No. SCOT-17-0000777, SCOT-17-0000811 & SCOT-17-0000812

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA; CLARENCE KUKAUAKAHI CHING; FLORES-CASE‘OHANA; DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit corporation, Petitioners-Appellants, vs. BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII; DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII; SUZANNE D. CASE, in her official capacity as Chair of the Board of Land and Natural Resources and Director of the Department of Land and Natural Resources; and the UNIVERSITY OF HAWAII AT HILO, Appellees. and	AGENCY DOCKET NO: BLNR-CC-16-002 (Agency Appeal) RECONSIDERATION OF FINAL JUDGMENT, filed on October 30, 2018 APPEAL FROM THE BOARD OF LAND AND NATURAL RESOURCES (BLNR-CC-16-002, filed on September 27, 2017

TMT INTERNATIONAL OBSERVATORY, LLC; HARRY FERGERSTROM; MEHANA KIHOI; C.M. KAHO'OKAHI KANUHA; JOSEPH KUALI'I LINDSEY CAMARA; J. LEINA'ALA SLEIGHTHOLM; MAELANI LEE; THE TEMPLE OF LONO; KALIKOLEHUA KANAELE; PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES, INC.;STEPHANIE-MALIA TABBADA; TIFFNIE KAKALIA; GLEN KILA; DWIGHT J. VICENTE; BRANNON KAMAHANA KEALOHA; CINDY FREITAS, AND WILLIAM FREITAS,	)
Intervenors.	)

BRIEF OF AMICI CURIAE
KUA'ĀINA ULU 'AUAMO, COLETTE Y. MACHADO, AND DAN AHUNA

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No. SC0T-17-0000777, SCOT-17-0000811, SCOT-17-0000812

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

MAUNA KEA ANAINA HOU et al., Petitioners-Appellants, vs. BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI‘I et al., Appellees. and TMT INTERNATIONAL OBSERVATORY, LLC et al., Intervenors.	AGENCY DOCKET NO: BLNR-CC-16-002 (Agency Appeal) RECONSIDERATION OF FINAL JUDGMENT, filed on October 30, 2018 APPEAL FROM THE BOARD OF LAND AND NATURAL RESOURCES (BLNR-CC-16-002, filed on September 27, 2017

BRIEF OF AMICI CURIAE KUA‘ĀINA ULU ‘AUAMO, COLETTE Y. MACHADO, AND DAN AHUNA

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Amici Curiae Kua‘āina Ulu ‘Auamo, Colette Y. Machado, and Dan Ahuna (collectively, the “Native Hawaiian Amici”) respectfully request this honorable Court to reconsider its October 30, 2018 majority opinion in this case. As a coalition of community-based organizations and individuals committed to perpetuating traditional and customary rights and practices, the Native Hawaiian Amici are deeply concerned about foreseeable, yet unintended consequences of this opinion. Accordingly, they seek to provide this Court an opportunity to “contemplate and reside with the life force and give consideration to the ‘Aloha Spirit’” in “exercising [its] power on behalf of the people and in fulfillment of [its] responsibilities, obligations and service to the people.” Haw. Rev. Stat. (“HRS”) § 5-7.5 (2007 & Supp. 2017).

The Native Hawaiian Amici submit that the majority opinion erodes Chief Justice William S. Richardson’s legacy regarding Native Hawaiian traditional and customary rights and the public trust doctrine. As he explained:

> Hawai‘i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai‘i’s territorial period, the decisions of our highest court, reflected a primarily Western orientation and sensibility that wasn’t a comfortable fit with Hawai‘i’s indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawai‘i. The result can be found in the decisions of the Hawai‘i Supreme Court beginning after Statehood. Thus, during my tenure on the Court, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases – and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.

Melody Kapilialoha MacKenzie, *Ka Lama Kū o ka No‘eau: The Standing Torch of Wisdom*, 14 U. HAW. L. REV. 1, 6-7 (2009) (quoting Chief Justice Richardson). The

Native Hawaiian Amici offer the following manaʻo (insight) with the hope that this Court will reconsider the majority opinion's significant impact on Native Hawaiians and the public at large ā mau loa (for ever and ever).

I. BY DELETING OR REVISING FOOTNOTES 15 AND 17, THIS COURT WILL CORRECT IMPORTANT ERRORS THAT WOULD OTHERWISE ALTER AND DISTORT ESTABLISHED NATIVE HAWAIIAN LAW

The Native Hawaiian Amici urge this Court to revise or delete footnotes 15 and 17 in the majority opinion because the material in these footnotes: (1) constitutes dicta that serve no necessary purpose for the majority's rulings; and (2) will upset and undercut critical legal protections of Native Hawaiian rights this Court has recognized in a series of cases including *Ka Paʻakai o Ka ʻĀina v. Land Use Comm'n*, 94 Hawaiʻi 31, 7 P.3d 1068 (2000). As explained below, these footnotes do not accurately reflect the law and will needlessly complicate the protection of Native Hawaiian rights, or worse, invite agencies to diminish their affirmative constitutional obligations to protect these rights. The Native Hawaiian Amici request that the Court delete these dicta, if not provide corrected guidance as discussed below.

Footnote 15 addresses the issue of the burden of proof related to traditional and customary Native Hawaiian rights. The footnote opines at the outset that "[t]he burden of proof is not at issue because *Kā* [*sic*] *Paʻakai* concerns procedural requirements placed on agencies in order to protect Native Hawaiian rights." Majority Op. at 34 n.15.[1] Nonetheless, the footnote embarks on an extended discourse as to how "Appellants' assertion that our cases do not recognize any burden on practitioners in civil cases is erroneous." *Id.* The footnote finally

[1] Short form citations in this brief include: "FOF" and "COL" for findings and conclusions in the September 28, 2017 Findings of Fact, Conclusions of Law, and Decision and Order of the Board and Land and Natural Resources ("BLNR"); and "Majority Op." for the Court's majority slip opinion filed on October 30, 2018.

concludes with the pregnant statement that "[w]e need not decide if *Kā* [*sic*] *Pa'akai* implicitly placed any evidentiary burden on the applicants." *Id.* at 35 n.15.

The Native Hawaiian Amici would have fewer concerns with footnote 15, had it stopped with the recognition that *Ka Pa'akai* imposes the obligation (or burden) to protect Native Hawaiian rights on BLNR, and not Native Hawaiians.[2] Indeed, BLNR's decision should have clearly and unequivocally recognized this established obligation in the first instance, yet the agency's decision instead thoroughly muddied the issue by digressing at length on Native Hawaiians' "burden of proof," *see, e.g.*, COLs 82, 371-75, 388, 393, 396, and repeatedly declaring that Native Hawaiian practitioners "have not met their burden" of proving their rights and practices, *see, e.g.*, COLs 379, 384, 386-87, 391-92, 399. Instead of correcting and admonishing these misconceptions—which were at least gratuitous, and further appeared to skew BLNR's understanding of its obligations—the majority's footnote 15 could be construed to validate such excursions by BLNR and other agencies.

While the Court can avoid the problems of footnote 15 by simply deleting it, the following discussion summarizes these problems for the Court's reference. The footnote quotes language from criminal cases—including *State v. Pratt*, 127 Hawai'i 206, 277 P.3d 300 (2012), which involved a Native Hawaiian defendant asserting affirmative defenses—then notes that the cases drew certain factors from *Public Access Shoreline Hawaii v. Planning Comm'n*, 79 Hawai'i 425, 903 P.2d 1246 (1995) ("*PASH*"), a land use case. *See* Majority Op. at 34 n.15. The footnote adds that *Pratt* commented on how *Pele Defense Fund v. Paty*, 73 Haw. 578, 837

[2] The Court in *Ka Pa'akai* elucidated the state's constitutional affirmative duty to protect Native Hawaiian rights "to the extent feasible," reviewing the judicial precedent and constitutional history of Hawai'i Constitution article XII, § 7. *See* 94 Hawai'i at 45-46, 7 P.3d at 1082-83.

P.2d 1247 (1992) ("*PDF*"), "had been remanded for the Native Hawaiian practitioners to prove that the Native Hawaiian practice is traditional and customary, in addition to showing that it meets the other requirements" under prior precedent. Majority Op. at 34 n.15 (brackets and internal quotation marks omitted). "Thus," footnote 15 avers, "the burden upon Native Hawaiian practitioners set forth in [the criminal cases] is not limited to the criminal context and is drawn from the civil context, with its origin in *PASH*, a land use case." *Id.*

To be clear, nothing in *PASH* contemplated, let alone set forth, a burden of proof on Native Hawaiian practitioners along the lines of a criminal defense. *PASH* addressed the standing of Native Hawaiian practitioners and, in fact, eased the way for Native Hawaiians to participate in administrative proceedings and protect their rights. The Court criticized the applicant and agency in that case for their "cultural insensitivity" to "issues relating to the subsistence, cultural, and religious practices of native Hawaiians," which "emphasize[d] the need to avoid 'foreclos[ing] challenges to administrative determinations through restrictive applications of standing requirements.'" *PASH*, 79 Hawai'i at 434 n.15, 903 P.2d at 1255 n.15 (citations omitted). The Court also "provide[d] HPC [the *agency*] with some specific, although not necessarily exhaustive, *guidelines* to aid its future deliberations in the event that Nansay [the *applicant*] elects to pursue its challenges to the legitimacy of PASH's claims." *Id.* at 438, 903 P.2d at 1259 (emphasis and bracketed material added).

As for the reference to a remand in *PDF*, that case involved a civil rights action under 42 U.S.C. § 1983, in which the Native Hawaiian plaintiffs asserted federal and state breach of trust claims, among other constitutional and statutory violations. *See* 73 Haw. at 589-90, 837 P.2d at 1256. This Court held that there were general issues of material fact with respect to plaintiffs' claim under article XII, § 7, and remanded the case for trial on that claim. *Id.* at 621, 837 P.2d at

1272-73. That case, as well, had nothing to do with Native Hawaiian practitioners participating in a contested case proceeding before an agency with an affirmative duty to protect their rights.

Indeed, the law makes clear that in this context of an administrative contested case, the applicant for a development permit bears the burden of proof, and not Native Hawaiian practitioners affected by that application. The Hawai‘i Administrative Procedure Act expressly requires that "[e]xcept as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion." HRS § 91-10(5). Moreover, this Court has recognized that Native Hawaiian rights are protected by the public trust doctrine under Hawai‘i Constitution article XI, § 1 and, thus, the burden is not on Native Hawaiian practitioners to prove harm to their rights; rather, the applicant "bears the burden of establishing that the proposed use will not interfere with any public trust purposes." *In re Kukui (Molokai), Inc.*, 116 Hawai‘i 481, 509, 174 P.3d 320, 348 (2007) (emphasis added).[3] Far from suggesting any burden of proof on Native Hawaiian practitioners, this Court has reversed agency decisions for "impermissibly shift[ing] the burden of proving harm to those claiming a right to exercise a traditional and customary native Hawaiian practice." *See*, *e.g.*, *Kukui*, 116 Hawai‘i at 486, 174 P.3d at 325.[4]

[3] The Native Hawaiian Amici raise concerns in Part III, *infra*, about the Court's failure to apply its established precedent on the public trust doctrine, including the burden of proof under the public trust.

[4] *Accord Kauai Springs, Inc. v. Planning Comm'n,* 133 Hawai‘i 141, 173, 324 P.3d 951, 983 (2014) (citing previous public trust case law establishing that an applicant cannot simply rely on the absence of evidence that its proposed use would adversely affect a protected use, which "erroneously shift[s] the burden of proof"); *see generally* JOHN M. ROGERS, ET AL., ADMINISTRATIVE LAW 139 (3rd ed. 2012) ("Obviously, weighing evidence has relevance only if the evidence on each side is to be measured against a standard of proof which allocates the risk of error.") (quoting *Steadman v. SEC*, 450 U.S. 91 (1981)).

Again, in repeatedly referring to the Native Hawaiian practitioners' "burden of proof" and their failures to meet their "burden," BLNR exhibited a grave misunderstanding of the law. Rather than correcting BLNR, however, footnote 15 counterproductively suggests Native Hawaiian practitioners' objections are "erroneous." At minimum, deleting this footnote would avoid exacerbating misconceptions by BLNR and other agencies.

The Native Hawaiian Amici also request that the Court delete or correct footnote 17 of the majority opinion. The summary conclusion that "BLNR properly analyzed the ['contemporary Native Hawaiian'] cultural practices at issue" under previous cited cases, Majority Op. at 36 n.17, compounds the problems associated with burdens of proof discussed above. Further, footnote 17 threatens to curtail Native Hawaiian rights by ratifying an artificial and oppressive distinction between "traditional" (i.e., valid) versus "contemporary" (i.e., invalid) practices, contrary to legal and cultural understandings that Native Hawaiian practices must be allowed to evolve in contemporary times, consistent with the purpose and spirit of the original traditional practice, and to support a *living* culture.

The potential for confusion is highlighted by the majority's characterization that "various Native Hawaiian traditional and customary practices are *derived from* these beliefs" about the sacred nature of Mauna Kea, "which have also led to *related contemporary practices*." Majority Op. at 3 (emphasis added).[5] Native Hawaiian traditional and customary rights have not been frozen in time; on the contrary, this Court's precedent establishes these rights may evolve beyond their form prior to 1892. In *Palama v. Sheehan*, 50 Haw. 298, 440 P.2d 95 (1968), authored by Chief Justice Richardson, this Court recognized access along ancient trails based on

[5] *See also, e.g.*, FOFs 26, 242, 462, 577-78, 683, 687, 701, 733, 765, 779, 783, 787, 791; and COLs 205, 376, 379-80, 383, 386, 391, 435, 438.

historic or customary use. *See also* NATIVE HAWAIIAN LAW: A TREATISE 817 (Melody Kapilialoha MacKenzie et al., eds. 2015) (discussing *Palama*). The Court rejected the attempt to restrict use of the trail to horses and pedestrians based on practices in existence around the time of the original grant in 1850; instead, the court relied upon the previous landowner's enlargement of the trail in 1910 to accommodate *vehicular* access. *Id.* at 302, 440 P.2d at 99 (emphasis added).

Similarly, on remand of the *PDF* case mentioned above, then-Circuit Court Judge Amano issued the ruling in *Pele Defense Fund v. Estate of James Campbell*, Civ. No. 89-089, 2002 WL 34205861 (Haw. 3d Cir. Aug. 26, 2002), more than eight years after trial. The court recognized that "[a]lthough there may be *changes* in the items that they gather, as well as how they gather it, *the values and the uses for which they are made are consistent with the values and uses extant from 300-1400 A.D. in Puna*." *Id.* FOF 50 (emphasis added); *see also id.* FOF 77: referencing testimony by PDF members and another witness that they "hunt with knives and hunting dogs, but now also *carry guns to hunt*") (emphasis added). The court concluded that "the hunting and gathering activities of PDF members were customary and traditional, i.e., that these activities were conducted *in accordance with Hawaiian norms and values existing prior to November 25, 1892*." *Id.* COL 26 (emphasis added).

Moreover, this Court maintained in *PASH* that "traditional and customary practices remain[] intact, notwithstanding arguable abandonment of a particular site, although this right is potentially subject to regulation in the public interest." 79 Hawai'i at 450, 903 P.2d at 1271; *accord id.* at 441 n.26, 903 P.2d at 1262 n.26 ("continuous exercise is not required").[6] This

[6] Earlier in the opinion, the *PASH* court added emphasis to the words "*wish to continue,*" to clarify past references to "continued" or "continuously exercised" rights, and suggestions that

principle inherently recognizes that Native Hawaiian rights must be allowed to live and adapt through changes in the broader society, as well as evolution in the Native Hawaiian culture itself. The history of stresses on Native Hawaiian rights and practices—in the form of dispossession, displacement, legal and moral prohibitions, and more—is well-known. The reality that a practice has evolved over time and place does not justify extinguishing so-called "contemporary Native Hawaiian practices" that derive from Native Hawaiian traditional and customary rights, provided that they are exercised consistent with indigenous norms and values that existed prior to 1892.

The majority opinion's reference to the criminal case in footnote 17 reinforces the "burden of proof" problems in footnote 15 discussed above; in addition, footnote 17 could likewise be construed as an invitation for agencies to abdicate their affirmative constitutional obligations to protect "contemporary Native Hawaiian practices" that derive from, and are exercised consistent with the ancient norms and values of, Native Hawaiian traditional and customary rights. Correcting or deleting footnote 17 would avoid these problematic changes to established law.

II. ARTIFICIAL LIMITS ON *KA PA'AKAI'S* REQUIREMENTS THREATEN TO DILUTE ESTABLISHED NATIVE HAWAIIAN LAW, INCLUDING CONSTITUTIONAL PROTECTIONS FOR TRADITIONAL AND CUSTOMARY PRACTICES

The majority opinion also undermines the law of Native Hawaiian rights in suggesting an overly narrow view of the scope of the *Ka Pa'akai* analysis this Court mandated as a means to protect traditional and customary Native Hawaiian rights. In reviewing the first step of the *Ka Pa'akai* framework, the majority focuses on BLNR finding "no evidence . . . of Native Hawaiian

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traditional usage would not have survived in a "private property regime within the framework of a private enterprise economic system." *Id.* at 449, 903 P.2d at 1270.

cultural resources or traditional and customary practices, *within the TMT Observatory site and the Access Way, which it characterized as the relevant area.*" Majority Op. at 36-37 (emphasis added). The majority then reinforces this constricted focus on the project site, stating that "Native Hawaiian rights were not found to have been exercised in the relevant area, so the third [*Ka Pa'akai*] requirement was not required to be addressed." *Id.* at 39; *see also id.* at 40-41 ("Again, it was not necessary to address the third *K[a] Pa'akai* requirement.").[7]

This articulation of the *Ka Pa'akai* analysis confined only to a specific project footprint, as defined by the applicant and approving agency, diverges from established law and practical realities. It threatens to create confusion and hardship by curtailing the scope of Native Hawaiian rights and their legal protections. The Court may consider how it can avoid intimating such undue and artificial limits on the *Ka Pa'akai* framework and the state's underlying affirmative obligation to protect Native Hawaiian rights to the extent feasible.

BLNR, in fact, started down this wrong path in its decision appealed to this Court. It described the first step in the *Ka Pa'akai* framework as addressing "(1) the identity and scope of 'valued cultural, historical, or natural resources[']in the [application] area." COL 366 (brackets by BLNR). Specifically, BLNR substituted "application" for the word "petition" in the *Ka Pa'akai* opinion, which referred to a petition to reclassify land before the state Land Use Commission in that case. BLNR then advanced an overly literal conception of "the application area," finding that Native Hawaiian practitioners "have not met their burden [*sic*]" to show

[7] Under the second step of the *Ka Pa'akai* framework, the majority stated "[t]he BLNR found that the TMT Project will not adversely impact cultural resources, whether in the relevant area of the TMT Observatory site and Access Way, or in other areas of Mauna Kea." Majority Op. at 38.

traditional and customary practices occurred "at the location of the TMT Project site." COLs 391-92.[8]

As an initial matter, the Native Hawaiian Amici understand that Native Hawaiian practitioners did indicate traditional and customary practices in the project site. In any event, nothing in *Ka Pa'akai* or any other authority suggests or endorses the notion that analysis of impacts to Native Hawaiian rights can be limited to a specific project site, so as to disregard broader impacts beyond that site. On the contrary, all indications in this Court's precedent establish the opposite. In the *Ka Pa'akai* case itself, the developer proposed a 235-acre Resource Management Plan ("RMP") to balance its development with Native Hawaiian rights. 94 Hawai'i at 47-48, 7 P.3d at 1084-85. Among other errors the Court highlighted, it criticized the agency for failing to "address[] possible native Hawaiian rights or cultural resources *outside* of [the] 235-acre RMP." *Id.* at 49, 7 P.3d at 1086. The Court further recognized testimony on "the practice of using the ahupua'a as a model for integrated planning . . . , embracing the ahupua'a custom and tradition from the mountains to the sea, including forest reserves, streams, anchialine ponds and coastal waters." *Id.* The Court ruled that the agency "failed to assess any of this potentially relevant testimony regarding possible effects on or impairment of" this practice of integrated ahupua'a planning and management. *Id.* at 49-50, 7 P.3d at 1086-87. In sum, the Court did not allow the applicant or agency to arbitrarily circumscribe the scope of the required analysis of *all* potentially affected rights and resources.

In the other major case discussing *Ka Pa'akai*'s requirements, *In re 'Īao Ground Water Mgm't Area*, 128 Hawai'i 228, 287 P.3d 129 (2012) ("*Nā Wai 'Ehā*"), the Court held the state

[8] *But compare* COL 378 (referring to an inventory of resources in the application area, "including the extent to which traditional and customary native Hawaiian rights may be exercised in the TMT Project area and the Astronomy Precinct").

water commission failed to comply with its *Ka Paʻakai* obligations in establishing instream flow standards because, although the agency documented Native Hawaiian practices throughout the Nā Wai ʻEhā region, it failed to make findings on impacts and feasible mitigation. *See Nā Wai ʻEhā*, 128 Hawaiʻi at 248-49, 287 P.3d at 149-50. The Court did not limit the analysis based on technical constructions of the "petition" or "application" area,[9] or a keyhole focus on, for example, the immediate vicinity of the streams or the diversions.

Similar understandings abound throughout the field of Native Hawaiian and environmental law. In *In re Waiʻola o Molokaʻi*, 103 Hawaiʻi 401, 83 P.3d 664 (2004), for example, the applicant and agency asserted that, as a matter of law, a water use in one aquifer could not interfere with Native Hawaiian water rights (specifically, a Department of Hawaiian Home Lands ("DHHL") water reservation) in another aquifer. *Id.* at 423, 83 P.3d at 686. The Court rejected such an artificial distinction, holding that the aquifer designations "d[id] not divest DHHL of its right to protect its reservation interests from interfering water uses in adjacent aquifers," that the applicant still bore the burden to show its use would not interfere with DHHL's rights, and that the agency "was duty bound to hold [the applicant] to its burden." *Id.* at 424, 426, 83 P.3d at 687, 689. Many other cases, too numerous to list here, recognize such a common, fundamental understanding of the need to review environmental impacts without arbitrary blinders.[10]

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[9] The "petitioners" for instream flow standards in the *Nā Wai ʻEhā* case were the parties asserting Native Hawaiian rights, which offers additional perspective and support on the "burden of proof" issue in Part I, *supra.*

[10] *See, e.g., Sierra Club v. Dep't of Trans.*, 115 Hawaiʻi 299, 342, 167 P.3d 292, 335 (2007) (invalidating an agency's environmental impact analysis restricted only "to the physical harbor improvements themselves," instead of all the impacts of the ferry project); Haw. Admin. R. § 13-5-30(c) (BLNR's rule including the criteria that "[t]he proposed land use will not cause substantial adverse impact to existing natural resources within the *surrounding area, community, or region*") (emphasis added).

Substantial evidence in this case indicates potentially affected cultural resources, practices, and rights not just at or near the TMT project site, but throughout the summit region. Limiting the analysis of Native Hawaiian rights only to the TMT site emasculates the law and not only deprives these rights fundamental justice, but essentially erases them from recognition. In sum, the Native Hawaiian Amici request that this Court avoid any such artificial restrictions on the scope of Native Hawaiian rights and the constitutional protections of these rights under *Ka Paʻakai*.

III. *WAIĀHOLE'S* ESTABLISHED PUBLIC TRUST PRECEDENT PROVIDES A CRITICAL FOUNDATION FOR THE COURT'S ANALYSIS

Finally, the majority opinion complicates and confuses the law of the public trust doctrine in Hawaiʻi by overlooking fundamental legal principles this Court established under article XI, § 1 through its landmark opinion in *In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawaiʻi 97, 9 P.3d 409 (2000) ("*Waiāhole*"). The majority notes that it need not address the concurrence's "suggested analytical framework," Majority Op. at 49-50 n.26, but neither does it address this Court's already established framework for the constitutional public trust doctrine under *Waiāhole*, or any other structured foundation to ensure the state fulfills its public trust obligations in this and future cases. This oversight not only undermines this Court's established legal precedent, it also will spawn confusion and litigation: leading agencies to guess or improvise on their public trust obligations; inviting continued wrong turns, appeals, and reversals; and producing a disintegrated patchwork of article XI, § 1 obligations for various types of resources. To avoid these legal problems, the Native Hawaiian Amici offer their recommendations on how the *Waiāhole* precedent could properly be applied here.

The majority notes that it "do[es] not wholesale adopt our precedent setting out public trust principles as applied to the state water resources trust" in *Waiāhole*. Majority Op. at 49

n.25. While the Native Hawaiian Amici agree such wholesale adoption is not necessary, they highlight the value of this Court recognizing a consistent foundational framework for the constitutional public trust under article XI, § 1, while specifying and explaining any distinctions from the *Waiāhole* precedent based on dispositive differences, if any, between water and land resources. *Waiāhole* was not just a water case, it was also more generally a *public trust doctrine* case. It surveyed and compiled the body of public trust principles and precedent concerning not only water, but also other resources.[11] It further comprehensively reviewed the legal substance of the public trust based on not only the plain language of article XI, § 1, but also the extensive common law and constitutional history of the doctrine.[12] The public trust doctrine, in Hawai‘i and even in its ancient roots elsewhere, has always applied to more than just water resources.[13] Article XI, § 1, likewise, expressly refers to "all public natural resources," including "land, water, air, minerals and energy sources."

Given this established body of history and authority, this Court need not and, indeed, should not start from zero in "reinventing wheels" for each particular resource that the public trust protects, but rather may apply *Waiāhole*'s foundation as relevant and necessary to inform the Court's decision in each case, including this one. Without such a starting *foundation*, the majority's opinion instead threatens to reduce the public trust doctrine to an *afterthought*, which

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[11] *See Waiāhole* pt. III.B (citing cases involving submerged lands, tidelands, fish and wildlife, and hazardous waste impacts on the environment).

[12] *See Waiāhole,* 94 Hawai‘i at 138-43, 9 P.3d. at 450-55.

[13] *See Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.* 136 Hawai‘i 376, 403, 363 P.3d 224, 251 (2015) ("*Mauna Kea I*") (Pollack, J., concurring) (reviewing the public trust as an "ancient principle recognizing that certain resources bestowed by nature are so inviolable that their benefits should accrue to the collective, rather than only to certain members of society," and citing ancient Roman protections of "the air, running water, the sea, and consequently the sea-shore" and Hawaiian Kingdom trust principles concerning the land).

ceases to direct agencies in implementing their independent, higher duties as trustees of natural and cultural resources to "consider[], protect[], and advance[] public rights in the resource at every stage of the planning and decisionmaking process," 94 Hawai'i at 143, 9 P.3d at 455, and instead becomes a duplicative restatement of their administrative functions.

This case already underscores the legal problems caused by failing to recognize *Waiāhole*'s public trust precedent. Rather than faithfully following *Waiāhole* at least as a starting foundation, the draft agency decision inexplicably declared "the public trust doctrine does not apply to consideration of the TMT project." While BLNR rescued its final decision from this obvious error by recognizing article XI, § 1 does apply to the public lands in this case, the agency proceeded to address *Waiāhole* mainly for the purpose of dismissing it, insisting that "this does not mean, however, that these lands and natural resources are covered by the 'public trust doctrine' as established by *Waiāhole* and related cases" and "the TMT does not violate the public trust doctrine as currently established in Hawai'i case law." COLs 327-28. Thus, BLNR approached the public trust on the wrong foot from the outset.

BLNR then went out of its way to interpret article XI, § 1 and *Waiāhole* from BLNR's own selective and skewed perspective focused on only part of the public trust doctrine's mandates. This Court has recognized that article XI, § 1 establishes "a dual mandate of 1) protection and 2) maximum reasonable-beneficial use." *Waiāhole*, 94 Hawai'i at 139, 9 P.3d at 451. Yet, BLNR mentioned the mandate of "protection" only secondarily and limited its meaning and effect to "prevent[ing] public trust resources from being irrevocably transferred to private parties." COL 339. As BLNR reasoned: "The TMT Project does not involve the irrevocable transfer of public land and resources to others, and the 'protection' element of the public trust doctrine is therefore satisfied." COL 349. BLNR, however, disregarded that the

public trust, "[a]s commonly understood," protects not just against "irrevocable transfer" of resources, but also their "*substantial impairment, whether for private or public purposes*." *Waiāhole*, 94 Hawai'i at 139, 9 P.3d at 451 (emphasis added) (internal quotation marks omitted).

Further, BLNR preferentially emphasized terms such as "development and utilization" and "public benefits" associated with the "maximum reasonable-beneficial use" mandate, COLs 329-30, 335, 337-38, 341-42, but here as well, ignored that this mandate is expressly subject to "conservation." As this Court has explained, this mandate does not promote "maximum use," but rather "the most equitable, reasonable, and beneficial allocation of [public trust] resources, *with full recognition that resource protection also constitutes 'use.'*" *Waiāhole*, 94 Hawai'i at 140, 9 P.3d at 452 (emphasis added).[14] BLNR thus misunderstood the public trust as mere "balancing" between competing binary mandates, COL 340, when in fact the public trust *includes "protection" on both sides of this "balance*." As a result, BLNR effectively flipped the orientation of the public trust, diminishing its mandates of protection and conservation, and instead exalting BLNR's utilitarian preference for maximum "public benefits."

The Court's majority did not address BLNR's erroneous distortions of the public trust; indeed, the problem is that the majority did not meaningfully address this Court's established public trust framework in the first instance. Instead, the majority merely referred to "a balancing" between the public trust's dual mandates. Majority Op. at 48.[15] The majority then

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[14] *See also id.* at 139-40 n.36, 9 P.3d at 451-52 n.36 (reviewing the constitutional history of this provision); Comm. of the Whole Rep. No. 18 in 1 Proceedings of the Const. Convention of Haw. of 1978, at 1026 (1980) (emphasizing that current policy regarding natural resources "seems to be *overly weighted by the emphasis on development and utilization*," and that "development and use of natural resources *must be consistent with their conservation* for future availability") (emphasis added).

[15] Unlike BLNR, the majority recognized that the second mandate to promote "use and development" must be "consistent with the conservation of the natural resource," and also that

reviewed article XI, § 1's two mandates separately and cited assorted aspects of BLNR's decision that appeared to indicate it complied with each of them. Majority Op. at 50-52. By failing to recognize the *Waiāhole* framework, however, the majority overlooked that this Court has established many fundamental requirements of the public trust doctrine not from the two mandates in isolation, but from their *synthesis*, recognizing that the public trust is more than just the sum—or "balancing"—of its parts. *Waiāhole*, 94 Hawai'i at 140-44, 9 P.3d at 452-56. The majority opinion thus could be construed as eliminating these fundamental principles of the public trust outside of the water resources context.

For example, the public trust requires the state not merely to "protect public trust uses wherever feasible," but further establishes a "presumption in favor of public use, access, enjoyment": or stated another way, "the public trust, by nature and definition, establishes use consistent with trust purposes as the norm or 'default' condition." *Waiāhole*, 94 Hawai'i at 141-42, 9 P.3d at 453-54. These protective requirements are missing from BLNR's decision, and while the majority opinion mentions the public trust's presumption, it does not appear to apply it. Of particular note, in recognizing this presumption, *Waiāhole* quoted *State v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977), a case that involved public *land*, which stated: "Presumptively, this [trust] duty is to be implemented by devoting the land to *actual public uses*, e.g., recreation." *Zimring*, 58 Haw. at 121, 566 P.2d at 735 (emphasis added) (quoted in *Waiāhole*, 94 Hawai'i at 142, 9 P.3d at 454).

As for what constitutes protected "public trust uses" in this case, this Court has recognized public trust uses or purposes based on established historic understandings of the trust.

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any balancing "must begin with a presumption in favor of public use, access and enjoyment." *Id.* at 48-49 (citing *Waiāhole*, 94 Hawai'i at 142, 9 P.3d at 454).

For purposes of this case, two such public trust uses should be obvious and indisputable: (1) "*resource protection*, with its numerous derivative public uses, benefits, and values" (which the Court essentially recognized in *Zimring*, *supra*); and (2) "the *exercise of Native Hawaiian and traditional and customary rights*," which can be seen as an "original intent" of the public trust and is also expressly protected in Hawai'i's constitution. *Waiāhole*, 94 Hawai'i at 136-37, 9 P.3d at 448-49 (emphasis added). BLNR, however, attempted to portray the TMT as a "public trust use," going as far as citing "expert opinions" and "findings of fact" on this *legal* issue, to the effect that the project "easily qualifies as a public or quasi-public use." COL 345; FOF 1065.[16] The agency's exercise muddies the basic understanding of public trust doctrine as "reserving the resource for use and access by the general public." *Waiāhole*, 94 Hawai'i at 138, 9 P.3d at 450. As this Court emphasized, "the public trust *is more than an affirmation of state power to use public property for public purposes*. It is an affirmation of the duty of the state to *protect* the people's common heritage of [trust resources]." *Id.* (emphasis added). Whether or not the TMT development project is a "public use," and even recognizing it produces important "public benefits" that should duly be considered, it is not a "*public trust* use," and the Court should dispel any such confusion.

Waiāhole explained that the practical effect of the public trust presumption is that those seeking or approving other uses should bear the burden of justifying them in light of the purposes protected by the trust. *Waiāhole*, 94 Hawai'i at 142, 9 P.3d at 454. *Waiāhole* specifically referred to "private commercial uses" that were at issue in that case, *id.*, but the practical

[16] In declaring "the purposes of TMT Project are valid public trust uses," BLNR cited § 5(f) of the Admission Act of 1959 and Hawai'i Constitution article X, § 5. COL 345. As the concurrence recognized, the requirements of the public trust doctrine under article XI, § 1 are distinct and independent from any other "trusts" that may confer other duties with respect to public lands.

difference is between *public trust* uses, which are presumptively protected, and *non-public trust* uses, which are not and, thus, must bear the burden of overcoming that presumption. As explained in Part I, *supra*, the legal burden of justifying the application falls on the applicant. The constitutional public trust reinforces this principle, and makes clear that the agency is "duty bound to hold an applicant to its burden." *Wai'ola*, 103 Hawai'i at 441, 83 P.3d at 704.

The public trust establishes other requirements, *see Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455, as the concurrence in this case also summarizes. One particularly relevant principle for this Court is that the constitutional public trust compels the Court to "take a '*close look*' at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action." *Id.* at 144, 9 P.3d at 456 (also referring to "heightened" or "close scrutiny"). The majority did not mention this long-established standard of review, having failed to consult *Waiāhole* in general. The Court's review in this case seems to have suffered as a result.

In sum, the Court can exercise its duty as "the ultimate authority to interpret and defend the public trust in Hawai'i," by recognizing *Waiāhole*'s foundational public trust framework, correcting BLNR's erroneous view of the public trust, and ensuring BLNR's decision complies with all of the public trust requirements, "with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *Id.* at 143, 9 P.3d at 455.

IV. CONCLUSION

The Native Hawaiian Amici respectfully urge this Court to remain true to the Court's precedent and Chief Justice Richardson's legacy regarding Native Hawaiian traditional and customary rights and the public trust doctrine, by reconsidering the Court's majority opinion and:

(1) revising or deleting footnotes 15 and 17; (2) avoiding artificial restrictions on the scope of Native Hawaiian rights and the constitutional protection of these rights under *Ka Pa‘akai*; and (3) correcting BLNR’s erroneous view of the public trust doctrine and recognizing the foundational public trust framework established in *Waiāhole.*

DATED: Honolulu, Hawai‘i, November 19, 2018.

/s/ Isaac H. Moriwake
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