rothstein v. Haw. Cnty. Plan. Comm'n by Fujimoto, 79 Hawaiʻi 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995) (the State is "obligated to protect the reasonable exercise of customarily and traditionally exercised rights of [Native] Hawaiians to the extent feasible."). One cannot be evaluated without looking to the other.

Burden-shifting is odd talk when the bottom line is balancing. But a moment's thought reveals that article XII, section 7 is not the only fundamental right in the Hawai'i Constitution. Indeed, with its explicit limiting language about government regulation, if the burden shifts here, then it shifts elsewhere. For instance, it would shift when article XI, section 9's right to a life-sustaining climate system comes up. See Matter of Hawaiʻi Elec. Light Co., Inc., No. SCOT-22-0000418, 2023 WL 2471890 (Haw. Mar. 13, 2023) (People of Hawaiʻi have a right to a life-sustaining climate system).

Flores-Case ʻOhana cites the First and Fourteenth Amendment to support flipping the burden to the government defendant. Analogies to federal First and Fourteenth Amendment doctrine, though, miss the point. First, although these individual rights are certainly not "absolute" in practice, unlike article XII, section 7, they do not have balancing built into their constitutional language. Second, both the First and Fourteenth

Amendment have analytical frameworks that reflect the unique nuances of their doctrinal areas.

FCO advances a line of First Amendment 'prior restraint' cases that put the burden on the government to justify its rules. In Berger v. City of Seattle, the court treated a rule requiring advance notice and permitting for certain speech as presumptively invalid. 569 F.3d 1029, 1037 (9th Cir. 2009). This presumption, explained the court, stemmed from the burdens such a rule placed on speech. Id. Registration requirements "dissuade potential speakers by eliminating the possibility of anonymous speech." Id. at 1038. And, "critically, advance notification requirements eliminate 'spontaneous speech'" that responds to immediate issues. Id. These are important concerns, but they cannot easily be split from the speech context. Berger's reasoning does not extend to all fundamental rights.

Equal protection doctrine, with its rational basis, rational basis "with bite," intermediate, and strict scrutiny tiers, is also a bad candidate for generalizations about constitutional burden-shifting. (See Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. Rev. 2070 (2015) for an analysis of equal protection's extra tier). Tacking between these tiers doesn't truly shift a burden, as it would in a motion for summary

judgment or in a criminal trial. Instead, it changes the standard for a successful challenge. It would be as accurate to say that under rational basis review, the government has a light burden, as it would be to say that under rational basis review, the challenger has a heavy burden. Even in these spheres of federal constitutional law that do occasionally speak of burdens, the language of burdens is still a poor fit — more useful as a metaphor than an analytical description.

FCO also points to water code cases, like In re Waiʻola O Molokaʻi, Inc., 103 Hawaiʻi 401, 83 P.3d 664 (2004) and In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Hawaiʻi 481, 174 P.3d 320 (2007), as another way to support burden shifting. The comparison doesn't work. First, those water cases involved contested case hearings; adversarial settings facilitated fact-finding. Next, the cases had nothing to do with rulemaking. Relatedly, there is no talk or thought in the cases about burden-shifting to the government in constitutional challenges to a law or rule's validity. Lastly, the plaintiffs raised challenges under article XII, section 7 and article XI, section 1 (public trust doctrine) after private companies requested permits to use State water resources. It was unremarkable that the companies had the burden to justify their proposed use of public trust resources.

So no, when the constitutionality of an administrative rule is challenged under article XII, section 7, the burden of proof does not shift to the government to prove that its rules are constitutional.

But nor do its obligations vanish. See Ka Paʻakai, 94 Hawai'i at 45, 7 P.3d at 1082, (Hawai'i Constitution "places an affirmative duty on the State and its agencies to preserve and protect traditional and customary [N]ative Hawaiian rights"). In an article XII, section 7 challenge, the government must explain why its regulation is reasonable and the customary usage unreasonable, and the challenger must explain why their customary usage is reasonable and the government's regulation unreasonable. It is the court's ultimate duty to balance these competing viewpoints and arrive at a reasoned decision.

III.

Flores-Case ʻOhana and the Chief Justice promote a new administrative rulemaking format: Ka Paʻakai's framework for contested case hearings applies to rulemaking and must take place before an agency promulgates a rule. I reject this approach.

Our legislature has provided a comprehensive statutory structure for agency rulemaking. I decline to depart from the Hawaiʻi Administrative Procedure Act. And refuse to tuck Ka

Paʻakai into Hawaiʻi Revised Statutes Chapter 91's rulemaking regime.

In the rulemaking context, the Ka Paʻakai framework simply doesn't fit. The whole point of Ka Paʻakai is to facilitate rigorous fact findings based on a *full evidentiary record*, fleshed out by adversarial parties. By its nature, a rulemaking can't achieve this specificity and rigor. Applying Ka Paʻakai to the general rulemaking context risks diluting its strong protections.

Even more worrying, it threatens the due process rights of parties who, unlike Flores-Case ʻOhana, actually *want* a contested case hearing; same for persons who get charged with violating a rule. If the Ka Paʻakai analysis – even a Ka Paʻakai-lite version – fast forwards to the general rulemaking stage, individuals with specific claims to adjudicate may find their cases prejudged or weakened.

We rarely apply Ka Paʻakai beyond contested case hearings – for good reason. Administrative agencies wear many hats. And an agency's hat during a contested-case hearing and a rulemaking are not the same.

A contested case hearing "is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are

subject to cross-examination. It provides a high level of procedural fairness and protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process." Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawaiʻi 376, 380, 363 P.3d 224, 228 (2015) (Mauna Kea I). In this context, agencies fulfill a "quasi-judicial" function. Town v. Land Use Comm'n, 55 Haw. 538, 545, 524 P.2d 84, 89 (1974).

In contrast, "we recognize that rule-making is essentially legislative in nature because it operates in the future." In re Hawaiian Elec. Co., 81 Hawaiʻi 459, 467, 918 P.2d 561, 569 (1996). "[T]he distinguishing characteristic of rule-making is the generality of effect of the agency decision." Id. at 466, 918 P.2d 568. This generality stems from the fact that legislation "affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity." Id. at 466–67, 918 P.2d 568–69 (quoting 1 Davis, Administrative Law Treatise § 5.02 (1958)).

The difference is straightforward. Adjudications handle the past or current rights of specific people; rulemakings make law for everyone, for the future.

Ka Paʻakai and the cases after it clearly contemplate agency adjudications, not rulemaking. In Ka Paʻakai, we held that the Land Use Commission, in reviewing a petition for the reclassification of district boundaries, must make "specific findings and conclusions" on the exercise of Native Hawaiian rights in the area, the effects of the proposed action on them, and any feasible actions to reasonably protect Native Hawaiian rights, if found to exist. Ka Paʻakai, 94 Hawaiʻi at 47, 7 P.3d at 1084. Closely examining the *evidence*, we found the LUC's findings insufficient to meet its constitutional burden.

In a prototypical follow-on case from Ka Paʻakai, In re ʻIao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, we agreed with the challengers that the agency in question – after evidence was presented in an adversarial proceeding - had "a duty to make specific findings of fact and conclusions of law with regard to the effect of its D & O on traditional and customary-[N]ative Hawaiian practices." 128 Hawaiʻi 228, 247, 287 P.3d 129, 148 (2012).

The law and process are clear-cut: agencies engaged in rulemaking do not make findings of fact and conclusions of law. They cannot, because they are not adjudicating specific rights. At a rulemaking, agencies gather information and make policy decisions. Comments flow in, but these comments are not comparable to testimony made during a contested case, which is

taken under oath, subject to cross examination, and done in the context of an adversarial proceeding. When agencies wear their rulemaking hat, they don't build a specific evidentiary record. They don't find facts. And they don't *enter* conclusions of law - they *make* law.

The rare instance where we have purported to apply Ka Paʻakai to an agency rule, rather than an adjudication, highlights the inherent problem with doing so. In State v. Armitage, we considered whether the Kaho'olawe Island Reserve Commission had fulfilled its constitutional obligations when it promulgated HAR §§ 13-261-10 and -11, rules governing entrance into the reserve. We said it had. We pointed to a clause in the rule that people seeking "to exercise traditional and customary rights and practices compatible with the law" could apply to the commission for permission. Armitage, 132 Hawai'i 36, 58, 319 P.3d 1044, 1066 (2014). We also observed that the "State's interest as balanced against the potential harm to Petitioners' ability to engage in [N]ative Hawaiian traditional and customary practices weighs in favor of the State." Id.

That was it. The agency had made no specific findings or conclusions, yet it apparently was fine under Ka Paʻakai. This seems deeply incongruous with Ka Paʻakai and the cases that have applied it. But the incongruity becomes understandable when the changed context – a rule, not an adjudication - is taken into

account. Ka Paʻakai's framework simply does not graph onto the quasi-legislative rulemaking activities of agencies. Trying to make it fit, as in Armitage, ends up distorting that framework into something meaningless.

Applying Ka Paʻakai to general rulemaking also raises serious due process concerns. Per the Chief Justice's proposed retool to Hawaiʻi Revised Statutes Chapter 91, whenever a rule touches upon article XII, section 7, the agency will have to conduct some form of a Ka Paʻakai proceeding in parallel with its rulemaking. It will ultimately reach a decision — doing so, of course, without the enlightenment of a specific evidentiary record or defined, adversarial parties. What will this mean for Native Hawaiians whose rights are specifically impacted by the rule?

Before, we would have said they have a right to a contested case hearing on issues particular to their situation. Mauna Kea I, 136 Hawaiʻi at 390, 363 P.3d at 238. Now though, it's not so clear. Any contested case hearing would be undertaken on the backdrop of the agency's prior Ka Paʻakai findings. And because that finding was made in a general rulemaking context, it would presumably apply generally.

But due process includes the right to not have your case prejudged. In Mauna Kea I we considered whether the approval of a permit before a contested case hearing violated due process.

136 Hawaiʻi at 380, 363 P.3d at 228. There, appellants had "unequivocally requested" a contested case hearing. The Board of Land and Natural Resources scheduled one but voted on the permit before the hearing was held. We found this unacceptable. We emphasized that the procedures of a contested case hearing "are designed to ensure that the record is fully developed and subjected to adversarial testing before a decision is made. Yet that purpose is frustrated if, as was the case here, the decisionmaker rules on the merits before the factual record is even developed." Id. at 391, 363 P.3d at 239.

The majority opinion in Mauna Kea I rested on due process, without mentioning article XII, section 7. But the concurrence highlighted the necessity of holding a contested-case hearing to vindicate article XII, section 7 and Ka Paʻakai. "[I]f customary and traditional Native Hawaiian practices are to be meaningfully safeguarded," the concurrence stressed, "it is imperative for the agency to receive evidence and then make a determination supported by the evidence in the record." Mauna Kea I, 136 Hawaiʻi at 402, 363 P.3d at 250 (Pollack, J., concurring) (cleaned up).

Under FCO and the Chief Justice's approach, this right to a contested case hearing, with all of its protections, seems drained, even under threat. Findings and conclusions concerning article XII section 7's sensitive balancing will be made before

a contested case hearing. And decided without Ka Paʻakai's essential infrastructure – an evidentiary hearing involving adversarial parties.

The agency's findings or fuzzy "adequate considerations" will not go unnoticed. Contested case hearings or prosecutions held afterwards may either violate due process, because the result had been pre-decided, *or* the existence of a general Ka Paʻakai rulemaking may nullify or undermine the rights of individuals who seek or have contested case hearings. Neither result is promising for the protection of Native Hawaiian rights.

/s/ Paula A. Nakayama

/s/ Todd W. Eddins