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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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FLORES-CASE 'OHANA,
Plaintiff-Appellant,

vs.

UNIVERSITY OF HAWAI'I,
Defendant-Appellee.

SCRQ-22-0000118

RESERVED QUESTION FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(3CCV-20-0000255)

MARCH 15, 2023

OPINION OF McKENNA, J., CONCURRING AND DISSENTING FROM OPINION OF RECKTENWALD, C.J., IN WHICH WILSON, J., JOINS, AND OPINION OF EDDINS, J., IN WHICH NAKAYAMA, J., JOINS

I write separately because I agree and disagree with portions of both Chief Justice Recktenwald's and Justice Eddins' opinions.

The reserved questions from the circuit court are:

> 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?

I join Sections II, III, IV.A IV.B, and IV.D of Chief Justice Recktenwald's opinion. I also join Sections I and II of Justice Eddins' opinion. My reasons for doing so are also informed by the following.

As explained in footnote 8 of Chief Justice Recktenwald's opinion, the presumption of constitutionality applicable to legislative enactments does not apply to executive agency rules. Thus, I believe it is axiomatic that in order to ensure that its rules comply with article XII, section 7 requirements, an agency must consider (1) the identity and scope of article XII, section 7 Native Hawaiian rights that will be affected by a proposed rule; (2) the extent to which those rights would be affected or impaired by the proposed rule; and (3) the feasibility of fashioning a rule that would reasonably protect those rights if they are found to exist. See Ka Paʻakai O Kaʻ Āina v. Land Use Comm'n, 94 Hawaiʻi 31, 45, 47, 7 P.3d 1068, 1082, 1084 (2000), as amended (Jan. 18, 2001).[1]

However, I believe requiring agencies to prepare a written statement explaining how they conducted a Ka Paʻakai analysis, as

[1] I believe an agency must always consider constitutional requirements when promulgating rules.

the Chief Justice would require in Section IV.C, violates separation of powers principles. Through the Hawai'i Administrative Procedures Act, Hawai'i Revised Statutes ("HRS") Chapter 91, the legislature has laid out rulemaking procedures for agencies to which it has delegated rulemaking authority. See HRS § 91-3 (2012 & Supp. 2018). The legislature has also laid out in Chapter 91 how such rules can be challenged. HRS § 91-6 (2012) allows any interested person to petition an agency to repeal a rule and requires the agency to explain any denial of such a request within thirty days. Whether or not a §91-6 challenge was previously made, HRS § 91-7(a) (2012) allows declaratory actions regarding rule validity, such as the one in this case. In a facial challenge to a rule, HRS § 91-7(b) provides that a court is to declare the rule invalid if it finds that it violates constitutional provisions.

In contrast with agency rules, these legislative enactments are presumptively constitutional. Pray v. Jud. Selection Comm'n, 75 Haw. 333, 340, 861 P.2d 723, 727 (1993).[2] The Chapter 91 statutory scheme does not require agencies to issue written statements summarizing how it considered Native Hawaiian or other constitutional rights when promulgating rules. Therefore,

[2] Pray seemingly applied this presumption to rules promulgated by the Judicial Selection Commission ("JSC"). But these were not rules promulgated pursuant to legislative authority, to which Chapter 91 applies; rather, the constitution allows for the JSC to promulgate rules.

I believe judicial imposition of such a requirement would violate separation of powers principles. Hence, I disagree with Chief Justice Recktenwald's opinion in Section IV.C that an agency must prepare a written statement. I also agree with Justice Eddins' analysis in Section III of his opinion that requiring Ka Pa'akai findings is workable and allowed in the contested case context (as an exercise of our judicial power) but not in the rulemaking context. I also share the concerns expressed by Justice Eddins in Section III of his opinion regarding the implications of requiring such a written statement. But I disagree with Justice Eddins' opinion that the Ka Pa'akai framework has no application to rulemaking. As discussed above, I believe the framework must be considered in rulemaking even if a written statement explaining the agency's application of the framework is not required.

Finally, I agree with Chief Justice Recktenwald that it is appropriate to address the standard that must be met by a person bringing a facial challenge to the constitutionality of an agency rule based on article XII, section 7. I agree that although the burden is on the person challenging constitutionality, the "high burden" governing challenges to legislative enactments does not apply. Rather, as further explained in Chief Justice Recktenwald's opinion, a plaintiff

must show the agency failed to adequately consider or reasonably protect article XII, section 7 rights.

/s/ Sabrina S. McKenna