



Hawai'i

June 3, 2019

To: University of Hawai'i
UH Government Relations Office
Via email: MKRules@hawaii.edu

From: Mandy Fernandes, Policy Director, ACLU of Hawai'i

Re: *ACLU of Hawai'i Comments on Proposed Rules regarding Public and Commercial Activities on Mauna Kea Lands*

The American Civil Liberties Union of Hawai'i (ACLU of Hawai'i) writes with comments regarding the proposed Chapter 20-26, Hawai'i Administrative Rules, entitled "Public and Commercial Activities on Mauna Kea Lands."

The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for 54 years.

The ACLU of Hawai'i takes no position on the Thirty Meter Telescope ("TMT") on Mauna Kea. We have concerns, however, with the proposed rules as they may infringe upon the constitutional rights of individuals seeking to access Mauna Kea for traditional, customary, and religious practices, and the constitutional rights of those who wish to access Mauna Kea to engage in speech around the building of TMT. We also have concerns about the potential for unequal enforcement of the rules and the excessive fines associated with violations.

Traditional and Customary Practices

The University of Hawai'i ("UH") received critical testimony during its September 2018 hearing on Section 20-26-21 of its previous draft, which addressed access to Mauna Kea for traditional

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and customary practices. In the subsequent informal proposed draft, this section was removed entirely. In the current version of the proposed rules, customary and traditional practices are only mentioned briefly in Section 20-26-3, which states:

(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. [Eff] (Auth: HRS §§304A105, 304A-1903) (Imp: HRS §§304A-103, 304A-105, 304A1903)

Article XII Section 7 of the Hawai'i State Constitution provides:

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.

UH is bound by the Hawai'i State Constitution and omitting or including reference to access for purposes of traditional and customary practices within the proposed rules does not change the rights guaranteed by the State Constitution. Failing to specify that those accessing the mountain for purposes of customary and traditional practices will not be subject to provisions of the rules, however, may chill constitutionally protected activity because people may falsely assume that access for traditional and customary practices falls under the general requirements and/or rules for group access (§ 20-26-62). UH should clarify that the rules do not regulate or govern access to Mauna Kea for traditional and customary practices.

Group Registration Requirements

ACLU of Hawai'i has serious concerns regarding the requirement that groups of ten members or more register with the president of UH at least fifteen calendar days in advance of accessing the UH management area of Mauna Kea, pursuant to § 20-26-62. If applied to groups seeking to

access Mauna Kea to engage in activity protected by the First Amendment of the U.S. Constitution and Article I Section 4 of the Hawai‘i State Constitution, this provision could be subject to constitutional challenge. Advance notice requirements have been found to violate the Constitution when applied to those engaging in free speech activity.¹ There is no legitimate interest served in requiring such a small group to give over two weeks’ advance notice of their intent to enter the relevant areas.

Registration requirements may be particularly chilling to those wishing to protest the building of the TMT. This requirement, imposed by UH, requires groups intending to access Mauna Kea for the purposes of engaging in speech that is critical of UH to first register with UH *over two weeks* in advance. This requirement is, at best, unnecessarily inconvenient for groups wishing to access Mauna Kea, and, at worst, **blatantly punitive to those critical of UH.**

This provision also requires groups of ten members or more to obtain insurance and to indemnify UH against liability before registering with UH, in violation of the First Amendment of the U.S. Constitution when applied to those engaged in political speech or other expressive activity. While § 20-26-62(b)(6) requires insurance “[d]epending on the potential impact to natural, cultural, archeological, historic, or scientific resources,” in practice, this would apply to all groups because there is no guidance on when insurance would or would not be required. First Amendment activity, therefore, would seemingly be included in this requirement. The blanket requirement that groups obtain insurance may be constitutionally invalid.² Further,

¹ *Sullivan v. Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) (affirming District Court decision that 30-day advance notice requirement violated the First Amendment of the U.S. Constitution); *see also Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1034 (9th Cir. 2008) (upholding an advance notice requirement for groups of seventy-five or larger, but stating “[a]dvance notice and permitting requirements applicable to smaller groups would likely be unconstitutional, unless such uses implicated other significant governmental interests, or where the public space in question was so small that even a relatively small number of people could pose a problem of regulating competing uses.”).

² *See, e.g., Collin v. Smith*, 578 F.2d 1197, 1207-09 (7th Cir. 1978); *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1029-30 (C.D. Cal. 2002);

“indemnification of the university” is overly broad. **This indemnification provision is likely impermissible under both the state and federal constitutions,³ and would be subject to swift—and, likely, successful—legal action.**

Imposition of fines for violation of rules

Under the proposed rules, excessive fines would be levied against individuals found in violation of what are essentially minor offenses to the public order. For example, section 20-26-22 (3) prohibits “[e]ntering and remaining within any portion of the UH management areas developed or used by the university for educational or research purposes, after being asked to leave the area by an authorized agent or law enforcement officer.” Section 20-26-34 vaguely prohibits “harass[ing] visitors, either verbally or with physical contact.” There is no definition of harassment as the term applies to this section; this provision potentially reaches activity protected by the First Amendment, and gives law enforcement officers too broad of discretion to determine what constitutes verbal harassment. This invites arbitrary and discriminatory enforcement.⁴

Courtemanche v. General Services Admin., 172 F. Supp. 2d 251, 268 (D. Mass. 2001); *Invisible Empire v. Mayor*, 700 F. Supp. 281, 285 (D. Md. 1988).

³ The ACLU of Hawai‘i filed a lawsuit challenging a similar insurance and indemnification requirements for demonstrators at the Hawai‘i State Capitol, which resulted in a settlement providing that demonstrators would no longer be required to indemnify the State or obtain insurance if they could not afford it. *See* Stipulation for Dismissal and Proposed Order, *American Civil Liberties Union of Hawaii v. Seki*, Civil No. 14-00150 JMS/RLP, (D. Haw. Sept. 5, 2014), ECF No. 17, available at <https://acluhawaii.files.wordpress.com/2014/09/17-stipulation-to-dismiss-with-prejudice-and-order.pdf>; *see also* *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011 (9th Cir. 2008).

⁴ This provision of the proposed rules is distinct from criminal harassment statutes, which have been interpreted to require a specific intent to harass. *See, e.g., U.S. v. De Anda*, 18-CR-00538-TSH-1, 2019 WL 1207452, at *4 (N.D. Cal. Mar. 14, 2019) (“In contrast, the statute here includes the requirement that persons have the “specific intent” to annoy or harass.”).

The fine for a first violation of these provisions is \$2,500, up to \$10,000 for successive violations. **These fines are grossly disproportionate to the underlying offense.** This is especially problematic in the case of violations under section 20-26-22(3), if the underlying citation that gave a law enforcement officer cause to remove an individual is invalid. An individual would still be subject to a fine if they refused to leave, even if the law enforcement officer had no legitimate basis for asking them to leave.

Banishment

Section 20-26-73(a)(2) allows banishment of individuals found in violation of any provision of the rules. The period of banishment is unspecified, and could be permanent. Like the hefty fines associated with violations, a total ban from entering the area—especially in light of the cultural significance of the land—is cruel and disproportionately punitive.

Verbal warnings

Pursuant to § 20-26-74(1), enforcement would require a verbal warning “provided . . . the violation stops or is corrected immediately.” Does this mean that if the violation does not stop—which is presumably why a citation was issued—then no verbal warning is required? This verbal warning requirement, which applies until it does not, is written in a way that is confusing and self-contradictory.

Right to appeal a citation

Pursuant to § 20-26-75, people found to be in violation of these rules must appeal a citation within seven (7) days, a period of time so brief that it is clear that it was designed to preclude the exercise of appeal rights. This period of time should be extended to guarantee a meaningful right to appeal citations issued under this chapter.