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We strive to view issues pertinent to Hawai‘i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai‘i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai‘i me ke kuana‘ike laulā. Ho‘okomo mākou i nā ‘atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā ‘atikala waiwai e ho‘ololi ana i nā mea kū kānāwai ma Hawai‘i a ma nā ‘āina ‘ē, me ke kālele ‘ana i nā kumuhana like ‘ole e like me nā kānāwai pū‘ali koa, ka mālama ‘āina, nā kānāwai ona ‘āina, a nā pono o nā po‘e ‘ōiwi.

Translation by Pauahi Ho‘okano

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# Intervening in the Public's Interest Before the Maui County Planning Commission, Hawai'i

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## INTRODUCTION

Hawai‘i's broad environmental protections present thorny issues for agencies tasked with implementing those mandates.[1] Amongst other issues, agencies must determine whether public interest intervention petitioners will improve decision-making or render proceedings into unmanageable, protracted legal battles.

Until recently,[2] the Planning Commission of Maui County, Hawai‘i ("MPC" or "Planning Commission") consistently threw down a gauntlet against public interest intervention in permitting proceedings conducted pursuant to Hawai‘i's Coastal Zone Management Act (Hawai‘i's CZMA).[3]

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[1] *See* Joseph H. Guth, *Law for the Ecological Age*, 9 VT. J. ENV'T L. 431, 481–82 (2008).

[2] At its regular meeting on April 9, 2019, the Planning Commission granted a petition to intervene filed by Nā Kahakai o Kula Kai, represented by its president, Vernon Kanani o La‘ie Kalanikau, in proceedings on Paynella Hawaii, LLC's special management area (SMA) use permit application in Docket No. SM1 2018/0009. Later, at its January 28, 2020 regular meeting, the Planning Commission granted a petition to intervene filed by Hawaiian cultural practitioner organizations: Mālama Kakanilua, Pele Defense Fund, and Ho‘oponopono o Mākena, in proceedings on the Grand Wailea Resort SMA use permit and planned development permit applications in Docket No. SM1 2018/0011; PD1 2019/0001; PD2 2018/0003. The author represents intervenors in both proceedings.

[3] HAW. REV. STAT. §§ 205A-1 to -71 (2021).

Hawai'i's CZMA protects a range of public interests in coastal resources, historic properties, open space, recreation, and ecosystems.[4]

The Planning Commission's recurrent, often-appealed rulings against intervention have been grounded in findings that intervenor-petitioners' interests were not "clearly distinguishable from that of the general public" and "additional parties will render the proceedings inefficient and unmanageable . . . ."[5] The first finding recites rule-language barring mandatory intervention and the second supports denial of permissive intervention.[6] Yet, petitioners must also demonstrate interests falling within the zone of public interests protected by Hawai'i's CZMA in order to comply with standing requirements.[7] Further, the broad public interests at stake in Hawai'i's CZMA create the expected result in which multiple parties will have interests in matters of broad public concern and seek to participate in proceedings to protect them. Restrictive intervenor rules, and interpretations of them, are inappropriate to the goals and objectives of Hawai'i's CZMA and, more generally, to Hawai'i's liberal environmental procedural protections.[8]

This article assesses MPC's intervenor-denials operated at an intersection of Hawai'i's liberal environmental standing laws, misalignments between standing and public nuisance doctrines, and practical exigencies of permit administration. Part I identifies socioeconomic and historical factors that pushed shoreline development permit applications before MPC and the legal frameworks that authorize and obligate MPC to adjudicate those permits. Part II examines the application of intervenor-standing laws by MPC and other Hawai'i county planning commissions. Part III brings scholarly ruminations on public nuisance and prudential standing doctrines to bear on MPC's intervention determinations. Part IV assesses three MPC intervenor-petition proceedings and how they show up the limits of the framework of intervention.

## I. SOCIOECONOMIC, HISTORICAL, AND LEGAL CONTEXT

Article XI, § 9 of Hawai'i's constitution guarantees "[e]ach person has the right to a clean and healthful environment[.]"[9] Consonant with this guarantee, Hawai'i's CZMA protects, preserves, and reduces impacts on coastal ecosystems, beaches, marine environments, and other natural resources.[10]

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[4] *Id.* § 205A-2.

[5] MAUI PLAN. COMM'N, MAUI PLANNING COMMISSION RULES § 12-201-41(b), -41(d)(2) (2020) [hereinafter MPC RULES CH. 201], https://www.mauicounty.gov/DocumentCenter/View/8411/Chpt-201--MPC-Rules-and-Procedures-updated-11092020?bidId=.

[6] *See id.*

[7] *See generally* HAW. REV. STAT. §§ 205A-1 to -71.

[8] *See, e.g.,* Life of the Land v. Land Use Comm'n, 63 Haw. 166, 623 P.2d 431 (1981).

[9] HAW. CONST. art. XI, § 9 (2021); *see also In re* Water Use Permit Applications, 94 Hawai'i 97, 130–32, 9 P.3d 409, 442–44 (2000) (interpreting Hawai'i's public trust doctrine under Article XI, section 1 of the Hawai'i Constitution).

[10] HAW. REV. STAT. § 205A-2 .

Hawai'i's counties—Maui, Kaua'i, Hawai'i, and the City and County of Honolulu—implement protections pursuant to Hawai'i's CZMA through "Special Management Area" (SMA) permitting systems.[11] SMAs are shoreline areas, the boundaries of which are determined by counties.[12]

### *A. Maui Shoreline Development*

MPC's rulings on SMA intervenor petitions discussed *infra* largely concerned West Maui parcels, where shoreline development has continued at a steady pace since the 1980s.[13] Shoreline developments require SMA use permits.[14]

In 1956, Maui visitors accounted for five percent of total visitors to Hawai'i and one percent of tourism expenditures.[15] Maui leadership encouraged visitor industry development to fill the economic gap left by waning sugar and pineapple agricultural industries.[16] In 1961, Hawai'i's first resort development, inclusive of hotels, restaurants, a shopping center, and a golf course was built in Ka'anapali, just north of Lahaina in West Maui.[17] Subsequent resort developments sprung up in Maui's Wailea and Kapalua areas.[18] By 1965, Maui had 1,383 hotel rooms, nearly all of which were located in Lahaina.[19] Tourism transformed Lahaina "from a sleepy, quietly declining town, into a healthy, growing economic and cultural center for West Maui and the rest of the County."[20]

The 1970 Kīhei Civic Development Plan featured a future of tourism-related development.[21] The Kīhei Plan designated Wailea regions for a major resort community, "set[ting] the stage for massive real estate speculation and development."[22] In 1970, Kīhei's population was 1,636, but by 2005, the

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[11] A SMA refers to "land extending inland from the shoreline as delineated on the maps filed with the authority as of June 8, 1977, or as amended pursuant to [Hawai'i Revised Statutes] section 205A-23." HAW. REV. STAT. § 205A-22 (2021).

[12] *See id.*; HAW. REV. STAT. § 205A-2.

[13] MAUI CNTY. LONG RANGE PLAN. DIV., MAUI ISLAND HISTORY: LESSONS FROM THE PAST – A GUIDE TO THE FUTURE, GENERAL PLAN 2030 MAUI ISLAND PLAN, at 10–14 (2006), http://www.co.maui.hi.us/DocumentCenter/Home/View/10483 [*hereinafter* MAUI GENERAL PLAN 2030 HISTORY].

[14] *See* HAW. REV. STAT. § 205A-2.

[15] MAUI GENERAL PLAN 2030 HISTORY, *supra* note 13, at 10.

[16] *See id.*

[17] *Id.* at 11.

[18] *Id.*

[19] MAUI CNTY. PLAN. COMM'N, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR LAHAINA PLAZA, LAHAINA MAUI, at 1-6 (1975), http://oeqc2.doh.hawaii.gov/EA_EIS_Archive/1975-10-DD-MA-FEIS-Lahaina-Plaza.pdf [hereinafter LAHAINA PLAZA FEIS].

[20] LAHAINA PLAZA FEIS, *supra* note 19, at i.

[21] MAUI GENERAL PLAN 2030 HISTORY, *supra* note 13, at 12 (citing MAUI CNTY. PLAN. DEP'T, KIHEI CIVIC DEVELOPMENT PLAN (1970)).

[22] *Id.*

population reached 25,000, with an average daily visitor population nearing 20,000.[23] Kīhei-Makena and West Maui areas were predicted to be areas of the greatest population growth.[24] Ka'anapali surged with tourism-related expansion, including the Hyatt Regency Maui, Maui Marriott Resort, and the Westin Maui.[25] County consultants recommended shoreline access improvements be concentrated in these areas.[26]

In 2005, Maui County's estimated resident population (140,050) and visitor population (47,809) totaled approximately 187,859 persons.[27] By the year 2030, Maui County's estimated resident and visitor population is projected to rise to 257,002 persons.[28] In the recent decades, Maui County came to recognize the need for mitigation of tourism-industry impacts on Maui's environment:

> Protecting the natural environment for both human and ecological purposes is a key challenge with rapid growth and development. Streams, rainforests, beaches, near shore waters, and native species are among Maui's numerous natural resources that provide critical services and add to a high quality of life. Preserving the multi-ethnic cultural heritage and spirit of aloha in the face of the pervasive American popular culture is a key challenge that will persist into the future.[29]

Management of the number and type of visitor accommodations is necessary to achieve the goal of Maui Island Plan Policy No. 4.2.3.a: "Promote a desirable island population by striving to not exceed an island-wide visitor population of roughly 33 percent of the resident population."[30] Currently, the Maui County Council has passed an ordinance placing a moratorium on issuance of building permits for any further visitor accommodations pending completion of further studies and community plans for South and West Maui.[31]

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[23] *Id.* (citing MAUI CNTY. PLAN. DEP'T, SOCIO-ECONOMIC FORECAST: THE ECONOMIC PROJECTIONS FOR THE MAUI COUNTY GENERAL PLAN 2030 (2006), https://www.mauicounty.gov/DocumentCenter/View/10497/SocioEconReport_June30?bidId= ).

[24] *Id.* at 11–13.

[25] *Id.* at 13.

[26] MAUI CNTY. PLAN. DEP'T, SHORELINE ACCESS INVENTORY UPDATE – FINAL REPORT, at 24 (2005), http://www.co.maui.hi.us/DocumentCenter/Home/View/3266.

[27] CNTY. OF MAUI, COUNTY OF MAUI 2030 GENERAL PLAN: COUNTYWIDE POLICY PLAN, at 23 (2010), http://www.mauicounty.gov/DocumentCenter/Home/View/11133 [hereinafter COUNTY OF MAUI 2030 GENERAL PLAN].

[28] *Id.*

[29] MAUI GENERAL PLAN 2030 HISTORY, *supra* note 13, at 15; *see also* Amy Henn, et. al, *Overdevelopment of North Beach: Community Management,* SOC. ISSUES & PSYCH.: PSYCH. & THE ENV'T (1997), http://www.users.miamioh.edu/shermarc/p412/t197community.shtml ("[T]he economy of Maui is primarily dependent on tourism. However, it is also true that overdevelopment of the coastal territories endangers the environment of the island.").

[30] MAUI CNTY. LONG RANGE PLAN. DIV., MAUI ISLAND PLAN 4-14 (2012).

[31] Committee Report No. 2139 of the Climate Action, Resilience, and Environment Committee, to the Council of the County of Maui, (June 18, 2021), https://mauicounty.legistar.com/View.ashx?M=F&ID=9473430&GUID=0E51C950-9A41-

Key to planning for the environmental impacts of economic policies are the specifically coastal protections of Hawai'i's CZMA, many of which MPC implements through its administration of SMA use permits.[32]

### *B. Hawai'i's CZMA*

Hawai'i's CZMA was enacted pursuant to the U.S. Coastal Zone Management Act.[33] The purpose of Hawai'i's and the federal CZMA is to prevent coastal development from destroying marine resources, wildlife, open spaces, and other important "ecological, cultural, historic, and esthetic values . . . ."[34] In 1978, the U.S. National Oceanic and Atmospheric Administration (NOAA) approved Hawai'i's Coastal Management Program.[35] The state Office of Planning and Sustainable Development is the lead agency of the CZMA program.[36]

Hawai'i's "coastal zone" includes the entirety of Hawai'i's land area and extends three miles into nearshore waters.[37] Under the precursor to Hawai''i's initial CZMA (1978), the Shoreline Protection Act, SMAs included all lands and waters beginning at the shoreline and extending inland for a minimum of 100 yards, but subsequent amendments to the CZMA permitted counties to extend SMA boundaries further inland.[38] Due in part to terrain and market demands, Hawai'i's development concentrated in coastal areas subject to SMA permit requirements.[39] SMAs were created to control this shoreline development.[40] Hawai'i's SMAs serve as:

> special controls on developments within an area along the shoreline [that] are necessary to avoid permanent losses of valuable resources and the foreclosure of management options, and to ensure that adequate access, by dedication or other

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4619-B4CD-758321D8EA5F.

[32] *See* HAW. REV. STAT. § 205A-22 (2021).

[33] *See* Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified at 16 U.S.C. §§ 1451–1467).

[34] 16 U.S.C. § 1452; *see* 16 U.S.C. § 1451; HAW. REV. STAT. § 205A-2 (stating the objectives and policies of Chapter 205A). Federal and state values and protections overlap with county-level ordinances as well. For example, "public open space" is also protected under the Maui County Subdivision Ordinances. *See, e.g.*, MAUI COUNTY, HAW., ORDINANCES NO. 789 (1974).

[35] *Coastal Zone Management Programs*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. OF COASTAL MGMT. (Oct. 13, 2021), https://coast.noaa.gov/czm/mystate/.

[36] Haw. Rev. Stat. § 225M-2(b)(6) (2021).

[37] *Coastal Zone Management Program*, CNTY. OF MAUI, https://www.mauicounty.gov/416/Coastal-Zone-Management-Program (last visited Oct. 13, 2021).

[38] *See* Shoreline Protection Act, 1975 Haw. Sess. Laws 386 (defining special management area as "the land extending not less than one hundred yards inland from the 'shoreline' as defined within this part"); Act 200, 1979 Haw. Sess. Laws 418–20 (codified as amended at HAW. REV. STAT. §§ 205A-22 to -23).

[39] Michael McPherson, *Vanishing Sands: Comprehensive Planning and the Public Interest in Hawaii,* 18 ECOLOGY L. Q. 779, 783 (1991).

[40] HAW. REV. STAT. § 205A-21 (2021).

> means, to public owned or used beaches, recreation areas, and natural reserves is provided.41

The overarching purposes of SMAs consist of a broad range of environmental protection interests.[42] SMA permits are essentially variances for construction in specific shoreline areas upon which "special controls" are implemented "to avoid permanent losses of valuable resources and the foreclosure of management options, and to ensure that adequate access, by dedication or other means, to public[ly] owned or used beaches, recreation areas, and natural reserves[.]"[43]

Statutory guidelines for implementing SMAs further specify interests protected by Hawai'i's CZMA, including public access, adequate recreational and wildlife areas, proper waste treatment, minimizing water runoff and erosion, minimizing adverse environmental effects, consistency with county and state guidelines and plans, scenic and coastline vistas, recreational beaches, water quality, and avoiding dredge-and-fill projects.[44]

Hawai'i's counties manage development in the shoreline areas of the coastal zone by implementing SMA permitting systems, amending SMA boundaries, and assessing shoreline certifications.[45] Hawai'i courts have enforced the procedural requirements of Hawai'i's CZMA, and counties have likewise followed suit.[46] In *Mahuiki v. Planning Commission*, the Hawai'i Supreme Court invalidated an SMA use permit because the Kaua'i Planning Commission failed to follow CZMA permit applications review guidelines.[47] The *Mahuiki* court concluded the Kaua'i Planning Commission had been "derelict" in ensuring procedures that could significantly affect the coastal zone, and therefore its actions injured the rights of the public in that area.[48] Similarly, in *Public Access Shoreline Hawaii by Rothstein v. Hawai'i County Planning Commission by Fujimoto* (*PASH II*), the court invalidated an SMA permit because the Hawai'i County Planning Commission failed to follow procedures for granting intervention by Native Hawaiian cultural practitioners.[49]

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[41] *Id.*

[42] *See id.*

[43] *See id.*

[44] *Id.* § 205A-26.

[45] *See id.* §§ 205A-21 to -49.

[46] *See* McPherson, *supra* note 39, at 810–13; Stanley Ching, *Land Use: County Application of CZMA* – Mahuiki v. Planning Commission of the County of Kauai, 6 U. HAW. L. REV. 683, 689–90 (1984).

[47] *See* 65 Haw. 506, 515–19, 654 P.2d 874, 880–83 (1982); Ching, *supra* note 46, at 683–86.

[48] *See Mahuiki*, 65 Haw. at 516–17, 654 P.2d at 881.

[49] *See* 79 Hawai'i 425, 903 P.2d 1246 (1995); *cf.* Chang v. Maui Plan. Comm'n, 64 Haw. 431, 458, 643 P.2d 55, 64 (1982) (concluding the planning commission "acted in contravention of the charter and its own rules[,]" but refusing to invalidate the SMA permit absent a showing that the commission's SMA permit approval itself caused injuries to the appellant).

As discussed further *infra*, recent MPC proceedings conducted pursuant to Hawai'i's CZMA disregarded certain intervenor procedures and thus risk invalidation of those SMA permits under *PASH II.*

### *1. Maui County SMA Implementation*

A crucial feature of Hawai'i's CZMA is the delegation of "home rule" to the Hawai'i, Kaua'i, and Maui County planning commissions.[50] The City and County of Honolulu no longer receives federal CZMA funding, but continues to implement a SMA permit system and attends joint state-county CZMA meetings.[51] In addition to implementing SMA permitting, MPC advises the Maui mayor, county council, and county planning director on shoreline issues; reviews the Maui General Plan; reviews proposed land use ordinances; and adopts rules.[52]

In 1986, Hawai'i amended its CZMA to include requirements for shoreline setbacks in SMAs.[53] "Maui County expanded its SMA inland to the nearest state highway."[54] Maui County's shoreline setback area is based on an erosion setback, or twenty-five percent of the average lot depth, or the overlay of the two, whichever is set back further.[55] Maui County expanded its shoreline setback area to protect coastal structures for the next fifty years, based on historic erosion rates of Maui's sandy shorelines.[56] According to Maui County Shoreline and Coastal Resources Planner, Thorne Abbott, Maui County selected the criteria for determining a SMA boundary for three reasons:

> First, since views to the ocean are protected under [Haw. Rev. Stat.] 205A, it seemed prudent to protect views from a state-jurisdictional area, namely state highways. Second, the state highway was easily to delineate on maps. Third, the highway is recognizable to the public and helps in determining if an SMA permit is required.57

SMA permitting sets conditions on proposed projects before development in SMAs begins in order to ensure compliance with Hawai'i's CZMA.[58]

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[50] *See* Lee E. Koppelman, *Models for Implementing the CZMA's Concept of State-Local Relations*, 16 WM. & MARY L. REV. 731, 732–33 (1975).

[51] *See* OFF. FOR COASTAL MGMT., NAT'L OCEANIC & ATMOSPHERIC ADMIN., EVALUATION FINDINGS: HAWAI'I COASTAL ZONE MANAGEMENT PROGRAM AUGUST 2008 TO AUGUST 2018, 7 (2019), https://coast.noaa.gov/data/czm/media/hawaiicmp.pdf.

[52] *See* CNTY. OF MAUI, MAUI COUNTY CHARTER § 8-8.4 (2021); *Maui Planning Commission*, CNTY. OF MAUI, http://www.mauicounty.gov/index.aspx?NID=191 (last visited Oct. 18, 2021).

[53] Thorne Abbott, *Maui County's Special Management Area Permit Process*, *in* ISLANDS OF THE WORLD IX CONFERENCE: SUSTAINABLE ISLANDS – SUSTAINABLE STRATEGIES 1, 3 (2006), https://www.kalanienglish.com/pdf/IOTW-IX-Conference_Proceedings.pdf.

[54] *Id.*

[55] *Id.* at 3–4.

[56] *Id.* at 4.

[57] *Id.* at 3.

[58] *See* HAW. REV. STAT. § 205A-28 (2021) ("No development shall be allowed in any county within the [SMA] without obtaining a permit in accordance with this part.").

Hawai'i courts have likewise strictly construed SMA procedural requirements to ensure environmental protections.[59]

Briefly, MPC's SMA permit application process consists of: applicant submission of a standardized application; MPD review of the application and, if complete, transmission of the application to "relevant government agencies" for comment; the applicant may be required to present the proposal to the Maui County Urban Design Review Board, Cultural Resources Commission, or the Hana Advisory Commission for comment and recommendation to MPC; the applicant completes its application by satisfactorily addressing agency comments; MPC holds a public hearing on the application; and MPC then reviews and acts upon the application.[60]

An SMA permit application requires documentation of zoning and flood compliance, environmental impact review, the applicant's property interest in the parcel, property owners and lessees identified within 500 feet of the parcel, drainage, landscape, site, and project plans, an overall assessment, and comments from governmental and non-governmental agencies and organizations.[61] Applicants publish notice of their application in state-wide and county-wide newspapers, mail notice to owners/lessees within 500 feet of the subject parcel boundaries, and submit certified or registered mailing receipts and a notarized affidavit of their compliance with notice requirements.[62] If the application is determined complete,[63] MPD's director issues a determination of whether the project may be exempt from SMA permit requirements or eligible for a SMA minor permit.[64]

Scarce agency resources,[65] potential for abuse of intervenor status to "shake down developers," and applicants' desire to a speedy completion of permitting processes mitigate towards denying intervenor petitions. Against such practical considerations, however, are values of good planning, due process, and prudent environmental protection.

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[59] *See* David L. Callies, Donna H. Kalama & Mahilani E. Kellett, *The Lum Court, Land Use, and the Environment: A Survey of Hawai'i Case Law 1983 to 1991*, 14 U. HAW. L. REV. 119, 134–36 (1992) (citing Hui Alaloa v. Maui Plan. Comm'n*,* 68 Haw. 135, 705 P.2d 1042 (1985) and Hui Malama Aina o Ko'ola v. Pacarro, 4 Haw. App. 304, 666 P.2d 177 (1983)).

[60] DEP'T OF PLAN., CNTY. OF MAUI, APPLICATION PACKET FOR SPECIAL MANAGEMENT AREA USE PERMIT (SM1), at 2 (Mar. 2015), http://www.co.maui.hi.us/DocumentCenter/Home/View/1689 [hereinafter APPLICATION PACKET FOR SMA USE PERMIT].

[61] MAUI PLAN. COMM'N, MAUI PLANNING COMMISSION RULES § 12-202-12 (2004) [hereinafter MPC RULES CH. 202], https://www.mauicounty.gov/DocumentCenter/View/8413/Chpt-202-MPC-SMA-Rules?bidId=; APPLICATION PACKET FOR SMA USE PERMIT, *supra* note 60, at 1–6.

[62] MPC RULES CH. 202, *supra* note 61, § 12-202-13; APPLICATION PACKET FOR SMA USE PERMIT, *supra* note 60, at 2.

[63] *See* MPC RULES CH. 202, *supra* note 61, § 12-202-12.

[64] *See id.* § 12-202-14.

[65] The Maui County Planning Department budget for 2015 was $4,973,200. CNTY. OF MAUI, COUNTY OF MAUI FINANCIAL SUMMARIES: REVENUE AND EXPENDITURE SUMMARY 63 (2015), http://co.maui.hi.us/DocumentCenter/View/92759.

The "skyrocket[ing]" workload of SMA permit assessments in Maui has increased permit processing time, but "severe development pressure begs the question that permit processing times should be slowed down."[66] Between 2001–2006, MPD conducted 3,413 SMA assessments and a total of 4,797 SMA permit actions.[67] Between 2007 and March 2012, Maui County issued 8,603 new building permits.[68] County planner Abbott observed, "If the time [for SMA permit processing] was reduced by 20%, would it result in 20% better development, or 20% greater resource protection?"[69] The volume of Maui's development calls for more prudent overall planning considerations and not more facile processing.[70] Accordingly, MPD policies "favor compliance and after-the-fact permits[,]" which are consistent with well-considered proposal assessments, as opposed to fines and penalties for later determinations of permit violations.[71] MPD's considered approach to SMA permitting suggests MPC was not pressured by exigencies of MPD workloads to exclude potential intervenors or to expedite SMA permit processes. In any case, MPC rules afford MPC discretion to consider how granting intervenor petitions would add to its administrative workloads.[72]

### *2. Implementation of a Right to a Clean and Healthful Environment*

MPC must respond to myriad development pressures while also complying with the state's constitutional obligations, including provision of a "clean and healthful environment" to each person.[73] MPC's obligations under Hawai'i's CZMA are part of a trend toward empowering counties to carry out statewide obligations to protect environments.[74] Making "one-size-fits-all decisions . . . is inappropriate because ecological realities are supposedly localized and decentralized."[75] In states with constitutional environmental protection

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[66] Abbott, *supra* note 53, at 8.

[67] *Id.* at 6.

[68] OFF. OF ECON. DEV., CNTY. OF MAUI, MAUI COUNTY DATA BOOK 2012, at 145 tbl.8.1.1, 149 tbl.8.1.8 (2012) (Maui County issued 1,578 building permits in 2012, 1,076 building permits in 2011, 1,016 building permits in 2010, 1,130 building permits in 2009, 1,607 building permits in 2008, and 2,196 building permits in 2007).

[69] Abbott, *supra* note 53, at 8.

[70] *See* Thorne Abbott, *Shifting Shorelines and Political Winds – The Complexities of Implementing the Simple Idea of Shoreline Setbacks for Oceanfront Developments in Maui, Hawaii*, 73 OCEAN & COASTAL MGMT. 13, 13–14 (2013), https://doi.org/10.1016/j.ocecoaman.2012.12.010.

[71] *See* Abbott, *supra* note 53, at 8.

[72] *See* MPC RULES CH. 201, *supra* note 5, § 12-201-41(d)(2).

[73] *See* HAW. CONST. art. XI, § 9; Kauai Springs, Inc. v. Plan. Comm'n, 133 Hawai'i 141, 324 P.3d 951 (2014).

[74] *See* HAW. REV. STAT. §§ 205A-1 to -71 (2021) (originally enacted as Act 176, § 1, 1975 Haw. Sess. Laws 385, 385–89, and amended by Act 188, § 3, 1977 Haw. Sess. Laws 396, 396–403); *see generally* John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 23 PACE ENV'T L. REV. 705 (2006).

[75] Joseph H. Guth, *Law for the Ecological Age*, 9 VT. J. ENV'T L. 431, 481–82 (2008).

mandates, counties have both a duty and the authority to regulate environmental protections.[76] Based on the Standard City Planning Enabling Act, most counties are also empowered to zone for the purpose of "promot[ing] health, safety, morals, . . . and [the] general welfare" of the community.[77] Yet, Michelle Bryan Mudd identified a "surprising disconnect" between county and state agencies over the implementation of constitutional obligations to secure rights to a healthful environment.[78] Mudd suggests inaction may result from: (1) a county's position that state and not county agencies are responsible for environmental protection; (2) insufficient direction provided in county enabling authorities; and/or (3) "practical difficulties that leave local governments uncertain of where to begin."[79]

The first position is untenable in Hawai'i. In 2006, the Hawai'i Supreme Court clarified that the political subdivisions of the state hold a constitutional duty to protect state environmental resources.[80] In Mudd's analysis, the second factor would not apply, as she concluded Hawai'i's CZMA served as an example of a legislature "provid[ing] local governments with specific guidance regarding how to address environmental harm."[81] Under Hawai'i's CZMA, counties may not permit development in SMAs unless that development "will not have any substantial environmental or ecological effect" or minimized adverse effects are "clearly outweighed by public health, safety, or compelling public interests."[82] In regulating shoreline development, Maui County has been faced with practical difficulties concerning the variability of the shoreline, sea-level rise planning, and the shortcomings of standardized policies in responding to Maui's rapid shoreline development.[83]

Article XI, section 9 of Hawai'i's constitution has also served to "temper[]" standing requirements for plaintiffs seeking declaratory relief.[84] "[L]ess rigorous standing requirement[s]" are applied in environmental cases in light of article XI, section 9 of Hawai'i's constitution.[85]

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[76] *See* Michelle Bryan Mudd, *A "Constant and Difficult Task": Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment*, 38 ECOLOGY L. Q. 1, 7–8 (2011).

[77] *See* ADVISORY COMM. ON CITY PLAN. & ZONING, U.S. DEP'T OF COM., A STANDARD CITY PLANNING ENABLING ACT § 7 (1928).

[78] *See* Mudd, *supra* note 76, at 9.

[79] *Id.*

[80] *See* Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 227, 140 P.3d 985, 1007 (2006) (rejecting the county's argument that it had no duty to protect state coastal waters from development-related runoff pollution because the county had affirmative duties to control erosion and sediment).

[81] Mudd, *supra* note 76, at 14.

[82] *Id.* (quoting HAW. REV. STAT. §§ 205A-4, -26 (2010)).

[83] *See* Abbot, *supra* note 73, at 13–15.

[84] *See* Life of the Land v. Land Use Comm'n, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981) (citing HAW. CONST. art. XI, § 9) ("standing requisites . . . may also be tempered, or even prescribed, by legislative and constitutional declarations of policy").

[85] Sierra Club v. Dep't of Transp., 115 Hawai'i 299, 320, 167 P.3d 292, 313 (2007).

Hawai'i's rules for standing for environmental public interest and Native Hawaiian rights plaintiffs are amongst the most liberal.[86] Article XI, section 9 of Hawai'i's constitution positions a considerably broad and powerful administrative mandate on state[87] and county agencies.[88] It also serves as a basis for private citizens' substantive rights in Hawai'i's land use zoning schemes.[89] A string of cases resulting from Hawai'i Public Utilities Commission appeals clarified that each person's right to a clean and healthful environment "as defined by laws relating to environmental quality" qualifies for constitutional due process protections, including admittance into administrative contested case proceedings.[90]

With one exception, federal environmental protection statutes contain citizen-suit provisions.[91] Citizen-suit provisions allow private citizens to bring two kinds of suits concerning implementation of environmental regulation laws: "(1) suits against the relevant federal agency for failure to perform nondiscretionary duties; and (2) suits against individual violators, to induce compliance and to assess civil penalties."[92] Hawai'i, amongst other states,

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[86] *See* Avis K. Poai, *Hawai'i's Justiciability Doctrine*, 26 U. HAW. L. REV. 537, 563 (2004) (citing HAW. CONST. art. XI, § 9).

[87] *See* HAW. CONST. art. XI, § 9. In addition to the statewide CZM program, the State of Hawai'i administers certain "community development districts" under the Hawai'i Community Development Authority (HCDA). *See* HAW. REV. STAT. § 206E-3 (2021). These development districts include SMAs and permits for development within these SMAs are administered by HCDA under the State's authority. *See Special Management Area Permits*, STATE OF HAW. OFF. OF PLAN. & SUSTAINABLE DEV., http://planning.hawaii.gov/czm/special-management-area-permits/ (last visited Oct. 22, 2021).

[88] *See* Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Plan. Comm'n, 149 Hawai'i 304, 489 P.3d 408, 416–17 (2021); *see generally* Kepo'o v. Watson, 87 Hawai'i 91, 99–100, 952 P.2d 379, 387–88 (1998) (concluding environmental regulations fall under the state's police powers).

[89] *See* Cnty. Of Haw. v. Ala Loop Homeowners, 123 Hawai'i 391, 394, 235 P.3d 1103, 1106 (2010) ("conclud[ing] that article XI, section 9 of the Hawai'i Constitution creates a private right of action to enforce [HRS] chapter 205 [(Hawai'i land use zoning statutes)] in the circumstances of this case"), *abrogated on other grounds by* Tax Found v. State, 144 Hawai'i 175, 439 P.3d 127 (2019).

[90] *See In re* Application of Maui Elec., 141 Hawai'i 249, 253, 408 P.3d 1, 5 (2017); *In re* Application of Haw. Elec. Light Co., 145 Hawai'i 1, 13–18, 445 P.3d 673, 685–90 (2019); *In re* Application of Gas Co., 147 Hawai'i 186, 203–04, 465 P.3d 633, 650–51 (2020).

[91] *See* 42 U.S.C. § 7604(a) (providing for citizen suits under the Clean Air Act); 33 U.S.C. § 1365(a) (providing authorization and jurisdiction for citizen suits under the Clean Water Act); 42 U.S.C. § 9659(a) (providing authority to bring civil action under the Comprehensive Environmental Response, Compensation, and Liability Act); 42 U.S.C. § 11046(a)(1) (providing authority to bring citizen suits under the Emergency Planning and Community Right-to-Know Act); 42 U.S.C. § 6972 (providing authority for citizen suits under the Resource Conservation and Recovery Act); 42 U.S.C. § 300j-8 (providing authority and jurisdiction for citizens' civil action under the Safe Drinking Water Act); 15 U.S.C. § 2619 (providing authority for citizens' civil actions under the Toxic Substances Control Act). The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 to 136y, notably lacks a citizen-suit provision.

[92] Robin Kundis Craig, *Removing "The Cloak of a Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis*, 29 CARDOZO L. REV. 149, 175

followed Congress' inclusion of the environmental citizen suit as an enforcement mechanism in federal pollution laws by also providing causes of action in its statutes, such as Hawai'i's CZMA.[93] Hawai'i's CZMA provides an express cause of action for any person against any agency that fails to comply with SMA objectives, guidelines, or policies—or fails to execute a duty required under Hawai'i land use zoning statutes.[94]

Liberalized standing for plaintiffs in environmental public interest cases is a consequence of market failure to account for "external" environmental costs.[95] Where the latter necessitates government intervention, environmental plaintiffs are deputized as private attorney generals.[96] Permitting public-interest interventions would contribute to this role for greater citizen participation in environmental protection enforcement.[97] Tensed against exhortations toward public participation, some commentators sympathize with the practical operations of resource-starved state and county agencies who carry out the day-to-day operations of justice.[98] Liberalized standing may not have a necessary relationship to enhanced environmental protections because permitting more citizen-suits may simply add to regulatory agencies' workload and thus detract from their environmental protection efforts.[99] This view supports removing public administration from the public and is premised on the latter's lack of capacity.[100]

### *C. MPC's Recent Recognition of the Intervention Rights of Hawaiian Traditional and Customary Practitioners*

MPC granted only two SMA interventions to Hawaiian cultural practitioner organizations in recent years: Mālama Kakanilua, Pele Defense Fund, Ho'oponopono o Mākena, and Nā Kahakai o Kula Kai.[101] No doubt the decisions elaborating due process rights afforded to Native Hawaiian traditional and customary practices protected under article XII, section 7 of the Hawai'i constitution and constitutional public trust protections in the context of administrative agency proceedings has better guided and informed MPC

(2007) (citing 33 U.S.C. § 1365(a), the Clean Water Act's citizen suit provision, and 42 U.S.C. § 7604(a), the Clean Air Act's citizen suit provision).

[93] *See id.* ("Congress purposely included an . . . unusual enforcement mechanism in almost all federal pollution control legislation: the environmental citizen suit."); HAW. REV. STAT. § 205A-6 (2021).

[94] *See* HAW. REV. STAT. § 205A-6; *see also* Ching, *supra* note 46, at 685.

[95] Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENV'T L. & POL'Y F. 39, 41–43 (2001).

[96] *Id.* at 42–43.

[97] *See id.* at 43–45.

[98] The Maui County Planning Department budget for 2015 was $4,973,200. *See supra* note 67 and accompanying text.

[99] *See* Adler, *supra* note 95, at 40–41, 61–63.

[100] *See id.*

[101] *See supra* note 2.

decisions on intervention petitions in recent years.[102] *Mauna Kea Anaina Hou* made clear that Hawaiian rights required due process protections in administrative contested cases, amongst other things.[103] *Ching v. Case* elaborated administrative agencies' duties as a public trustee to natural and cultural resources.[104]

Hawaiian traditional and customary rights, however, are not merely adjunct to environmental standing. The constitution mandates protections for natural resources under public trust provisions and traditional and customary Hawaiian practices.[105] Hawai'i regulations define Hawaiian cultural resources inclusively as "natural resources."[106] This is appropriate as many cultural practices utilize plants, winds, living creatures, and waters.[107]

Public trust litigation has helped restore water rights to kalo farmers and nearshore ecosystems,[108] prevented private landowners from usurping shoreline access,[109] stopped the taking of Kaua'i's freshwater for commercial sale,[110] and stymied the desecration of sacred summits by industrial astronomy development.[111] "Trusting" the state risks "reif[ying] the legitimacy of the U.S. government"[112] and fosters a stultifying politics of demand that reinvests political futurity in a paternalistic state.[113] Fiduciary principles riddle trust

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[102] *See, e.g.*, Mauna Kea Anaina Hou v. Bd. of Land and Nat. Res., 136 Hawai'i 376, 363 P.3d 224 (2015); Ching v. Case, 145 Hawai'i 148, 449 P.3d 1146 (2019).

[103] *See* 136 Hawai'i at 389–91.

[104] *See* 45 Hawai'i at 176–80.

[105] Reservations of Hawai'i's public trust revenues for Native Hawaiians under Article XII, Section 4 of the Hawai'i state constitution were created through the 1978 Hawai'i State Constitutional Convention, which "marked a watershed for the Kanaka 'Oiwi movement." Davianna Pomaika'i McGregor, *Statehood: Catalyst of the Twentieth-Century Kanaka 'Ōiwi Cultural Renaissance and Sovereignty Movement*, 13 J. ASIAN AM. STUD. 130, 315–16 (2010).

[106] HAW. CODE R. § 13-5-2 (LexisNexis 2021).

[107] *See* Bianca Isaki, *State Conservation as Settler Colonial Governance at Ka'Ena Point, Hawai'i*, 3 ENV'T & EARTH L.J. 57, 57 (2013) (quoting Lawai'a Action Network, Mālama Ka'ena, a mālama Ka'ena ia 'oe: A Community Plan for Culturally-based Resource Management at Ka'ena, O'ahu 5 (2010) (unpublished manuscript) (on file with the Office of Hawaiian Affairs, Compliance Division)) ("[W]ithout the resources provided to us by the land and sea, our lawai'a [fishing] traditions would not exist.").

[108] *See In re* Water Use Permit Applications, 105 Hawai'i 1, 93 P.3d 643 (2004).

[109] *See* Diamond v. Dobbin, 132 Hawai'i 9, 319 P.3d 1017 (2014).

[110] *See* Kauai Springs, Inc. v. Plan. Comm'n*,* 133 Hawai'i 141, 324 P.3d 951 (2014).

[111] *See* Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 363 P.3d 224 (2015) (Pollack, J., concurring).

[112] ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 50 (2003).

[113] *See* Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RES. J. 317, 318 (2006). This has been true of federal Indian trusts that served as "intrusive means of denying Tribes control of their lands." *Id.* Unlike the trust doctrine in Indian law, however, a trust applied to public lands more aptly describes a public interest in stewardship of natural resources. Rebecca Tsosie, *Conflict Between the Public Trust and the Indian Trust Doctrines: Federal Public Land Policy and Native Indians*, 39 TULSA L. REV. 271, 281 (2003); *see* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. CAL. DAVIS L. REV. 269

resource management with real property conventions that enable frameworks of settler colonial control.[114] In turn, property concepts tend to assess cultural values of land "parcels"[115] in ways that fail to recognize indigenous relationships between land, epistemology, and ontology.[116]

The problem is not only that the state needs to be a better protector—or that the public trust is premised on structures in disrepair. The premise is not identity, particularly where legal instruments are being used. The problem is when the public trust becomes a method of producing state control as something that protects Hawaiian culture. This is a matter I have discussed elsewhere.[117]

## II. APPLICATION OF INTERVENOR STANDING BY HAWAI'I'S COUNTIES

### *A. MPC's Implementation of Intervenor Rules*

MPC's application of its procedural rules for intervening in SMA permit application proceedings include a maze of requirements that have essentially allowed MPC unfettered discretion in denying petitions to intervene.[118] This section briefly compares rules governing other counties' SMA permit proceedings interventions with MPC's rules and application of them.

MPC's rules permit petitions to intervene in all MPC proceedings that will result in a final determination of legal rights, duties, or privileges of specific parties.[119] MPC rules specifying contents of petitions to intervene require petitioners to address the same factors MPC considers in granting or denying permissive or mandatory intervenor status.[120] These factors include whether a petitioner's interest in the proceedings (1) concern a property ownership interest; (2) could be protected by means other than intervention; (3) may be represented by existing parties; (4) differs from interests of the other parties;

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(1980).

[114] *See* Eve Tuck et. al, *Land Education: Indigenous, Post-colonial, and Decolonizing Perspectives on Place and Environmental Education Research*, 20 ENV'T EDUC. RES. 1, 10 (2014).

[115] Settler citizenship accomplishes a territorialization of land and body that pushes against an Indigenous recognition of a bond between community and land. *See* Mishuana Goeman, *From Place to Territories and Back Again: Centering Storied Land in the Discussion of Indigenous Nation-building*, 1 INT'L J. CRITICAL INDIGENOUS STUD. 23, 31 (2008).

[116] *See generally* David D. Shorter, *Hunting for History in Potam Pueblo: A Yoeme (Yaqui) Indian Deer Dancing Epistemology*, 118 FOLKLORE 282 (2007).

[117] *See generally* Bianca Isaki, *State Conservation as Settler Colonial Governance at Ka'ena Point, Hawai'i,* 3 ENV'T & EARTH L.J. 1 (2013); Bianca Isaki, *Post-plantation Worker Memories and Tourism Futures in West Maui*, *in* TOURISM IMPACTS ON WEST MAUI (Lance D. Collins & Bianca Isaki eds., 2016); Bianca Isaki, *The Once and Future Farmer of West Maui*, *in* CIVIL SOCIETY IN WEST MAUI (Lance D. Collins ed.) (2021).

[118] *See* MPC RULES CH. 201, *supra* note 5, §§ 12-201-39 to -41.

[119] *Id.* §12-201-39.

[120] *Compare id.* § 12-201-41, *with id.* § 12-201-43.

(5) could lead to participation that would assist in development of a complete record; (6) could lead to participation that would broaden the issue(s) or delay the proceedings; and (7) could lead to participation that would serve the public interest.[121] Hawai'i case law established adjoining or nearby property owners with standing entitling them to intervene as a matter of right and to participate in formal contested case hearings conducted pursuant to Hawai'i Revised Statutes (HRS) chapter 91 (Hawai'i's Administrative Procedure Act or "HAPA").[122]

Intervention-of-right or mandatory intervention is accorded to persons who have property interests in the subject land, reside on the land, or "can demonstrate they will be so directly and immediately affected by the matter before the commission that their interest in the proceeding is *clearly distinguishable from that of the general public*[.]"[123] Permissive intervention

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[121] MPC Rule § 12-201-43, titled "Contents of petition to intervene[,]" provides:

> (a) The petition shall contain the following:
>
> (1) The nature of petitioner's statutory or other right to intervene;
>
> (2) The nature and extent of petitioner's interest in the proceedings and, if an abutting property owner, the tax map key number of the abutting property; and
>
> (3) The effect of any decision in the proceeding on petitioner's interest.
>
> (b) If applicable, the petition shall also make reference to the following:
>
> (1) Other means available whereby petitioner's interest may be protected;
>
> (2) Extent petitioner's interest may be represented by existing parties;
>
> (3) Extent petitioner's interest in the proceeding differs from that of the other parties;
>
> (4) Extent petitioner's participation can assist in development of a complete record;
>
> (5) Extent petitioner's participation will broaden the issue(s) or delay the proceedings; and
>
> (6) How the petitioner's intervention would serve the public interest.

*Id.* § 12-201-43 (formatting altered).

[122] *See* Cnty. of Haw. v. Ala Loop Homeowners, 123 Hawai'i 391, 419, 325 P.3d 1103, 1131 (2010); Mahuiki v. Plan. Comm'n, 65 Haw. 506, 654 P.2d 874 (1982) (affirming a decision to permit development nearby land in the SMA could only have an adverse impact on an adjacent landowner); Town v. Land Use Comm'n, 55 Haw. 538, 524 P.2d 84 (1974) (concluding adjacent and nearby property owners had a property interest in changing the land use entitlements and adjacent and nearby landowners have legal rights as a specific and interested party in a contested case proceeding to change land use designations or entitlements); E. Diamond Head Ass'n v. Zoning Bd. of Appeals, 52 Haw. 518, 479 P.2d 796 (1971) (adjoining property owner has standing to protect property from "threatening neighborhood change"); Dalton v. City & Cnty., 51 Haw. 400, 462 P.2d 199 (1969) (finding that property owners across the street from a proposed project have a concrete interest in scenic views, sense of space and density of population); *In re* Banning, 73 Haw. 297, 832 P.2d 724 (1992) (affirming land court's conclusion that adjoining landowners had standing "to enforce the rights of the general public in the parcel").

[123] MPC RULES CH. 201, *supra* note 5, § 12-201-41(b) (emphasis added).

"shall be freely granted" to others subject to considerations of (quasi)-judicial economy: (1) the petitioner's position is substantially the same as another party in the proceeding; (2) admission of the petitioner would render proceedings inefficient and unmanageable; or (3) "intervention will not aid in development of a full record and will overly broaden issues."[124]

MPC's acrobatic rule interpretations have resulted in denials of intervenor status in SMA proceedings. In 2009, intervenor proceedings concerning an SMA permit for the expansion and renovation of the Grand Wailea Resort in Kīhei, MPC found petitioners failed to show interests clearly distinguishable from those of the general public and that those public interests were anyway already represented by MPC itself.[125] These reasons for denial were repeated across at least two other intervenor proceedings.[126]

### *1. Intervention & SMA Permit Proceedings*

MPC's SMA permitting proceedings are "contested cases" within the meaning of HRS chapter 91.[127] The public is permitted to testify in these proceedings, except if intervention is granted and a hearings officer appointed.[128]

A contested case proceeding under HRS chapter 91 is a legal determination of the "legal rights, duties, or privileges of specific parties" administered by the agency or county body.[129] Contested cases are "required by law" if a statute or rule governing the contested agency action mandates a hearing prior to the agency's decision-making, or if mandated by constitutional due process.[130] Due process is a right under the U.S. constitution and the Hawai'i state constitution.[131]

In Hawai'i, a petitioner can establish a due process right to a contested case by showing "the particular interest which [the petitioner] seeks to protect by a hearing [is] 'property' within the meaning of the due process clauses of the federal and state constitutions[.]"[132] Each person's rights to a clean and healthful environment as defined by laws relating to environmental quality are property interests that require a due process hearing.[133] Laws relating to

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[124] *Id.* §12-201-41(d).

[125] *See infra* Part III.

[126] *See infra* Part III.B & C.

[127] *See* MPC RULES CH. 201, *supra* note 5, § 12-201-41(e); *Maui Planning Commission Regular Minutes April 9, 2013*, CNTY. OF MAUI, HAW. 35 (Apr. 9, 2013), http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/17925.

[128] *See Maui Planning Commission Regular Minutes April 9, 2013*, *supra* note 127, at 35.

[129] *See* HAW. REV. STAT. § 91-1 (2021).

[130] *See* Bush v. Hawaiian Homes Comm'n*,* 76 Hawai'i 128, 134–36, 870 P.2d 1272, 1278–80 (1994).

[131] *See* U.S. CONST. amend. XIV; HAW. CONST. art. I, § 5.

[132] *See* Sandy Beach Def. Fund v. City Council*,* 70 Haw. 361, 376, 773 P.2d 250, 260 (1989).

[133] *See In re* Haw. Elec. Light Co.*,* 145 Hawai'i 1, 17, 445 P.3d 673, 689 (2019) (citing In re Application of Maui Elec. Co., 141 Hawai'i 249, 265, 408 P.3d 1, 17 (2017)) (concluding a

environmental quality include HRS chapters 205 and 269, and all statutes listed under HRS section 607-25.[134]

Hawai'i constitutional protections for Native Hawaiian traditional and customary subsistence, cultural, and religious practices under article XII, section 7 and Native Hawaiian beneficiaries of Hawai'i's public land trust under article XII, section 4 have not been deemed to rise to the level of a protected property interest within the meaning of federal or state due process.[135] Although not a property interest, an agency's obligations to protect Native Hawaiian traditional and customary rights may require them to hold a contested case hearing on a SMA permit application upon a showing by Native Hawaiian practitioners.[136]

Even where an agency held a *discretionary* public hearing on a permit, that hearing could be considered a "contested case" if it implicated the constitutional due process rights of persons seeking to "intervene" in that permitting process.[137] In *Pele Defense Fund v. Puna Geothermal Venture*, the Hawai'i Supreme Court concluded that the state Department of Health's public discretionary hearing on an Authority-to-Construct permit was a "contested case" because it was "required by constitutional due process."[138]

### *2. MPC Strictly Construes Intervenor Petition Timeliness Requirements*

Petitions to intervene must be filed at least ten days before the first hearing date on the application and accompanied by a filing fee.[139] MPC Rules prohibit untimely filed petitions to intervene, "except for good cause[.]"[140] MPC has strictly construed this provision in tandem with MPC Rule section 12-201-21, which provides "all papers" to be timely filed, to deny intervention where petitions were filed by deadlines, but accompanying fees, certificate of service, and additional copies arrived days later.[141] On October 8, 2013, MPC denied a

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contested case hearing was required).

[134] These include "chapters 6E, 46, 54, 171, 174C, 180C, 183, 183C, 184, 195, 195D, 205, 205A, 266, 342B, 342D, 342F, 342H, 342J, 342L, and 343 and ordinances or rules adopted pursuant thereto under chapter 91." HAW. REV. STAT. § 607-25(c) (2021); *see also* Cnty. of Haw. v. Ala Loop Homeowners, 123 Hawai'i 391, 410, 235 P.3d 1103, 1122 (2010).

[135] *Ka Pa'akai o Ka 'Āina v. Land Use Comm'n,* 94 Hawai'i 31, 45, 7 P.3d 1068-82 (2000).

[136] *See* Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH I*), 79 Hawai'i 246, 253, 900 P.2d 1313, 1319 (1993) (holding the Hawai'i Planning Commission had "disregarded the rules regarding the gathering rights of native Hawaiians and its obligation to preserve and protect those rights" and PASH's "interest in the proceeding was clearly distinguishable from that of the general public[.]").

[137] *See* Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 881 P.2d 1210 (1994).

[138] *Id.* at 71, 881 P.2d at 1217.

[139] MPC RULES CH. 201, *supra* note 5, § 12-201-40.

[140] *Id.*

[141] *Id.* §§ 12-201-40, 12-201-21.

petition to intervene in a short-term rental permit proceeding on this narrow basis.[142]

In 2011, MPC also denied a petition to intervene in a SMA permit proceeding concerning the construction of a Maui Business Park subdivision in Kahului filed by Dairy Road Partners, LLC on the basis of untimeliness.[143] At issue was Dairy Road Partners' claim of "good cause" because the applicant Alexander & Baldwin Properties ("A&B") notified the owner of property within 500 feet of the affected parcel, HRT Realty, LLC, but not Dairy Roads Partners, [144] who were lessees of the property.[145] Dairy Roads Partners noted that A&B was also a property owner of its parcel and "[i]f [the applicant] can pick and choose who to send notice to because of [the MPC's] rules, that's an abuse of the process."[146] MPC denied Dairy Road Partners' petition to intervene and motion for reconsideration of the petition.[147] MPC found A&B's consultant was unclear about whether Dairy Roads was within 500 feet, and might have been within 510 feet of the project.[148] Because there were multiple owners listed for the Dairy Roads parcel and "adequate[,]" not actual, notice was required, MPC concluded A&B was not required to give actual notice to Dairy Roads, who therefore had no "good cause" excusing their untimely petition.[149] The Intermediate Court of Appeals (ICA) later overturned this decision.[150]

### *B. Other Counties' Rules for Intervention*

MPC's rules on their face are not markedly different from those of other counties. For instance, Hawai'i Planning Commission (HPC) Rules provide that "[i]n all proceedings where [HPC's] action is directly appealable to . . .

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[142] *Maui Planning Commission Regular Minutes October 8, 2013*, CNTY. OF MAUI, HAW. 14, 31 (Oct. 8, 2013), http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/18624; *see also Maui Planning Commission Regular Minutes July 22, 2014*, CNTY. OF MAUI, HAW. 74–76 (July 22, 2014), http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/19547; *Maui Planning Commission Regular Meeting Transcript September 22, 2009*, CNTY. OF MAUI, HAW. 166 (Sept. 22, 2009), https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/12675 (MPC counsel stating he had not "always agreed with [MPC's] take on [strict deadlines]").

[143] *Maui Planning Commission Regular Minutes April 26, 2011*, CNTY. OF MAUI, HAW. 55 (Apr. 26, 2011), http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/15337 [hereinafter *MPC Apr. 26, 2011 Meeting Minutes*].

[144] *Id.* at 41.

[145] *Id.* at 44.

[146] *Maui Planning Commission Regular Minutes June 28, 2011*, CNTY. OF MAUI, HAW. 71 (June 28, 2011), https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/15666.

[147] *Id.* at 82; *see also* Findings of Fact, Conclusions of Law, & Decision and Order, Denying Dairy Road Partners' Petition to Intervene Filed on April 25, 2011 (on file with author) [hereinafter *Dairy Roads* FOFs/COLs/Order].

[148] *Dairy Roads* FOFs/COLs/Order, *supra* note 147, at 3 ¶ [#].

[149] *Id.* at 4–5 ¶ [# (FOF No. 19)], 6–8 ¶¶ [## (COL Nos. 9-19)].

[150] *See* Dairy Road Partners v. Maui Plan. Comm'n, No. CAAP-11-0000789, 2015 WL 302643 at *6 (Haw. Ct. App. Jan. 23, 2015) (unpublished table disposition).

Circuit Court," a person seeking to intervene must file a written request and pay a filing fee.[151] As in MPC rules, HPC holds a hearing and is mandated to admit a petitioner-to-intervene who demonstrates: an interest clearly distinguishable from that of the general public; a "property interest in the land or lawfully reside on the land[;]" the proposed action "will cause them actual or threatened injury in fact[;]" or is a Native Hawaiian practitioner of customary and traditional, subsistence, or religious practices.[152] HPC rules equate mandatory intervention with "standing" in a contested case and provide for permissive intervention by allowing HPC to join as a person "if complete relief cannot be accorded among those already parties or that person has an interest in the matter so that the action of [HPC] may impair or impede that person's ability to protect that interest or create a risk of multiple or otherwise inconsistent actions."[153]

The City and County of Honolulu (Honolulu County) Department of Planning and Permitting (DPP) administers the Honolulu County SMA permit system.[154] Rather than promulgating rules specific to interventions, individuals may request hearings on the Honolulu DPP director's orders concerning the enforcement or violation of SMA rules.[155] Such hearings are considered "contested case" proceedings under HRS chapter 91 and are appealable under the same statute.[156] The lack of specific intervenor rules or contested case

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[151] RULES OF PRACTICE AND PROCEDURE: RULES 1-16, CNTY. OF HAW. PLAN. COMM'N § 4-6 (2021) [hereinafter HPC RULES 1-16], https://records.hawaiicounty.gov/WebLink/DocView.aspx?dbid=1&id=112050&page=1&cr=1.

[152] See HPC Rule § 4-6, titled "Prehearing Procedure," which provides in relevant part:

> (b) Upon receipt of a written request to intervene, the Commission, at the first meeting on the matter, shall hold a hearing on the written request. The petitioner shall be admitted as a party if it can demonstrate that:
>
> 1) His or her interest is clearly distinguishable from that of the general public; or
>
> 2) Government agencies whose jurisdiction includes the land involved in the subject request; or
>
> 3) That they have some property interest in the land or lawfully reside on the land; or
>
> 4) That even though they do not have an interest different than the public generally, that the proposed action will cause them actual or threatened injury in fact; or
>
> 5) Persons who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, who practice those rights which were customarily and traditionally exercised for subsistence, cultural or religious purposes.
>
> The Commission will grant or deny such written request prior to any further action on the matter.

*Id.* § 4-6.

[153] *Id.* § 4-6(e).

[154] *See* HONOLULU, HAW., REV. ORDINANCES ch. 25, art. 1, § 25-1.1 (2014) [hereinafter ROH ch. 25], https://www.honolulu.gov/rep/site/ocs/roh/ROH_Chapter_25_article_1_12.pdf.

[155] *See id.* §§ 25-9.1, 25-9.2(b), 25-10.1.

[156] Revised Ordinances of Honolulu § 25-10.1, titled "Appeal in accordance with state statute" provides:

provisions in the City and County Council of Honolulu County SMA permitting rules was addressed via litigation in the 1980s.[157]

Like MPC rules, the Kaua'i Planning Commission (KPC) rules also provide for intervention in permit proceedings.[158] KPC rules define intervenors as "[a]ll Persons who have hold[sic] interest in the land, who[sic] lawfully reside on the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed application that their interest in the Proceeding is clearly distinguishable from that of the general public[.]"[159]

Because these county rules provide for hearings in which legal rights and duties of particular persons would be determined, they would be considered "contested cases," which are appealable to Hawai'i's circuit courts pursuant to HRS section 91-14 .[160]

Kaua'i, Maui, and Hawai'i planning commission rules provide for mandatory formal intervention in SMA permitting proceedings upon a showing of interests "clearly distinguishable from the general public[.]"[161] Under these rules, potential intervenors would have a "right" to a contested case based on their interests in particular SMA permit application proceedings if they demonstrated sufficient interests to merit mandatory intervention.[162]

In *Sandy Beach Defense Fund v. City Council,* the court held the City and County Council of Honolulu County was not required to hold a contested case on an SMA permit application pursuant to HRS chapter 91 because the

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> If any person is aggrieved by the order issued by the director pursuant to [ROH] Sections 25-9.1 and 25-9.2, the person may appeal the order in the manner provided in HRS Chapter 91; provided, that no provision of such order shall be stayed on appeal unless specifically ordered by a court of competent jurisdiction.

*Id.* § 25-10.1.

[157] *See generally* Sandy Beach Def. Fund v. City Council*,* 70 Haw. 361, 773 P.2d 250 (1989).

[158] *See* RULES OF PRACTICE AND PROCEDURE OF THE KAUAI'I COUNTY PLANNING COMMISSION, CNTY. OF KAUA'I §§ 1-4-1 to 1-4-9 (2014) [hereinafter KPC RULES], http://www.kauai.gov/Portals/0/Boards_Commissions/Rules%20of%20Practice-Planning.pdf?ver=2015-04-22-125309-057.

[159] *Id.* § 1-4-1. KPC Rules further specify grounds for denying a petition to intervene:

> Leave to intervene may be granted, except in matters over which the Commission exercises only advisory functions, provided that the Commission or its Hearing Officer, if one is appointed, may deny an application to intervene when in the Commission's or Hearing Officer's sound discretion it appears that:
>
> (1) the position of the applicant for intervention concerning the proposal is substantially the same as the position of a Party-Intervenor already admitted to the proceeding;
>
> (2) the admission of additional Parties-Intervenors will render the proceedings inefficient and unmanageable; or
>
> (3) the intervention will not aid in the development of a full record and will overly broaden issues.

*Id.* § 1-4-2 (formatting altered).

[160] *See supra* notes 151–59 and accompanying text; HAW. REV. STAT. §§ 91-1, -14 (2021).

[161] *See* MPC RULES CH. 201, *supra* note 5, § 12-201-41(b); HPC RULES 1-16, *supra* note 151, § 4-6(b); KPC RULES, *supra* note 158, § 1-4-1.

[162] *See* Bush v. Hawaiian Homes Comm'n*,* 76 Hawai'i 128, 134, 870 P.2d 1272, 1278 (1994).

Honolulu City Council was not an "agency" subject to HRS chapter 91 and had complied with CZMA requirements of promulgating SMA permit procedural rules by passing an ordinance to the same effect.[163] Some speculated *Sandy Beach* would encourage county agencies to shift CZMA permitting authorities to legislative bodies, which are not subject to HRS chapter 91 requirements for contested case hearings.[164] This has not occurred as SMA permitting continues to be administered by Hawai'i, Kaua'i, and Maui planning commissions.

In *PASH II*, the Hawai'i Supreme Court reviewed HPC's denial of intervenor status to the PASH members who sought to intervene in a SMA permit proceeding.[165] The *PASH II* court refused to afford deference to HPC's "restrictive interpretation of standing requirements[,]" which resulted in denial of a petition to intervene filed by Native Hawaiian cultural practitioners.[166] HPC found those practitioners' "asserted interests were 'substantially similar' to those of the general public."[167]

*PASH II* and *Pele Defense Fund* relied on *Akau v. Olohana Corp.* for the proposition that a showing of "injury in fact" would suffice to establish "standing" to intervene in an SMA permit proceeding.[168] Under *Akau*:

> a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action.[169]

The *Akau* court was addressing the argument that only the state could bring an action against landowners to enforce a public right to beach access.[170] The court appropriately traced this proposition to "the general rule in the law of public nuisance that a private individual has no standing to sue for the abatement of a public nuisance if his injury is only that which is shared by the public generally."[171] Taken together, *PASH II*, *Pele Defense Fund,* and *Akau* elaborate a framework for intervening in SMA permit proceedings that requires petitioners-to-intervene to show an injury in fact *instead of* an interest

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[163] *See* Sandy Beach Def. Fund v. City Council, 70 Haw. 361, 370, 773 P.2d 250, 257 (1989).

[164] McPherson, *supra* note 39, at 783 (citing Lea Oksoon Hong, Sandy Beach Defense Fund v. City & County of Honolulu: *The Sufficiency of Legislative Hearings in an Administrative Setting*, 12 U. HAW. L. REV. 499, 530 (1990)).

[165] *See* Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH II*), 79 Hawai'i 425, 430, 903 P.2d 1246, 1251 (1995).

[166] *See id.* at 434, 903 P.2d at 1255 (citations omitted).

[167] *Id.*

[168] *See id.*; Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 70, 881 P.2d 1210, 1216 (1994); Akau v. Olohana Corp., 65 Haw. 383, 388–89, 652 P.2d 1130, 1134 (1982).

[169] *Akau*, 65 Haw. at 388-89, 652 P.2d at 1134.

[170] *Id.* at 386, 652 P.2d at 1133.

[171] *Id.* at 386, 652 P.2d at 1133 (citing Holloway v. Bristol-Myers Corp., 327 F. Supp. 17 (D.D.C. 1971)).

clearly distinguishable from the general public to merit intervention by right.[172] As discussed further *infra*, "[t]he necessary elements of an 'injury in fact' include: 1) an actual or threatened injury, which 2) is traceable to the challenged action, and 3) is likely to be remedied by favorable judicial action."[173] This means, under *PASH II*, "individuals or groups requesting contested case hearing procedures on a SMA permit application before the HPC must demonstrate that they will be 'directly and immediately affected by the [Hawai'i Planning] Commission's decision[.]'"[174]

As indicated by *Akau,* two related, but dissimilar doctrines: standing and public nuisance came to structure Hawai'i's legal framework for intervention in SMA permit proceedings.[175]

### *C. Standing Against Public Nuisance*

Standing is a jurisdictional doctrine used to determine whether specific kinds of plaintiffs may *bring their claims* to court and does not directly address intervenors' claims.[176] A "public nuisance" interferes with a right common to the general public, which does not require the entire community be affected, so long as the nuisance interferes with a party in the exercise of a public right.[177] A "private nuisance," by contrast, gives rise to rights to protect one's enjoyment of private property from unreasonable interference by adjacent property owners.[178] That private nuisance actions were typically brought by private owners concerning "conflicting contemporaneous and adjoining land uses, where the plaintiff has a legal interest in the land that is being adversely affected by the defendant's nearby nuisance activity" suggests further error with MPC decisions to deny intervention by right to adjoining landowners.[179]

MPC rule references to property-ownership and "distinguishable interests" for intervention by right indicate this relationship to public nuisance law.[180] For an individual to recover damages personally for a nuisance that affected

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[172] *See supra* notes 165–171.

[173] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH II*), 79 Hawai'i 425, 434 n.15, 903 P.2d 1246, 1255 n.15 (1995) (citing *Pele Def. Fund,* 77 Hawai'i at 70, 881 P.2d at 1216; *Akau*, 65 Haw. at 388–89, 652 P.2d at 1134).

[174] *Id.*

[175] *Akau*, 65 Haw. at 386–90, 652 P.2d at 1133–35.

[176] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475–76 (1982).

[177] William L. Prosser, *Private Actions For Public Nuisance*, 52 VA. L. REV. 997, 1001–02 (1966).

[178] *See id.*; Bryson & Macbeth, *The Restatement (Second) of Torts and Environmental Law*, 2 ECOLOGY L.Q. 241, 242 n.2 (1972).

[179] *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 765–66 (2001) (citing RESTATEMENT (SECOND) OF TORTS § 821D (AM. L. INST. 1977) (defining private nuisance)).

[180] MPC RULES CH. 201, *supra* note 5, § 12-201-41(b).

the general public, that individual was required to show they had "suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."[181]

### *1. Injury-in-fact Standing (Article III)*

The injury-in-fact test is generally considered to illustrate "constitutional" standing, that is, based on the "cases and controversies" limitation on federal court jurisdiction under Article III, Section 2 of the United States Constitution.[182] In 1992, Justice Antonin Scalia definitively articulated the federal modern standing doctrine when he denied standing to the environmental organization plaintiffs in *Lujan v. Defenders of Wildlife*.[183] Article III of the U.S. Constitution requires the existence of a "case or controversy" for federal courts to exercise jurisdiction.[184] The "case or controversy" clause requires prospective parties to establish their standing.[185] This "case or controversy" jurisdictional limitation does not apply to Hawai'i state courts, for which "standing is solely an issue of justiciability, arising out of prudential concerns of judicial self-governance."[186]

The U.S. Supreme Court's more recent formulation of Article III standing requires showing that a claimant: "(1) has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[187] Two lines of analysis are applied

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[181] RESTATEMENT (SECOND) OF TORTS § 821C(1) (AM. L. INST. 1979); *see also* David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 ECOLOGY L.Q. 883 (1989) (explaining relationships between public nuisance and modern environmental statutes and regulations).

[182] *See* Gollust v. Mendell, 501 U.S. 115, 124 (1991).

[183] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[184] U.S. CONST. art. III, § 2, cl. 1 (setting forth "case" or "controversy" requirement); *see also Lujan*, 504 U.S. at 560. Article III provides in pertinent part:

The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, . . . to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; --between a State and Citizens of another State; -- between Citizens of different States; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

[185] *See* Diamond v. Charles, 476 U.S. 54, 61–62 (1986).

[186] *See* Tax Found. of Haw. v. State, 144 Hawai'i 175, 190, 439 P.3d 127, 142 (2019).

[187] Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 180–81 (2000) (citations omitted); *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (summarizing the "irreducible minimum" that a party must show to gain access to the federal courts: "in order to satisfy Article III, a plaintiff must show that he has suffered, or will suffer, a distinct and palpable injury that is caused by the defendant's conduct and that is redressable by the court").

to determine what constitutes injury-in-fact standing. The first requires injuries to be "direct," "distinct and palpable," "concrete" and may not be "speculative" or "too remote."[188] The "indirect" standard of injury is more liberal, allowing noneconomic or aesthetic injuries, even when widely shared, to suffice.[189]

Procedural rights are notably not subject to injury-in-fact requirements. *Lujan* concerned a citizens' group challenge to the federal government's changes to regulations promulgated under the federal Endangered Species Act and originated the infamous footnote number seven, attributed to Justice Scalia.[190] "There is this much truth," Scalia wrote, "to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[191] This footnote merited much attention because it means procedural rights are "special" such that a plaintiff with procedural rights does not have to meet all prongs of the three-prong test.

Standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise."[192] The "case" or "controversy" requirement under Article III, Section 2 of the United States Constitution imposes constitutional limits, while prudential limitations concern whether a plaintiff's grievances falls within the "zone of interests" that was meant to be protected under a law or constitutional provision invoked in a suit.[193] The "zone of interest" test is also considered a prudential requirement.[194] That is, a claim must be within the "zone of interests" that a law meant to protect in order to go forward.[195]

### *2. Standing in Hawai'i Courts: Personal Injuries and Public Harms*

In Hawai‘i state courts, standing is a prudential consideration regarding the "proper – and properly limited – role of courts in a democratic society" and is not an issue of subject matter jurisdiction, as it is in federal courts. Importantly, this

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[188] Ellyn J. Bullock, *Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporation Into Intervention of Right,* 1990 U. ILL. L. REV. 605, 611–12 (1990) (citing *Ex Parte* Levitt*,* 302 U.S. 633, 634 (1937); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 261 (1977); Warth v. Seldin, 422 U.S. 490, 501 (1975); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 40 (1976); Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 76 (1974); O'Shea v. Littleton*,* 414 U.S. 488, 498 (1974)).

[189] *Id.* at 612 (citations omitted).

[190] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 573 n.7 (1992).

[191] *Id.*

[192] Warth v. Seldin, 422 U.S. 490, 498 (1975) (citing Barrows v. Jackson, 346 U.S. 249, 255–56 (1953)).

[193] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474–75 (1982).

[194] Carl W. Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 426 (1992).

[195] *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

court has repeatedly ruled that standing requirements may be tempered, or even prescribed, by legislative declarations of policy. Therefore, standing requirements can differ based on legislative enactments.[196]

The Hawai'i constitution does not contain the "case or controversy" clause of Article III, Section 2 of the U.S. Constitution and Hawai'i courts have recently rejected reliance on federal injury-in-fact standing doctrines.[197] Earlier, however, the Hawai'i Supreme Court wrote, "our decisions have afforded standing on a basis at least coextensive with federal doctrine where harm to such interests has been alleged."[198] The "three-part injury[-in-fact] test serves as Hawai'i's counterpart to the Article III 'cases and controversies' requirement."[199]

Hawai'i's prudential rules of standing "properly limit the role of the courts in our society[.]"[200] Standing requirements "promote the separation of powers between the three branches of government by limiting the availability of judicial review to cases in which there is an actual dispute between adverse parties[.]"[201] Judicial restraint policies underlying the "cases or controversies" constitutional limitation also apply to Hawai'i's prudential test for standing.[202]

In quasi-judicial proceedings, such as contested cases, agencies appropriately operate at an intersection of executive and judicial roles.[203] Here, standing requirements are to be even more liberally construed because separation of powers concerns undergirding standing are not as crucial.[204] Participation in quasi-judicial agency proceedings is better framed as aiding agency decision-making.[205]

Plaintiffs and intervenors asserting public interests have been stymied by requirements that parties assert rights personal to them and prohibit vindication

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[196] Tax Found. of Haw. v. State, 144 Hawai'i 175, 188, 439 P.3d 127, 140 (2019) (citations and footnote omitted).

[197] *Id.* at 190, 439 P.3d at 142; Akau v. Olohana Corp., 65 Haw. 383, 388, 652 P.2d 1130, 1135 (1982) (holding a person has standing even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact).

[198] Life of the Land v. Land Use Comm'n, 63 Haw. 166, 176, 623 P.2d 431, 441 (1981).

[199] Asato v. Procurement Pol'y Bd., 132 Hawai'i 333, 343, 322 P.3d 228, 238 (2014) (citations omitted).

[200] McDermott v. Ige, 135 Hawai'i 275, 284 n.7, 349 P.3d 382, 390 n.7 (2015) (quoting Trs. of Off. of Hawaiian Affs. v. Yamasaki, 69 Haw. 154, 170–71, 737 P.2d 446, 456 (1987)) (citations omitted), *abrogated on other grounds by Tax Found. of Haw.*, 144 Hawai'i 175.

[201] *Id.* at 283, 349 P.3d at 390.

[202] *See* Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171–72, 623 P.2d 431, 438 (1981) (citations omitted).

[203] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 SUFFOLK U.L. REV. 881, 882 (1983); *cf.* Jonathan Poisner, *Environmental Values and Judicial Review after* Lujan*: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991).

[204] *See generally* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1165–69 (1992-1993).

[205] *See id.* at 1165 ("[T]he 'personal stake' a plaintiff brings to a suit challenging executive action is a question quite analytically distinct from the separation of powers determination.").

of "'abstract questions of wide public significance' [amounting to] 'generalized grievances,' pervasively shared[.]"[206] Prudential considerations require the presence of a "justiciable" controversy—the claim must be addressed to a law under which the plaintiff may find relief.[207] This is the "zone of interests" test for standing.[208]

Compliance with the zone of interests test under laws, such as Hawai'i's CZMA, that implicate a broad range of public interests, create a tension between personal injuries and public harms.[209] As discussed *infra*, MPC rules required potential intervenors to demonstrate interests clearly distinguishable from the general public, a requirement that made compliance with the zone of interests test into grounds for denying intervention petitions.[210]

### *3. Intervention under Rule 24 of the Federal and Hawai'i Rules of Civil Procedure*

The Federal Rules of Civil Procedure (FRCP) define intervention as the process by which a nonparty may enter a suit to protect his or her rights.[211] Federal rules provide for intervention of right to "anyone" if they were "given an unconditional right to intervene by a federal statute[,]" or "claims an interest

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[206] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499–500 (1975)).

[207] *Life of the Land*, 63 Haw. at 171–72, 623 P.2d at 438.

[208] *See Valley Forge*, 454 U.S. at 474–75.

[209] *See* HAW. REV. STAT. §§ 205A-21, -26 (2021).

[210] *See infra* Part III.A. In its appeal to the circuit court, Protect Wailea argued MPC confused their compliance with the third element of the injury-in-fact test with evidence that their interests were already represented by MPC. *See* Brief of Petitioner-Appellant at 17, Protect Wailea v. Maui Plan. Comm'n, Civ. No. 09-1-0899(1) (Haw. 2d Cir. Mar. 31, 2010) [hereinafter Brief of Petitioner-Appellant, Protect Wailea] (on file with author). That MPC was "required to make findings with regard to the statutory purposes, objectives and policies of the CZMA could not be used as a reason to deny the Petitions to Intervene, especially when the Intervenors were required by the injury-in-fact test to demonstrate that they were seeking relief that the MPC had the power and authority to grant them based upon identical CZMA statutory purposes, objectives and policies." *Id.* at 18.

[211] See Rule 24 of the Federal Rules of Civil Procedure, which provides in part:

> (a) INTERVENTION OF RIGHT. On timely motion, the court must permit anyone to intervene who:
> (1) is given an unconditional right to intervene by a federal statute; or
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
> (b) PERMISSIVE INTERVENTION.
> (1) *In General.* On timely motion, the court may permit anyone to intervene who:
> (A) is given a conditional right to intervene by a federal statute; or
> (B) has a claim or defense that shares with the main action a common question of law or fact.

FED. R. CIV. P. 24 (formatting altered).

relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."[212] Permissive intervention is available to anyone who "(A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact."[213] In their exercise of discretion, courts are required to consider whether "the intervention will unduly delay or prejudice the adjudication of the original parties' rights."[214]

Rule 24 of the Hawai'i Rules of Civil Procedure (HRCP) and FRCP contain substantially similar provisions for intervention of right and for permissive intervention that are substantially similar to the federal rules such that the promulgation of the latter sheds light on the former.[215] In 1938, the U.S. Supreme Court promulgated and made effective the FRCP pursuant to Congress' enactment of the Rules Enabling Act of 1934.[216] Intervention was codified in this first draft of the federal rules and covered all civil actions.[217] Distinctions between intervention of right and permissive intervention were included in order to reconcile competing interests of the original parties and potential intervenors.[218]

In drafting the federal rules, the Advisory Committee explained that its rules would value equity in law.[219] Notes to the 1966 amendments include Advisory Committee recommendations that courts apply flexibly and pragmatically the requirements under FRCP Rule 24(a)(2):[220] "[T]he 'liberal ethos,' which pervaded the [federal] Rules as a set of litigation principles, and the flexibility that equity promoted, permitted public interest litigants to initiate lawsuits, defeat preliminary motions, undertake thorough discovery, and reach the merits as plaintiffs, and to gain intervention rather easily as applicants."[221] The 1966 amendments encompassed FRCP Rule 24(a)(2), which currently states that potential intervenors who may suffer practical prejudice to an interest in the property or transaction that is the subject of the litigation shall be permitted to intervene, unless existing parties represent them

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[212] FED. R. CIV. P. 24(a)(1) & (2).

[213] FED. R. CIV. P. 24(b)(1)(A) & (B).

[214] FED. R. CIV. P. 24(b)(3).

[215] *See* HAW. R. CIV. P. 24(a) & (b).

[216] *See* 28 U.S.C. §§ 2072-2074; *see also* Tobias, *supra* note 194, at 421–22.

[217] *See* Erik Figlio, *Stacking the Deck Against "Purely Economic Interests": Inequity and Intervention in Environmental Litigation*, 35 GA. L. REV. 1219, 1225 (2000-2001) ("Intervention in federal practice was codified as Rule 24 in the first Federal Rules of Civil Procedure and was expanded to cover all civil actions.").

[218] *See* Jack H. Friedenthal et. al, CIVIL PROCEDURE 374–75 (3d ed. 1999).

[219] *See* Tobias, *supra* note 194, at 422 & n.32.

[220] *Id.* at 422–23, 423 n.39 (citing Advisory Committee Notes for Rule 24(a)(2), 39 F.R.D. 69, 109 (1966)).

[221] *Id.* at 423 (citation omitted).

adequately.[222] Although the purpose of this revision is "unclear," the 1966 amendment of FRCP Rule 24(a)(2) responded to an ambiguity in interpreting previous language, which provided for intervention if an applicant might be bound, and whose interests would be inadequately represented, if litigation proceeded in his or her absence.[223] Some courts understood "bound" to indicate practical prejudice against the applicant, but others, including, eventually, the U.S. Supreme Court, interpreted "bound" to mean res judicata would apply to the applicant's claims.[224] By eliminating "bound" from the amended FRCP Rule 24(a)(2), the Advisory Committee clarified that legal interests and not claims subject to a res judicata bar would be enough to merit intervention of right.[225]

Intervention doctrines are rooted in Roman law, which permitted nonparties to intervene when a losing party's decision not to appeal would adversely affect the potential-intervenor's interests.[226] Early U.S. law retained procedures for intervention, but "such procedures were inadequate because the claims of potential intervenors were generally subordinate to the claims of the original parties, and because the potential intervenors themselves were generally required to align themselves on one side of the original suit."[227] Under the federal rules, intervenors must show a "case or controversy" within the meaning of Article III of the U.S. Constitution to merit intervention.[228] While Hawai'i courts have no recourse to Article III of the federal constitution, federal interpretations of FRCP Rule 24 guide Hawai'i court interpretations of HRCP Rule 24.[229] In assessing petitions for intervention of right under HRCP Rule 24(a)(2), Hawai'i courts consider: (1) "whether the application was timely;" (2) "whether the intervenor claimed an interest relating to the property or transaction which was the subject of the action;" (3) "whether the disposition of the action would, as a practical matter, impair or impede the intervenor's ability to protect that interest;" and (4) "whether the intervenor's interest was inadequately represented by the existing defendants."[230] Hawai'i

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[222] *See id.*; FED. R. CIV. P. 24(a)(2).

[223] Tobias, *supra* note 194, at 428–29.

[224] *Id.* at 429 (citing Sam Fox Publ'g Co. v. United States, 366 U.S. 683 (1961)).

[225] *Id.*

[226] Figlio, *supra* note 217, at 1224–25 (citing James WM. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565 (1936)).

[227] *Id.* at 1225 (citations omitted).

[228] *See* Juliet Johnson Karastelev, *On the Outside Seeking In: Must Intervenors Demonstrate Standing to Join a Lawsuit?*, 52 DUKE L.J. 455, 458 (2002) (reviewing intervention of right under FRCP Rule 24 requires a showing of a "case or controversy" under Article III of the U.S. Constitution).

[229] For example, in *Hoopai v. Civil Service Commission*, the court relied on the Ninth Circuit's adoption of a four-part test for assessing applications for intervention as a matter of right under HRCP Rule 24(a). 106 Hawai'i 205, 217, 103 P.3d 365, 377 (2004) (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983)).

[230] *Id.* at 216, 103 P.3d at 376.

courts review orders denying intervention under HRCP Rule 24(a)(2) *de novo*.[231]

### *D. Tautology of Private Interests under Public Nuisance Law*

Inconsistencies between MPC intervenor rules and injury-in-fact standing mirror those between public nuisance and standing doctrines as they have evolved from different areas of law.[232] MPC intervenor proceedings remain caught in this paradox of the public nuisance environmental lawsuit, even as Hawai'i case law has pushed towards injury-in-fact standing for environmental citizen suits.[233] Other Hawai'i laws refer to "interests clearly distinguishable from the general public" and are likewise implicated in this debacle.[234]

The phrase "clearly distinguishable from the general public" derives from tort law concerning public nuisance and is reflected in authorities that grew out of tort.[235] This "special injury" or "special damage" rule arose from public nuisance law.[236] To bring an action against a public nuisance, an injury was required to be "sufficiently 'special,'" which meant that it must be "different-in-kind and not just different-in-degree from injuries to the general public."[237] The rationale for the "different-in-kind" requirement was to "preserve[] the role of the sovereign [as the primary enforcer of] the law, prevent[ a] multiplicity of actions, and discourage trivial lawsuits."[238]

An early public nuisance case instructs in the context giving rise to this rationale. In 1536, a plaintiff was permitted a private action against a defendant who had blocked access to a public highway.[239] Prior to this instance, only the king, and not a private person, could receive a remedy for a crime.[240] The court determined to require the plaintiff to show he suffered "greater hurt or inconvenience than any other man had" and upon that showing could "have an

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[231] *Id.* at 214–15, 103 P.3d at 375 (citing Ing v. Acceptance Ins. Co., 76 Hawai'i 266, 271, 874 P.2d 1091, 1096 (1994)).

[232] *See* John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241, 256 (1972).

[233] *See* Akau v. Olohana Corp., 65 Haw. 383, 390–91, 652 P.2d 1130, 1135 (1982); David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 ECOLOGY L.Q. 883, 896 (1989).

[234] *See, e.g.,* HAW. REV. STAT. § 205-4(e) (2021); HAW. CODE. R. § 15-15-52(c) (LexisNexis 2021) (setting forth rules for the Land Use Commission); KPC RULES, *supra* note 161, § 1-4-1.

[235] *See generally* Elizabeth Rae Potts, *A Proposal for an Alternative to the Private Enforcement of Environmental Regulations and Statutes Through Citizen Suits: Transferable Property Rights in Common Resources,* 36 SAN DIEGO L. REV. 547, 560 (1999) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 90, at 646 (5th ed. 1984)).

[236] *See* Matt Dulak, *What's It to You? Citizen Challenges to Landmark Preservation Decisions and the Special Damage Requirement,* 113 COLUM. L. REV. 447, 447, 459–60 (2013) (assessing "special damage" injuries in the context of New York historic landmark preservation laws).

[237] Antolini, *supra* note 179, at 766.

[238] *Id.* at 767.

[239] Hodas, *supra* note 181, at 884 (citing Prosser, *supra* note 177, at 1005).

[240] *Id.* (citing Prosser, *supra* note 177, at 1005).

action to recover his damages that he had by reason of this special hurt."[241] This became the rule whereby private persons had standing to bring actions against public nuisances upon a showing of particularized, personal damage distinguishable from the general public.[242] English courts adopted the "special injury rule" due to: (1) a lingering notion that private persons could not "vindicate rights historically in the province of the sovereign[;]" (2) courts' efforts to protect defendants from a multitude of complaints about alleged public nuisances; and (3) courts' reticence to be burdened with trivial damages.[243]

Contemporary courts have mechanisms, doctrines, and procedures to address these three concerns, such as class action suits, leading some to characterize the "special injury rule" as an "anachronistic and overinclusive bar to public nuisance actions."[244] Even courts applying the special injury rule, including Hawai'i courts, have been troubled by the unfairness of excluding plaintiffs from certain environmental public nuisance cases.[245] For example, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the Court stated, "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread . . . actions could be questioned by nobody."[246] The special injury rule is conceptually incoherent. As a commentator on citizen suits against the Exxon-Valdez oil spill observed, "in trying to limit the number of suits by individuals representing the general public, the special injury rule actually requires that these representatives be as unrepresentative of the public as possible."[247]

Denise Antolini questioned the utility of the special injury rule, calling it "an anomaly in tort law."[248] "The traditional [public nuisance] doctrine presents a paradox" in which "the broader the injury to the community and the more the plaintiff's injury resembles an injury also suffered by other members of the public, the less likely that the plaintiff can bring a public nuisance lawsuit."[249] Construed as requiring a "unique injury," this doctrine could "directly undermin[e] a plaintiff's ability to be a 'representative' of the threatened public interests."[250]

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[241] *Id.* (citing Prosser, *supra* note 177, at 1005).

[242] *See id.* (citing Prosser, *supra* note 177, at 1005–07).

[243] *Id.* (citing Prosser, *supra* note 177, at 1005–07).

[244] *See id.* at 889.

[245] *See id.* at 891; Akau v. Olohana Corp., 65 Haw. 383, 388, 652 P.2d 1130, 1134 (1982) (following "the trend away from the special injury rule towards the view that a plaintiff, if injured, has standing").

[246] Hodas, *supra* note 181, at 891 (citing United States v. Students Challenging Regul. Agency Procs. (*SCRAP*), 412 U.S. 669, 688 (1973)).

[247] Miles Tolbert, Comment, *The Public as Plaintiff: Public Nuisance and Federal Citizen Suits in the Exxon Valdez Litigation*, 14 HARV. ENV'T L. REV. 511, 514 (1990).

[248] Antolini, *supra* note 179, at 761.

[249] *Id.*

[250] *Id.* at 762.

The precedent on what constitutes sufficient injury for standing to sue is problematic and inconsistent. Functionally, a potential environmental group plaintiff is advised to plead a formal claim that a member's personal, physical use of the land is impaired, in addition to pleading the essence of the battle, which is widespread public injury. This technique is cumbersome and artificial.[251]

One approach to this artifice would restrict the definition of "harm" sufficient for standing to "damage to things, setting back of another's interests, or wrongful violation of another's rights."[252] This is narrower than Restatement definition of harm: a "loss or detriment in fact of any kind to a person resulting from any cause."[253] Further, absent from this list of "harms" are definitions of the "different-in-kind" special injuries sufficient to bring public nuisance claims.[254] Standing requirements of the "special injury" rule thus impose a "high barrier to judicial access."[255] And, as discussed in Part IV, they impose an "artificial" distinction between public and private actions and injuries.[256]

Articulating a separate doctrine for public interest intervention would also avoid artificial and tautological requirements for showing personal, non-public injuries remediable under public interest laws.[257] Hawai'i courts, however, have resolved inconsistencies between public nuisance and injury-in-fact standing in favor of the latter.[258]

### *1. Other Treatments of "Special Injury"*

Other jurisdictions and federal district courts continue to apply the "special injury" rule in public nuisance cases and towards differing conclusions. A U.S. District Court in New Mexico turned to tort law to assess whether "pecuniary loss" constituted a "special injury" different in kind from that suffered by the

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[251] Bullock, *supra* note 188, at 613; *see also* Craig, *supra* note 92, at 175.

[252] Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 924 (2006) (citing JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 32–35 (1984)).

[253] *See* RESTATEMENT (SECOND) OF TORTS § 7 (AM. L. INST. 1965).

[254] *See* Lin, *supra* note 252, at 923 (citations omitted).

[255] Antolini, *supra* note 179, at 776.

[256] *See* Craig, *supra* note 92, at 175.

[257] *See* Antolini, *supra* note 182, at 761–62 (criticizing the "ancient" doctrine of special injury as "an anomalous technical defense in tort law" that has acted "as an unduly strict gatekeeper rather than honoring the fundamental purpose of public nuisance").

[258] The court in *Akau v. Olohana Corp.* traced the proposition that only the state could enforce a public right to beach access to the public nuisance law proposition that prohibited standing to those whose injuries were shared by the public generally. 65 Haw. 383, 386, 652 P.2d 1130, 1133 (1982). Noting trends in law towards injury-in-fact standing, *Akau* rejected this proposition because "it is unjust to deny members of the public the ability to enforce the public's rights when they are injured." *Id.* at 386, 652 P.2d at 1134.

general public due to the "pollution of public waters."[259] The court relied on Section 821C of the Restatement (Second) of Torts, which limited recovery for damages in "an individual action for a public nuisance [to those who] have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public."[260]

Noting "special injury" to a plaintiff's land may include pecuniary loss,[261] the New Mexico court found an illustration of § 821C persuasive: "A, pollutes public waters, killing all the fish. B, who has been operating a commercial fishery in these waters, suffers pecuniary loss as a result. B, can recover for the public nuisance."[262]

The court stated that the "historical roots of the 'special injury' requirement run deep[,]" and thus applied this requirement to conclude that environmental interest plaintiffs would have to prove physical or pecuniary harm and limited their relief to damages in the amount of such proof.[263]

A Florida court declined to apply restrictive "special injury" analyses to determine the standing of an environmental organization whose members used the subject property because its administrative procedures act sought to expand "public access to the activities of governmental agencies."[264]

By contrast, a West Virginia court required plaintiff groups to demonstrate "special injury" to sustain an environmental public nuisance claim.[265] Citing a comment to the Restatement of Torts requiring individuals to have "suffered a harm of a different kind" to recover for public nuisance torts, the court determined the plaintiffs' interest in a clean municipal water supply was not different from that of other municipal water customers and denied standing.[266]

In an Illinois case applying the special injury rule, plaintiff homeowners "directly adjacent" to lakes alleged "sufficient individual harm" to maintain

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[259] *See* New Mexico v. Gen. Elec. Co., 335 F. Supp. 2d 1185, 1239 (D.N.M. 2004) (citing RESTATEMENT (SECOND) OF TORTS § 821C (AM. L. INST. 1979)) (order granting and denying in part defendant's motion to dismiss).

[260] *See id.*

[261] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 821C cmt. d, h (AM. L. INST. 1979)).

[262] *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 821C cmt. h, illus. 11 (AM. L. INST. 1979)).

[263] *See id.* at 1239–41 (citing RESTATEMENT (SECOND) OF TORTS § 821C cmt. a. (AM. L. INST. 1979)); William L. Prosser, HANDBOOK OF THE LAW OF TORTS § 86, at 572 (4th ed. 1971) ("The remedy [for public nuisance] remained exclusively a criminal one until the sixteenth century, when it was recognized that a private individual who had suffered special damage might have a civil action in tort for the invasion of the public right.")).

[264] Friends of the Everglades, Inc. v. Bd. of Trs. of the Internal Improvement Tr. Fund, 595 So. 2d 186, 189–90 (Fla. Dist. Ct. App. 1992) (finding the petitioners' allegations that the development would preclude their recreational use and cause environmental damage was sufficient to show injury which the statute sought to prevent).

[265] Rhodes v. E.I. Du Pont De Nemours & Co., 657 F. Supp. 2d 751, 769 (S.D.W. Va. 2009).

[266] *Id.* at 769–70 (quoting RESTATEMENT (SECOND) OF TORTS § 821C cmt. b); *see* RESTATEMENT (SECOND) OF TORTS § 821C cmt. B (AM. L. INST. 1979) ("The private individual can recover in tort for a public nuisance only if he has suffered harm of a different kind from that suffered by other persons exercising the same public right.").

suit by citing the "unpleasant smell and appearance" of the lake caused by defendant's actions.[267] These cases illustrate disparate approaches to *work around* the special injury rule in environmental nuisance cases and thus support a general trend away from that rule.

### *2. Standing to Intervene*

Hawai'i courts, MPC, and agency litigants have agreed that potential intervenors must demonstrate injury in fact standing.[268] Yet, considerations supporting the requirement of standing to *bring* a case to court are not identical to considerations involved in permitting intervention in processes already underway.[269] The distinction is between "those who wish *to commence* litigation" and "an applicant that wishes *to participate* in litigation, in which the plaintiff has standing, before the court enters an order that may prejudice the applicant."[270]

Notably, article III standing is not required under FRCP Rule 24, nor is it referenced in the few Supreme Court decisions applying that rule.[271] Allowing nonparties to intervene may be beneficial because it permits nonparties to "represent their interests and arguably improves the court's decision making by allowing the presentation of different viewpoints and evidence."[272] Indeed, "ensur[ing] that the best and most relevant information is presented to the decision-making body,"[273] is the "overriding purpose" for Hawai'i agencies to hold contested case proceedings.[274] Further, including intervenors benefits judicial economy because their inclusion may spare parties from relitigating the same issue.[275]

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[267] *See* Willmschen v. Trinity Lakes Improvement Ass'n, 840 N.E.2d 1275, 1281 (Ill. 2005) (emphasis omitted).

[268] *See* Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n, (*PASH II*), 79 Hawai'i 425, 434, 903 P.2d 1246, 1255 (1995).

[269] *See* Karastelev, *supra* note 228; Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263 (1999); Tobias, *supra* note 197.

[270] Tobias, *supra* note 197, at 428.

[271] Karastelev, *supra* note 228, at 456–57, 457 n.14 (citing Trbovich v. United Mine Workers, 404 U.S. 528, 538 (1972) (analyzing intervention of right by the Rule's literal terms without recourse to Article III standing analysis); Donaldson v. United States, 400 U.S. 517, 527–28 (1971) (same); Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., 386 U.S. 129, 133–134 (1967) (same)).

[272] Karastelev, *supra* note 228, at 455.

[273] M. CASEY JARMAN, U. HAWAI'I ENV'T L. PROGRAM, MAKING YOUR VOICE COUNT: A CITIZEN GUIDE TO CONTESTED CASE HEARINGS 6 (2002), http://www.hawaii.edu/ohelo/resources/MakingYourVoiceCount.pdf.

[274] *Id.*; *see generally* HAW. REV. STAT. §§ 91-1 to -18 (2021).

[275] Karastelev, *supra* note 228, at 455–56, 456 n.4 (citing Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 279–80 (1999) (disposition of issues in a single lawsuit may be achieved through liberal intervention and may avoid subsequent lawsuits)).

Less than a showing injury-in-fact standing may be appropriate where an intervenor "merely seeks to protect an interest that might be impaired by the outcome of a lawsuit, rather than present or defend against a legal claim[.]"[276] Separating intervention from standing considerations could "enhance judicial review of environmental claims."[277]

Hawai'i courts have not articulated a separate environmental intervention rule, but have addressed the issue through liberal standing doctrines and by permitting a wide range of situations to meet the "personal stake" prong of the injury-in-fact test for standing.[278] The Hawai'i Supreme court recognizes a trend towards "broaden[ing] the class of persons that have standing to challenge agency action" and "standing cannot be confined only to those who allege economic harm, nor can it be denied to others simply because many persons share the same purported injury[.]"[279]

## III. MPC INTERVENTION PROCEEDINGS

### *A. Protect Wailea Intervention Denied*

The Grand Wailea Resort and Spa ("Grand Wailea"), inclusive of luxury residences, waterfalls, golf and tennis clubs, a floating restaurant, a wedding chapel, and several swimming pools, sprawls over forty-acres on Maui's west coast in Kīhei.[280] First built in 1991, Grand Wailea planned extensive renovations and additions in 2009 and filed for a SMA use and several planned development permits with MPC.[281] The Protect Wailea Beach Committee,[282] Dana Naone Hall ("Naone Hall"), an experienced Native Hawaiian burial practitioner, and landowners of adjoining parcels in Ho'olei, less than 500 feet east of the Resort project, ("Ho'olei Petitioners") filed petitions to intervene

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[276] Karastelev, *supra* note 228, at 457 (footnotes omitted).

[277] Bullock, *supra* note 188, at 606.

[278] *See* Stewart Yerton, *Comment: Procedural Standing and the Hawaii Superferry Decision: How a Surfer, a Paddler, and an Orchid Farmer Aligned Hawaii's Standing Doctrine with Federal Principles,* 12 ASIAN-PAC. L. & POL'Y J. 330, 346 (2010-2011).

[279] Asato v. Procurement Pol'y Bd., 132 Hawai'i 333, 342, 322 P.3d 228, 237 (2014) (quoting Life of the Land v. Land Use Comm'n, 63 Haw. 166, 175, 623 P.2d 431, 440 (1981) (emphasis added) (quoting *In re* Application of Hawaiian Elec. Co., 56 Haw. 260, 265 n.1, 535 P.2d 1102, 1105 n.1 (1975))).

[280] Grand Wailea, a Waldorf-Astoria Resort, *Grand Wailea Fact Sheet* (May 2014) http://www.grandwailea.com/wp-content/uploads/2014/05/Grand-Wailea-Fact-Sheet.pdf (last visited May 2021).

[281] *Maui Planning Commission Regular Meeting September 22, 2009*, CNTY. OF MAUI, HAW. 62, 108–36 (Sept. 22, 2009) [hereinafter *Sept. 22, 2009 Regular Meeting*], https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/12675.

[282] Protect Wailea is an unincorporated association of property owners at Wailea Beach Villas, which lay within 500 feet south of the Grand Wailea project. *See id.* at 134–36.

(collectively, "Protect Wailea").[283] MPC denied all three petitions, all three appealed to the circuit court, and the circuit court reversed MPC's denials.[284]

### *1. Public Testimony in the first Grand Wailea Proceeding*

Prior to voting to deny Protect Wailea's petitions to intervene, MPC took public testimony on the Grand Wailea proposal.[285] Community members testified to concerns that the addition of 310 rooms with 2.8 people per room would turn the beach into a Waikīkī experience for people; with the drainage plan; impacts of the resort expansion on coral reefs and ecology; and view corridors.[286] Concerns raised by Protect Wailea's petition included:

> use and enjoyment of their properties, decrease in the sale and rental value of their properties, impacts on protected resources within the Coastal Zone Management Area, changes in the density and intensity of use of land, native Hawaiian burials, impacts upon visual and open space resources, inconsistency with the Kihei-Makena Community Plan, coastal access and recreational opportunities, overburdening of public beaches, inadequate public parking, infrastructure deficits concerning water source, traffic, drainage, and construct, lack of an environmental assessment, protection of existing open spaces within the 150-foot and 300-foot shoreline setback areas, and public health, safety or compelling public interests.[287]

Isaac Hall, counsel for Protect Wailea testified that the Ho'olei homeowners and the Protect Wailea Beach Committee included adjoining property owners or owners of property within 500 feet of the Grand Wailea.[288] Hall argued that thirty years of Hawai'i case law established that a timely filed petition is to be freely granted and MPC should not consider opponents' contests to facts asserted in the intervention petitions because those allegations should be taken as true in deciding those petitions.[289] Hall also cited *Akau* in support of the principle that "an intervenor can advocate public interest as long as the intervenor is among the injured."[290] In regard to Naone Hall's petition,

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[283] *See id.*

[284] *See* Notice of Appeal at 3, Lee v. Maui Plan. Comm'n*,* Civ. No. 09-1-0899(1) (Haw. 2d Cir. Nov. 25, 2009); Notice of Appeal at 4–90, Lee v. Maui Plan. Comm'n*,* Civ. No. 09-1-0900 (Haw. 2d Cir. Nov. 25, 2009); Notice of Appeal at 4–90, Hall v. Maui Plan. Comm'n*,* Civ. No. 09-1-0901 (Haw. 2d Cir. Nov. 25, 2009).

[285] *See Sept. 22, 2009 Regular Meeting*, *supra* note 281, at 110–133.

[286] *See id.* at 110–11, 121, 125, 134–35.

[287] Findings of Fact, Conclusions of Law, Decision and Order Denying the Protect Wailea Beach Committee, Schuyler W. Lininger, Jr., Mitchell Van Kley, James L. Payne, and Lee Minshull's Petition to Intervene, Filed September 8, 2009 at 4 (FOF No. 10) [hereinafter MPC Wailea FOFs/COLs/Order] (on file with author).

[288] *Sept. 22, 2009 Regular Meeting*, *supra* note 281, at 134–35.

[289] *See id.* at 139.

[290] *Id.* at 140.

Hall argued that under *Ka Pa'akai* holdings, MPC could not "issue the SMA permit and then let somebody figure out what to do if we run into burials."[291]

Grand Wailea argued Protect Wailea and Naone Hall collectively constituted more than twenty intervenors, "[t]hat's gonna make for a disaster in terms of trying to manage a contested case hearing[.]"[292] Commissioner Mardfin inquired as to whether Protect Wailea's position was that MPC was "incompetent" to make the SMA permit determination without intervention.[293] Mardfin noted:

> [Protect Wailea's] initial statement here was, "The interests which the intervenors seek to protect are the same interests protected by the Coastal Zone Management Act," that we are obligated to enforce. And so if you're saying that it's in our competence, also, then why is an intervention necessary if – if we're doing it?[294]

Hall responded that the record was insufficient to allow MPC to make a decision without intervention and, although MPC could ask for more information for the record, Protect Wailea had no assurance that this information would later be inserted into the record.[295]

Commissioner Mardfin also requested a legal interpretation of "freely granted," to which MPC's counsel responded, "if you're in doubt, you should err on the side of allowing intervention[,]" but that those doubts should be colored by whether or not the petitioners raised interests that were to be furthered by Hawai'i's CZMA.[296] MPC discussed the kind of informational lacks that might call for intervention and the procedures whereby MPC would receive that information via the intervention, after which MPC's counsel stated:

> I do think that that is an issue that should be discussed. Because I believe this body has seen interventions where I don't think the issues were discussed far enough before the intervention was granted. And when you got your report back, you discovered that it was a very inadequate hearing that happened.[297]

Another commissioner offered the interpretation of "freely granted" as conditioned on whether "the particular rights of the applicant are shown to be different from those of all other members of the community."[298] Protect Wailea had not, in his opinion, raised such separate, different interests. Further, MPC was to "represent all parts of the community[,]" and Protect Wailea's participation may thus "tend to narrow the discussion rather than keeping it in

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[291] *Id.* at 152.
[292] *Id.* at 157.
[293] *Id.* at 162.
[294] *Id.* at 164.
[295] *See id.* at 164–65.
[296] *Id.* at 181–82.
[297] *Id.* at 184.
[298] *Id.* at 189.

the broad fashion that 205A calls for."[299] MPC denied Protect Wailea Beach Committee's petition for intervention because they had not "differentiated their interest from those of the general public. And, also, to grant would be . . . subjecting the issue to be . . . delayed per . . . 12-201-41(d)(2)."[300]

Emphasizing its discretion to deny petitions to intervene where "admission of additional parties will render the proceedings inefficient and unmanageable;" MPC specified "the fact the concerns raised by [Protect Wailea] are all concerns of the general public which [MPC] is obligated to consider . . ." and SHPD's "no effect" determination and approval of a 2008 archaeological monitoring report as support for its conclusion that admitting the five parties comprising Protect Wailea would render the proceedings inefficient and unmanageable.[301]

MPC's denials recited the refrain that was used in denying other intervenor-petitions: the petitioners did "not have a property interest in the land[]" and "[t]he concerns raised by [petitioners] are all concerns of the general public which [MPC] is obligated to consider, pursuant to [HRS §§ 205A-4; 205A-26(2), (3); and MCC § 12-202-15(f)]."[302]

### *2. Dana Naone Hall's Pled Interests*

MPC also denied Naone Hall's petition to intervene against dissent from Commissioner Mardfin.[303] MPC concluded Naone Hall had no property interest in the subject lands and her concerns "are all concerns of the general public which [MPC] is obligated to consider, pursuant to the aforementioned rules and laws [(HRS §§ 205A-4; 205A-26(2), (3); and MCC § 12-202-15(f))], prior to making a decision on the Application" and she "failed to demonstrate that she will be so directly and immediately affected by the matter before [MPC] that her interest in the proceeding is clearly distinguishable from that of the general public."[304]

Naone Hall is native Hawaiian; amongst "the most experienced Hawaiian burial rights activists[;]"[305] previously served as chair of the Maui/Lanai Island Burial Council; affiliated with the Wailea region; and had wrapped and reinterred many of the burials, which were found at the Grand Wailea Resort and Spa during earlier construction phases between January 1988 and October

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[299] *Id.*

[300] *Id.* at 200.

[301] MPC Wailea FOFs/COLs/Order, *supra* note 287 at 6 ¶ 3, 8 ¶ 9.

[302] *Id.* at 8 ¶ 12.

[303] *Sept. 22, 2009 Regular Meeting*, *supra* note 281, at 202–13.

[304] Findings of Fact, Conclusions of Law, Decision and Order Denying Dana Naone Hall's Petition to Intervene, Filed September 8, 2009 at 7 ¶ 4–7 [hereinafter MPC Naone Hall FOFs/COLs/Order] (on file with author).

[305] Greg Johnson, *Bone-Deep Indigeneity: Theorizing Hawaiian Care for the State and its Broken Apparatuses, in* PERFORMING INDIGENEITY: GLOBAL HISTORIES AND CONTEMPORARY EXPERIENCES 189, 197 (Laura R. Graham & H. Glenn Penny eds., 2014).

1990, with other burials encountered in 2006.[306] The Grand Wailea project was located on a "known traditional Native Hawaiian burial ground and burial site located in a shoreline sand dune area."[307] During the 1987 to 1991 initial construction phase of the Grand Wailea, archaeological monitors encountered 344 native Hawaiian burials that were disinterred.[308] Between 1990-1991, all 344 native Hawaiian burials were reinterred. Again, in 2006, Grand Wailea excavated its grounds to install a Multiceptor degreasing unit, but the excavation project ceased when further in situ native Hawaiian burials were encountered.[309]

Naone Hall observed the Grand Wailea area proposed for resort expansion was on undisturbed land, closer to the shoreline, and would be the area most likely to contain undisturbed burials."[310] Native Hawaiian traditional burials are often located in shoreline sand dunes and thus, often fall within the shorelines of SMAs.[311] In 1938, the largest excavation of iwi kūpuna (1,600 sets) occurred during construction of the Kane'ohe Marine Corps Base on O'ahu.[312] In 1988, Native Hawaiian communities stepped up efforts to protect and care for iwi kūpuna (traditional burials) after developers of the Ritz-Carlton Kapalua Resort excavated over 1,100 ancestral Hawaiian burials from sand dunes overlooking Honokahua Bay.[313]

Hawai'i's legislature responded, passing Act 324, which established the State Historic Preservation Division (SHPD), and required SHPD to take a more active role in managing and identifying burial sites.[314] SMA permitting thus also intersects with SHPD's administration of burial laws under Chapter 6E, HRS.[315]

By letter dated June 24, 2009, SHPD notified MPC that it had reviewed the Grand Wailea project applications and determined "no effect on historic

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[306] MPC Naone Hall FOFs/COLs/Order, *supra* note 304, at 3.

[307] Notice of Appeal at 28, Protect Wailea Beach Comm. v. Maui Plan. Comm'n, Civ. No. 09-1-0899(1) (Haw. 2d Cir. Nov. 25, 2009).

[308] Notice of Appeal at 29, Hall v. Maui Plan. Comm'n, Civ. No. 09-1-0901 (Haw. 2d Cir. Nov. 25, 2009).

[309] *Id.*

[310] Brian Perry, *Grand Wailea Interveners [sic] to Get Second Look*, MAUI NEWS (Sep. 17, 2010) (quoting Dana Naone Hall).

[311] *See* Todd Dickenson, *Hawaiian Burial Rights: The Regrettable Burial of a Rich Cultural History Beneath Urban Development*, 5 PHOENIX L. REV. 811, 814 (2012) (citing SAMUEL MANAIAKALANI KAMAKAU, KA PO'E KAHIKO: THE PEOPLE OF OLD 40 (Dorothy B. Barrère ed., Mary Kawena Puku'i, trans. 1992)).

[312] Natasha Baldauf, *One-Way Track to Desecration: Implications of the Honolulu Rail's Failure to Comply with Protections Mandated for Native Hawaiian Burials,* 12 ASIAN-PAC. L. & POL'Y J. 141, 153 n.86 (2010).

[313] *Id.* at 155 (citations omitted).

[314] *See id.* at 155 n.101 (citing Act 324, 1989 Sess. Laws Haw. 960–62 (codified as amended at HAW. REV. STAT. § 6E-3 (2021)).

[315] *See generally* NATASHA BALDAUF & MALIA AKUTAGAWA, KA HULI AO CENTER FOR EXCELLENCE IN NATIVE HAWAIIAN LAW, HO'I HOU I KA IWIKUAMO'O: A LEGAL PRIMER FOR THE PROTECTION OF IWI KŪPUNA IN HAWAI'I NEI (2013), http://hdl.handle.net/10125/66331.

resources" because of precautionary archaeological monitoring that would be in place during ground altering.[316] SHPD's "no effect" determination factored into Naone Hall's decision that her intervention was necessary and she intended to push for a thorough archeological inventory survey (AIS).[317]

MPC Commissioner Douglas Mardfin raised concerns about MPC's obligations to assess Native Hawaiian traditional and customary usage and urged MPC not to deny Naone Hall's petition.[318] He argued, notwithstanding SHPD's opinion, *Ka Pa'akai v. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000) would apply and obligated MPC to have an AIS completed prior to granting the permits.[319] An AIS had initially been commissioned, but according to Protect Wailea's allegations, Grand Wailea halted the surveying because it interfered with hotel occupancy and could potentially harm utility lines, whose locations were unknown.[320] Commentators have noted Naone Hall's thwarted efforts to participate in MPC proceedings was "a battle that should not have needed to be fought, as the legal issues in question had been settled in Hawaiians' favor more than twenty years earlier."[321]

Other MPC Commissioners opined SHPD's monitoring plan provided for consultation with the Maui/Lāna'i Island Burial Council if iwi were encountered, and Naone Hall could participate in Grand Wailea's cultural advisory council.[322] Commissioner Mardfin pointed out that iwi were likely to be encountered by tractors and backhoes, as opposed to "neat little archaeologists picking over burial sites millimeter by millimeter."[323] He continued, "if we're not gonna involve the Burial Council before, we're gonna wait until a bunch of these are smashed before we call the Burial Council in, something to me is very wrong about that."[324] Further, Naone Hall's intervention would not render proceedings "inefficient and unmanageable[;]" rather, she possessed expertise that MPC lacked, which would provide the benefit of a full record.[325] Commissioner Mardfin signed MPC's order denying Naone Hall's petition for intervention with the note: "I voted Nay."[326]

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[316] MPC Wailea FOFs/COLs/Order, *supra* note 287, at 4 ¶ 11; *see* HAW. CODE R. §13-284-5(b) (LexisNexis 2021) ("An agency shall first consult the SHPD to determine if the area proposed for the project needs to undergo an inventory survey to determine if historic properties are present.").

[317] *See* Johnson, *supra* note 305, at 197.

[318] SEPT. 22, 2009 REGULAR MEETING, *supra* note 281, at 202–04.

[319] *See id.*

[320] Notice of Appeal at 30, Protect Wailea Beach Comm. v. Maui Plan. Comm'n, Civ. No. 09-1-0899(1) (Haw. 2d Cir. Nov. 25, 2009).

[321] *See* Johnson, *supra* note 305, at 196.

[322] *See* SEPT. 22, 2009 REGULAR MEETING, *supra* note 281, at 205–13.

[323] *Id.* at 209.

[324] *Id.*

[325] *Id.* at 204.

[326] MPC Naone Hall FOFs/COLs/Order, *supra* note 304, at 10.

### *3. First Wailea Appeal*

On November 25, 2009, Protect Wailea appealed MPC's decision to the Circuit Court of the Second Circuit of the State of Hawai'i (circuit court) and won.[327] Protect Wailea alleged nine causes of action against MPC: (1) unlawful denial of right to intervene; (2) unlawful denial of permissive intervention; (3) denial of administrative due process;[328] (4) core requirements for a SMA permit were not satisfied, rendering the SMA permit void; (5) violating state protections for Native Hawaiian burials under HRS § 6E-42; (6) violating Hawai'i's CZMA by failing to protect valuable cultural resources before granting the SMA permit; (7) the SMA permit was void because inconsistent with the Kihei-Makena Community Plan; (8) adverse impacts within protected coastal areas; (9) the environmental assessment exemption was illegal; and (10) Protect Wailea was denied a fair hearing by an impartial administrative tribunal.[329]

Protect Wailea also alleged MCC § 12-201(b), "to the extent that it attempts to impose a requirement that an Intervenor must demonstrate that its interest is clearly distinguishable from that of the general public . . . is invalid, void or voidable, as written, because it is inconsistent with thirty years of case law in the State of Hawaii."[330] Protect Wailea specified that MPC Rule § 12-201-41(b) was unlawful as it was inconsistent with *Akau*.[331] MPC Rule § 12-201-41(b) remains in force today.[332] Protect Wailea further claimed MPC's determinations were "merely a pretext for the basic decision" that they did not want to conduct any contested case hearings.[333]

The circuit court found MPC had failed to discuss on record the injury-in-fact test or factors under MPC Rule §12-201-41(b) or (d) and failed to give a factual basis for its denial of mandatory or permissive intervention.[334] Citing "a long line of appellate decisions that support the principle that adjoining or nearby property owners . . . have standing entitling them to intervene as a matter of right[,]" the circuit court concluded Hoʻolei Petitioners had a

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[327] *See* Notice of Appeal at 3, Lee v. Maui Plan. Comm'n*,* Civ. No. 09-1-0899(1) (Haw. 2d Cir. Nov. 25, 2009); Notice of Appeal at 4–90, Lee v. Maui Plan. Comm'n*,* Civ. No. 09-1-0900 (Haw. 2d Cir. Nov. 25, 2009); Notice of Appeal at 4–90, Hall v. Maui Plan. Comm'n*,* Civ. No. 09-1-0901 (Haw. 2d Cir. Nov. 25, 2009).

[328] After MPC denied the petition, PPM added several documents to the record, upon which Protect Wailea was only permitted to respond through three-minute long testimonies. *See* Notice of Appeal at 23–24, Protect Wailea Beach Comm. V. Maui Plan. Comm'n*,* Civ. No. 09-1-0899(1) (Haw. 2d Cir. Nov. 25, 2009) [hereinafter Protect Wailea Notice of Appeal].

[329] *Id.* at 4-50.

[330] *Id.* at 14.

[331] Brief of Petitioner-Appellant, Protect Wailea, *supra* note 210, at 13 (citing MPC RULES CH. 201, *supra* note 5, § 12-201-41(b)).

[332] *See* MPC RULES CH. 201, *supra* note 5, § 12-201-41(b).

[333] Protect Wailea Notice of Appeal, *supra* note 328, at 20.

[334] MPC Wailea FOFs/COLs/Order, *supra* note 287, at 10.

"presumptive property interest" in the permit applications.[335] The circuit court found Naone Hall, "[a]s a Native Hawaiian seeking to protect and preserve burials threatened with harm or destruction through the development project through the exercise of her constitutionally protected traditional and customary rights to care for the bones of the dead," had legal rights required to be determined in MPC's proceedings on Grand Wailea project permits.[336]

The circuit court corrected MPC's view that potential intervenors could be disqualified by holding interests shared with the general public; "[e]ven if Intervenors are raising concerns that may also be public concerns, the only relevant issue is whether Interevenors are 'among the injured' – an issue the MPC never addressed."[337] MPC had placed petitioners in a double bind in which they were required to satisfy the third element of the injury in fact test by showing their interests fall within the zone of interests the CZMA was designed to protect; "[t]he fact that the Intervenors demonstrated to the MPC that the interests they sought to protect were within the zone of interests of the CZMA statute should not, therefore, be used as justification to deny intervention."[338] MPC's decision was in direct conflict with *Akau v. Olohana Corp.*, which held "a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact[.]"[339]

In *Akau*, Native Hawaiian William Akau, Jr. initiated a class action suit against private landowners who had closed several miles of public beach between Spencer Beach Park and Hapuna Beach Park on the Kona coast of Hawai'i island.[340] The state-defendant argued only the state could enforce the public's right-of-way on public beaches, but the court rejected this reasoning.[341] Although *Akau* did not address an intervenor petition, but standing for a class of plaintiffs, it clearly prohibited MPC's denial of intervention by right based on a requirement that Protect Wailea petitioners demonstrate injuries clearly distinguishable from the general public.[342]

The circuit court found MPC failed to provide any factual basis "to explain how [Protect Wailea/Naone Hall's] interests were not clearly distinguishable from those of the general public[;]" or "to explain how the admission of additional parties would render the proceedings inefficient and unmanageable."[343] This was consistent with Hawai'i case law, holding "Native

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[335] *Id.* at 18–19.

[336] *Id.* at 19.

[337] *Id.*

[338] *Id.* at 20.

[339] *See id.*; Akau v. Olohana Corp., 65 Haw. 383, 388–89, 652 P.2d 1130, 1134 (1982).

[340] *Akau*, 65 Haw. at 384–85, 652 P.2d at 1132.

[341] *Id.* at 386–89, 652 P.2d at 1133–1134.

[342] *See id.* at 388–89, 652 P.2d at 1134 ("We hold, therefore, that a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action.").

[343] Findings of Fact, Conclusions of Law, and Decision and Order at 10, Protect Wailea Beach

Hawaiians who exercise customary rights within an ahupua'a have interests distinguishable from the general public that afford them standing to oppose development in that ahupua'a."[344] Further, the circuit court found MPC Rule §§ 12-201-52 and -90 could assure that contested case hearings would not be unreasonably delayed, inefficient, or unmanageable and concluded "[n]o rational basis exist[ed] on the record in this case for finding that the intervention by Appellants/Plaintiffs in formal contested case proceedings would make those formal contested case proceedings 'inefficient and unmanageable.'"[345]

At the circuit court hearings, the judge "lectured [MPC] about setting the clock back twenty years" and asked, "What is the point of law if administrative bodies constantly reinvent its framework to suit their immediate needs?"[346] The circuit court voided Grand Wailea's permits and remanded the case to MPC with orders to reconsider the intervention-petitions.[347] The circuit court, however, did not address Protect Wailea's contentions regarding the unlawfulness of MPC Rules, on their face and as applied.[348]

The court's reticence to extend its review to the conflict between MPC Rules and the injury-in-fact test for standing permitted the issue to reappear in future SMA proceedings, until January 2020, when the Grand Wailea Resort sought another SMA permit to expand its resort.

At its January 28, 2020 regular meeting, the Planning Commission granted a petition to intervene filed by Hawaiian cultural practitioner organizations: Mālama Kakanilua, Pele Defense Fund, and Ho'oponopono o Mākena, in proceedings on the Grand Wailea Resort SMA use permit and planned development permit applications in Docket No. SM1 2018/0011; PD1 2019/0001; PD2 2018/0003. The contested case proceedings on the Grand Wailea permits are ongoing as of this writing.

### *4. Ongoing Wailea Appeal*

By petition dated June 28, 2019, Intervenors Mālama Kakanilua, Pele Defense Fund, and Ho'oponopono O Mākena, each Kānaka Maoli traditional and customary practitioner organizations, raised impacts on their rights as traditional and customary practitioners consequent to new resort owner BRE Iconic GWR Owner, LLC's proposed Special Management Area (SMA) use permit, planned development step II approval, and a shoreline setback

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Comm. v. Maui Plan. Comm'n, Civ. No. 09-1-0899(1) (Haw. 2d Cir. Sept. 15, 2010) [hereinafter Protect Wailea Decision].

[344] *See* David L. Callies et al., *The Moon Court, Land Use, and Property: A Survey of Hawai'i Case Law 1993-2010*, 33 U. Haw. L. Rev. 635, 665 (2011) (citing Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n, 79 Hawai'i 425, 434 n.15, 903 P.2d 1246, 1255 n.15 (1995)).

[345] Protect Wailea Decision, *supra* note 343, at 10–11, 23.

[346] *See* Johnson, *supra* note 308, at 198.

[347] Protect Wailea Decision, *supra* note 343, at 25.

[348] *See* Brief of Petitioner-Appellant, Protect Wailea, *supra* note 210, at 10–18.

assessment for expansion of the Grand Wailea resort.[349] MPC granted this petition to intervene and contested case proceedings are presently ongoing.

### *B. Wahikuli Community Intervention*

On November 2, 2011, the Wahikuli Neighborhood Community Association (Wahikuli Association) filed a petition to intervene in the Iglesia Ni Christo Church's (the church's) application for a SMA use permit in Lahaina, Maui.[350] In their petition, the Wahikuli Association asserted its members were adjoining landowners and lived near the parcel where a home, which had been used by a church, was to be demolished and rebuilt as a larger church. [351] Wahikuli Association alleged its members would be directly and immediately affected by the project's impacts on traffic, scenic vistas, wastewater, coastal waters, drainage, amongst other concerns. The Wahikuli Association petition also stated, "[t]he interests which the Petitioners seek to protect are the same interests protected by the [Hawai'i CZMA] and the Hawai'i State Constitution."[352]

At its November 22, 2011 meeting, MPC first took testimony on the church's SMA permit application and received Wahikuli Association's petition to intervene, which the church opposed.[353] At its November 13, 2012 meeting, MPC held a public hearing on the church's SMA permit application and then another on Wahikuli Association's petition to intervene in SMA application proceedings concerning church construction.[354] After receiving oral arguments from counsel, MPC voted to deny the Wahikuli Neighborhood Community Association's petition to intervene in SMA application proceedings concerning church construction.[355]

During the public hearing phase of the meeting, Wahikuli Association council raised concerns with the construction's compliance with county general and community plans, wastewater, parking, traffic, and the

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[349] *See generally* Dep't of Plan. Report & Recommendation Jan. 28, 2020, *In re* Applications of BRE Iconic GWR Owner, LLC, Docket No. SM1 2018/0011, PD1 2019/0001, PD2 2018/0003 (Maui Plan. Comm'n Jan. 28, 2020), https://www.mauicounty.gov/DocumentCenter/View/120778/012820_Agenda-Item-D1_BRE-ICONIC-GWR-OWNER-Grand-Wailea_SM1-2019-0011-PD1-2019-0001-PD-2018-0003_report. The author is counsel for intervenors in this proceeding.

[350] Petition to Intervene by Wahikuli Neighborhood Cmty. Ass'n, *In re* Allan A. Villanueva, Nos. SM1 20080025/CUP 20080006 (Maui Plan. Comm'n Nov. 2, 2011) (on file with author).

[351] *Id.*

[352] *Id.* at *3.

[353] *Maui Planning Commission Regular Minutes November 22, 2011*, CNTY. OF MAUI, HAW. 1–2, 52–53 (Nov. 22, 2011), http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/16309.

[354] *Maui Planning Commission Regular Minutes November 13, 2012*, CNTY. OF MAUI, HAW. 1, 2, 27 (Nov. 13, 2012) [hereinafter *MPC Nov. 13, 2012 Meeting Minutes*], http://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/17459.

[355] *Id.* at 27–40.

incompleteness of the SMA permit application.[356] The church's counsel argued Wahikuli Association's petition could only be reviewed "under the third door" of interests clearly distinguishable from that of the general public, but the Wahikuli Association had no such distinguishable interests.[357] Similarly, Maui county corporation counsel argued Wahikuli Association raised "issues such as wastewater, aesthetics, landscaping and the style of architecture . . . which relate to the community-at-large[,]" but had not provided evidence of "specific injuries to specific proposed intervenors."[358]

After going into executive session, one Commissioner stated that Wahikuli Association's property interests were "actually no different than the general public and this board is a general public board made up of general public members. And so the information is no different."[359] The commissioner further opined that Wahikuli Association was "just a private entity to express themselves and perhaps even say something about not in my backyard[,]" and cautioned "[t]his is the kind of invidiousness that I think this Commission is gonna be addressing and can address by ourselves. We don't need another party to deal with this."[360] Another Commissioner noted his belief that Wahikuli Association members lacked a property interest in the subject parcel and recited the standard; "admitting them as a party would make the proceedings unwieldy and . . . they do not bring to the table additional information which cannot be found in the course of our normal deliberation with members of the general public."[361] While applauding Wahikuli Association for organizing itself, another commissioner concurred with denying the intervention on the basis that not enough facts had been presented.[362]

On November 20, 2012, the Maui Planning Department issued a SMA permit for the church.[363] The Wahikuli Association action highlighted questions about how specific persons could gain intervenor status on the basis of interests shared with the general public.[364] Such questions remained unanswered by MPC commissioners' reference to their "normal deliberation" with the general public because no further public input was afforded[365] and the

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[356] *Id.* at 28–30.

[357] *Id.* at 31.

[358] *Id.*

[359] *Id.* at 39.

[360] *Id.*

[361] *Id.*

[362] *Id.* at 40.

[363] *See* Letter from William Spence, Plan. Dir., Maui Cnty., to Marcelino Raza, Jr., Architect (Nov. 20, 2012) (regarding the approval of the Special Mangement Area (SMA) Use Permit and County Special Use Permit (CUP) for the demolition of existing and construction of New Iglesia Ni Cristo Church Facility) (on file with author).

[364] *See id.*

[365] Wahikuli Association filed objections to MPC's findings, conclusions, and order denying their petition to intervene, thus occasioning a second opportunity for MPC to receive public testimony at its January 22, 2013 meeting. *See Maui Planning Commission Regular Minutes*

church's SMA permit was issued a week later.[366] When would MPC receive this further public input? This question arose again in MPC's denials of the Kahoma Village Association petition for intervention in 2014.[367]

### *1. Can an Agency be a Party-in-Interest?*

MPC's claim to representing the general public interest in itself, repeated a claim from the Protect Wailea petition and would again be repeated in the Kahoma Village Association petition proceedings.[368] MPC submitted this argument under MCC §12-201-41(d), which affords MPC discretion to deny petitioners who have interests substantially the same as the applicant or a party to the proceeding, would render proceedings inefficient, or would not aid in developing a full record.[369] In other words, MPC's interests in enforcing Hawai'i's CZMA meant they, as an existing party, would already defend petitioners' interests in enforcement of the CZMA.

The commissioner's observation that MPC was composed of members of the general public could not support denial of intervention on the basis that petitioners' interests were substantially the same as MPC as an existing "party."[370]

In applying the HRCP Rule 24 four-part test to assess a petition to intervene, the Ninth Circuit held that the burden of showing a petitioner's interests would be inadequately represented by other defendants "is minimal."[371] *Hoopai v. Civil Service Commission,* the Hawai'i Supreme Court reviewed a lower court's denial of the United Public Workers' (UPW) petition to intervene in a collective bargaining agreement dispute on the basis that UPW would be able to intervene upon remand of the case to the Hawai'i Civil Service Commission, a defending party in the case before the circuit court.[372] The *Hoopai* court concluded petitioners-to-intervene needed only to show their interests *may* be inadequately represented by other defendants in order to merit intervention-by-right under HRCP Rule 24(a)(2).[373] Like the Civil Service Commission in *Hoopai*, MPC was not a participant or a "party" to the

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*January 22, 2013*, CNTY. OF MAUI, HAW. 1, 52, 53 (Jan. 13, 2013), https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/17649. MPC called for public testimony on the objections, but seeing none, immediately closed the public testimony period. *Id.* at 53.

366 Letter from William Spence to Marcelino Raza, Jr., *supra* note 363.

367 *See infra* Part III.D.

368 *See infra* Part III.D.

369 *See infra* Part III.D.

370 *See infra* notes 446–48 and accompanying text; MPC RULES CH. 201, *supra* note 5, § 12-201-41(d)(1).

371 *See* Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983).

372 *See* 106 Hawai'i 205, 212, 103 P.3d 365, 372 (2004).

373 *Id.* at 217, 103 P.3d at 377.

process and thus its interest was "substantially different" from the Wahikuli Association.[374]

### *2. Capture Theory*

MPC's claim to stand-in for the public interest, rendering intervention by community groups' redundant, may fail to recognize how liberal public participation protects against regulatory capture. Capture theory grew out of criticism of the classical view that government policymakers are "public individuals" who endeavor to create policies best for the polity and in the public interest.[375] Instead, capture theory posits government regulation as "an arena in which special interests contend for the right to use government power for narrow advantage[.]"[376] One remedy for agency capture is "citizen participation in environmental law."[377] Concerns giving rise to capture theory provide further bases for opposing MPC's position that its interests were identical to those of environmental interest group-petitioners.

Further, environmental group participation may rather aid MPC decision making. One study of interventions into U.S. Fish and Wildlife Service listing procedures pursuant to the Endangered Species Act found, "little or no support for the hypothesis that FWS is more expert than outside groups in identifying species at risk" and "limited support for the notion that FWS is more sensitive to cost or conflict than outside groups in identifying species that warrant listing."[378] Rather than rendering proceedings inefficient, these non-government groups were able to bring "dispersed" information about species risks to bear on agency decision making.[379]

### *3. Allegations of Fact Sufficient to Show Injury*

Wahikuli Association appealed to the circuit court, which affirmed MPC's grant of the SMA permit.[380] The circuit court found Wahikuli Association members, although adjoining neighbors, did not have a property interest in the subject land and their testimonies concerned traffic and impacts of the additional church in general, and concluded they had failed to meet their

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[374] *See id.*

[375] *See* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis,* 6 J.L. ECON. & ORG. 167, 168–69 (1990).

[376] *Id.* at 167.

[377] Eric Biber & Berry Brosi, *Officious Intermeddlers of Citizen Experts? Petition and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 325 (2010).

[378] *Id.* at 363.

[379] *Id.* at 364.

[380] Findings of Fact, Conclusions of Law, Decision and Order, Wahikuli Neighborhood Ass'n v. Maui Plan. Comm'n, Civ. No. 12-1-0954(2) (Haw. 2d Cir. June 12, 2013) (on file with author).

burden of showing an actual or threatened injury fairly traceable to the church's actions (injury-in-fact).[381]

In reviewing the circuit court affirmance of MPC's denial of Dairy Road Partners' petition to intervene, the Hawai'i Intermediate Court of Appeals (ICA) reversed the circuit court's conclusion that the petitioner had failed to "provide sufficient facts or allegations to demonstrate that it has suffered an actual or threatened injury or that such injury is traceable to [MPC's] conduct."[382] Dairy Roads Partners had declared to the circuit court that it had observed traffic increases and believed that, absent infrastructural improvements, a proposed development would contribute to negative traffic impacts and flooding.[383] The *Dairy Roads* court noted that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice[,]"[384] and concluded Dairy Road Partners had alleged facts that would establish that it had standing to intervene.[385] Although a memorandum opinion, *Dairy Roads* counsels that petitioners' burden for establishing a right to intervention should be lessened.[386]

### *C. Big Island Scrap Metal: Private Interests Clearly Distinguishable from the General Public*

Where MPC found a petitioner's interests to not be clearly distinguishable from those of the general public, that petitioner could also not distinguish itself with interests of a private, commercial nature.

On January 24, 2012, MPC reviewed a petition to intervene[387] in proceedings on a request for an amendment to a Special Accessory Use (SAU) Approval.[388] MPD's legal counsel opposed claims for intervention as a matter of right by petitioner Schnitzer Steel because its claim was based on a competitive business interest and they failed to carry their burden of demonstrating "market surveys or financial data, any thing that would show how they would be affected."[389] MPD also opposed permissive intervention on

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[381] *Id.* at 8, 12-13.

[382] Dairy Rd. Partners v. Maui Plan. Comm'n, No. CAAP-11-0000789, 2015 WL 302643, at *4, *6 (Haw. App. Jan. 23, 2015).

[383] *Id.* at *5-6.

[384] *Id.* at *5 (quoting Sierra Club v. Haw. Tourism Auth. *ex rel.* Bd. of Dirs., 100 Hawai'i 242, 250, 59 P.3d 877, 885 (2002)).

[385] *Id.* at *8.

[386] *See id.* at *5–6.

[387] *Maui Planning Commission Regular Minutes January 24, 2012*, CNTY. OF MAUI, HAW. 49–53 (Jan. 24, 2012), http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/16714 (deferring discussion of intervention petition until February 28, 2012).

[388] *See id.*; COUNTY OF MAUI, HAW., CODE § 19.18.020 (2021) (describing permitted uses in a Maui County B2 Community Business District).

[389] *Maui Planning Commission Regular Meeting February 28, 2012*, CNTY. OF MAUI, HAW. 37 (Feb. 28, 2012) [hereinafter *MPC Feb. 28. 2012 Meeting Minutes*], http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/16687.

the basis that Schnitzer Steel's participation would "overly broaden the issues to take into account issues such as Big Island's market share as opposed to Schnitzer's market share and the economic impact, if any, on Schnitzer if Big Island is allowed to [amend their SAU approval.]"[390] As with other intervenor-petitioners, MPD further urged denial on the basis of the time and expense of contested cases and, again, cited the "expertise of the Commission itself. The issues you're asked here asks [sic] to decide on whether they be the issues on the petition to intervene or the issues on the ultimate applications are well within your experience and expertise."[391] After hearing arguments from the applicant, MPD, and Schnitzer Steel, MPC went into executive session.[392]

Just prior to unanimously voting to deny the petition to intervene, a commissioner commented that Schnitzer Steel:

> clearly ha[s] a competitive interest in this [proceeding], . . . but that's not the issue before us. We're supposed to be looking at public interest and I believe that their public interest – I believe that their interest aside from perhaps, and only perhaps, a competitive interest is not distinguishable from that of the general public. So I believe that it's a matter of right they don't have a standing to intervene.[393]

On the motion to deny permissive intervention, the same commissioner stated, "I think their interest is substantially the same as the public interest" and their admission would "render [proceedings] inefficient and unmanageable because they want to raise issues about competitive effect."[394] MPC denied Schnitzer Steel's petition for permissive intervention without further discussion.[395]

The Schnitzer Steel intervention denial further elaborates the catch-22 within which potential intervenor-petitioners in other MPC permit proceedings found themselves.[396] First, "public" interests were not distinguished from the general criteria MPC were obligated to consider in their decision making.[397] Yet, private business interests could not "clearly distinguish[]"[398] a petitioner because MPC was "suppose[d] to be looking at public interest[.]"[399] Insofar as Schnitzer Steel provided "valuable information the Commission can use[,]" MPC reasoned permissive intervention would be denied because they raised interests "substantially the same as the public interest."[400] Issues raised beyond

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390 *Id.* at 38.
391 *See id.*
392 *Id.* at 42.
393 *Id.* at 43–44.
394 *Id.* at 44.
395 *See id.* at 44–45.
396 *See supra* notes 387–395 and accompanying text.
397 *See supra* notes 389, 393, and accompanying text.
398 *See* MPC RULES CH. 201, *supra* note 5, § 12-201-41(b).
399 *See MPC Feb. 28. 2012 Meeting Minutes*, *supra* note 389, at 44.
400 *Id.* at 44.

the public interest, yet again, would "overly broaden" and "render inefficient" the proceedings so as to give MPC "good cause" to deny the petition.[401]

MPC took a similar stance on a petition to intervene filed by Dairy Roads Partners, who raised concerns relating to traffic and drainage issues consequent to a SMA permit application.[402] The commissioner who moved to deny the petition stated, "the intervenor's right and standings are really similar to the general public" and "[a]dding this intervention I feel would be complicating and rendering this process inefficient . . . [i]f I'm gonna hear the same thing over or read the same thing over then I'd rather not do it."[403] MPC voted to deny the petition, with Commissioner Mardfin voting against the motion, as he had also done for the Protect Wailea petition.[404]

### *1. Freely Granting Interventions*

Like Hawai'i's county planning commissions, the State of Hawai'i Land Use Commission (LUC) is subject to statutes and rules requiring intervention to be "freely granted[.]"[405] The meaning of this clause is that "[a]ny person shall be permitted to intervene."[406] In *Life of the Land v. Land Use Commission*, the Hawai'i Supreme Court rejected the Land Use Commission conclusion that an environmental organization lacked standing because the LUC's action would not injure rights which are "personally and peculiarly theirs."[407] The Hawai'i Supreme Court concluded authorities governing the LUC and agency proceedings demonstrated a legislative policy to "encourage[] broad public participation, with intervention to be freely granted."[408]

The Hawai'i County Planning Commission's (HPC's) application of "freely granted" in the next example was consistent with the high state court's interpretation. On May 7, 2010, HPC considered an SMA permit application

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[401] *See supra* notes 393, 398, and accompanying text. *See also* MPC RULES CH. 201, *supra* note 5, § 12-201-41(d).

[402] *See Maui Planning Commission Regular Minutes September 13, 2011*, CNTY. OF MAUI, HAW. 18 (Sept. 13, 2011), https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/16232.

[403] *Id.* at 30.

[404] *Id. See supra* note 330 and accompanying text.

[405] *See* HAW. REV. STAT. § 205-4(e)(4) (2021) ("Leave to intervene shall be freely granted" in proceedings on amendments to district boundaries); HAW. CODE R. § 15-15-52(d) (LexisNexis 2021) ("All other persons may apply for leave to intervene, which shall be freely granted . . . .").

[406] Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 444 (1960).

[407] *See* Life of the Land v. Land Use Comm'n, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981); Pam Bunn & Wayne Costa, Note, Public Access Shoreline Hawaii v. Hawaii County Planning Commission*: The Affirmative Duty to Consider the Effect of Development on Native Hawaiian Gathering Rights*, 16 U. HAW. L. REV. 303, 312 (1994).

[408] Life of the Land, Inc. v. W. Beach Dev. Corp., 63 Haw. 529, 631, 633, P.2d 588, 590 (1981).

from Hu Honua Bioenergy Company and many submitted petitions to intervene in contested case hearing on that application.[409] Prior to reviewing those petitions, HPC explained one could attain "formal status" by establishing an interest "clearly distinguishable from that of the general public[,]" which would consist of "happen[ing] to live close, . . . some property interest in the land or lawfully reside on the land[,] . . . [o]r even if [one doesn't] have an interest different from the public generally the proposed action [would cause one] actual or threaten[ed] injury in fact," or Hawaiian traditional and customary practitioners.[410] Each petitioner was subject to cursory questioning and HPC admitted approximately twenty-one intervenors on the basis of proximity to the proposed project.[411] Of those admitted, approximately a half a dozen people who were not physically present were represented by their neighbors.[412] HPC addressed all of the requests for intervention, excluding only one, and concluded its meeting in less than an hour and a half.[413]

### *2. Intervening for Financial Gain?*

MPC's relative reticence to grant intervenor status is a recent development.[414] Beginning in 1997, MPC granted an intervention that gave rise to what its hearings officer called "perhaps the most complex special management area proceeding the county has faced in at least the last 20 years."[415] In 2005, MPC granted intervenor status to West Maui Preservation Association, Inc.'s (WMPA) in the Honua Kai condominium project SMA permit proceedings.[416] Both interventions resulted in settlement agreements under which intervenors allowed projects to go forward and imposed conditions on that project, including receipt of financial benefits.

Citizen suit settlements are generally structured to avoid creating profit motives for citizen-enforcers, however spectres of disingenuity generally

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[409] *Windward Planning Commission Hearing Transcript May 7, 2010*, CNTY. OF HAW., HAW. (May 7, 2010), http://records.hawaiicounty.gov/WebLink/docview.aspx?id=12027&dbid=1&cr=1. *See generally Planning Department*, CNTY. OF HAW., HAW. 225, 231, https://lrb.hawaii.gov/wp-content/uploads/CountyOfHawaii_guide.pdf (last visited Sept. 24, 2021) ("The Planning Department consists of a Planning Director, Windward Planning Commission, Leeward Planning Commission, and necessary staff.").

[410] *Windward Planning Commission Hearing Transcript May 7, 2010*, *supra* note 409, at 27.

[411] *Id.* at 28–40.

[412] *Id.*

[413] *Id.* at 43.

[414] *See supra* Part III.A.

[415] *See* Harry Eager, *N. Beach Settlement Called 'Wonderful'*, THE MAUI NEWS, at A1 (Oct. 14, 1998), *quoted in* SYDNEY LEHUA IAUKEA, KEKA'A: THE MAKING AND SAVING OF NORTH BEACH WEST MAUI 185 (North Beach-West Maui Benefit Fund Inc., 2014).

[416] Maui Planning Commission, Meeting Agenda, at 2 (Nov. 9, 2004), http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/4182 (last visited May 2021).

haunt public interest litigation.[417] Conflicts between a teachers' union and a school district's administration belied claims to a "cancer-cluster" on school grounds claim; a business competitor alleged misinformation about an applicant's hazardous waste treatment facility to derail its grant of a Resource Conservation Recovery Act permit; and a medical center hired a public relations firm to testify against a lease to a recycling facility – so that the medical center could expand into the proposed location.[418]

Standing and intervenor status are things of value.[419] In environmental cases, petitioners' standing gives them influence over the use of a resource, which affects a developer's or owner's property.[420] In this sense, "[a] grant of standing to an environmental advocacy group is thus a transfer of property rights from resource owners to environmental interest groups"[421] that some have "considered 'an off-budget entitlement program for the environmental movement.'"[422] Further, environmental activist organizations benefit because they have "organizational incentives to bring suits for the purpose of attracting or retaining members."[423] Studies of federal citizen-suits have led some to characterize public interest environmental suits as vehicles for settlements that "extort" monies from defendants.[424] Financial incentives for intervention, however, may rather mitigate the necessary legal costs of intervention.[425] In the 1970-80s, agencies provided specific funding to promote public interest intervention.[426]

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[417] *See* Carol J. Forrest, *Hidden Agendas: How Dubious Motives Can Lurk Behind Environmental Issues – and Complicate Public Dialogue,* ENV'T QUALITY MGMT. 1, 17 (2010) (suggesting that two structures may incentivize public interest litigation: (1) "credit" programs providing payments to environmental organizations; and (2) reimbursement of attorneys' fees paid at private-attorney rates, which are often higher than rates of attorneys who work for nonprofit environmental advocacy groups); *see also* Bruce L. Benson & Julian Simon Fellow, *Enviro-Extortion: Private Attorneys General and the Use and/or Threat of Environmental Litigation to Extract Involuntary Wealth Transfers*, ACADEMIA, https://www.academia.edu/22435447/Enviro_Extortion_Private_Attorneys_General_and_the_Use_and_or_Threat_of_Environmental_Litigation_to_Extract_Involuntary_Wealth_Transfers (last visited Oct. 30, 2021).

[418] Forrest, *supra* note 417, at 1–2.

[419] *See* A. H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen-Suit Provisions of Environmental Legislation*, 12 DUKE ENV'T L. & POL'Y F. 1, 3 (2001).

[420] *Id.* at 3.

[421] *Id.* at 4.

[422] *Id.* at 9 (citing Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 363 (1990)).

[423] Adler, *supra* note 95, at 50 (quoting Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 840 (1985)).

[424] *See* Benson & Fellow, *supra* note 417, at 11–27.

[425] Michael I. Jeffery, *Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People Back into the Picture*, 19 ARIZ. J. INT'L & COMP. L. 643, 661 (2002).

[426] *See* Susan B. Flohr, Comment, *Funding Public Participation in Agency Proceedings*, 27 AM. U.L. REV. 981 (1978).

In 2012, MPC received the 2011 annual report of funds disbursed to WMPA pursuant to a settlement agreement with SMA permit-holder, SVO Pacific, Inc. ("SVOP, Inc.").[427] At a regular MPC meeting, MPC's counsel noted MPC's "very liberal intervention rules" and commented that in "intervention settlement type scenarios[,] . . . it's always the applicant who's put between the rock and the hard place."[428] MPC's counsel then raised the question of MPC's ongoing discretion to ensure CZMA objectives would be met in a SMA permitting action, even after settlement between applicants and potential intervenors.[429]

One MPC commissioner noted the turnover of commissioners and requested further guidance on intervention, suggesting "even a class in what to look for," a consideration of "what [their] goals are," or something else so that "when this intervention comes before [them], [they're] able to deal with [it] in the best way where people don't get hurt."[430] MPC's apparent reticence to grant interventions may also be consequent to concerns about abuses of public process: one commissioner referred to the intervention process as a "moneymaking thing" in which "[g]uys are making money just intervening to stop a project" and the project proponent delivers a monetary settlement to avoid project delays.[431]

MPC staff addressed MPC's concerns about the abuse of intervention processes.[432] Staff reported information on WMPA governing and financial structure, noting WMPA had been organized prior to the 2005 intervention petition filed on SVOP, Inc.'s 2005 SMA permit application and that some of its expenditures included water quality testing.[433] MPC staff further noted that the North Beach West Maui Benefit Fund, which also received settlement monies, "has also been in existence for quite a while and it shows donations going back to 2008 . . . ."[434]

MPC's role in overseeing settlements of SMA intervention actions, if any, remains unclear. During an MPC hearing on the 2014 annual report on WMPA settlement monies disbursement, West Maui resident, Patricia Nishiyama of Na Kūpuna O Maui inquired into MPC's obligation to ensure settlement proceeds from WMPA's interventions into SMA proceedings would be governed by West Maui residents and distributed to nonprofits in West Maui.[435] MPC responded that it had little control over WMPA, save for its receipt of

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[427] *Maui Planning Commission Regular Minutes March 27, 2012*, CNTY. OF MAUI, HAW. 23–26 (Mar. 27, 2012), https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/16770.

[428] *Id.* at 28.

[429] *See id.*

[430] *Id.*

[431] *See id.* at 28.

[432] *Maui Planning Commission Regular Minutes April 10, 2012*, CNTY. OF MAUI, HAW. 59–61 (Apr. 10, 2012), https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/16889.

[433] *Id.* at 60.

[434] *Id.* at 61.

[435] *Maui Planning Commission Regular Minutes October 28, 2014*, CNTY. OF MAUI, HAW. 24–25 (Oct. 28, 2014), http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/19676.

an annual report.[436] Imposing conditions on settlements that require settlement expenditures to forward CZMA goals and policies is one way of safeguarding intervention processes from abuse.[437] Such conditions would provide a finer instrument for addressing MPC concerns than simply denying intervention requests altogether.[438]

MPC counsel stated that MPC's requests for training on interventions implicated "huge policy question[s]" concerning how MPC conducts contested cases.[439] MPC's chair, however, noted that previous commissions permitted more intervention actions to proceed and the current MPC had "basically denied every intervention request . . . ."[440] Thus, the chair stated, "I don't know if there really is a need for a workshop like that because we haven't been granting interventions."[441] MPC counsel insisted further examination of interventions that had been denied, were appealed to the circuit courts, and were remanded back to MPC would provide "a helpful lesson[,]" but:

> the caveat would be not only should we learn a lesson, but we should learn the right lesson because just the fact that things were denied and remanded doesn't mean that the Commission did the wrong thing. It could possibly just be a procedural issue that we need to do better training with you as far as what are the things we need to say and do on the record to ensure that those decisions aren't overturned in the future.[442]

After this discussion in 2012, MPC would deny several intervenor petitions, including *Dairy Roads*, which was remanded back by the ICA.[443]

### *D. Protect Kahoma Association Intervention*

On June 5, 2014, the Protect and Preserve Kahoma Ahupua'a Association (Kahoma Association) presented MPC with its most recent petition to intervene, concerning developer Stanford Carr's SMA permit application for

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[436] *Id.* at 25–26.

[437] *See Maui Planning Commission Regular Minutes July 10, 2012*, CNTY. OF MAUI, HAW. 103 (July 10, 2012), http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/17055.

[438] *See id.*

[439] *See id.*

[440] *Id.* For instance, on December 7, 1993, MPC granted a petition to intervene in SMA permit proceedings on a residential subdivision filed by Kahana Sunset Owners Association, resulting in a contested case hearing held between August 22 and September 15, 1994. *See* Kahana Sunset Owners Ass'n v. Cnty. of Maui, 86 Hawai'i 66, 68, 947 P.2d 378, 380 (1997) (concluding an environmental assessment was required before MPC could have granted the SMA permit.

[441] *Maui Planning Commission Regular Minutes July 10, 2012*, *supra* note 437, at 103. In 2006, MPC granted a petition to intervene in a SMA use permit application for redevelopment of the Maui Lu hotel, with the final SMA permit approvals accomplished in 2011. *See Maui Planning Commission Regular Meeting May 13, 2014*, CNTY. OF MAUI, HAW. 11–24 (May 13, 2014), http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/19372.

[442] *See Maui Planning Commission Regular Minutes July 10, 2012*, *supra* note 437, at 104.

[443] *See* Dairy Rd. Partners v. Maui Plan. Comm'n, Nos. CAAP-11-0000789, 2015 WL 302643, at *1 (Haw. Ct. App. Jan. 23, 2015).

a Kahoma Village residential subdivision project.[444] Kahoma Association members included adjoining property owners and Hawaiian practitioners.[445] Their petition alleged the proposed development would impact interests protected by Hawai'i's CZMA, concerning: (1) access to public beaches; (2) maintenance of adequate public recreation areas; (3) adverse effects of wastewater, drainage and runoff; (4) impacts on natural and man-made historic and prehistoric cultural resources, including burials, in the coastal zone management area; (5) impacts on beach access, traffic, and scenic and open space resources; and (6) inconsistencies with Maui community plans.[446]

At its June 24, 2014 meeting, and after hearing presentations on Kahoma Association's petition and opposition from Stanford Carr's attorney, MPC denied the petition and then approved a SMA permit for Kahoma Village development.[447] Prior to taking the vote, MPC commissioners stated: "[Petitioners] have [not shown] an interest separate and distinct from that of the general public"; "It's not distinct, it's not separate from the system that they're railing against"; "It's a typical NIBY [sic] approach to the problem and it's something that I cannot support"; and, "I don't get to choose my neighbors and they don't get to choose theirs."[448] No commissioner explained why Kahoma Association, most of whose members were adjacent and nearby landowners, did not have interests clearly distinguishable from the general public nor how admitting them would render the proceedings inefficient and unmanageable.[449] The dissenting commissioner stated, "I think that those living in the immediate area have a personal impact from this [development] or at least they have shown that they expect to have [such impacts] . . . ."[450]

Kahoma Association filed objections to MPC's denial of their intervention, reiterating concerns for preservation of open space, the historic and cultural value of the lands.[451] Kahoma Association also contended that MPC was effectively enforcing a "rule" concerning SMA permit proceeding interventions and that rule was invalid because it had not been properly promulgated under section 91-3 of the Hawaii Revised Statutes.[452]

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[444] *See generally* Kahoma Association, Petition to Intervene, *In re* Stanford Carr, No. SM1 2012/007 (Maui Plan, Comm'n June. 5, 2014) (on file with author).

[445] *See id.*

[446] *Id.* at *1–19; *see also* Stanford Carr Development, LLC, *Draft Environmental Assessment: Proposed Kahoma Village Project, Lahaina, Maui, Hawai'i (TMK (2) 4-5-008:001 (POR.))*, OFF. OF ENV'T QUALITY CONTROL (Sept. 2012), http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Maui/2010s/2012-10-23-DEA-Kahoma-Village-Project-5B.pdf.

[447] *Maui Planning Commission Regular Minutes June 24, 2014*, CNTY. OF MAUI, HAW. 37–50 (June 24, 2014), https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/19337.

[448] *Id.* at 47–48.

[449] *See id.* at 37–50.

[450] *Id.* at 47.

[451] *Maui Planning Commission Regular Minutes September 23, 2014*, CNTY. OF MAUI, HAW. 49 (Sept. 23, 2014), http://www.co.maui.hi.us/ArchiveCenter/ViewFile/Item/19819.

[452] *Id.* at 48.

After receiving Kahoma Association's testimony on its objections, MPC inquired with its counsel as to whether it had complied with procedures, to which counsel stated: "you analyzed the application and then made a decision based on the criteria set out in your rules regarding intervention either as a matter of right or permissively. You did walk through that analysis in your decision making previously."[453] MPC then voted to deny Kahoma Association's objections.[454]

In its written order, MPC concluded Kahoma Association raised concern that "are all concerns of the general public, which the Commission is obligated to consider[;]" "failed to demonstrate that they will be so directly and immediately affected by the matter before the Commission and that their interests are clearly distinguishable from that of the general public[;]" had not shown "an actual or threatened injury traceable to [Developer's] actions or showing how a favorable decision would provide relief for such injury[;]" and that admitting Kahoma Association as a party would render proceedings "inefficient as Petitioners provided no information that would not already be available through the course of normal deliberation" and "[would] not aid the development of a full record as Petitioners will have ample opportunity to express all of their concerns through public testimony and without formal intervention."[455]

Kahoma Association appealed from MPC's order;[456] the circuit court affirmed MPC's decision, reciting standards for denying mandatory and permissive intervention to Kahoma Association (i.e., petitioners had no property interest in the subject land, interest clearly distinguishable from that of the general public, and intervention would render the proceedings inefficient, unmanageable, or would not aid in the development of a record).[457] Kahoma Association's appeal from this ruling is pending before the ICA.

### *1. Unlawful Rules or Unlawful De Facto Rulemaking?*

On appeal, Kahoma Association claimed MPC's intervenor rules were unlawful, on their face and as applied.[458] Citing Wahikuli Association and Protect Wailea intervention petitions, Kahoma Association argued MPC's

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[453] *Id.* at 51–52.

[454] *Id.* at 52.

[455] Findings of Facts, Conclusions of Law, and Decision and Order Relating to Protect and Preserve Kahoma Ahupua'a Association, Michele Lincon, Mark and Linda Allen, Patrick and Naomi Guth, and Constance B. Sutherland's Petition to Intervene at 8–9, *In re* Application of Stanford Carr, No. SM1 2012/0007 (Maui Plan. Comm'n Oct. 7, 2014) (on file with author).

[456] Notice of Appeal, Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Plan. Comm'n, Civ. No. 14-1-0616(1) (Haw. 2d Cir. Oct. 23, 2014).

[457] *See* Findings of Fact, Conclusions of Law, Decision and Order at 7–9, Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Plan. Comm'n, Civ. No. 14-1-0616(1) (Haw. 2d Cir. June 19, 2015) (on file with author).

[458] Notice of Appeal, Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Plan. Comm'n, *supra* note 456, at 9–10.

regularly applied, tautological interpretation of its rules to deny intervenor-petitions (petitioners raised concerns of a "general public" and adding parties would render proceedings "unmanageable") amounted to a de facto "rule."[459] Such a "rule" would be subject to agency rulemaking procedures and would be deemed invalid.[460] A "rule" is defined as 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. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.[461]

A government "policy . . . constitutes a rule inasmuch as it affects the procedures available to the public, and implements, interprets, or prescribes . . . policy, or describes the . . . procedure or practice requirements" of that agency.[462]

Kahoma Association pointed to MPC's rationales for denying Protect Wailea and Wahikuli Association intervenor-petitions and argued MPC utilized petitioners' compliance with the redressability and "zone of interests" prong of the injury-in-fact test as evidence of their noncompliance with MPC Rule § 12-201-41(b).[463] Under *Akau*, issues within the scope of SMA permit proceedings would be required to fall within the zone of interests protected by Hawai'i's CZMA.[464] Thus, MPC Rule § 12-201-41(b) to deny intervention for failure to allege injuries distinct from those of the general public, demonstrating that this rule, and/or its application, was invalid under injury-in-fact standards enforced under *Akau*.[465] The circuit court did not rule on this issue in *Protect Wailea*[466] and the Wahikuli Association did not appeal the denial of their petition.[467]

### *2. Kahoma Association Prevails on Appeal, and then Some.*

Kahoma Association prevailed in their claims before the ICA on appeal. In a memorandum opinion, the ICA concluded MPC restrictively interpreted its

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[459] Brief of Petitioner-Appellant, Protect Wailea, *supra* note 210, at 13; Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Plan. Comm'n, Civ. No. 14-1-0616(1) (Haw. 2d Cir. Jan. 29, 2015) (citing MPC RULES CH. 201, *supra* note 5, § 12-201-41(b)).

[460] *See* HAW. REV. STAT. § 91-3 (2021).

[461] *Id.* § 91-1.

[462] Nuuanu Valley Ass'n v. City & Cnty., 119 Hawai'i 90, 100, 194 P.3d 531, 541 (2008) (internal quotations and alterations omitted).

[463] *See* Brief of Petitioner-Appellant, Protect Wailea, *supra* note 210, at 13.

[464] *See generally* HAW. REV. STAT. §§ 205A-1 to -71 (2021).

[465] *See* Akau v. Olohana Corp., 65 Haw. 383, 388, 652 P.2d 1130, 1134 (1982).

[466] *See* Protect Wailea Decision, *supra* note 343, at 10.

[467] *See id.*

standing requirements and therefore its denial of Kahoma Association's petition is subject to *de novo* review.[468] The ICA proceeded to review the record and concluded the Kahoma Association were entitled to intervene as a matter of right because they established an injury in fact and had been denied "due process to protect their right to a clean and healthful environment under article XI, section 9" of the Hawai'i Constitution.[469]

Additionally, the ICA held that the Planning Commission is required to make specific findings on the underlying project's consistency with the Maui County General and Community plans as provided under HRS § 205A-26(2)(C).[470] The Hawai'i Supreme Court granted the opposing developer, Stanford Carr's application for writ of certiorari and ordered the parties to brief the issue of whether the Planning Commission was required to comply with HRS § 205A-26 requirements for findings of consistency even where the SMA application concerns a "fast-tracked" affordable housing project under HRS § 201H-38.[471]

On June 16, 2021, the Hawai'i Supreme Court entered their published opinion in *Protect Kahoma,* which affirmed and extended the ICA's rulings.[472] *Protect Kahoma* held that HRS section 205A is a law "relating to environmental quality" for purposes of article XI, section 9 of the Hawai'i Constitution;[473] the County Council "would not have been able to exempt the Project from HRS § 205A-26(2)'s requirements" and "HRS ch. 205A is, viewed as a whole, an *environmental* law. . . . To the extent the CZMA affects development, it is 'in order to preserve, protect, and where possible, restore the natural resources of Hawai'i's coastal zone,' not to 'improve' the land. We therefore do not construe HRS ch. 205A as a law 'relating to' the development and improvement of land for the purposes of exemptions under 201H-38."[474] Importantly, the Hawai'i Supreme Court affirmed the ICA's holding that HRS § 201H-38–the housing "fast-track" statute–does not excuse MPC from making findings as to the consistency of the project with county general and community plans.[475]

The Hawai'i Supreme Court's ruling in *PPKAA* will hopefully staunch MPC's repeated tendency of short-changing intervenor rights. Less than a month prior on May 25, 2021, MPC denied intervenor status to both the Maui Meadows Neighborhood Association and Pono Power Coalition concerning a

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[468] *See* Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Plan. Comm'n, CAAP-15-0000478, 2020 WL 5512512, at *6 (Haw. Ct. App. Sept. 14, 2020) (citing Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 434, 903 P.2d 1246, 1255 (1995)).

[469] *See id.* at *8–11.

[470] *See id.* at *11–12.

[471] *See* Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Plan. Comm'n, SCWC-15-0000478, 2021 WL 195053 (Haw. Jan. 20, 2021).

[472] *See* Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Plan. Comm'n, 149 Hawai'i 304, 489 P.3d 408 (2021).

[473] *Id.* at 313, 498 P.3d at 417.

[474] *Id.* at 315, 498 P.3d at 419.

[475] *See id.* at 314–15, 498 P.3d at 418–19.

special use permit for a South Maui renewable energy project that adjoined the Maui Meadows neighborhood.[476]

## CONCLUSION

MPC's implementation of intervenor rules in permitting proceedings conducted pursuant to Hawai'i's CZMA raises important questions about structures of public participation and tensions between public nuisance and standing doctrines. These proceedings are also productive sites for discussing competing concerns that animate rights asserted by private parties pursuant to environmental public interest laws, and more specifically, how agencies administer those rights. Such concerns include the agency's timely and informed decision-making, potential abuse of intervenor standing, and petitioners' ability to safeguard their rights. Recent approvals of two contested case proceedings for Hawaiian cultural practitioner groups may indicate a change in the culture of the Maui Planning Commission, but it is too soon to tell if this change is limited to issues of protections for Hawaiian traditional and customary practitioner rights. The most recent denial of a contested case requested by public interest community groups may be corrected by the Hawai'i Supreme Court's recent *PPKAA* decision. At issue is whether and how public interest environmental advocacy and protections are implemented in site-specific instances at the level of local government.

[476] *See Maui Planning Commission Summary Minutes May 25, 2021*, CNTY. OF MAUI, HAW. 1–3 (May 25, 2021), https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/28227.

# Necessity Exceptions to Takings

Shelley Ross Saxer*

## INTRODUCTION

In mid-March 2020, the state ordered the oldest manufacturer of orchestral quality musical handbells and handchimes in the United States, Schulmerich Bells, to shut down because it was not an "essential" or "life-sustaining" business. When Governor Tom Wolf of Pennsylvania announced the COVID-19 Closure Orders to protect public health, the Orders allowed only businesses categorized as such to stay open.[1] This shutdown occurred during Schulmerich's busiest time of the year, spring and summer; when handbell performing groups from schools and churches send the company their instruments for repair and restoration.[2] The complaint sought class-action status on behalf of shuttered businesses and their employees to assert Section 1983 claims alleging violations of Due Process and the Takings Clause under the Fifth and Fourteenth Amendments to the Constitution.[3]

States' responses to the health crisis from the COVID-19 pandemic generated substantial litigation, including takings claims. Lawsuits similar to Schulmerich's complaint followed in rapid succession as the economy crumbled under the weight of closures, social distancing, and other efforts to "flatten the curve."[4] Many of the early cases reviewing these complaints cited the Court's 1905 decision, *Jacobson v. Massachusetts*,[5] for the public health necessity defense. The government has authority to promote the general health, safety, and welfare of the community, especially during emergencies, but the doctrine of necessity does not preclude the judiciary's duty to protect

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[1] Complaint, Schulmerich Bells, LLC v. Wolf, No. 2:20-cv-01637 (E.D. Pa. filed Mar. 26, 2020) *available at* https://www.ballardspahr.com/-/media/files/alerts/schulmerich-bells-v-wolf.pdf.

[2] *Id.* at 9.

[3] *Id.* at 5.

[4] *See Covid-19 Complaint Tracker*, HUNTON ANDREWS KURTH, https://www.huntonak.com/en/covid-19-tracker.html (last visited Jan. 5, 2020) (listing 6,955 Covid-19 related complaints filed as of January 5, 2020).

[5] 197 U.S. 11 (1905).

constitutional rights.[6] While litigants will have an uphill battle proving constitutional violations from responses to the pandemic,[7] they should at least have the opportunity to have their arguments heard by courts applying traditional constitutional frameworks.[8] It is likely that future litigation relying on *Jacobson* will continue as objections to COVID-19 vaccinations raise issues of civil liberties in schools, workplaces, and other social situations.[9]

In recent times, the government has asserted the doctrine of necessity in response to takings claims for property damage from natural disasters like wildfires and floods, and for police tactics that destroy or damage property to apprehend suspected criminals.[10] Scholars have proposed using the doctrine of necessity to promote climate change adaptation and government nationalization of private companies in the face of an economic emergency.[11] Government agencies have also raised the doctrine of necessity to defend their responses to the pandemic, the likes of which the world has not seen in more than a century.[12] Most government actions in response to the pandemic will likely be lawful exercises of police powers, unless the actions are arbitrary and capricious. In addition to requiring that the government action fulfill a public purpose, a regulatory takings claim requires that the action

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[6] *See* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 181–83 (2020) (arguing judicial review should not be suspended during an emergency); *see also* Ilya Somin, *Judicial Review and Emergency Powers*, JOTWELL (June 29, 2020), https://conlaw.jotwell.com/judicial-review-and-emergency-powers/ (reviewing Wiley and Vladeck's article).

[7] *See* Ilya Somin, *Does the Takings Clause Require Compensation for Coronavirus Shutdowns?*, REASON: THE VOLOKH CONSPIRACY (Mar. 20, 2020), https://reason.com/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/ (concluding that "it is unlikely that the [Takings] Clause mandates compensation in all but a few cases").

[8] *But see* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring) ("When those [state] officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people.") (citations omitted) (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)).

[9] Discussion of these issues is beyond the scope of this Article.

[10] *See* Shelley Ross Saxer, *Paying for Disasters*, 68 U. KAN. L. REV. 413, 451–54 (2019) (discussing Brewer v. State, 341 P.3d 1107 (Alaska 2014); TrinCo Investment Co. v. United States (*TrinCo II*), 722 F.3d 1375 (Fed. Cir. 2013); and Lech v. Jackson, 791 Fed. App'x 711 (10th Cir. 2019)).

[11] *See infra* Part III and notes 448–73 and accompanying text (discussing proposals by Professors Robin Kundis Craig and Nestor M. Davidson).

[12] *See infra* text preceding notes 516–84.

constitutes a taking of property requiring compensation.[13] The government may assert necessity defenses to a takings claim. Such defenses include distinguishing between the power of eminent domain and the police power; public necessity relying on *TrinCo Investment Co. v. United States*, where the Federal Circuit rejected a takings claim for damages to private timber from a government-set backfire;[14] a public health necessity based on *Jacobson*;[15] or the abatement of a public nuisance.

The goal of this Article is to show how the various "necessity exceptions" to regulatory takings, other than the nuisance and the background-principles exception, have not been properly applied by courts following *Pennsylvania Coal Co. v. Mahon*.[16] It is particularly troubling that after *Mahon*, some courts have distinguished between the eminent domain power and the police power and denied just compensation, rather than analyzing the exercise of police power as a potential regulatory taking. This Article explores the history of various necessity defenses and argues that courts have incorrectly transported these common law concepts into regulatory takings jurisprudence.[17]

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[13] *See* League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 126 (6th Cir. 2020); TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 832–33 (W. D. Tenn. 2020); Pro. Beauty Fed'n of Cal. v. Newsom, No. 2:20-cv-04275, 2020 WL 3056126, at *1 (C.D. Cal. June 8, 2020).

[14] 722 F.3d 1375, 1377–79 (Fed. Cir. 2013). *See* Avi Weitzman & Mark A. Perry, *Constitutional Implications of Government Regulations and Actions in Response to the COVID-19 Pandemic*, 29 No. 11 WESTLAW J. PROF. LIABILITY 02 (Apr. 23, 2020) (discussing the requirements to assert the public necessity defense from *TrinCo Inv.*).

[15] *See* Jeffrey D. Jackson, *Tiered Scrutiny in a Pandemic*, 12 CONLAWNOW 39, 40–41 (2020) (noting the "problem arises from courts that use *Jacobson* as if it provides a different, more deferential framework for the intrusion on fundamental rights than the normal scrutiny required by the Constitution") (citing *In re* Abbott, 954 F.3d 772, 789 (5th Cir. 2020) (relying on *Jacobson* to uphold "a temporary postponement of all non-essential medical procedures, including abortion")).

[16] 260 U.S. 393 (1922). Similar to most commentators, I am using this decision to mark the beginning of the law of regulatory takings. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1212–13 (arguing that beginning in the 1810s, "[s]tate courts interpreting the takings clauses of their constitutions and refining state common law delineated the early contours of eminent domain doctrine in America, and many of these early expressions of takings law embraced what we might now describe as regulatory takings"); *see also* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1604–07 (2003) (arguing that *Mahon* was not the "first *real* regulatory takings decision" because regulatory takings law developed in the states before federal courts in the nineteenth century began hearing takings cases).

[17] While this Article looks generally at the application of necessity exceptions to

Constitutional challenges to COVID-19 measures have highlighted how courts have rapidly retreated from using the public health necessity exception under *Jacobson* to block modern constitutional analysis of these restrictions. Courts have decided so many cases citing *Jacobson* in such a short time; they have found that interpreting *Jacobson* to provide an emergency exception to constitutional claims is not appropriate under modern constitutional frameworks developed since 1905.[18] Similarly, this Article argues that it is inappropriate for courts to apply any of the common law necessity doctrines in a way that precludes judicial review under today's established constitutional frameworks.

This Article proposes that the nuisance exception—as acknowledged in *Lucas v. South Carolina Coastal Council*—is the only conceptually valid categorical defense to a takings claim.[19] Even so, the nuisance exception is not really a categorical defense, but is, instead, premised on the notion that the government may rely on "background principles of nuisance and property law" to deny a landowner's use of property if the landowner never had the right to use the property as prohibited by the government.[20] In analyzing a takings claim, we must ask, "what is the property interest being taken?" If the state could have prevented the use under nuisance and property law principles[21] without paying just compensation, that particular use by the landowner is not a property interest subject to a taking.[22]

Part I explores the various necessity defenses to a takings claim by reviewing the history of using the police power to destroy or damage property without paying just compensation. Part II examines how courts have improperly incorporated these common law concepts of necessity into the regulatory takings jurisprudence following the *Mahon* decision in 1922.[23]

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regulatory takings and analyzes how courts have often misapplied such exceptions during the temporary emergencies COVID-19 pandemic, Professor Amnon Lehavi specifically covers the government's numerous applications of takings exceptions when it comes to "temporary physical takeovers" during COVID-19. *See generally* Amnon Lehavi, *Temporary Eminent Domain*, 69 BUFF. L. REV. 683 (2021). He posits that such types of temporary takeovers require a unique analysis and calculation of damages based on actual damages or lost profits. *Id.* at 690–92.

[18] *See, e.g.*, *Pro. Beauty Fed'n of Cal.*, 2020 WL 3056126, at *1 (noting a perceived shift in courts' treatment of *Jacobson*).

[19] 505 U.S. 1003, 1030–32 (1992).

[20] *Id.*

[21] *Id.* at 1030–31 (analyzing state nuisance law should include the factors from the Restatement (Second) Torts §§ 826–28, 830).

[22] *See, e.g.*, Akshar Global Corp. v. City of Los Angeles, 817 F. App'x 301, 304 (2020) (holding that motel owners cannot plead a violation of property rights under the Fifth Amendment based on the revocation of a conditional use permit (CUP) because of concerns about nuisance).

[23] 260 U.S. 393 (1922).

Part III assesses the evolution of the necessity doctrine as a defense to regulatory takings claims. These claims include government responses to disaster, climate change, and the pandemic. The takings claims, as well as other claims of constitutional violations, arising from the COVID-19 shutdowns show how emergency defenses to takings claims may fare based on our history of regulatory takings in the United States. The Article concludes that courts should reject emergency exceptions to constitutional scrutiny of takings claims. Instead, as the *Jacobson* Court instructed us in 1905, the legislature is in the best position to assess matters protecting the public health, safety, or welfare, but it is the judiciary's duty to decide whether the regulation rationally relates to the government's purpose and whether it violates constitutional rights.[24] Moreover, as at least two Supreme Court Justices told us in a concurrence to *Roman Catholic Diocese of Brooklyn v. Cuomo*, some have "mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic."[25]

## I. HISTORICAL BACKGROUND OF THE DOCTRINE OF NECESSITY

The "doctrine of necessity" has privileged the use of police power over private property rights at least as far back as 1606 in England.[26] The government has used several versions of the necessity doctrine as defenses to claims for just compensation when its actions have interfered with private property rights. First, there is a doctrine of necessity destruction when the government destroys private property for the public good.[27] This doctrine includes three distinct types of necessity: general public necessity, military necessity, and law enforcement necessity.[28] Second, there is a public health doctrine of necessity when the government acts to confront public health emergencies, including imminent harm to human health, and to livestock and agricultural resources.[29] Third, the *Lucas* Court acknowledged the nuisance and background principles exceptions under existing takings jurisprudence

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[24] 197 U.S. at 30–31 (finding a statute requiring vaccination to "suppress the evils of a smallpox epidemic" had a real or substantial relation to protect public health and safety and did not violate constitutional rights).

[25] 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring in per curiam opinion enjoining enforcement of severe restrictions on religious services).

[26] *See* Derek T. Muller, *"As Much Upon Tradition as Upon Principle": A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment*, 82 NOTRE DAME L. REV. 481, 488–89 (2006).

[27] *See generally infra* Part I.A (discussing the doctrine of necessity destruction).

[28] *See* Muller, *supra* note 26, at 484.

[29] *See generally infra* Part I.B (discussing the public health doctrine of necessity).

as historical exceptions to a takings claim.[30] Finally, some courts have used a general police power exception to defeat a regulatory takings claim when it is not premised on the government's intent to use its eminent domain power.[31]

This Article uses the four categorical exceptions above to discuss whether these exceptions are still doctrinally viable following the regulatory takings decision in *Mahon*. There is no universally recognized classification of these exceptions because some of the categories overlap depending upon how they are identified.[32] For example, Professors David Dana and Thomas Merrill identified four categorical rules "where compensation is never required" for a taking.[33] These rules include "the nuisance exception, the forfeiture rule, the navigation servitude, and the conflagration rule."[34] In many cases, these exceptions have been captured under the fourth category (the general police power exception), which distinguishes regulatory power from the eminent domain power. This particular exception conflicts with the understanding of police power after the Court recognized regulatory takings claims as the mirror image of eminent domain actions.[35] The police power authorizes the state or local government to promote the public health, safety, morals, and general welfare through its actions, regulations, or use of eminent domain power.[36]

These categorical rules come into play when a property owner challenges a government action or regulation that "would warrant the exercise of eminent domain" but instead takes the form of a regulation to improve the public condition without paying for it.[37] In decisions following *Mahon*, the

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[30] 505 U.S. 1003, 1030–32 (1992).

[31] *See* Muller, *supra* note 26, at 516 ("Defining the police power . . . has been a confusing body of law that unsuccessfully attempts to compartmentalize the necessity privilege.").

[32] *See* Robin Kundis Craig, *Drought and Public Necessity: Can a Common-law "Stick" Increase Flexibility in Western Water Law?*, 6 TEX. A&M L. REV. 77, 93–97 (2018) (discussing public necessity in general and quoting City of Rapid City v. Boland, 271 N.W.2d 60, 65 (S.D. 1978) for the three exceptions to requiring compensation as "the taking or destruction of property (1) during actual warfare; (2) to prevent an imminent public catastrophe; and (3) to abate a public nuisance").

[33] DAVID A. DANA & THOMAS W. MERRILL, PROPERTY TAKINGS 110 (Found. Press 2002).

[34] *Id.*

[35] Regulatory takings claims may be framed as *inverse* condemnation claims because the property owner brings the claim. On the other hand, the government brings condemnation claims under the eminent domain power.

[36] *See* Muller, *supra* note 26, at 516–18 (discussing the foundations of the modern police power).

[37] Pa. Coal v. Mahon, 260 U.S. 393, 415–16 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a

Court has continued to guide decisionmakers in determining whether a "regulation goes too far" such that it constitutes a regulatory taking.[38] First, the Court recognized two per se takings: a permanent physical occupation in *Loretto v. Teleprompter Manhattan CATV Corp.*[39] and a denial of all economically viable use in *Lucas v. South Carolina Coastal Council*.[40] If the regulation is not one of these per se takings, *Penn Central Transportation Co. v. City of New York* requires an ad hoc factual inquiry into three factors: 1) the severity of the impact on the property owner's interest; 2) the degree of interference with the owner's investment-backed expectations; and 3) the character of the governmental action.[41]

When the government defends against a regulatory taking using a categorical defense discussed above, however, this prescribed judicial framework is irrelevant. Instead, the necessity defenses allow the government to use its police power in an emergency without paying just compensation, even if the action or regulation "goes too far."[42] This Article contends that courts should not use necessity defenses post-*Mahon* to preclude scrutiny of the government action under the takings framework, nor should they expand necessity defenses to shelter government from liability for its responses to disasters, climate change, or financial emergencies.

### *A. Doctrine of Necessity Destruction*

The doctrine of necessity arose from the maxim "*salus populi suprema lex est* (the welfare of the people is the supreme law)" and from the concept of a monarch or state's sovereign powers to regulate the domestic order of a kingdom.[43] American courts relied on English common law cases providing that in times "of calamity (e.g., fire, pestilence, or war) individual interests, rights, or injuries would not inhibit the preservation of the common weal."[44] Individual losses suffered to protect the public good were not compensated

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taking.").

[38] *Id.*

[39] 458 U.S. 419 (1982). *But see* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074–75 (2021) (noting that while *Loretto* emphasized permanent physical occupation, "physical invasions constitute takings even if they are intermittent as opposed to continuous").

[40] 505 U.S. 1003 (1992).

[41] 438 U.S. 104 (1978).

[42] *Mahon*, 260 U.S. at 415.

[43] William J. Novak, *Common Regulation Legal Origins of State Power in America*, 45 HASTINGS L. J. 1061, 1091–94 (1994) (emphasis added).

[44] *Id.* at 1092.

because public necessity overruled private interests.[45] The necessity defense is asserted against claims of trespass, conversion, or other invasions of property interests as being justified to protect public or private interests from a greater harm.[46] Thus, the common law defense of public necessity bars the rights of property owners to obtain recourse or compensation when government destroys private property for the public good.[47]

According to Professor Derek Muller, three major types of necessity allow for destruction of private property without compensation:

> First, an individual may destroy property to prevent the spread of a natural disaster, usually a fire, flood, or epidemic. For instance, an individual may tear down an untouched house to create a firebreak. Second, the government may destroy property in times of necessity during war. Under this privilege, the army can destroy privately owned kegs of flour to prevent the approaching enemy from using them. Third, the government may destroy property in times of necessity during law enforcement, such as burning down a home to capture a barricaded criminal.[48]

Professor Muller, while a Notre Dame Law student under Professor John Nagle's guidance, heavily researched the historical background of these three types of necessity.[49] I will not duplicate his research here, but instead refer the reader to his discussion of the early cases recognizing this defense, including *The Case of the King's Prerogative in Saltpetre*,[50] *Mouse's Case*,[51] *Respublica v. Sparhawk*,[52] and *Mayor of New York v. Lord*.[53]

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[45] *Id.* at 1092–93.

[46] John Alan Cohan, *Private and Public Necessity and the Violation of Property Rights*, 83 N.D. L. REV. 651, 654 (2007).

[47] *See* Muller, *supra* note 26, at 485.

[48] *Id.* (footnotes omitted).

[49] *Id.*

[50] (1606) 77 Eng. Rep. 1294 (K.B.) (decided in December of the fourth regnal year of James I, which some sources identify as 1607) (finding no compensation was due when King James I took saltpeter from a private citizen to use for gunpowder during war).

[51] (1608) 77 Eng. Rep. 1341 (K.B.) (decided in the Michaelmas term of the sixth regnal year of James I, which some sources identify as 1609) (providing no compensation for the value of cargo thrown overboard during a violent storm to save the lives of the passengers on a barge).

[52] 1 U.S. (1 Dall.) 357 (Pa. 1788) (relying on an English common law case allowing destruction to prevent fire during the Great Fire of London of 1666 to hold that no compensation was due when the government moved privately-owned barrels of flour to a depot and British troops took the depot and flour ).

[53] 17 Wend. 285 (N.Y. Sup. Ct. 1837) (noting that destruction of property to prevent spreading of a fire was allowed at common law without compensation to the property owner and holding that a city statute allowed for compensation for the real property, but not for personal goods stored in the destroyed building).

In 1879, the U.S. Supreme Court recognized the doctrine of necessity in *Bowditch v. Boston* and refused to compensate a building owner for property damage when firemen exploded his building to stop a fire from spreading.[54] Although the Court decided *Bowditch* based upon state law, later cases involving claims for Fifth Amendment takings relied upon *Bowditch* to deny compensation for destruction of private property privileged by necessity.[55]

Many of the early destruction by necessity cases involved building demolitions in urban areas to create firebreaks to fight major conflagrations.[56] While building demolition "to create firebreaks was a common tactic for fighting the vast urban fires of the nineteenth century," modern firefighting strategies have reduced the need for using urban firebreaks.[57] However, as discussed in Part II, firebreaks are still an important approach to fighting forest fires and wildfires, but can result in unintended damage or destruction to private property.

The U.S. government recognized the military necessity defense during World War II.[58] The Department of Justice relied on *Bowditch* and other natural disaster cases to provide a defense for compensation claims when the government destroyed property for the public good.[59] In *United States v. Caltex (Philippines), Inc.*,[60] the Supreme Court denied compensation under the Fifth Amendment to oil companies whose terminal facilities in Manila were demolished by the U.S. Army to prevent the facilities from falling into the hands of Japanese troops invading the Philippines.[61] The Court noted that it "has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign."[62]

Justice Douglas, joined by Justice Black, dissented in *Caltex*, pointing out that the property destroyed was not a public nuisance, but instead the government appropriated it to help in the war defense.[63] The dissent proposed

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[54] 101 U.S. 16 (1879).

[55] *See* Muller, *supra* note 26, at 495.

[56] *See* Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 396–97 (2015).

[57] *Id.* at 397.

[58] *See* Muller, *supra* note 26, at 497 (citing Lands Div., U.S. Dep't of Justice, Acquisition of Property for War Purposes 78 (1944); Lands Div., U.S. Dep't of Justice, Expropriation of Property for National Defense 72 (1941)); *see also* Lee, *supra* note 56, at 398 (discussing United States v. Caltex (Philippines) Inc., 344 U.S. 149 (1952), as a "prominent example of wartime emergency takings").

[59] *See* Muller, *supra* note 26, at 497.

[60] 344 U.S. 149 (1952).

[61] *Id.* at 150–56; *see also* Steven J. Eagle, *Regulatory Takings* § 6-5 (5th ed. 2012) (noting that Japanese troops were expected to overrun the refinery within hours, so any fair market value at the time of appropriation was merely "conjectural").

[62] *Caltex*, 344 U.S. at 155–56.

[63] *Id.* at 156 (Douglas, J., dissenting).

that "the guiding principle should be this: Whenever the government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse rather than the individual, should bear the loss."[64]

Finally, the necessity defense to compensation for destruction of property when the state exercises its law enforcement duties also finds its roots in the English common law doctrine of necessity.[65] Most of the decisions discussing this exception appear in the latter half of the twentieth century and the first part of the twenty-first century and involve police actions that damage private property when officers pursue criminal suspects or conduct searches and investigations.[66] Part II discusses this exception in more detail. However, with this exception, as well as the other necessity exceptions for destruction, it is important to distinguish between two inquiries:[67] First, was the public official's action to destroy the property permissible? Second, is the property owner entitled to compensation for the loss?[68]

### *B. Public Health Doctrine of Necessity*

A public health doctrine of necessity arose in the U.S. Supreme Court decision in *Jacobson v. Massachusetts*,[69] which involved a Cambridge, Massachusetts regulation requiring vaccination or revaccination of all inhabitants to protect the public against smallpox.[70] Jacobson refused vaccination. Cambridge prosecuted him, the jury found him guilty, and his sentence required him to pay a five-dollar fine.[71] The Court recognized the "authority of a state to enact quarantine laws and 'health laws of every description'" to protect public health and safety, so long as the laws do not invade constitutional rights.[72] *Jacobson* noted "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[73]

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[64] *Id.*

[65] *See* Muller, *supra* note 26, at 498.

[66] *See, e.g.*, Eggleston v. Pierce County, 4 P.3d 618, 620 (Wash. 2003) (holding that the destruction of an individual's home was not a compensable taking under the state constitution).

[67] *See* Lee, *supra* note 56, at 404–05.

[68] *Id.*

[69] 197 U.S. 11 (1905).

[70] *Id.* at 12. The regulation included some exceptions and additional regulations to enforce the vaccination. *Id.*

[71] *Id.* at 13–14.

[72] *Id.* at 25.

[73] *Id.* at 27.

In deciding whether such a public health necessity was constitutionally valid, the *Jacobson* Court stated:

> an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.[74]

Justice Harlan's statement in *Jacobson* might permit a court to invalidate a public necessity regulation as either violating substantive due process because it was arbitrary or unreasonable, or as a regulatory taking because, as the Court acknowledged in *Mahon*,[75] it went "too far." Instead of viewing the public health doctrine of necessity as an exception to the Fifth Amendment, courts should allow challenges to such regulations either as a violation of due process or as a regulatory taking if the regulation has gone too far.[76]

The *Jacobson* Court concluded that Massachusetts had the authority to protect the safety and health of its people so long as it did not interfere with individual constitutional rights to life, liberty, or property.[77] The Court did "not perceive that this legislation ha[d] invaded [any] right secured by the Federal Constitution."[78] Given that the Court decided *Jacobson* in 1905, seventeen years before *Mahon*, courts should not apply the public health necessity doctrine as a defense to a regulatory takings claim.

States have traditionally used their authority under the police power to quarantine and destroy livestock, trees, and crops to protect public health and the safety of our food supply.[79] In some early cases, the courts allowed

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[74] *Id.* at 28 (discussing R.R. Co. v. Husen, 95 U.S. 465, 471–73 (1877), where the Court recognized a state's right to pass laws to prevent contagion and infectious diseases, but found the laws invalid because they violated federal constitutional rights by going "beyond the necessity for its exercise").

[75] 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[76] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

[77] *Jacobson*, 197 U.S. at 38.

[78] *Id.*

[79] *See, e.g.*, Bowman v. Va. State Entomologist, 105 S.E. 141, 144 (Va. 1920) (holding that even though cedar trees destroyed to eradicate cedar rust would be a nuisance at common law, the police power "may interfere whenever the public interests demand it"); La. State Bd. of Agri. & Immigr. v. Tanzmann, 73 So. 854 (La. 1917) (holding that destroying infected orange trees was not a taking, but instead was an exercise of the police power).

destruction of property that was a common law nuisance.[80] However, in *Miller v. Schoene*, the U.S. Supreme Court declined to inquire whether cedars infected with cedar rust constituted a nuisance at common law.[81] Instead, the Court held that the state had the power to choose "between the preservation of one class of property and that of the other wherever both existed in dangerous proximity."[82] Thus, when Virginia faced the choice to save the apple orchards over the cedars, it could prefer one interest to the other because of the greater economic benefit apples provided to the state's economy.[83] The Court decided the *Schoene* case six years after the *Mahon* decision, but the Court did not discuss whether Virginia's statute constituted a regulatory taking nor did it cite to *Mahon*.

Many of the cases that denied just compensation for destruction were decided prior to the regulatory taking decision in *Mahon*.[84] Statutes authorizing:

> the destruction of domestic animals suffering from contagious or infectious diseases, provide in some manner for compensating the owner therefor; and although only partial compensation is provided for, this is held not to render such statutes unconstitutional, since the legislature is not bound to provide for compensation on abating a public nuisance.[85]

Even where statutes allowed the state to destroy diseased animals without any compensation, these statutes were valid as a constitutional exercise of the police power to destroy property when it constitutes a public nuisance.[86] Similarly, the state police power to destroy trees affected by disease in order to protect orchards from contagion and infection without just compensation was a valid exercise of the power.[87]

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[80] *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (upholding an ordinance that prohibited the manufacture of bricks in a residential area as valid based on the concept of nuisance).

[81] 276 U.S. 272, 280 (1928).

[82] *Id.* at 279.

[83] *Id.* at 279–80.

[84] *See, e.g.*, Chi., B. & Q. R. Co. v. Illinois, 200 U.S. 561 (1906) (finding no taking occurred, but rather that it was the "duty of the railway company, at its own expense" to remove a bridge and then erect "a new bridge for crossing that will conform to the regulations established by the Drainage Commissioners, under the authority of the State").

[85] Annotation, *Right to and Measure of Compensation for Animals or Trees Destroyed to Prevent Spread of Disease or Infection*, 67 A.L.R. 208, at I.a. (originally published in 1930).

[86] *Id.*

[87] *Id.* at II.a., -b. ("There is little authority dealing with the question of damages or compensation in case of the destruction of trees affected with contagious or infectious diseases.").

Section II.B. illustrates how courts have applied the public health necessity doctrine after the *Mahon* decision in 1922. It focuses on the destruction of domestic animals and agriculture to protect public health and safety and contain contagious or infectious diseases. Section III.C. observes how courts have applied the *Jacobson* decision over the years in response to civil liberty concerns arising from public health necessities, including the COVID-19 pandemic.

### *C. Nuisance Exception and Background Principles Exceptions*

"[O]ne of the most powerful doctrines shaping early American conceptions of public authority was the maxim *sic utere tuo ut alienum non laedas* (use your own so as not to injure another) of the common-law of nuisance."[88] The U.S. Supreme Court in *Lawton v. Steele* explained the extent and limits of the police power "to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance."[89] At issue in *Lawton* was a New York law regulating the use of certain nets to protect fisheries.[90] The Court held that the legislature had the authority to condemn nets that violated the law by declaring them nuisances if their manner of use was detrimental to the public interest.[91] Recognizing that the nets themselves were not a nuisance, the Court nevertheless concluded that the "illegal use of a harmless article" might justify the legislature in destroying property it has denounced as a public nuisance.[92] Chief Justice Fuller dissented, arguing that destroying fishing nets and prohibiting any action for damages "without process, notice, or the observance of any judicial form" was unconstitutional.[93]

Some jurisdictions did not limit *Lawton* to public nuisances and instead relied on the decision to validate legislative action requiring compulsory vaccination and quarantine to prevent contagious and infectious diseases such as smallpox.[94] In *Jacobson*, the U.S. Supreme Court relied on the broad

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[88] Novak, *supra* note 43, at 1094–95 (noting that nuisance has also been called "the common law of the police power, striking at all gross violations of health, safety, order, and morals") (quoting ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 66 (1917)) (emphasis added).

[89] 152 U.S. 133, 136 (1894).

[90] *Id.* at 139 (supporting without question a state's power to enact fish and game laws for the public's benefit).

[91] *Id.* at 140.

[92] *Id.* at 142–43.

[93] *Id.* at 144 (Fuller, C.J., dissenting).

[94] *See, e.g.*, Morris v. City of Columbus, 30 S.E. 850 (Ga. 1898). *But see* W. & A. R. Co. v. City of Atlanta, 38 S.E. 996 (Ga. 1901) (disagreeing with *Morris* and

limits of the police power from *Lawton* and provided that "[a]ccording to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[95] The Court cited *Lawton* for the state's authority to use the police power to enact quarantine laws and health laws, rather than for its actual holding that a state could destroy illegally used but harmless property by legislatively declaring the illegal use a public nuisance.[96]

The Court also cited *Lawton* in *Reinman v. City of Little Rock*, where it considered the constitutional validity of a city ordinance that deemed maintaining a livery stable in a particular district to be a nuisance in fact and in law.[97] The city prohibited livery businesses in a densely populated part of the city, even though they had been in the same location for a long time, because "the stables are conducted in a careless manner, with offensive odors, and so as to be productive of disease"—in other words, they constituted a nuisance.[98] The Court held that the ordinance was within the city's police power as delegated by the state and cited *Lawton* for authority that abating a nuisance did not constitute a deprivation of property.[99]

In *Lucas v. South Carolina Coastal Council*, the Court recognized the traditional nuisance exception to a per se takings challenge when landowners are denied all economically beneficial use of their property.[100] In explaining why such an exception exists, the Court noted that a landowner does not have a property right to use his land as a public or private nuisance.[101] Thus, a landowner may not seek compensation if "the proscribed use interests were not part of his title to begin with."[102] Section II.C. explores the modern application of the nuisance exception in more detail.

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requiring a nuisance, "such as a rabid dog, infected clothing, the carcass of a dead animal on a private lot, the presence of a smallpox patient on the street," for abatement based on necessity and emergency).

[95] 197 U.S. 11, 25 (1905).

[96] *Id.*

[97] 237 U.S. 171, 176–77 (1915).

[98] *Id.* at 177–78; *see also* Hadacheck v. Sebastian, 239 U.S. 394, 411–12 (1915) (city's prohibition of the manufacture of bricks in certain localities was valid because it was deemed to be a nuisance in fact and in law); Murphy v. California, 225 U.S. 623, 629 (1912) (city's prohibition against keeping a billiard hall was valid because although it was not a nuisance per se, it could be a nuisance in fact based upon its location).

[99] *Id.*

[100] 505 U.S. 1003, 1027 (1992).

[101] *Id.*

[102] *Id.*

The categorical exception identified by Dana and Merrill for the navigation servitude could be part of the exception identified by the *Lucas* Court as a background principle of law.[103] The navigation servitude permits the federal government "to regulate and keep clear the channels of navigable waterways, regardless of who owns the bed beneath the water."[104] Because riparian owners have always been subject to the government's exercise of power over navigable waterways, any damages suffered are not part of the property owner's bundle of sticks and, therefore, do not require compensation.[105] Unfortunately, it is difficult to reconcile some of the early Court decisions from the 1800s with Court decisions from the twentieth century, such as *United States v. Cherokee Nation of Oklahoma*[106] and *United States v. Rands*,[107] cited by Dana and Merrill in support of the navigation exception to takings liability.[108]

As one commentator explained, state courts in the 1800s recognized the need to compensate riparian property owners when water diversions by a state legislature devalued their interest in real property by taking rights associated with the real property.[109] Kris W. Kobach traced state cases throughout the first half of the nineteenth century that required just compensation for takings involving diversions of water, nonriparian usage rights, denial of access rights, and government actions requiring property owners to bear expenses, such as fencing their properties.[110]

According to Kobach, the U.S. Supreme Court first recognized regulatory takings in a navigation case, *Yates v. City of Milwaukee*, based on a city ordinance, which effectively declared Yates's wharf to be a nuisance or an obstruction to navigation requiring removal.[111] The Court held that Yates, as a riparian owner of a lot adjacent to a navigable stream, had the right to build and maintain a wharf unless the city undertook to widen the channel and

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[103] *See* DANA & MERRILL, *supra* note 33, at 116–18.

[104] *Id.* at 116–17.

[105] *See generally* Kobach, *supra* note 16, at 1234–39 (discussing the history of takings cases over riparian uses).

[106] 480 U.S. 700 (1987).

[107] 389 U.S. 121 (1967).

[108] *See* DANA & MERRILL, *supra* note 33, at 117.

[109] *See* Kobach, *supra* note 16, at 1234–36 (citing Gardner v. Trs. of Newburgh, 2 Johns. Ch. 162, 162–63 (N.Y. Ch. 1816) (holding that a statute passed by the New York Legislature allowing defendants to divert water from an upstream farmer's property was a taking requiring just compensation to be paid to downstream riparian owners whose water flow was diminished).

[110] *See* Kobach, *supra* note 16, at 1234–65.

[111] 77 U.S. 497, 505 (1870); *see* Kobach, *supra* note 16, at 1214, 1267–68 (noting that the *Yates* decision was the Court's "first acknowledged nonacquisitive, nondestructive takings" rather than the *Mahon* case).

improve the navigation, in which case the city must pay him just compensation for his property.[112] In support of its holding, the *Yates* Court declared that:

> This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.[113]

Another navigation decision in *Pumpelly v. Green Bay & Mississippi Canal Co.*,[114] followed the *Yates* decision and was similarly penned by Justice Samuel Miller. In *Pumpelly*, the plaintiff landowner sought damages for the flooding of his land from Wisconsin's authorization to build a dam to improve the navigation of the Fox and Wisconsin Rivers.[115] The Court rejected the defendant's argument "that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation."[116] In rejecting this "navigation servitude" exception to a taking, the Court concluded:

> [W]hen the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the State within which it lies; and that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream.[117]

Thus, even before the *Mahon* decision, property owners could claim a taking by government action other than eminent domain in state courts. The Court in *Yates* and *Pumpelly* required the government to pay just compensation when it interfered with riparian rights.[118] However, the Court retreated from this takings doctrine in its decisions between 1877 and 1900.[119] Part of that retreat included the Court's decision in *Mugler v. Kansas*, where Justice Harlan distinguished and narrowly characterized the *Pumpelly* decision, stating:

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[112] *Yates*, 77 U.S. at 507.
[113] *Id.* at 504.
[114] 80 U.S. 166 (1871).
[115] *Id.* at 175–76.
[116] *Id.* at 177.
[117] *Id.* at 182.
[118] *See* Kobach, *supra* note 16, at 1265–76.
[119] *Id.* at 1276.

> These principles have no application to the case under consideration. The question in *Pumpelly v. Green Bay Company* arose under the state's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the state, exerted for the protection of the health, morals, and safety of the people.[120]

The *Mugler* Court distinguished between the power of eminent domain and the police power such that state actions considered within the police power did not require just compensation. This distinction has remained in some modern decisions, even after the decision in *Mahon* revisited regulatory takings resulting from the valid exercise of the police power.[121]

It appears that the regulatory takings doctrine from *Yates* and *Pumpelly* was distinguished away, first by *Mugler* and then by *Scranton v. Wheeler*,[122] both authored by Justice Harlan.[123] The *Scranton* Court again confronted the issue of whether a riparian owner was entitled to compensation for government actions improving navigation that interfered with private rights.[124] The Court addressed the government's liability "to compensate an owner of land fronting on a public navigable river when his right of access from the shore to the navigable part of such river is permanently obstructed by a pier erected in the river under the authority of Congress for the purpose only of improving navigation."[125]

The Court distinguished the facts in *Scranton* from its earlier decision in *Yates*, where the Court found that there was no proof that Yates' wharf was a nuisance or an obstruction to navigation requiring removal.[126] In contrast, the *Scranton* case involved the exercise of a government power that resulted in a citizen losing the "right of access to navigation" that he had never exercised.[127] The *Scranton* Court noted that the *Yates* opinion "went further" than necessary to dispose of the case and that, the *Yates* decision could not address the points raised by the *Scranton* facts.[128] Accordingly, the *Scranton* Court repudiated the compensation requirement for navigation improvements that damage private rights. Instead, it determined that when the government improves the navigation of the public navigable waters necessary for commerce, it is *not* required to compensate "for the injury to a riparian owner's right of access to navigability, that might incidentally result

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[120] *Id.* at 1280–83 (quoting Mugler v. Kansas, 123 U.S. 623, 668 (1887)).
[121] *See infra* Section I.D.
[122] 179 U.S. 141 (1900).
[123] *See infra* notes 148–160 and accompanying text.
[124] 179 U.S. 141 (1900).
[125] *Id.* at 141.
[126] *Id.* at 157–58.
[127] *Id.* at 158.
[128] *Id.*

from an improvement ordered by Congress."[129] Thus, most courts in the twentieth and twenty-first centuries have treated the "navigation servitude" as not within the property rights of the riparian owner.[130] The navigation servitude, the public trust doctrine, and customary rights have continued to be viable exceptions to regulatory takings claims that constitute a "total taking" under *Lucas,* as background principles of state law. Similar to the nuisance exception, these background principles define certain rights that are not subject to private ownership and, thus, are not property rights that the government can take away.[131]

### *D. Police Power Exception*

Many have credited Chief Justice Lemuel Shaw of the Massachusetts Supreme Court with developing the "practical scope of regulation under the police power"[132] in the 1851 decision of Commonwealth v. Alger.[133] In Alger, the defendant built a wharf into Boston harbor that exceeded restrictions set by the legislature.[134] The court stated that property rights are subject to reasonable regulations that are "necessary to the common good and general welfare."[135] It then noted that the police power "is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use" with reasonable compensation.[136] The Alger court recognized the difficulty in determining how "to mark [the] boundaries [of the police power], or prescribe limits to its exercise," but affirmed that restraining a nuisance would not fall within a taking under eminent domain and should not require compensation.[137] Although the defendant's wharf obstructed or impeded navigation, the court found it was not a nuisance, but held that the defendant had violated the regulation.[138] The regulation was

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[129] *Id.* at 164–65.

[130] *See* Kobach, *supra* note 16, at 1284–85 (three dissenting Justices supported the *Yates* opinion "that riparian rights, when recognized as existing by the law of the State, are a valuable property, and the subject of compensation when taken for public use").

[131] See DAVID CALLIES, REGULATORY TAKINGS AFTER KNICK (2020) for an extensive analysis of regulatory takings and the *Lucas* exceptions.

[132] *See* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 479, 482 (2004) ("*Alger* . . . analytically freed police regulation from its common law origins, and provided an important intellectual building block for the development of the modern regulatory state.").

[133] 61 Mass. 53 (1851).

[134] *Id.* at 64.

[135] *Id.* at 85.

[136] *Id.*

[137] *Id.* at 85–86.

[138] *Id.* at 102–04.

constitutional because the legislature has the right "to make such reasonable regulations as they may judge necessary to protect public and private rights, and to impose no larger restraints upon the use and enjoyment of private property, than are in their judgment strictly necessary to preserve and protect the rights of others."[139] While Alger may be helpful in determining the scope of the police power, the decision occurred more than seventy years before the regulatory taking decision in Mahon.

In 1887, the Court in *Mugler v. Kansas* upheld a regulation during prohibition that denied a brewery's right to continue operation of a previously lawful use.[140] The *Mugler* Court relied on an 1884 decision to declare that the Fourteenth Amendment did not

> interfere with the power of the state, sometimes termed "its police power," to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.[141]

The *Mugler* Court recognized that the state, when using its police power to protect public health, morals, or safety, could not violate federal constitutional rights.[142] However, the brewery owner alleged that the regulation was a taking of property without compensation and due process.[143] The Court distinguished between the state's power of eminent domain and the police power of the state to protect the health, morals, and safety of the people.[144] It stated that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[145]

Courts have cited *Mugler* for the proposition that the police power can prohibit activity the state legislature has deemed a nuisance.[146] Indeed, the Kansas legislation declared places that manufacture and sell intoxicating

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[139] *Id.*

[140] 123 U.S. 623, 664, 674–75 (1887).

[141] *Id.* at 663 (internal quotation marks omitted) (quoting Barbier v. Connolly, 113 U.S. 31, 31 (1884)).

[142] *Id.*

[143] *Id.* at 664.

[144] *Id.* at 668.

[145] *Id.* at 668–69 ("The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.").

[146] *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 519–202 (2005) (Thomas, J., dissenting).

liquors to be common nuisances.[147] However, Justice Harlan relied on the distinction between eminent domain and the police power, rather than nuisance law, to deny compensation for a taking. Harlan dismissed the view from *Pumpelly* that the use of police power could constitute a taking of property and instead relied on the Court's decision in *Transportation Co. v. Chicago*[148] that declared *Pumpelly* to be

> an extreme qualification of the doctrine, universally held, that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use," do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation.[149]

Justice Thomas made the same argument in his *Kelo v. City of New London* dissent that Justice Harlan made in *Mugler*: that "[t]he question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power."[150]

In 1888, well before the 1922 *Mahon* decision, the Court relied on *Mugler* to uphold the state prohibition of oleomargarine in *Powell v. Pennsylvania.*[151] The *Powell* Court concluded that the defendant's argument, claiming a deprivation of property without compensation under the Fourteenth Amendment, was without merit.[152] The Court, led by Justice Harlan again, affirmed the Pennsylvania Supreme Court's decision that the state act prohibiting the "manufacturing or selling [of] wholesome oleomargarine as an article of food" was a valid exercise of legislative power that "will promote the public health, and prevent frauds in the sale of such articles."[153] In *Powell*, there was no mention of nuisance in the decision to justify the use of police power without paying compensation. Thus, the Court did not base its reliance on *Mugler* as a nuisance exception but instead based it upon Harlan's continued dismissal of the idea that a valid exercise of the state's police power to address the public health, safety, or morals could constitute a taking.[154]

In dissent, Justice Field noted two distinct questions at play in the *Powell* decision. "First, whether a state can lawfully prohibit the manufacture of a healthy and nutritious article of food designed to take the place of butter . . .

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147 *Mugler*, 123 U.S. at 675–76 (Field, J., dissenting).
148 99 U.S. 635 (1879).
149 *Mugler*, 123 U.S. at 668 (quoting Transp. Co. v. Chi., 99 U.S. 635, 642 (1879)).
150 *Kelo*, 545 U.S. at 519 (Thomas, J., dissenting).
151 127 U.S. 678 (1888).
152 *Id.* at 687.
153 *Id.* at 686.
154 *Id.* at 686–87.

and, second, whether a state can, without compensation to the owner, prohibit the sale of an article of food, in itself healthy and nutritious . . . ."[155] While the majority found that the answer to the first question was yes, Field concluded that if the legislature were to "forbid the production and sale of any new article of food, though composed of harmless ingredients, and perfectly healthy and nutritious in its character,"[156] such a result would be unconstitutional.[157] Justice Field also took issue with the majority's response to the second question that a state could prohibit the sale without compensation, arguing that the state could not forbid the sale or use of an article that was, not itself, a nuisance, without compensating the owner.[158]

Justice Harlan in *Mugler*, *Scranton*, and *Powell* retreated from Justice Miller's analysis in *Yates* and *Pumpelly* that awarded just compensation for regulatory takings. However, Justice Holmes in his *Mahon* decision eventually defeated Harlan's efforts to eschew regulatory takings. Instead, *Mahon* recognized that unconstrained use of the police power to regulate private property could eventually lead to the disappearance of all private property, thus reintroducing regulatory takings.[159] While the nuisance exception may still serve as a categorical exception to a takings claim, after the *Mahon* decision in 1922, the distinction averred by Justice Harlan between the eminent domain power requiring just compensation and the police power requiring none should no longer exist.[160]

## II. NECESSITY EXCEPTIONS TO TAKINGS AFTER *MAHON*

Regardless of how you interpret the nineteenth century holdings of *Yates* and *Pumpelly* requiring just compensation for the government's interference with property rights,[161] most people accept the view that Justice Holmes in

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[155] *Id.* at 689 (Field, J., dissenting).

[156] *Id.*

[157] *Id.* at 697 ("If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.") (quoting Mugler v. Kansas, 123 U.S. 623, 661 (1887)).

[158] *Id.* at 698–99 ("If the article could not be used without injury to the health of the community, as would be the case, perhaps, if it had become diseased, its sale might not only be prohibited, but the article itself might be destroyed. But [h]ere the article was healthy and nutritious, in no respect injuriously affecting the health of any one.").

[159] 260 U.S. 393, 415 (1922); *see also* Kobach, *supra* note 16, at 1280–85.

[160] *See also* Muller, *supra* note 26, at 518 ("[C]onsensus among contemporary legal scholars has been to accept this [the police power] privilege without much question and to move on without much explanation.").

[161] *See supra* notes 110–31 and accompanying text; *see also* Kobach, *supra* note

*Mahon* first recognized regulatory takings.[162] In *Mahon*, the plaintiffs owned the surface rights to land with an express reservation of rights by the Pennsylvania Coal Company to remove all of the subsurface coal.[163] The plaintiffs took the premises with the risk of subsidence, but subsequent state legislation prohibited coal mining that caused subsidence of a dwelling, with some exceptions.[164] The coal company claimed that the state statute (the Kohler Act) deprived it of its contract and property rights protected by the U.S. Constitution.[165]

Justice Holmes explained that while some property values "must yield to the police power," when the diminution in property value "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[166] The Court held "that the act cannot be sustained as an exercise of the police power" when it takes away the reserved right to mine coal.[167] "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[168] Thus, a property owner may sue the government for compensation for an exercise of police power that has gone "too far." This claim is the "inverse" of a condemnation action taken by the government under its eminent domain power. After *Mahon*, there should be no distinction between excessive use of the police power and eminent domain, both of which may result in a taking requiring just compensation.

In his *Mahon* dissent, Justice Brandeis argued that just compensation need not be paid when the regulated use, in this case, the subsidence of surfaces caused by mining coal, constitutes a noxious use—a nuisance.[169] Justice Holmes, in the majority opinion, countered that a source of damage to a single private house "is not a public nuisance even if similar damage is inflicted on others in different places."[170] However, Holmes did consider a potential exception to a takings claim. He observed that some exceptional cases based "as much upon tradition as upon principle" might go beyond the general rule that "if regulation goes too far it will be recognized as a taking. . . . like the blowing up of a house to stop a conflagration."[171]

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16, at 16.

[162] 260 U.S. 393, 415 (1922).

[163] *Id.* at 412.

[164] *Id.* at 412–13.

[165] *Id.* at 412.

[166] *Id.* at 413.

[167] *Id.* at 414.

[168] *Id.* at 415.

[169] *Id.* at 417 (Brandeis, J., dissenting).

[170] *Id.* at 413 (majority opinion) ("The damage is not common or public.").

[171] *Id.* at 415–16 (citing Bowditch v. Boston, 101 U.S. 16 (1879), but expressing "doubt [as to] how far exceptional cases . . . go – and if they go beyond the general

Recognizing that the Kohler Act was passed "upon the conviction that an exigency existed," Holmes also assumed "that an exigency exists that would warrant the exercise of eminent domain."[172] Nevertheless, "the question at bottom is upon whom the loss of the changes desired should fall," and Holmes reminded us "that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[173]

Indeed, the Court in *Armstrong v. United States* explained the rationale for the Fifth Amendment Takings Clause as "designed to bar [the g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[174] This rationale, recognized as the "*Armstrong* Principle," has become a touchstone in modern decisions applying the Takings Clause in the Fifth Amendment,[175] or as applied to the states through the Fourteenth Amendment.[176]

When the government regulates to promote the general health, safety, and welfare of the public and its use of the police power goes "too far," just compensation will be required.[177] Following *Mahon*, necessity may justify government action to protect public health and safety, but should not shield the government from regulatory takings liability unless the government is acting to prevent a nuisance or is interfering with rights that are not subject to private ownership under background principles of state law.

### *A. Doctrine of Necessity Destruction*

The doctrine of necessity destruction generally includes three separate categories. First, the general doctrine allows for destruction without compensation to prevent the spread of natural disasters such as fires or floods.[178] While this doctrine may encompass destruction to prevent contagions or epidemics,[179] this Article discusses the prevention of contagions and epidemics under the Public Health exception in Section II.B. The second category of necessity destruction allows the military to destroy

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rule, whether they do not stand as much upon tradition as upon principle").

[172] *Id.* at 416.

[173] *Id.*

[174] 364 U.S. 40, 49 (1960).

[175] *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1956 (2017) (Roberts, J., dissenting) (stating that *Armstrong* is the "traditional touchstone for spotting a taking").

[176] *See id.* at 1942 (stating that the Takings Clause "is made applicable to the States through the Fourteenth Amendment").

[177] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (stating that if the regulation goes "too far" it will be considered a taking).

[178] Bowditch v. Boston, 101 U.S. 16 (1879).

[179] *See* Muller, *supra* note 26, at 485.

property without compensation in times of war,[180] and the third category sanctions property destruction without compensation during law enforcement activity.[181]

Part I discussed the historical development of these three categories. This Part discusses how courts have applied these exceptions following the twentieth-century recognition of regulatory takings in *Mahon*.

### *1. General Necessity Destruction*

The general doctrine of necessity recognized in 1879 by the Court in *Bowditch v. Boston*[182] has justified destruction without compensation in modern cases of floods, fires, and law enforcement action.[183] Takings claims for damage or destruction from floods and fires have also been problematic when the distinction between a tort and a taking claim is blurred.[184] Tort concepts of negligence and the question of liability when the government acts, in contrast to when it fails to act, may preclude compensation for a takings claim in both state and federal courts.[185]

State and federal courts have invoked the doctrine of necessity to allow regulatory takings to go uncompensated based on findings of imminent harm and the need for emergency measures to address flooding.[186] For example, in *Irwin v. City of Minot*, the city entered the Irwins' property to remove clay and topsoil for constructing an emergency dike to combat flooding from a nearby river.[187] The City did not have the Irwins' consent and refused to compensate them for removal of the materials from their property.[188]

Initially, the *Irwin* court cited *Bowditch* for the proposition that "[a]t common law, a public entity can exercise a taking without compensating a property owner when acting under its police powers."[189] However, it

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[180] *See infra* notes 228–43 and accompanying text.

[181] *See infra* notes 244–97 and accompanying text.

[182] 101 U.S. 16 (1879).

[183] *See, e.g.*, Strickland v. Dep't of Agric. & Consumer Servs., 922 So. 2d 1022, 1023 (2006) (holding that Florida was not liable for damages and destruction by fire fighters to create a fire line on private property and relying on the statement in Bowditch that "[t]o prevent the spreading of fire, property may be destroyed without compensation to the owner") (alteration in original).

[184] *See* Saxer, *supra* note 10, at 427–39.

[185] *Id.*

[186] *See* Davidson, *infra* note 448, at 188–89 (proposing that the constitutional doctrine of emergency in takings law include economic exigencies such as the nationalization of Fannie Mae and Freddie Mac during the mortgage finance crisis).

[187] 860 N.W.2d 849, 851 (N.D. 2015).

[188] *Id.*

[189] *Id.* at 852 (citing Bowditch v. Boston, 101 U.S. 16, 18–19 (1879)).

recognized that "such use or injury of private property under the police power is uncompensated in this State only where such power is exercised to meet sudden emergencies."[190] The *Irwin* court also relied on *TrinCo Investment Co. v. United States*,[191] stating that "[f]ederal courts have adopted the 'doctrine of necessity' to absolve the State of compensating a party for lost or damaged property."[192] Finally, the *Irwin* court cited the Court's decision in *Lucas v. South Carolina Coastal Council* for "defin[ing] this defense from compensation by requiring proof of actual necessity to forestall 'other grave threats to the lives and property of others.'"[193]

Finding that there was a question of fact "as to whether the imminent danger facing the City gave rise to an actual necessity to take the Irwins' property," the court reversed the order for summary judgment and remanded.[194] The dissenting justice agreed with the outcome but noted that on remand the court should question whether a police power emergency doctrine should allow for uncompensated takings of property.[195]

In consolidated cases of flooding claims after Tropical Storm Harvey, the Court of Federal Claims in *In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs* rejected the government's invocation of its police power to "protect[] . . . life or property . . . during an emergency" to override private property rights during the Harvey emergency.[196] The court refused to dismiss the plaintiffs' taking claims, explaining that the flooding of private land did not occur because the government was responding to an emergency, but was instead due to "the design of the dams and the government's procedures for operating them, all put in place well before Harvey arrived."[197]

Following a trial on the merits, the case returned to the Court of Federal Claims to decide "the nature of government-induced flooding on private property necessary to rise to the level of a Fifth Amendment taking of a flowage eastment [sic]."[198] After analyzing the factors identified by the Supreme Court in *Arkansas Game & Fish Commission v. United States*[199] to

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[190] *Id.* (quoting Wilson v. City of Fargo, 141 N.W.2d 727, 728 (N.D. 1965)).

[191] 722 F.3d 1375, 1378 (Fed. Cir. 2013).

[192] *Irwin*, 860 N.W.2d at 852 (citing *TrinCo Inv. Co.*, 722 F.3d at 1378).

[193] *Id.* at 853 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 n.16 (1992)).

[194] *Id.*

[195] *Id.* at 853–54 (Sandstrom, J., dissenting).

[196] 138 Fed. Cl. 658, 669 (2018) (alterations in original) (internal quotation marks omitted) (quoting Defendant's Reply at 5, 7–11) (citing, *inter alia*, Miller v. Schoene, 276 U.S. 272 (1928); Bowditch v. Boston, 101 U.S. 16 (1879)).

[197] *Id.*

[198] *In re* Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs, 146 Fed. Cl. 219, 227 (2019).

[199] 568 U.S. 23, 38–40 (2012) (identifying six factors to decide whether a

determine whether a taking occurred, the court upheld the trial court's decision that the government took a flowage easement on the properties involved.[200] The court then turned to the government's two defenses to liability for a compensable taking.[201] First, the government cited *Miller v. Schoene*, arguing that "[p]articularly in an emergency, where the government action is part of an effort to reduce or mitigate *unavoidable* harms to the public, no viable taking claim exists."[202] The court quickly disposed of this defense, explaining that the "[d]efendant cannot now claim that this harm was unavoidable when it planned for years to impound floodwaters onto [the] plaintiffs' properties."[203] The second defense based on the necessity doctrine also failed because the land flooded after the government based its flood planning on the design and operation of the dams—not because there was an unexpected emergency.[204]

The upstream landowners affected by Hurricane Harvey were thus entitled to just compensation for the flooding of their properties, although the downstream owners were not as lucky.[205] A different judge in the same court dismissed the downstream owners' takings claim in *In re Downstream Addicks & Barker (Texas) Flood-Control Reservoirs*, finding "that neither Texas law nor federal law creates a protected property interest in perfect flood control in the face of an Act of God."[206] Because the owners did not have a property interest "in perfect flood control," they did not possess an interest the government could take.[207] Note that this outcome is similar to the nuisance and background principles exceptions where the government does not owe compensation when the property owner never had a property interest to begin with—here, "perfect flood control."[208]

State and federal courts have also used the doctrine of necessity as a defense to takings claims for fire damage or destruction of property.[209] For

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compensable taking occurred).

[200] *Upstream Addicks*, 146 Fed. Cl. at 263.

[201] *Id.* at 263–64.

[202] *Id.* at 263 (alteration in original) (quoting Defendant's Brief at 88) (citing Miller v. Schoene, 276 U.S. 272, 279–80 (1928)).

[203] *Id.* at 264.

[204] *Id.* (citing TrinCo Inv. Co. v. United States, 722 F.3d 1375, 1379 (Fed. Cir. 2013) for the three requirements called for to apply the necessity doctrine).

[205] *See* Gabrielle Banks, *Why Did Upstream Win and Downstream Lose When It Came to Lawsuits Over Harvey Flooding in the Houston Area?*, CHRON (Feb. 20, 2020), https://www.chron.com/news/houston-texas/houston/article/Why-did-upstream-win-and-downstream-lose-when-it-15071944.php.

[206] 147 Fed. Cl. 566, 570–71 (2020).

[207] *Id.*

[208] *Compare id.*, *with* discussion *supra* notes 102–08 and accompanying text.

[209] Brewer v. State, 341 P.3d 1107, 1116–18 (Alaska 2014); *see also TrinCo Inv. Co.*, 722 F.3d at 1377.

example, in *Brewer v. State*, landowners brought claims for compensable takings when firefighters used backfire or burnout techniques to protect landowners' structures from an oncoming wildfire by setting fire to the surrounding vegetation.[210] While the structures were not damaged when the fires passed through, the landowners claimed that burning the wildlands on their private property was not necessary and could have been done on nearby state-owned property.[211]

The Alaska Supreme Court allowed the takings claim to proceed, even though it noted that the defense of public necessity might render the taking non-compensable if there were an "imminent danger and an actual emergency giving rise to actual necessity."[212] The *Brewer* court recognized that the doctrine of necessity does not automatically preclude compensation for the taking of private property when the government is acting within the scope of its general police power by conducting firefighting activities.[213] Instead, the doctrine only absolves the government from liability when, at the moment of the taking, there was an imminent danger and actual emergency that required the government to choose between damaging private property and averting an impending peril.[214]

In *TrinCo Investment Co. v. United States* (*TrinCo I*),[215] the Forest Service intentionally set fires for purposes of emergency fire containment and the fires destroyed acres of TrinCo's timber crop, worth over six million dollars.[216] The court dismissed TrinCo's takings claim, relying on the doctrine of necessity to shield the government from compensating when it acts to contain a wildfire.[217] In reviewing *TrinCo I*'s dismissal of the takings claim, the Federal Circuit in *TrinCo II* recognized the doctrine of necessity as a defense[218] but explained that it "may be applied only when there is an imminent danger and an actual emergency giving rise to actual necessity."[219]

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[210] *Brewer*, 341 P.3d at 1110.
[211] *Id.* at 1110–11.
[212] *Id.* at 1116–18 (citing Bowditch v. Boston, 101 U.S. 16, 18 (1879); *TrinCo Inv. Co.*, 722 F.3d at 1377–80).
[213] *Id.* (citing *TrinCo Inv. Co.*, 722 F.3d at 1377).
[214] *Id.*
[215] 106 Fed. Cl. 98, 102 (2012).
[216] *Id.* at 99.
[217] *Id.* at 102.
[218] 722 F.3d 1375, 1377–80 (Fed. Cir. 2013) (citing United States v. Caltex, 344 U.S. 149, 154 (1952); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 n.16 (1992); Bowditch v. Boston, 101 U.S. 16, 18–19 (1880)).
[219] *TrinCo Inv. Co.*, 722 F.3d at 1378.

On remand, the Court of Federal Claims (*TrinCo III*) relied on *Steele v. City of Houston*,[220] discussed below, the Alaska case, *Brewer*,[221] and the Federal Circuit's reversal and remand of the takings claims in *TrinCo II*[222] to establish a "framework for determining when a necessity defense would excuse government-caused fire damage to private property while fighting a wildfire."[223] The court "construe[d] the necessity defense elucidated in *TrinCo II*, as it applies to wildfire situations" [224] as follows:

> Two prerequisites, an actual emergency and imminent danger, must be present to mount a successful necessity defense. If those two prerequisites are satisfied, the court turns to the "actually necessary" component of the necessity defense. For this inquiry, the government's response to a wildfire will be analyzed on a case-by-case, fact-specific basis. In addition, the necessity of the agency's fire-fighting response will be measured at the time of the actual emergency and imminent danger, not in hindsight, and accordingly, must take into account the information available to the fire-fighters at that time. Finally, the fire-fighting decisions of the agency that damaged private land must have been reasonable under the circumstances.[225]

The most troubling aspect of the *TrinCo III* decision is that the Federal Circuit created a new framework for evaluating whether the government can assert the common law doctrine of necessity, which existed before the regulatory takings decision in *Mahon*.[226] When the government acts to protect the public by destroying or damaging private property that is not a nuisance, the public as a whole should bear the burden of paying for it rather than putting the burden on individual owners.[227] One of the major goals of this Article is to show how the various common law doctrines of necessity have crept into modern regulatory takings jurisprudence to preclude private property owners from claiming just compensation when government action has gone "too far," even though it is a valid exercise of police power.

### *2. Military Necessity Destruction*

As discussed in Section I.A., the Court recognized the military necessity defense to claims for compensation during times of war in *United States v.*

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[220] 603 S.W.2d 786, 792 (Tex. 1980).
[221] 341 P.3d 1107, 1116–18 (Alaska 2014).
[222] 722 F.3d at 1375.
[223] Trin-Co Inv. Co. v. United States (*TrinCo III*), 130 Fed. Cl. 592, 600 (2017).
[224] *Id.* at 601.
[225] *Id.*
[226] 260 U.S. 393 (1922).
[227] Armstrong v. United States, 364 U.S. 40, 49 (1960).

*Caltex (Philippines), Inc.*[228] In a more recent wartime situation, the Court of Federal Claims in *Doe v. United States* distinguished between military actions that require compensation and those that do not.[229] Destruction of private property in battle or by enemy forces is not compensable, while "[m]ilitary conduct that does not touch on the destruction or appropriation of enemy property" may require compensation.[230] In *Doe*, members of the U.S. Marine Corps (USMC) temporarily occupied the home and property of an Iraqi citizen, during which time the USMC destroyed a wall that surrounded his home to prevent the enemy from sheltering behind it.[231] The Foreign Claims Commission of the USMC investigated the plaintiff's compensation claim for the destruction and paid for the fence damage only.[232] The Commission declined to compensate for damages incurred after the USMC vacated the property because "the property was attacked, looted, and destroyed by unknown persons."[233] The plaintiff subsequently filed a takings claim with the Court of Federal Claims.[234]

The *Doe* court explained that when the military destroys enemy property, the United States has no liability under the Takings Clause, nor does it have to pay "for the property of even its own citizens in its own country destroyed in attacking or defending against a common public enemy."[235] While military conduct can constitute a compensable taking, there are no bright line rules to determine whether such claims fall within the Takings Clause.[236] The court quoted precedent from the U.S. Court of Claims holding:

> under the military necessity doctrine, "the sovereign is immune from liability for confiscation of private property taken by [the military], through destruction or otherwise, to prevent it from falling into enemy hands, or to protect the health of troops, or as an incidental element of defense against hostile attack and is not compensable under the fifth amendment."[237]

The *Doe* court agreed with the USMC that it did not matter "whether this military necessity was to acquire a better ground position for Coalition operations or to prevent the insurgents from using the home for the placement

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[228] 344 U.S. 149 (1952); *see supra* text preceding notes 58–62.
[229] 95 Fed. Cl. 546, 555–56 (2010).
[230] *Id.* (quoting El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1356 (Fed. Cir. 2004)).
[231] *Id.* at 551–52.
[232] *Id.* at 552.
[233] *Id.* at 551.
[234] *Id.* at 552.
[235] *Id.* at 555 (quoting Perrin v. United States, 4 Ct. Cl. 543, 547–48 (1868)).
[236] *Id.* at 556.
[237] *Id.* (quoting Franco-Italian Packing v. United States, 130 Ct. Cl. 736, 747 (1955)).

or storage of improvised explosive devices, ammunition, or booby traps. Either use falls under the military necessity doctrine and excludes recovery."[238]

The military necessity doctrine requires "that each case in this category must be judged on its own facts."[239] Although the Supreme Court permitted compensation for military takings in cases from the Mexican-American War[240] and the Civil War,[241] it also recognized an exception to government liability when it destroys or damages private property during war.[242] In concluding that the plaintiff's takings claim was not cognizable under the Fifth Amendment, the *Doe* court lamented that "[t]he unfortunate loss of [the] plaintiff's house is yet another addition to the long, sad catalog of wartime property losses that 'must be attributed solely to the fortunes of war, and not to the sovereign.'"[243]

### *3. Law Enforcement Necessity Destruction*

Various states confronting the law enforcement doctrine of necessity in the second half of the twentieth century have allowed the defense, while some states have compensated individuals for property damages resulting from police action for the public good.[244] As discussed below, at least two states allow landowners to use state constitutional damagings claims to obtain just

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[238] *Id.* at 559 (quoting Defendant's Brief filed Feb. 5, 2010, at 10–11).

[239] *Id.* at 565 (quoting Nat'l Bd. of the Young Mens Christian Ass'ns v. United States, 396 F.2d 467, 473 (Ct. Cl. 1968)).

[240] Mitchell v. Harmony, 54 U.S. (13 How.) 115, 128–30, 136 (1851). The taking occurred when Spanish-born naturalized U.S. citizen was "forced to follow the Army against his will, with the Army requisitioning his merchandise for use during the battle of Sacramento and a subsequent march into Mexico." *Doe*, 95 Fed. Cl. at 559 (citing *Mitchell*, 54 U.S. at 128–30).

[241] United States v. Russell, 80 U.S. (13 Wall.) 623, 628–29 (1871) (holding the U.S. Army's taking of three steamboats to ferry Union troops during the Civil War was valid due to necessity, but requiring the U.S. to compensate the owner of the boats).

[242] *See, e.g.*, United States v. Pac. R.R., 120 U.S. 227, 233–39 (1887) ("The destruction or injury of private property in battle . . . had to be borne by the sufferers alone . . . ."); Juragua Iron Co. v. United States, 212 U.S. 297, 301–02 (1909) (denying a takings claim brought by owners of buildings in Cuba that were destroyed by the military during the Spanish-American War). *See generally* Lynda L. Butler, *The Governance Function of Constitutional Property*, 48 U.C. DAVIS L. REV. 1687 (2015) (discussing physical takings, public necessity, and emergency uses).

[243] *Doe*, 95 Fed. Cl. at 566 (quoting United States v. Caltex, 344 U.S. 344 U.S. 149, 155–56 (1952)).

[244] *See* Muller, *supra* note 26, at 498–500.

compensation when law enforcement pursues criminal suspects and damages private property in the process.[245]

In *Wegner v. Milwaukee Mutual Insurance Co*.,[246] an armed suspect pursued by the Minneapolis police entered the plaintiff's home and hid in a closet.[247] The SWAT team responded with tear gas and flash-bang grenades to apprehend the suspect, causing extensive damage to the plaintiff's house.[248] Lower courts held that even though there was a "taking" under the Minnesota constitution, the "taking" was not compensable because it was for a public necessity.[249] The Minnesota Supreme Court in *Wegner* reversed, holding that where police damage an innocent third party's property in pursuit of a suspect, the damage is compensable under the state constitutional provision for takings and damagings.[250]

The *Wegner* court respected "the well-reasoned decision of *Steele v. City of Houston*" from the Texas Supreme Court to uphold a takings claim.[251] In *Steele*, armed escaped prisoners concealed themselves in a house chosen at random, and Houston police set the house on fire and let it burn to apprehend them.[252] The Texas Supreme Court reversed the lower court's grant of summary judgment to the City and remanded to allow the plaintiffs to prove the police intentionally set the house on fire to apprehend the dangerous men for the public's benefit in an emergency.[253] The court also allowed the City to defend its actions on remand by showing "a great public necessity" to allow the uncompensated destruction of property "justified by reason of war, riot, pestilence or other great public calamity."[254] Even though the court did not hold that the police "wrongfully ordered the destruction of the dwelling," it did hold that "innocent third parties are entitled by the Constitution to compensation for their property."[255]

Both Texas and Minnesota recognize that innocent property owners deserve compensation for damages from law enforcement to protect the public safety under the traditional police power. In *Steele*, Texas indicated the possibility of a necessity defense based on a "great public necessity."[256]

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[245] *See infra* notes 256–57.
[246] 479 N.W.2d 38 (Minn. 1991).
[247] *Id.* at 39.
[248] *Id.*
[249] *Id.* at 42.
[250] *Id.* at 41.
[251] *Id.* at 40 (citing Steele v. City of Houston, 603 S.W.2d 786 (Tex. 1980)).
[252] 603 S.W.2d at 789.
[253] *Id.* at 791–92.
[254] *Id.* at 792.
[255] *Id.* at 793.
[256] *Steele*, 603 S.W.2d at 792 (providing that "City of Houston may defend its actions by proof of a great public necessity").

However, Minnesota noted in *Wegner* that it would not allow such a necessity defense and that "the better rule, in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages."[257]

Some state courts have denied just compensation by distinguishing the police power from eminent domain when interpreting their state constitutions.[258] For example, in *McCoy v. Sanders*, a Georgia court affirmed the denial of compensation for taking or damaging property where law enforcement officers drained a pond on private property to locate the body of a murder victim.[259] Relying on an 1894 treatise, *Bowditch v. City of Boston*,[260] and *Barbier v. Connolly*,[261] among other sources, the court distinguished the use of the police power based on necessity from eminent domain.[262]

California similarly distinguished the police power from eminent domain in *Customer Co. v. City of Sacramento* to reject an inverse condemnation claim when law enforcement damaged a food and liquor store in pursuit of a suspect.[263] The California Supreme Court explained that an inverse condemnation claim is allowed for property damage that results from a public improvement or public work, but not for damages "caused by actions of public employees having 'no relation to the function' of a public improvement," which should instead be handled under tort principles.[264] In addition to relying on the distinction between eminent domain and police power, the court relied on the "so-called emergency exception to the just compensation requirement."[265]

The Washington Supreme Court in *Eggleston v. Pierce County* distinguished between eminent domain and the police power to hold that a homeowner did not suffer a compensable taking when her "home was rendered uninhabitable by the execution of a criminal search warrant and

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[257] Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 42 (Minn. 1991).

[258] *See* Muller, *supra* note 26, at 498–500.

[259] 148 S.E.2d 902, 903 (Ga. Ct. App. 1966).

[260] 101 U.S. 16 (1879).

[261] 113 U.S. 27 (1884).

[262] 148 S.E.2d at 903–05 (first citing WILLIAM PACKER PRENTICE, POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY 4, 6 (1894); then citing *Bowditch*, 101 U.S. 16; and then citing *Barbier*, 113 U.S. at 30).

[263] 895 P.2d 900, 906–07 (Cal. 1995).

[264] *Id.* at 909; *see also* Walter W. Heiser, *Floods, Fires, and Inverse Condemnation*, 28 N.Y.U. ENV'T L.J. 1 (2021) (discussing the police power exemption as it applies to claims of inverse condemnation).

[265] *Id.* ("[The emergency exception] is a specific application of the general rule that damage to, or even destruction of, property pursuant to a valid exercise of the police power often requires no compensation under the just compensation clause.").

preservation order."[266] Though the court recognized that the Washington takings clause provides greater protection than its Fifth Amendment counterpart does, it nevertheless held that seizing and preserving evidence was an exercise of police power and not a use of eminent domain.[267] Accordingly, the court determined that the destruction of her home was not a compensable taking under the state constitution.[268]

As in California's *Customer* decision and Georgia's *McCoy* decision, Washington's *Eggleston* decision distinguished between the exercise of police power and eminent domain. The *Eggleston* majority stated, "[e]minent domain takes private property for a public use, while the police power regulates its use and enjoyment, *or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public*."[269] Justice Richard B. Sanders vigorously dissented stating, "the majority appears to incant 'police power' as some sort of mystical excuse to cart away part of a person's house without paying for it."[270] He pointed out that regulatory taking jurisprudence is not applicable to the facts of this case because here there was "a physical invasion, physical seizure, and confiscation, not an alleged regulatory taking by excessive use restriction."[271] After thoroughly discussing the cases relied upon by the majority, Justice Sanders concluded in dissent that Mrs. Eggleston's "property was taken, she was paid nothing, and she is being required to shoulder a public burden which, in all justice, should be borne by all of society, not herself alone."[272]

Federal decisions have similarly barred takings claims for law enforcement actions under the Fifth Amendment. For example, the Seventh Circuit in *Johnson v. Manitowoc County*[273] denied a landlord's claim for compensation when his property was damaged during the murder investigation of his tenant and the execution of search warrants on the premises.[274] Investigating officers damaged the landlord's property by "removing carpet sections and wall paneling, cutting up a couch in the trailer, and jackhammering the

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[266] 64 P.3d 618, 620 (Wash. 2003).

[267] *Id.* at 622–23; *see also* Soucy v. State, 506 A.2d 288, 290, 293 (N.H. 1985) (holding that a court order preventing repair of an apartment to preserve evidence during an arson investigation was not a taking, but rather "a non-compensable exercise of the police power").

[268] *Eggleston*, 64 P.3d at 623.

[269] *Id.* at 623 (quoting Conger v. Pierce County, 116 Wash. 27, 36 (1921)).

[270] *Id.* at 629 (Sanders, J., dissenting).

[271] *Id.*

[272] *Id.* at 633.

[273] 635 F.3d 331 (7th Cir. 2011).

[274] *Id.* at 336.

concrete floor of the garage."[275] The court noted, "it seems quite unfair to make an innocent, unlucky landlord absorb the costs associated with the execution of a search warrant directed at a criminally-inclined tenant."[276] The Takings Clause, however, "does not apply when property is retained or damaged as the result of the government's exercise of its authority pursuant to some power other than the power of eminent domain."[277]

In *Lech v. Jackson*,[278] the Tenth Circuit denied a takings claim under the Fifth Amendment for damages to a private home caused by the police pursuing a criminal suspect.[279] In rejecting the claim, the Tenth Circuit held "that when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause."[280] The *Lech* court rejected the argument "that the police power does not encompass the state's ability to seize property from an *innocent* owner."[281] It also relied on *AmeriSource Corp. v. United States*,[282] which held there was no taking "where the government physically seized (and ultimately 'rendered worthless') the plaintiff's pharmaceuticals 'in connection with [a criminal] investigation' because 'the government seized the pharmaceuticals in order to enforce criminal laws'–an action the Federal Circuit said fell well 'within the bounds of the police power.'"[283] The *Lech*

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[275] *Id.* at 333.

[276] *Id.* at 336 (noting that the landlord could seek redress through Wisconsin state law).

[277] *Id.* (citing AmeriSource Corp. v. United States, 525 F.3d 1149, 1154 (Fed. Cir. 2008) to find that actions were taken under state's police power).

[278] 791 F. App'x 711 (10th Cir. 2019), *cert. denied*, 141. S. Ct. 160 (2020).

[279] *Id.* at 712; *but see* Baker v. City of McKinney, 2022 WL 2068257, at *19–20 (E.D. Tex. 2022) (stating "[t]he flaw in the Tenth Circuit's reasoning is that it focuses solely on the scope of the police power. By ending its inquiry upon finding that the actions were taken pursuant to the state's police powers, the *Lech* court impliedly asserted that the public good and public use categories are mutually exclusive") (internal citations omitted); Emilio R. Longoria, *Lech's Mess with the Tenth Circuit: Why Governmental Entities are not Exempt from Paying Just Compensation When They Destroy Property Pursuant to Their Police Powers*, 11 WAKE FOREST J.L. & POL'Y 297 (2021) (discussing and distinguishing *Lech* by examining cases in which individuals should get just compensation, even in situations where the government uses the police power).

[280] *Id.* at 717.

[281] *Id.* at 719; *see also* Bachmann v. United States, 134 Fed. Cl. 694, 695 (2017) (dismissing the plaintiffs' taking claim against the United States Marshals Service for "damage caused by USMS's entry onto their property to apprehend a fugitive" on the grounds that "[f]ederal jurisprudence does not reflect the same broad inclusion of all types of property damage within the scope of the Takings Clause") (citing Gibson v. United States, 166 U.S. 269, 274–75 (1897)).

[282] 525 F.3d 1149 (Fed. Cir. 2008).

[283] *Lech*, 791 F. App'x at 715 (quoting *AmeriSource Corp.*, 525 F.3d at 1150, 1153–

decision concluded that regardless of the property owner's innocence, if the government acts pursuant to a power other than eminent domain, the property owner could not claim compensation for a taking under the Fifth Amendment.[284]

In concluding the law enforcement exception, note that civil asset forfeiture from criminal activity is not a compensable taking, even when the property owner is not involved in the crime and had no knowledge of the criminal use of their property.[285] For example, the U.S. Supreme Court in *Bennis v. Michigan* affirmed the Michigan Supreme Court decision that a husband's use of his car to engage in a sexual act with a prostitute was a public nuisance justifying a forfeiture of the wife's interest in the car even though she was an innocent owner.[286]

The Fourth Circuit in *Ostipow v. Federspiel* acknowledged, "several circuits have concluded that the use of police power to lawfully seize and retain property categorically bars a Takings Clause claim."[287] The Ostipows received a state court judgment after eight years of litigation for property

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54) (citing Bennis v. Michigan, 516 U.S. 442, 443–44, 452–53 (1996)).

[284] *Lech*, 791 F. App'x at 719 (citing *AmeriSource Corp.*, 525 F.3d at 1154–55); *see also* McCutchen v. United States, 145 Fed. Cl. 42, 45 (2019) (rejecting a takings claim brought by owners of bump stock firearms in response to a directive from the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) that they must destroy all bump-stock devices in their possession). The Federal Circuit affirmed the Court of Federal Claims' dismissal of the takings claim in *McCutchen v. United States*, but did so on different grounds. 14 F.4th 1355, 1358 (Fed. Cir. 2021). While the Claims Court "principally relied on the 'police power' doctrine, concluding that, because the Final Rule sought to protect health and safety, it did not effect [sic] a taking for public use," the Federal Circuit based its dismissal of the takings claim on finding that "plaintiffs lacked an established property right in continued possession or transferability." *Id.*

[285] *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 (1974); *see also* Kam-Almaz v. United States, 682 F.3d 1364, 1371–72 (2012) ("'Property seized and retained pursuant to the police power is not taken for a "public use" in the context of the Takings Clause,' . . . Kam-Almaz's innocence does not convert ICE's seizure into a compensable taking under the Fifth Amendment." (quoting *AmeriSource Corp.*, 525 F.3d at 1153)).

[286] 516 U.S. 442, 443–46 (1996). It is unclear whether the concept of forfeiture without just compensation is based on the law enforcement exception to takings, but the *Bennis* Court appears to have relied on the public nuisance exception to support the police action without compensation. *See* Singer v. City of Chicago, 435 F. Supp. 3d 875 (N.D. Ill. 2020) (allowing City to seize and possess personal property that had not been used in a crime or declared illegal as a valid exercise of police power without compensation).

[287] 824 F. App'x 336, 342 (6th Cir. 2020) (citing *Lech*, 791 F. App'x at 717; Zitter v. Petruccelli, 744 F. App'x 90, 96 (3d Cir. 2018); Johnson v. Manitowoc County, 635 F.3d 331, 333–34, 336 (7th Cir. 2011); Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1331–32 (Fed. Cir. 2006)).

seized and sold under forfeiture proceedings, but Michigan's Saginaw County had not satisfied the judgment.[288] The Fourth Circuit concluded that the state court was responsible for ensuring satisfaction of the Ostipows' judgment.[289] The Fourth Circuit denied the Ostipows' takings claim for a civil asset forfeiture action, noting that "[t]he weight of authority holds that claims emanating from the use of police power are excluded from review under the Takings Clause."[290] It is curious that while the Fourth Circuit adopted the weight of authority precluding a takings claim for civil asset forfeiture, it also remarked that several states, including Michigan, have acted to curb abuses in these forfeitures and that "[t]his area of law . . . is one that appears to be evolving."[291]

The doctrine of necessity destruction developed at common law during a time when government regulations were not as pervasive as they are today.[292] The government has used this doctrine as a defense to takings claims when government action destroys or damages private property when facing wildfires, flooding, military action, and law enforcement.[293] Both state and federal courts have applied this doctrine to deny compensation by distinguishing between the eminent domain power and the police power.[294]

Exercises of eminent domain and police power actions that "go too far" require compensation because the Fifth Amendment "was designed to bar [the g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[295] Law enforcement is one aspect of the police power authority to promote the health, safety, and welfare of the public.[296] But calling law enforcers "police" does not mean that their actions should be shielded from takings liability under "the police power" when they enforce the law, whether in an

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[288] *Id.* at 344.
[289] *Id.*
[290] *Id.* at 342.
[291] *Id.*
[292] *See* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 40 (1964) ("As the scope of governmental regulations grew, however, the economic impact of government regulation undermined the rationality of Harlan's conceptual distinctions. Particularly with the growth of zoning, conservation legislation, and pervasive business regulation, the impact of the police power, however defined as qualitatively distinct, upon the traditional perquisites of private ownership could hardly be ignored."); *see also* Barros, *supra* note 132, at 503 ("As the modern regulatory state developed in the late nineteenth century, and the scope of police regulation increasingly transcended its community-based common law roots, police regulations increasingly restricted uses of private property that were not so inherently harmful that they could be condemned as noxious uses.").
[293] *See* Saxer, *supra* note 10, at 275–303.
[294] *See infra* notes 380–4445 and accompanying text.
[295] Armstrong v. United States, 364 U.S. 40, 49 (1960).
[296] *See* Muller, *supra* note 26, at 498.

emergency or not. When private property rights that are not illegal or a nuisance are destroyed or damaged to achieve a public purpose, regulatory takings claims should be reviewed under our takings jurisprudence to determine whether they are a compensable taking so as not to burden the individual with costs that should be borne by the community as a whole.[297]

### *B. Public Health Necessity Exception*

Public health law has developed from the 1800s into modern times to permit the destruction of animals affected with a contagious disease.[298] States have relied on a public nuisance exception to avoid compensation unless provided for under the statutory destruction authority.[299] Statutory authority and the exercise of police power to protect the health, safety, and welfare of the community have also supported the destruction of trees and crops.[300]

In some states, destruction for public health purposes has required compensation if the item destroyed is not itself diseased.[301] For example, in *Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc*., the Florida Department of Agriculture ordered citrus nurseries in Hardee County to destroy their stock of citrus trees, even though there was no citrus

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[297] *See id.*

[298] *See, e.g.*, Newark & S.P. Horse Car R. Co. v. Hunt, 12 A. 697, 699–701 (N.J. 1888) (holding that owners of horses destroyed by the state health official were not entitled to compensation because the official was authorized to abate the public nuisance of horses infected with a contagious disease called glanders); Cory v. Graybill, 149 P. 417, 419–20 (Kan. 1915) (finding that cattle diseased with tuberculosis were not taken for public use under eminent domain but were instead destroyed for the public good because "they were afflicted with a contagious disease endangering the public welfare" and, thus, the destruction need not be compensated); Pa. Dep't. of Agric. v. Hill, 3 Pa. D. & C.2d 302, 314–15 (1955) (holding that the slaughter of contagious or infectious cattle to control and eradicate bang disease was not a taking, but rather a valid exercise of police power to destroy a public nuisance); Raynor v. Md. Dep't. of Health & Mental Hygiene, 767 A.2d 978, 991 (Md. Ct. Spec. App. 1996) (finding that the destruction of a pet ferret was not a compensable taking because it was a wild animal that bit a child and could have spread the rabies virus, making it a public nuisance that could be abated).

[299] *Id.*

[300] *See Right to and Measure of Compensation for Animals or Trees Destroyed to Prevent Spread of Disease or Infection*, 67 A.L.R. 208 (originally published in 1930).

[301] *See, e.g.*, Dep't of Agric. & Consumer Servs. v. Bogorff, 35 So. 3d 84, 90 (Fla. Dist. Ct. App. 2010) (requiring compensation for the destruction of healthy trees and stating that "if government cuts down and burns private property having value, then government has taken it. And if government has taken it, government must pay for it.")

canker infestation.[302] The nurseries filed inverse condemnation claims to seek compensation for the destruction of their healthy trees.[303] The appellate court certified the following question to the Florida Supreme Court: "Whether the state, pursuant to its police power, has the constitutional authority to destroy healthy, but suspect citrus plants without compensation?"[304] The Florida Supreme Court answered the certified question in the negative and concluded, "destruction of the healthy trees benefited the entire citrus industry and, in turn, Florida's economy, thereby conferring a public benefit rather than preventing a public harm."[305] Although the state's order to destroy the healthy trees was a valid exercise of police power, it was a taking that required just compensation.[306]

Some states have refused to compensate property owners for the destruction of healthy trees and crops because the exercise of police power was necessary to address "an extremely threatening emergency."[307] Washington courts have typically upheld tree destruction without compensation when ordered to "avert a public calamity."[308] In *In re Property Located at 14255 53rd Ave., S.*, the court denied compensation when state agricultural officials removed healthy trees within a one-eighth mile radius of where five quarantined citrus longhorned beetles escaped, as potential host trees for the dangerous pest.[309] The court compared the tree destruction "to the uncompensated confiscation of cedar trees in Virginia to save the apple industry from a communicable disease."[310] The Washington Supreme Court in *Short v. Pierce Co*. also applied the necessity defense to berry farmers'

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[302] 521 So. 2d 101, 102 (Fla. 1988).

[303] *Id.*

[304] *Id.*

[305] *Id.* at 103 ("Although this factor alone may not be conclusive, we have previously recognized that if a regulation creates a public benefit it is more likely that there is a taking." (citing Graham v. Estuary Props., Inc., 399 So. 2d 1374, 1381 (Fla. 1981)).

[306] *Id.* at 103–04 ("[W]hen the state, in the exercise of its police power, destroys decayed fruit, unwholesome meats or diseased cattle, the constitutional requirement of 'just compensation' clearly does not compel the state to reimburse the owner for the property destroyed because such property is valueless, incapable of any lawful use, and a source of public danger." (citing State Plant Bd. v. Smith, 110 So. 2d 401, 406–07 (Fla. 1959)); *see also* Corneal v. State Plant Bd., 95 So. 2d 1 (Fla. 1957) (holding the destruction of healthy citrus trees required just compensation)).

[307] *In re* Prop. Located at 14255 53rd Ave., S., 86 P.3d 222, 229 (E.D. Wash. 2014).

[308] *Id.* at 223.

[309] *Id.* at 223–26 (analyzing the facts based on cases applying the necessity defense rather than determining if it was a taking under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426–30 (1982) or Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104 (1978)).

[310] *Id.* at 227–28 (citing extensively Miller v. Schoene, 276 U.S. 272 (1928)).

claims for compensation for topsoil removed from their property for emergency flood control.[311] The court relied on the rule found in *Nichols on Eminent Domain*, a 1917 treatise, that allows private property to be damaged or destroyed without just compensation in order "to avert the impending calamity," such as fire, flood, or pestilence.[312]

California refused to compensate insurance companies who were obligated to pay owners of automobiles damaged by aerial spraying of pesticides and chemicals to eradicate the Mediterranean fruit fly (medfly).[313] The court noted that emergencies justifying police action without compensation include "the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized."[314] In addition to finding that the emergency exercise of police power provides immunity from an inverse condemnation claim, the court determined that "the medfly eradication program was a valid exercise of the State's police power to abate a public nuisance" without compensation.[315]

The Federal Circuit in *Yancey v. United States* adopted the approach used by Florida courts to find that even if the regulatory action is reasonable, it can nonetheless constitute a compensable taking.[316] The U.S. Department of Agriculture (USDA) imposed a poultry quarantine to control and eliminate an outbreak of Avian Influenza in Pennsylvania in 1983 and 1984, which also spread to Maryland and Virginia.[317] Turkey breeders in Virginia alleged a taking of their property because they could not ship live poultry and other products outside the state, destroying the economic value of their stock.[318]

The *Yancey* court first determined that the quarantine legislation did not provide compensation for restrictions on healthy turkeys that did not require destruction.[319] It then turned to the breeders' constitutional takings claims and agreed with the Court of Federal Claims that the Fifth Amendment protected the Yanceys' ownership of their turkeys as personal property as much as it would protect the real property ownership of their farm.[320] The

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311 78 P.2d 610, 614–15 (1938).
312 *Id.* at 615–16.
313 Farmers Ins. Exch. v. State, 221 Cal. Rptr. 225, 227–29 (Cal. Ct. App. 1985).
314 *Id.* at 229 (quoting House v. L.A. Cnty. Flood Control Dist., 25 Cal. 2d 384, 391 (1944)).
315 *Farmers Ins. Exch.*, 221 Cal. Rptr. at 230.
316 915 F.2d 1534, 1540 (Fed. Cir. 1990) (citing Dep't of Agric. & Consumer Servs. v. Mid-Fla. Growers, Inc., 521 So. 2d 101 (Fla. 1988), *cert. denied*, 488 U.S. 870 (1988)).
317 *Id.* at 1536.
318 *Id.* at 1536–37.
319 *Id.* at 1537–38.
320 *Id.* at 1541.

court discussed a case with similar facts and a different outcome, which the Claims Court had not addressed.[321] In *Empire Kosher Poultry, Inc. v. Hallowell*,[322] the USDA quarantined healthy chickens in Pennsylvania due to the same Avian Influenza outbreak, and the Third Circuit held there was no compensable taking.[323] The *Yancey* court chose *not* to follow *Empire*, first, because it could distinguish the two cases, and second, because it found the *Empire* decision was "inconsistent with the intent of the Fifth Amendment."[324]

*Yancey* upheld the Claims Court's findings of fact and concluded that it properly weighed the facts "under the modern *Penn Central* approach [to find] that the Yanceys suffered severe economic impact."[325] The *Yancey* court factually distinguished *Galloway Farms, Inc. v. United States*,[326] where "the court ruled that the grain embargo imposed on the Soviet Union did not amount to a compensable taking under the Fifth Amendment" because unlike the Yanceys, the farmers in *Galloway Farms* could use their property "in other economically viable ways."[327] The *Yancey* court concluded its finding of a compensable taking with the following statement:

> When adverse economic impact and unanticipated deprivation of an investment backed interest are suffered, as when the poultry quarantine forced the Yanceys to sell their turkey flock, compensation under the Fifth Amendment is appropriate. Even when pursuing the public good, as the USDA was doing when it imposed the poultry quarantine, the Government does not operate in a vacuum. Bluntly stated, the consequences of the Government's action cannot be ignored. Why should the Yanceys be forced to bear their own losses when their turkeys were not diseased? The Yanceys' losses came about because of the Government's action. If the intent of the poultry quarantine was to benefit the public, the public should be responsible for the Yanceys' losses.[328]

When the police power destroys or damages property for a valid public purpose, a court must analyze an inverse condemnation claim for the loss under the relevant takings jurisprudence. Unless the property destroyed or damaged is itself a nuisance, the court should allow a takings claim for the harmful government action addressing imminent harm, emergency, or public health concerns.

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[321] *Id.*
[322] 816 F.2d 907 (3d Cir. 1987).
[323] 915 F.2d at 1541.
[324] *Id.*
[325] *Id.*
[326] 834 F.2d 998, 1003 (Fed. Cir. 1987).
[327] 915 F.2d at 1541–42.
[328] *Id.* at 1542.

In a case involving the destruction of agricultural property for a public health issue, the Fourth Circuit directly addressed the police power/eminent domain distinction in *Yawn v. Dorchester County*.[329] The court upheld the district court's decision that the beekeepers' claim for the death of their bees from an aerial pesticide spray by the county, intended to kill mosquitos to avoid a possible Zika virus outbreak, was not a taking because the death of the bees was not intended or foreseeable.[330] However, even though the district court held that because the County "was exercising its police power, and not its power of eminent domain, the Takings Clause is not implicated,"[331] the Fourth Circuit stated "[t]hat Government actions taken pursuant to the police power are not per se exempt from the Takings Clause is axiomatic in the Supreme Court's jurisprudence."[332]

### *C. Nuisance Exception*

As discussed above in Section I.C, the Court in *Lucas v. South Carolina Coastal Commission* acknowledged that while the deprivation of all economically beneficial use would constitute a per se taking, uses that create a nuisance would not inhere in the owner's property rights.[333] Thus, if "the proscribed use interests were not part of his title to begin with" a landowner may not seek compensation for a taking.[334] Courts, practitioners, and scholars recognize that "no one has a legally protected right to use property in a manner that is injurious to the safety of the general public," so when the government prohibits or damages a land use that is a public nuisance, there is no taking.[335] Many, but not all, of the necessity exception cases discussed above have also relied on the public nuisance distinction. This Section will review a sampling of modern decisions that apply the nuisance exception to a takings claim.

When the government enters private property to remediate property posing a safety hazard, courts have denied takings claims.[336] For example, in

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[329] 1 F.4th 191 (4th Cir. 2021).

[330] *Id.* at 194–96 (4th Cir. 2021).

[331] *Id.* at 194 (4th Cir. 2021) (citing Chicago, B. & Q. Ry. Co. v. Illinois, 200 U.S. 561, 593–94 (1906)).

[332] 1 F.4th 191, 195 (4th Cir. 2021).

[333] 505 U.S. 1003, 1027 (1992).

[334] *Id.*

[335] *See* Sandra B. Zellmer, *Takings, Torts, and Background Principles*, 52 WAKE FOREST L. REV. 193, 234 (2017) (quoting Allied-Gen. Nuclear Servs. v. United States, 839 F.2d 1572, 1576 (Fed. Cir. 1988)).

[336] *Id.*; *see also* Nat'l Amusements, Inc. v. Borough of Palmyra, 716 F.3d 57, 63 (3d Cir. 2013) (exercise of police power to temporarily close flea market to abate danger of unexploded artillery shells buried in property was not compensable as it

*Hendler v. United States*, the trial court determined that the Environmental Protection Agency's installation of monitoring wells on private property to identify toxic plume flows from a nearby site fell within the nuisance exception such that the landowner was not entitled to compensation.[337] The Federal Circuit upheld the finding that no taking occurred because there was insufficient economic impact to constitute a regulatory taking, but it did not consider the trial court's alternative theory of a nuisance exception.[338]

Building destruction has also been allowed as a reasonable exercise of police power when the building itself is a public nuisance.[339] In *Perepletchikoff v. City of Los Angeles*, the Board of Building and Safety required a hotel building to be vacated and demolished as it was unfit for human occupancy and constituted a public nuisance.[340] Likewise, the court in *Miles v. District of Columbia* stated that a local government might destroy private property rather than permitting it to "remain in a condition that harms, or threatens to harm, the public interest."[341] The *Miles* court noted that before the government exercises its police power without compensation, there must be a public nuisance defined by common law or statute to allow the nuisance abatement.[342] Because the landowner was denied due process by not being informed of the demolition or given an opportunity to object, she was entitled to just compensation.[343]

Building closure in lieu of destruction may also be appropriate if the building presents a public nuisance. In *City of New York v. New St. Mark's Baths*, the court permanently enjoined "high risk sexual activity in a gay bathhouse," although it agreed to allow the baths to reopen in a year so long as the owners allowed private rooms to be open to visual inspection.[344] The New St. Marks Baths was shuttered permanently in 1985 after gay activists, in fear of the HIV/AIDs epidemic, convinced the State of New York to authorize New York City to close gay bathhouses.[345]

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was a harmful or noxious use).

[337] 36 Fed. Cl. 574, 585–86 (1996).

[338] 175 F.3d 1374, 1386 (Fed. Cir. 1999).

[339] Building destruction by municipalities is beyond the scope of this Article, but for an interesting article discussing destruction as necessary to urban resiliency see Kellen Zale, *Urban Resiliency and Destruction*, 50 IDAHO L. REV. 85 (2014).

[340] 345 P.2d 261, 268 (Cal. Ct. App. 1959).

[341] 354 F. Supp. 577, 579 (D.D.C. 1973).

[342] *Id.* at 579–81.

[343] *Id.* at 585.

[344] 562 N.Y.S.2d 642, 643 (App. Div. 1990).

[345] Will Kohler, *Gay History – December 9, 1985: The NYC Dept. of Health Closes the Infamous New St. Marks Baths*, BACK2STONEWALL (Dec. 9, 2019), http://www.back2stonewall.com/2019/12/dec-9-1985-nyc-department-health-closes-st-marks-baths.html.

*Miller v. Schoene* is a major obstacle for courts attempting to distinguish the "nuisance exception" from the "doctrine of necessity."[346] In *Schoene*, the Court declined to consider the common law of nuisance or statutory regulation and instead relied on a general necessity defense to uphold the non-compensable government action of destroying healthy trees to prevent spreading disease to more economically valuable trees.[347] Yet courts have continued to cite the *Schoene* decision as an application of the nuisance exception to healthy and lawful uses.[348] This is a broad interpretation and may apply to situations that do not qualify for the nuisance exception.[349]

The Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis* rejected the view that *Pennsylvania Coal* overruled earlier cases such as *Mugler*, *Hadacheck*, and *Reinman*, pointing to the fact that Justice Holmes joined a unanimous decision in *Miller v. Schoene* only five years after *Pennsylvania Coal*.[350] In *Schoene*, the Court upheld the State's use of police power to prevent imminent danger without paying just compensation.[351] The *Keystone* majority noted, "[c]ourts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance."[352] Chief Justice Rehnquist in dissent argued that the nuisance exception to takings analysis is a "narrow exception allowing the government to prevent 'a misuse or illegal use' . . . [that] is not intended to allow 'the prevention of a legal and essential use, an attribute of its ownership.'"[353]

The broad citation of *Miller v. Schoene* to support a public necessity exception to the takings clause after *Mahon* is in error because the issue in *Schoene* was not whether the infected or healthy cedar trees were a nuisance under common law or statute.[354] Instead, the Court in *Miller v. Schoene* stated, "where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is

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[346] 276 U.S. 272 (1928).

[347] *Id.* at 280.

[348] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 470 U.S. 460 (1987).

[349] *See* Muller, *supra* note 26, at 512.

[350] 480 U.S. 470, 490 (1987) (citing Miller v. Schoene, 276 U.S. 272 (1928)).

[351] *Schoene*, 276 U.S. at 279–80; *see also Keystone*, 480 U.S. at 490 (discussing the holding in *Schoene*).

[352] *Keystone*, 480 U.S. at 492 n.22.

[353] *Id.* at 512 (Rehnquist, C.J., dissenting) (quoting Curtin v. Benson, 222 U.S. 78, 86 (1911)).

[354] *Schoene*, 276 U.S. at 280 (stating "[w]e need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute").

one of the distinguishing characteristics of every exercise of the police power which affects property."[355]

The *Schoene* Court relied on eight decisions for the principle that the exercise of police power for the public interest allows for destruction of private property without compensation.[356] Six of the eight decisions the Court relied upon were based on the nuisance exception to police power: *Mugler v. Kansas* (intoxicating liquors),[357] *Hadacheck v. Sebastian* (brick making),[358] *Fertilizing Co. v. Village of Hyde Park* (transporting animal matter and manufacturing it into fertilizer),[359] *Northwestern Laundry v. City of Des Moines* (smoke from laundry operation),[360] *Lawton v. Steele* (illegal fishing nets),[361] and *Reinman v. Little Rock* (livery stables).[362] However, two decisions the *Schoene* Court relied upon did not directly involve nuisance abatement: *Village of Euclid v. Ambler Realty Co*. (zoning)[363] and *Sligh v. Kirkwood* (state regulation prohibiting sale or shipment of citrus fruits immature or unfit for consumption).[364] *Village of Euclid* was a facial challenge to a zoning ordinance that sought to invalidate the ordinance, not assert a takings claim, but the decision's incidental reference to the ill effects of apartment buildings could classify it as a nuisance exception case.[365] The issue in *Sligh* was whether Florida had the authority "to make it a criminal offense to deliver for shipment in interstate commerce citrus fruits, oranges in this case, then and there immature and unfit for consumption."[366] The *Sligh* Court never even mentioned the word nuisance and instead held that the state

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[355] *Id.* at 279–80.
[356] *Id.* at 280.
[357] 123 U.S. 623, 670 (1887).
[358] 239 U.S. 394 (1915).
[359] 97 U.S. 659, 665 (1878).
[360] 239 U.S. 486 (1916).
[361] 152 U.S. 133 (1894).
[362] 237 U.S. 171 (1915).
[363] 272 U.S. 365, 387–88, 395 (1926) (analogizing zoning to nuisance law and noting that apartment houses in certain neighborhoods "come very near to being nuisances").
[364] 237 U.S. 52, 61–62 (1915) (upholding state regulation prohibiting sale and shipment of citrus fruits immature or unfit for consumption as only indirectly affecting interstate commerce and as supported by police power to protect state's reputation for raising citrus fruits).
[365] 272 U.S. at 386 (question at issue is whether the ordinance is invalid, "in that it violates the constitutional protection 'to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory'").
[366] 237 U.S. at 57.

could validly regulate such interstate shipments without conflicting with the Commerce Clause.[367]

*Miller v. Schoene* should not justify a non-compensable taking based on a necessity exception or a distinction between eminent domain and the police power.[368] Using nuisance as a defense to a takings claim is doctrinally viable, but it should not extend to situations where the government destroys or damages a lawful and healthy use that is not itself a nuisance, as was the case in *Schoene*.[369]

Common law forbids owners from using property in a manner that injures the community (a nuisance) and property owners may not have "acquired rights to make certain uses of properties"[370] (i.e., property subject to the navigation servitude, customary rights, or the public trust). As discussed in Section I.D, the navigation servitude modernly qualifies as a categorical exception to takings challenges. The Supreme Court in *Kaiser Aetna v. United States* explored the navigation servitude in a takings challenge by owners of a private marina on a private pond in Hawai'i.[371] Admitting that recent navigation cases limited the government's obligation to pay for riparian access, the Court contended that compensation might be due for invasion of property rights such as acquiring "fast lands riparian to a navigable stream."[372] The Court held that "the Government's attempt to create a public right of access to the improved pond" was a taking.[373] While the government could have denied private owners the right to dredge the marina because of its impact on navigation, imposing a navigational servitude was a taking of the right to exclude and physically invaded the private marina.[374]

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[367] *Id.* at 62.

[368] *But see* Sax, *supra* note 292, at 49–50 (1964) (exercise of police power should be non-compensable if government is regulating "a problem of inconsistency between perfectly innocent and independently desirable uses" not a noxious or harm-creating activity as illustrated by *Miller v. Schoene*).

[369] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 512 (1987) (Rehnquist, C.J., dissenting) ("'The nuisance exception to the taking guarantee,' however, 'is not coterminous with the police power itself,' but is a narrow exception allowing the government to prevent 'a misuse or illegal use.' It is not intended to allow 'the prevention of a legal and essential use, an attribute of its ownership.'") (first quoting Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 145 (1978); and then quoting Curtin v. Benson, 222 U.S. 78, 86 (1911)).

[370] *Id.* at 205.

[371] 444 U.S. 164, 173–78 (1979).

[372] *Id.* at 176–78 ("Because the factual situation in this case is so different from typical ones involved in riparian condemnation cases, we see little point in tracing the historical development of that doctrine here.").

[373] *Id.* at 178.

[374] *Id.* at 178–80.

Property owners alleging inverse condemnation claims must show that they have a right to use their property in a way that the challenged regulation proscribes.[375] The navigation servitude, the nuisance exception,[376] customary rights,[377] and the public trust doctrine[378] may provide defenses to a takings claim, not as exceptions, but as interests not capable of ownership as part of the property owner's bundle of rights.[379]

### *D. Police Power Exception*

Distinguishing the police power from the power of eminent domain has allowed courts to deny compensation for an inverse condemnation without going through a regulatory takings analysis.[380] A treatise that preceded the *Mahon* decision explained the relationship between the police power and the power of eminent domain:

> Under the police power, rights of property are impaired not because they may become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference between the power of

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[375] Terence J. Centner, *Legitimate Exercises of the Police Power or Compensable Takings: Courts May Recognize Private Property Rights*, 7 J. FOOD L. & POL'Y 191, 204–05 (2011).

[376] *See* CALLIES, *supra* note 131, at 103–21 (discussing the nuisance exception).

[377] *Id.* at 63–96 (discussing customary rights as a background principle exception).

[378] *Id.* at 35–62 (discussing the public trust doctrine as a background principle exception).

[379] *See* Zellmer, *supra* note 335, at 234; *see also* Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 17 FLA. L. REV. 1165 (2019).

[380] *See, e.g.*, DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS §119 (2d ed. 2011) (noting that "[w]hen the destroyed property presented no dangers to others and would not have been destroyed anyway, it is hard to see the difference between cases of 'taking' for which compensation must be paid and cases of public necessity (or police power) for which no compensation is due); 29A C.J.S. *Eminent Domain* § 8 (2007) ("Eminent domain takes property because it is useful to the public, while the police power regulates the use of, or impairs rights in, property to prevent detriment to the public interest, and constitutional provisions against taking private property for public use without just compensation impose no barrier to the proper exercise of the police power. . . . According to some authority, a regulation or statute may meet the standards necessary for an exercise of the police power but still result in a taking for which compensation must be paid.").

> eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.[381]

Years after the *Mahon* decision, Professor Joseph Sax offered the following rule to distinguish compensable from non-compensable regulatory powers:

> The rule proposed here is that when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.[382]

Professor William Stoebuck, in his seminal work on eminent domain,[383] explained that "[t]here is a great deal of artificiality in attempting to pigeonhole the types of sovereign power into police power, war power, navigation power, taxing power, eminent domain power, and the like."[384] The distinction between eminent domain and the police or regulatory power is that the police or regulatory power does not acquire a property right in the government, but may "decrease some private owners' property interests and may, in equal measure, increase other private owners' interests."[385] Stoebuck recognized that courts have broadly interpreted the "public use" requirement for eminent domain as public purpose. He based this conclusion on the thinking that "eminent domain is no more sacred or profane than other powers of government, it may be used in combination with other powers when this would serve a public purpose, and what is a public purpose is up to the legislature and hardly ever up to the courts."[386]

Stoebuck concluded that the exercise of eminent domain should not be limited any more than the government's regulatory powers "as long as some ordinary purpose of government is served."[387] He then offered a framework

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[381] William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 794 (1995) (quoting ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 546–47 (1904)).

[382] Sax, *supra* note 292, at 62–63 (government is acting as an arbiter when it resolves conflicts between neighbors caused by nuisance activities).

[383] William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

[384] *Id.* at 569.

[385] *Id.* at 569–70.

[386] *Id.* at 590 (discussing Berman v. Parker, 348 U.S. 26 (1954)).

[387] Stoebuck, *supra* note 383, at 590 (noting special problem when eminent domain is used to transfer A's property to B).

to analyze taking problems.[388] First, determine if a property interest is involved. Second, decide whether the interest has been "taken." Has the owner transferred a property interest to the condemning authority (an exercise of eminent domain) or is there a police-power regulation? He gives as an example a traffic safety ordinance that prohibits owners abutting a certain street from driving onto it compels "a release by the owners of the access easement they formerly had against the city's street" and is both a police-power regulation and a taking.[389] Finally, if the "property" has been "taken," may the governmental entity invoke its eminent domain power to further some public purpose? If no, we should enjoin the attempted taking, and if yes, we must pay just compensation.[390]

Thus, it appears that Stoebuck recognized what Justice O'Connor clarified in *Lingle*—if the government cannot invoke its eminent domain power to further some public purpose, the attempted taking is a substantive due process violation and no amount of compensation would make it valid.[391] It seems that Stoebuck would not distinguish eminent domain from the police power so long as the government could have invoked eminent domain to further some public purpose. If there is a taking, it requires compensation whether it occurred through using eminent domain or exercising the police power.

The U.S. Supreme Court opted to develop its own approach to deciding when the exercise of police power is a compensable taking following *Mahon*, including the ad hoc, three-factor test for a partial taking from *Penn Central Transportation Co. v. City of New York*.[392] In deciding whether New York City's Landmarks Law affected a "taking" of property, the *Penn Central* Court acknowledged it had not developed any "set formula" for determining

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[388] *See id.*
[389] *Id.* at 607.
[390] *Id.* at 607–08.
[391] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005); Pavlock v. Holcomb, 35 F.4th 581, 590, 592 (7th Cir. 2022) (holding that beachfront property owners in Indiana lack standing to sue under Article III based on causation and redressability problems). In *Pavlock*, property owners sued Indiana alleging a judicial taking of their beachfront property based on the Indiana Supreme Court's finding in Gunderson v. State. The court in *Gunderson* held that under the public-trust doctrine, "the State of Indiana holds exclusive title to Lake Michigan and its shores up to the lake's ordinary high-water mark." *Pavlock*, 35 F.4th at 583 (quoting Gunderson v. State, 90 N.E.3d 1171, 1173 (Ind. 2018)).
[392] 438 U.S. 104, 124 (1978) (regulatory takings determined based on ad hoc factual inquiry reviewing: 1) "the economic impact of the regulation on the claimant;" 2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" 3) "the character of the governmental action").

whether a regulatory taking had occurred and instead observed that it depended on the particular circumstances of the case.[393]

In discussing one of the significant factors—"the character of the governmental action"—the *Penn Central* Court stated a rule similar to that proposed by Professor Sax. The Court concluded, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[394] Determining that the restrictions on the airspace rights above Grand Central Terminal were "substantially related to the promotion of the general welfare" and permitted reasonable beneficial use of the site, the Court held after ad hoc analysis that the Landmark Law was not a compensable "taking."[395]

The Court's regulatory takings doctrine continued to evolve when the Court recognized per se takings in *Loretto v. Teleprompter Manhattan CATV Corp.*,[396] *Horne v. Department of Agriculture*,[397] and *Cedar Point Nursery v. Hassid* for physical occupations[398] and in *Lucas v. South Carolina Coastal Council*[399] for denial of all economically beneficial uses.[400] In *Lucas*, the Court recognized Mr. Lucas's inability to build on his two coastal lots as the relatively rare situation "where the government has deprived a landowner of all economically beneficial uses."[401] The Court observed that:

> regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.[402]

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[393] *Id.*
[394] *Id.* (citation omitted).
[395] *Id.* at 138.
[396] 458 U.S. 419 (1982).
[397] 476 U.S. 350 (2015).
[398] 141 S. Ct. 2063, 2074–75 (2021) (noting that while *Loretto* emphasized permanent physical occupation, "physical invasions constitute takings even if they are intermittent as opposed to continuous").
[399] 505 U.S. 1003, 1019 (1992).
[400] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) (noting these "two categories of regulatory action will generally be deemed per se takings" and clarifying that "[o]utside these two relatively narrow categories (and the special context of land-use exactions . . .), regulatory takings challenges are governed by the standards set forth in *Penn Central*").
[401] 505 U.S. 1003, 1018 (1992).
[402] *Id.*

The *Lucas* Court averred, "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder" and "depends primarily upon one's evaluation of the worth of competing uses of real estate."[403] It resolved that the "prevention of harmful use" could not distinguish compensable regulatory takings from regulations that do not require compensation.[404] Note that this statement directly contradicts the treatise quoted in the first paragraph of this Section, which is not surprising given that the treatise, written in 1904, preceded the *Mahon* decision (recognizing regulatory takings) in 1922.[405] The *Lucas* Court also acknowledged that compensation for a regulation that "deprives land of all economically beneficial use" would not be required if the owner's prohibited use was one that was "not part of his title to begin with."[406] This "nuisance exception" includes "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[407]

So how do the writings of Professor Joseph Sax and Justice Antonin Scalia's majority opinion in *Lucas* help us understand the distinction between the exercise of eminent domain (compensable) and the exercise of police power (non-compensable)? Sax's proposed rule would only allow compensation for those situations where the government could use its eminent domain power to gain a benefit, but not for its use of police power to resolve conflicting land uses. This means that if the regulation confers a benefit on the public, compensation is required, but if the regulation chooses between clashing land uses, no compensation is required. *Lucas* points out that the state could avoid paying compensation for a public benefit so long as it frames the regulation as mediating between conflicting land uses to mitigate a public harm.[408] Distinguishing between eminent domain and the use of police power to determine whether to compensate a property owner for a regulation that has gone "too far" appears to be the same tautological exercise dismissed in *Lucas* as framing the regulation as either benefit conferring or harm preventing.

The Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* adopted an approach similar to Sax's distinction between

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[403] *Id.* at 1024–25 (quoting Sax, *supra* note 292, at 49).
[404] *Id.* at 1026.
[405] *See* Treanor, *supra* note 381 (quoting ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 546–47 (1904)).
[406] *Id.* at 1026–27.
[407] *Id.* at 1029 (citing Scranton v. Wheeler, 179 U.S. 141 (1900) for the rule that "interests of 'riparian owner in the submerged lands . . . bordering on a public navigable water' held subject to Government's navigational servitude") (alterations in original).
[408] *Id.*

government actions to gain a benefit and police power actions to resolve conflicting land uses.[409] It held that a thirty-two month moratoria on building in sensitive areas near Lake Tahoe to formulate a regional land use plan was not a categorical taking of property and required analysis under the *Penn Central* approach.[410] The Court noted the "longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other" and concluded that precedential cases involving physical takings are not applicable to regulatory takings claims.[411] The Court stated a tenet even closer to the Sax rule by combining a statement from *Eastern Enterprises v. Apfel*[412] and part of the rule from *Penn Central*[413] discussed above. "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," instead the interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[414]

In *Lingle v. Chevron U.S.A. Inc.*,[415] the Court reviewed a Ninth Circuit holding that a Hawai'i statute limiting "the rent that oil companies may charge to dealers who lease service stations owned by the companies" was a compensable taking.[416] The district courts based their holdings on the finding that the rent cap did "not substantially advance Hawai'i's asserted interest in controlling retail gasoline prices" under the first prong of a two-prong takings test from *Agins v. City of Tiburon*,[417] but the *Lingle* Court concluded that the "substantially advances" formula from *Agins* is not a takings test.[418]

The *Lingle* Court acknowledged that its "regulatory takings jurisprudence cannot be characterized as unified," but it recognized a "common touchstone" when regulatory actions "are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[419] The Court concluded that the "substantially advances" formula from *Agins* is not a takings test but is instead a substantive due process test.[420] The substantially advances test is

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[409] 535 U.S. 302 (2002).
[410] *Id.* at 340–42.
[411] *Id.* at 323–24.
[412] 524 U.S. 498, 522 (1998).
[413] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
[414] *E. Enters.*, 524 U.S. at 522 (alteration in original) (quoting *Penn Cent.*, 438 U.S. at 124).
[415] 544 U.S. 528 (2005).
[416] *Id.* at 531–32.
[417] *Id.* at 532 (citing *Agins*, 447 U.S. 255 (1980)).
[418] *Id.*
[419] *Id.* at 539.
[420] *Id.* at 540–41.

actually an antecedent test to any takings analysis that ensures the government is acting for a valid public purpose under the Takings Clause requirement that the interference is "*for public use*."[421] Indeed, if the government action fails to meet the "public use" requirement or is arbitrary or capricious in violation of due process, "[n]o amount of compensation can authorize such action."[422]

The Court heard the arguments for both *Lingle* and *Kelo v. City of New London*[423] on the same day, but the Court issued its *Kelo* decision one month after *Lingle*. The *Kelo* case focused on whether the city of New London's use of eminent domain to assemble land for economic redevelopment and then transfer it to private developers met the "public use" requirement of the Fifth Amendment.[424] Relying on the cases of *Berman v. Parker*[425] and *Hawai'i Housing Authority v. Midkiff*,[426] the Court held that "the City's proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment."[427]

In her *Kelo* dissent, Justice Sandra Day O'Connor explained that the troubling result in the majority opinion "follows from errant language in *Berman* and *Midkiff*."[428] First, the *Berman* Court declared, "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear."[429] Second, the *Midkiff* Court stated, "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers."[430] O'Connor argued that while *Berman* and *Midkiff* used language not necessary for the holdings, "[t]he case before us now

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[421] *Id.* at 543 ("if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry").
[422] *Id.*
[423] 545 U.S. 469 (2005).
[424] *Id.* at 472.
[425] 348 U.S. 26 (1954).
[426] 467 U.S. 229 (1984).
[427] *Kelo*, 545 U.S. at 486–90; *see also* Hlavinka v. HSC Pipeline P'ship, LLC, 2022 WL 1696443, at *2 (Tex. 2022) (holding that a pipeline demonstrated "common carrier status," and thus, had eminent domain authority under Texas law to condemn easements and construct a pipeline carrying propylene despite the company's private, nongovernmental status); *see* PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244, 2251–52 (2021) (determining, significantly, that a private gas company is allowed to bypass requests of the State of New Jersey, and allowing the private gas company rights to condemn both private and state held land).
[428] *Id.* at 501–02 (O'Connor, J., dissenting).
[429] *Id.* at 501 (alteration from *Kelo* Court) (quoting *Berman*, 348 U.S. at 33).
[430] *Id.* (alteration from *Kelo* Court) (quoting *Midkiff*, 467 U.S. at 240).

demonstrates why, when deciding if a taking's purpose is constitutional, the police power and 'public use' cannot always be equated."[431]

Justice Clarence Thomas's dissent pointed out that "*Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States," and noted that "[t]raditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever."[432] Thomas declared, "[t]he question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power."[433] As an example, Thomas explained that if the slums in *Berman* were "blighted" then state nuisance law would be the appropriate remedy rather than the power of eminent domain.[434]

Thomas's dissent from *Kelo* explicitly distinguished between eminent domain and the police power.[435] However, it is still unclear how to differentiate these two powers, particularly when viewing *Berman* and *Midkiff*. In *Berman*, the landowners who brought the claim against the eminent domain action owned unblighted property.[436] A declaration of nuisance would not have been appropriate to allow the government to destroy unblighted property. Similarly, the government could not destroy Susette Kelo's pink house because it was not blighted or a nuisance. Suppose all the properties in this New London area were blighted and common law nuisances, would it be just and fair for the government to knock down whole neighborhoods without paying just compensation?[437] Such a result would be even more egregious than the *Kelo* majority opinion that allowed the government to use its eminent domain power to purchase property to turn over to private developers.

Even more difficult to see is how the *Midkiff* Court could justify "regulating oligopoly and the evils associated with it" by requiring the "redistribution of fees simple to correct deficiencies in the market determined

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[431] *Id.* at 501–02.
[432] *Id.* at 519 (Thomas, J., dissenting) (citing Mugler v. Kansas, 123 U.S. 623, 668–69 (1887)).
[433] *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992); *Mugler*, 123 U.S. at 668–69).
[434] *Id.* at 520 ("[t]o construe the Public Use Clause to overlap with the States' police power conflates these two categories").
[435] *Id.* at 519.
[436] Berman v. Parker, 348 U.S. 26 (1954).
[437] *See* Steven J. Eagle, *Does Blight Really Justify Condemnation*, 39 URB. LAW. 833 (2007) (arguing that the over-used concept of "blight" is *never* a legitimate basis for condemnation, since government could order remediation under the police power, perform it if the owner doesn't, impose a benefit lien for the cost, and foreclose on the lien if not paid).

by the state legislature" without using the eminent domain power.[438] *Midkiff* declared that the public purpose at issue in the case shows a classic exercise of a State's police powers and a rational exercise of the eminent domain power.[439] Under traditional nuisance law, it is doubtful that the oligopoly at issue in Hawai'i would be a public nuisance allowing regulation to redistribute property without paying compensation. Recognizing the possibility that the police power encompasses the eminent domain power, the *Midkiff* Court, with the "errant language" written and subsequently identified by Justice O'Connor's *Kelo* dissent, held that the 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."[440]

Many judges, scholars, and practitioners over the years have attempted to distinguish between the non-compensable use of police power and the power of eminent domain requiring just compensation.[441] Professor Shai Stern views "property as a legal institution that is torn between protecting owners' autonomy and fulfilling community needs" and suggests there is a tipping point on the continuum that will narrow the scope of ownership.[442] His approach is to "look at these two powers as part of a complete set of relationships between the state, the community, and the property owners."[443] Stern observes that many of the cases challenging state orders to combat COVID-19 "are placing a strong emphasis on the taking of property rights without just compensation" and "most of these legal proceedings are still underway."[444]

The distinction between the state's exercise of its police power and its use of the eminent domain power is negligible at best when deciding whether to pay a property owner just compensation. When the government condemns

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[438] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984).
[439] *Id.* at 242.
[440] Robert H. Thomas, *Evaluating Emergency Takings: Flattening the Economic Curve*, 29 WM. & MARY BILL RTS. J. 1145, 1147 (2021) (arguing that "there is no blanket immunity from compensation simply because the government claims to be acting in response to an emergency" and proposing that "claims that the taking is not compensable because of the exigency of an emergency should only win the day if the government successfully shows that the measure was actually needed to avoid imminent danger posed by the property owner's use, and that the measure was narrowly tailored to further that end").
[441] *See, e.g.*, Shai Stern, *Pandemic Takings: Compensating for Public Health Emergency Regulation* 11 (Bar Ilan Univ. Fac. of L. Rsch. Paper No. 20-10) (Draft 6/15/2020) ("[c]ourts have struggled to find a bright-line rule to distinguish between legitimate exercise of state police power, wherein states can limit landowner autonomy in their property without any form of compensation, and the cases in which compensation is required").
[442] *Id.* at 5.
[443] *Id.* at 16.
[444] *Id.* at 8–9 (including references to many of these filings).

property using eminent domain, only two questions are relevant: (1) whether the condemnation was for a public purpose (is it within the police power to promote the public health, safety, and welfare?); and (2) whether just compensation has been paid. If the condemnation was not for a public purpose, the government has no authority to exercise the power, and it violates substantive due process, invalidating the condemnation.

When the government regulates or acts under its police power, three questions arise. First, whether the regulation or action was for a public purpose (is it within the police power to promote the public health, safety, and welfare?). Second, if the regulation or action is valid as promoting a public purpose, is it nonetheless a regulatory taking because it has gone "too far"? Third, if it is a regulatory taking, what compensation is due? If the regulation or action is arbitrary or capricious or does not promote a public purpose, the regulation violates substantive due process and is invalid as exceeding the government's police power authority. If it is a regulatory taking under the framework aptly explained in *Lingle*,[445] the property owner must receive just compensation.

The only categorical defense to a condemnation action or a regulatory takings claim should depend on the property interests at issue. If the property use being prohibited is a nuisance, no compensation is due because the property owner never had the right to use their property in a way that constitutes a nuisance. Alternatively, if background principles of common law such as the navigation servitude, customary rights, or the public trust doctrine prevented property owners from interfering with these public rights, no compensation is due if the government prevents the property owner from asserting private rights in these public resources. Courts should eliminate the remaining necessity defenses for emergencies, public health, military necessity, forfeitures, and law enforcement. While emergencies may weigh heavily in determining violations of constitutional rights, they should not preclude judicial review of constitutional challenges under the Takings Clause and other constitutional rights.

## III. EVOLVING APPLICATIONS OF NECESSITY EXCEPTIONS

As our world faces more emergencies, the government's power to address these emergencies is an essential component of a functioning society.[446] The police power authorizes the government to promote the health, safety, morals, and general welfare of the community. The Fifth Amendment

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[445] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[446] *See, e.g.*, Amy L. Stein, *Energy Emergencies*, 115 NW. U. L. REV. 799 (2020) ("challenging the assumptions underlying unilateral presidential delegations for energy emergencies").

answers the question as to who should bear the financial burden of government actions. It requires just compensation when private property is taken for a public purpose. The emergency exception allows the government to act in situations of impending peril to protect community survival, but does not function as "a cloak to destroy constitutional rights as to the inviolateness of private property."[447]

Yet, new and expanded uses of the doctrine of necessity offer a pathway to avoid compensating individuals whose property rights are taken to serve the public. Professor Robin Kundis Craig's proposal to use the necessity doctrine for climate change adaptation, discussed in Section B, below, is just one. In addition, Professor Nestor Davidson has proposed applying a doctrine of economic necessity to allow the nationalization of failing private companies without the obligation to pay just compensation. He argues that public officials faced with acute economic spillovers from these failures "must be able to respond quickly to serious economic threats, no less than when facing the kinds of imminent physical or public health crises—such as wildfires and contagion—that have been a staple of traditional takings jurisprudence."[448]

### *A. Natural Disasters*

As discussed in detail in Section II.A above, courts have used the general doctrine of necessity to protect the government from paying just compensation for its actions in averting impending peril. With the increasing intensity of wildfires and floods due to climate change conditions, the necessity defense operates to shield public agencies from paying compensation to private individuals for property damage or destruction to protect the community against disaster.[449]

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[447] *See* Los Osos Valley Assocs. v. City of San Luis Obispo, 30 Cal. App. 4th 1670, 1682 (1994) (finding City liable for subsidence of private buildings due to City's groundwater pumping operations) (quoting House v. L.A. Cnty. Flood Control Dist., 25 Cal. 2d 384, 388–89 (1944)). In a recent article, Professor Robert H. Thomas provides in-depth critique of the courts' application of takings tests in emergency contexts. *See* Thomas, *supra* note 440, at 1164. He explains that courts have misapplied the takings test in emergency situations by "most often treating [emergency circumstances] as dispositive, cutting off further inquiry even though an invocation of police power—responding to an emergency or otherwise—is not an exception to the just compensation requirement." *Id.*

[448] *See* Nestor M. Davidson, *Nationalization and Necessity: Takings and a Doctrine of Economic Emergency*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 187 (2014) (proposing an emergency exception to allow nationalization to address economic harm without paying just compensation).

[449] *See* Saxer, *supra* note 10; *see, e.g.*, Milton v. United States, 36 F.4th 1154, 1158

Recall the *TrinCo Investment Company v. United States* line of cases involving intentional fires set by the Forest Service for purposes of emergency fire containment that destroyed acres of TrinCo's timber crop.[450] In reviewing the district court's decision to dismiss the takings claim, the Federal Circuit recognized the doctrine of necessity as a defense,[451] but explained it "may be applied only when there is an imminent danger and an actual emergency giving rise to actual necessity."[452] On remand, the Federal Claims court established a "framework for determining when a necessity defense would excuse government-caused fire damage to private property while fighting a wildfire."[453] This "new" framework to evaluate whether the government can assert the common law doctrine of necessity relies on common law precedent developed before the regulatory takings decision in *Pennsylvania Coal Co. v. Mahon*.[454] When the government acts to protect the public by destroying or damaging private property that is not a nuisance, the public, as a whole should bear the burden of paying for it rather than burdening the individual property owners.[455]

### *B. Climate Change*

The impact of climate change in combination with other factors may generate emergencies requiring government action. Professor Robin Kundis Craig has proposed that the scarcity of water, particularly in times of major drought, is an emergency, calling into play the common-law doctrine of public necessity for the purpose of reallocating water rights.[456] Even without climate change, there is an impending water supply emergency in the United

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(Fed. Cir. 2022) (holding that the plaintiffs, who had their property destroyed during flooding caused by Hurricane Harvey, alleged a cognizable property interest, allowing them to bring takings claims against the government for the resulting flooding); Walter W. Heiser, *Floods, Fires, and Inverse Condemnation*, 29 N.Y.U. ENV'T L.J. 1 (2021) (identifying the significant history involved in claims of inverse condemnation in flooding cases, identifying the standards of liability that apply in each case, and the historical significance of each).

[450] *See supra* notes 215–27 and accompanying text.

[451] 722 F.3d 1375, 1377–80 (Fed. Cir. 2013) (citing United States v. Caltex, 344 U.S. 149, 154 (1952); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 n.16 (1992); Bowditch v. Boston, 101 U.S. 16, 18–19 (1880)).

[452] *TrinCo Inv. Co.*, 722 F.3d at 1378.

[453] TrinCo Inv. Co. v. United States (*TrinCo III*), 130 Fed. Cl. 592, 600 (2017).

[454] 260 U.S. 393 (1922).

[455] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[456] *See* Robin Kundis Craig, *Adapting Water Law to Public Necessity*, 11 VT. J. ENV'T L. 709, 710 (2010).

States, and Craig encourages us to view climate change as an emergency so that adaptation constitutes emergency preparedness and response.[457]

Using the doctrine of public necessity, government response to an emergency will focus on community survival and provide "a viable defense to property destruction or limitations imposed on property rights."[458] For example, in 2011 the Brazos River in Texas experienced a severe drought resulting in billions of dollars of state agricultural losses. Dow Chemical Company, as the senior water rights holder and largest water user on the Bravos, called its senior rights to limit water withdrawals by junior rights holders.[459] The Texas Commission that managed state surface water appropriative rights refused to suspend junior water rights for municipal use, power generation, and non-exempt domestic use.[460] Craig has proposed that the doctrine of public necessity be used in situations such as those confronted in Texas to "limit non-survival-related senior water rights holders" in order to provide drinking water and power supply during a drought.[461]

Framing climate change adaptation as a public necessity favors saving human lives over property.[462] "The principle behind public necessity is that the law regards the welfare of the public as superior to the interests of individuals and, when there is a conflict between them, the latter must give way."[463] In times of war and epidemic, community survival may depend on rationing and quarantine. Similarly, climate change adaptation may require applying legal doctrines such as nuisance, the public trust doctrine, and public necessity to balance public and private interests.[464] Nevertheless, the Fifth Amendment protects property rights and it is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[465] This "*Armstrong* Principle" provides equality and fairness for landowners impacted by climate change and "ensures protection for the politically powerless."[466]

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[457] *Id*. at 711–15.
[458] *Id*. at 716.
[459] Craig, *supra* note 32, at 82.
[460] *Id*.
[461] *Id.* at 83.
[462] Craig, *supra* note 456, at 750.
[463] *Id.* at 751 (quoting John Alan Cohan, *Private and Public Necessity and the Violation of Property Rights*, 83 N.D. L. REV. 651, 653 (2007)).
[464] Robin Kundis Craig, *"Stationarity is Dead" – Long Live Transformation: Five Principles for Climate Change and Adaptation Law*, 34 HARV. ENV'T L. REV. 9, 62–63 (2010).
[465] Armstrong v. United States, 364 U.S. 40, 49 (1960).
[466] *See* A.S. Flynn, *Climate Change, Takings, and* Armstrong, 46 ECOLOGY L.Q. 671, 677 (2019).

Professor Sara C. Bronin observed, "[c]limate change will likely increase the risk of future pandemics, forcing us to factor pandemic preparedness into climate mitigation and preparation work."[467] In recognizing the link between climate and COVID-19 because of the threat of climate-exacerbated viruses, Bronin advises attorneys addressing climate change to watch the COVID-19 lawsuits. She identifies "at least three types of lawsuits that climate attorneys should watch and learn from: failure-to-protect suits, misinformation suits, and takings suits."[468] In discussing the takings suits, she notes that the courts' handling of government mandated business shutdowns for COVID-19 will inform how courts might rule when faced with drastic government actions to address climate change.[469] Bronin supports the government's right to prevent a public nuisance without paying compensation, but she does not advocate using the doctrine of necessity to preclude compensation for government actions restricting property uses that are not nuisances.[470] A property owner does not have the right to use their property as a public nuisance. Thus, there is no property interest taken when the government shuts down a nuisance.

Eventually, the public must realize that securing community survival against the disastrous impacts of climate change will require that we all share the cost of adaptation. Those who inhabit sinking islands and coastlines should not have to bear the entire burden of climate change impacts. Instead of using the necessity defense to allow climate change adaptation without compensating private property owners, the Fifth Amendment should protect individuals against disproportionately bearing the burdens that the public as a whole should bear. The *Armstrong* principle "can create the potential for increased compensation for property owners harmed due to the intersection of government action and climate change."[471] Coping with the crushing effects of climate change will require fairness and justice to ensure that society bears the burden rather than putting it onto a small subset of individuals.[472] Communities must "make hard land use decisions in the face of climate change" knowing that taxpayers will be required to pay for development placed in harm's way.[473]

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[467] Sara C. Bronin, *What the Pandemic Can Teach Climate Attorneys*, 72 STAN. L. REV. ONLINE 155 (2020).
[468] *Id.* at 159.
[469] *Id.* at 162–63.
[470] *Id*. at 163.
[471] Flynn, *supra* note 466, at 679.
[472] *Id*. at 681.
[473] *Id.*

### *C. Pandemics and COVID-19 Litigation*

Quarantine has an ancient history as documented in the Old Testament and in the works of Hippocrates and other Greek scholars.[474] It has not been used on a large scale since the Spanish Flu in 1918, other than for the outbreak of the Severe Acute Respiratory Syndrome (SARS) in 2003 and the outbreak of the Ebola Virus Disease in 2014.[475] Quarantine laws in the American colonies began in the Massachusetts Bay Colony in 1647 and "establish[ed] the legal tradition of local and state jurisdiction over matters of public health reflected in the Constitution's reservation of power to the states to regulate public health, safety, and morals."[476] Congress enacted the National Quarantine Act in 1878 to respond to yellow fever outbreaks and it later enacted the Public Health Service Act in 1944.[477] While quarantine and social distancing measures may help fight contagion, these tools may also cause "economic disruption, personal isolation, and even violence."[478]

The police power authorizes states to protect the health and safety of the public. State public health officials working with local officials are responsible for determining what health and safety measures to take when a public health emergency is declared.[479] Most public health law developed before our modern views of individual constitutional rights evolved.[480] With medical advancements in antibiotics and vaccinations, public health laws regarding quarantines and forced isolation were mostly unnecessary.[481] Modern federal government responses to bioterrorism or the "natural outbreak of a dangerous infectious disease" must contend with states' rights and the Tenth Amendment.[482] A state's attempt to deal with public health concerns by imposing restrictions using its police power will encounter civil liberties challenges under the Fourteenth Amendment and economic

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[474] Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. 227, 229 (2015).
[475] *Id*. at 228.
[476] *Id*. at 230 (ships from the West Indies were quarantined due to the treat of plague).
[477] *Id.* at 231 ("The Centers for Disease Control and Prevention (CDC) has been responsible for federal quarantine since 1967.").
[478] *Id.* at 233–34 (cautioning that while quarantine is an established public health measure, it also has "significant implications for civil liberties, economic activity, and social cohesion").
[479] *Id.* at 239–40 (noting that the anthrax incidents after 9/11 raised public concerns about bioterrorism and incentivized states to update and revise their public health laws).
[480] Vickie Williams, *Legal Issues Arising in the Context of Quarantine and Isolation*, AHLA-PAPERS P06270405 (June 27, 2004).
[481] *Id.* at 4.
[482] *Id.*

challenges under the Takings Clause, Contracts Clause, and Commerce Clause.[483]

The public health exception to the Takings Clause developed before the *Mahon* decision acknowledged regulatory takings. While Part I discussed the history of this exception, the focus here is to offer a brief overview of how courts have applied the *Jacobson* decision since *Mahon* through the COVID-19 pandemic. The traditional law of public health and its restrictions on personal liberty in times of emergency often conflict with the modern law of civil liberties.[484] In anticipation of such conflicts, the majority of states' public health laws incorporated the Model State Emergency Health Powers Act (MSEHPA) in whole or in part since its publication in December 2001.[485] However, some have criticized MSEHPA for failing to protect civil liberties and for subjecting some individuals to severe restrictions during a public health emergency.[486] MSEHPA provides that owners of facilities appropriated for use under the Act will receive just compensation.[487] On the other hand, just compensation will not be provided for "closed, evacuated, decontaminated, or destroyed facilities that might endanger the public health" under a traditional public nuisance exception.[488]

As stated earlier, before the onset of the COVID-19 pandemic in 2020, quarantine was not used on a global basis since the Spanish flu pandemic in 1918-1919.[489] In the midst of a global pandemic, more than a century later, we are facing serious legal and ethical concerns and using the same tools employed by public health officials in fighting the Spanish flu pandemic, the SARS epidemic, and the Ebola epidemic. During the Ebola epidemic of 2014 in West Africa, "Social distancing measures, including quarantine, became a primary containment strategy. The social distancing measures then, as now,

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[483] *Id.* ("This paper discusses the constitutional issues that in-house counsel are likely to encounter in the event a state or the federal government imposes isolation and/or quarantine on American citizens in response to threatened or actual acts of bioterrorism, or a natural outbreak of a dangerous infectious disease.").

[484] *Id.* at 7.

[485] *Id.* at 7 n.4. *See generally* Lawrence O. Gostin, *The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX 3 (2003).

[486] *See* Rothstein, *supra* note 474, at 242 (noting that another model law project, the Turning Point Model State Public Health Act (TPMSPHA), addresses public health issues not limited to emergencies and has been adopted in part by more than half of the states).

[487] Williams, *supra* note 480, at 7.

[488] *Id.* Further discussion of the model acts, adopted mostly in response to the 9/11 terrorist attacks and the threat of bioterrorism, are beyond the scope of this Article.

[489] Rothstein, *supra* note 474, at 228 (this excludes the quarantines for the Severe Acute Respiratory Syndrome (SARS) outbreak in 2003 and the Ebola Virus Disease outbreak in 2014, which were not on a global scale).

included school closures and bans on public gatherings, including sports, shopping, and entertainment."[490]

Some have asked whether the 1918 pandemic produced judicial opinions that could guide us in current litigation. Other than a few cases involving life insurance claims,[491] the only case challenging a board of health prohibition on gathering during the Spanish flu pandemic was *Benson v. Walker*.[492] James Benson owned a traveling amusement enterprise and North Carolina denied a license to conduct his show in 1920 based on public health concerns.[493] Benson claimed that the denial violated his constitutional rights by obstructing him from opening his lawful business.[494] The Alamance County Board of Health resolved, "that traveling shows, such as circuses, and carnivals, are the means of transmitting and spreading dangerous and infectious diseases."[495] The *Benson* court found that this resolution was "clearly within the police power of the State" and that:

> the gathering together of large numbers of people from without, and from one community to another within their jurisdiction, would tend to the spread of the

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[490] *Id.* at 231–32.

[491] *See, e.g.*, Denton v. Kan. City Life Ins. Co., 231 S.W. 436 (Tex. Civ. App. 1921) (affirming trial court judgment that life insurance policy was never consummated because issuance was subject to the condition that insured be in good health and not have had "any attack of la grippe, Spanish influenza, or pneumonia since being examined for the policy," but policy applicant "took the influenza" after the examination, developed pneumonia, and died one week later before the policy was delivered); Tuepker v. Sovereign Camp, W.O.W., 226 S.W. 1002 (Mo. Ct. App. 1920) (life insurance company denied payment to daughter after her father's death in 1918, alleging that he died of delirium tremens from drinking liquor, which death was excepted in the policy, but evidence showed he was a moderate drinker and jury found that the cause of death after a three-day illness was the influenza that "was raging as an epidemic in that vicinity at the time"); Frush v. Ohio State Life Ins. Co., 31 Ohio Dec. 49 (1920) (finding insurance company liable on its policy, which excluded death while in military service, because such a policy provision would violate public policy and the soldier died of the Spanish Flu that was contracted at the military base, not in military service).

[492] 274 F. 622, 622 (4th Cir. 1921); *see also* Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 104 (2007) (noting that while there were multiple quarantines during the Spanish Flu of 1918, "it does not appear that any legal cases were brought challenging such cordons sanitaire").

[493] 274 F. at 622.

[494] *Id*. at 623 (contending that the action was "unreasonable, unjust, capricious, and discriminatory against him, under the guise or pretext of the rightful exercise of their legitimate powers").

[495] *Id.*

> Spanish influenza, a disease which at that time, or shortly theretofore, had been epidemic bringing death and much sickness and disease in the community.[496]

The *Benson* court also noted that courts could not substitute their judgment for the legislative or municipal exercise of their lawful power and authority, particularly for public health regulations, unless their actions unmistakably exceed their power and authority.[497] Notably, this decision occurred shortly before the *Mahon* regulatory takings case in 1922.

A brief review of the 980 case-citing references to *Jacobson* in Westlaw from 1905 through the end of June 2021 reveals that approximately 276 of the 980 cases occurred in 2020 and involved COVID-19. This constitutes over 25% of the total case citations over more than 100 years since *Jacobson* was decided. As previously noted, only one of these cases appears to be related to the Spanish flu pandemic, although a few of the cases involved temporary changes to rental laws around 1920 due to housing shortages in urban cities following the pandemic.[498] Many of the cases before 2020 involved objections to various vaccination regulations,[499] objections to chlorination and fluoridation of municipal water supply,[500] and the denial of

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[496] *Id.* at 623–24.

[497] *Id.* at 624.

[498] *See, e.g.*, Block v. Hirsh, 256 U.S. 135, 153–54 (1921) (tenant refused to surrender premises based upon a 1919 Act titled "District of Columbia Rents" and landowner challenged the statute as a taking of property not for public use; J. Holmes, writing for the majority, upheld the Act as necessary "by emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health . . . and thereby embarrassing the Federal Government in the transaction of public business").

[499] *See, e.g.*, Love v. State Dep't of Educ., 29 Cal. App. 5th 980, 984 (2018) (upholding vaccination regulations, "which repealed the personal belief exemption to California's immunization requirement for children attending public and private educational and childcare facilities," against constitutional challenges); Wright v. DeWitt Sch. Dist. No. 1 of Arkansas Cnty., 385 S.W.2d 644, 648 (Ark. 1965) (upholding school district's health regulation requiring students to be vaccinated for smallpox as a reasonable regulation that does not violate free exercise of religion); Bd. of Ed of Mountain Lakes v. Maas, 152 A.2d 394, 406–07 (N.J. Super. Ct. App. Div. 1959) (holding that compulsory vaccination does not violate free exercise of religion); Cram v. Sch. Bd. of Manchester, 136 A. 263 (N.H. 1927) (school board's requirement that child be vaccinated in order to attend public school does not violate the Constitution and is substantially related to public health protection against the disease of smallpox).

[500] *See, e.g.*, Minn. State Bd. of Health v. City of Brainerd, 241 N.W.2d 624, 633 (Minn. 1976) (concluding that forced fluoridation of the water supply is justified by "balancing the substantial public health benefit of fluoridation against its innocuous effect on the individual"); Baer v. City of Bend, 206 Or. 221, 236 (1956) (concluding that fluoridation of the water supply is a valid exercise of police power and does not violate religious freedom).

civil liberties to individuals outside the social norms.[501] One of the most appalling cases, *Buck v. Bell*, referenced *Jacobson* to uphold Virginia's statute promoting "the sterilization of mental defectives" who are "afflicted with hereditary forms of insanity, imbecility, etc."[502] Justice Holmes in this infamous passage stated:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U. S. 11. Three generations of imbeciles are enough.[503]

The goal of protecting society against the economic burden imposed by the disabled has also sparked laws requiring motorcyclists to wear helmets. The court in *People v. Bennett*[504] relied extensively on *Jacobson* to find that the exercise of police power to regulate for the health, safety, and welfare of

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[501] *See, e.g.*, People v. Adams, 597 N.E.2d 574, 577, 584, 586 (Ill. 1992) (defendants guilty of prostitution were ordered to undergo an HIV test and unsuccessfully challenged the regulation as violating state and federal constitutional rights as a Fourth Amendment unreasonable search and seizure and an equal protection violation); Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278, 286–87 (1990) (citing *Jacobson* for the principle that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment" and upholding Missouri's right "to require clear and convincing evidence of the patient's wishes" by choosing "to defer only to those wishes, rather than confide the decision to close family members"); England v. La. State Bd. of Med. Exam'r, 263 F.2d 661, 674 (1950) (holding that State has power to regulate the medical field and that the plaintiff has the burden to show that regulations excluding chiropractors from practice have no rational relation to the regulation of chiropractic "whether chiropractic is considered as a school or cult or theory or specialty or profession"); People v. Chapman, 4 N.W.2d 18, 21–22, 28 (Mich. 1942) (civil statute providing for commitment of "criminal sexual psychopathic persons" is constitutional as a valid and proper exercise of State police power as a measure of public safety and applied to Chapman, who was not determined to be insane but instead was deemed a sexual deviant "not only because of his homosexual practices but also his psychosexual deviation is very likely to assume a much more ominous manifestation, that of pedophilia"); State v. Nelson, 11 A.2d 856, 862 (Conn. 1940) (upholding constitutionality of statute making it a crime to assist a married woman in using drug or device to prevent conception).

[502] 274 U.S. 200, 205–06 (1927).

[503] *Id.* at 207.

[504] 89 Misc. 2d 382 (N.Y. 1977).

the community must be within constitutional limits, and it further held that the right to operate a motorcycle is not a fundamental right.[505] The *Bennett* court noted that a person's health is a societal concern and that "in our inter-dependent society the welfare of each of us too often depends upon the acts and conduct of others."[506] The requirement to wear a helmet while riding a motorcycle, or even a bicycle, is analogous to a mandatory requirement to wear a mask during a pandemic. Both requirements have engendered claims of illegal restrictions on personal freedom.[507]

While the impact of the COVID-19 pandemic has not required the destruction of property to prevent public harm from the emergency, it has impacted individual property owners in both the ownership of their real property and the survivability of their personal property businesses due to business losses. As aptly predicted by a law and health policy expert, "[b]ecause quarantine often causes hardships and because many Americans are distrustful of the government and are prepared to exercise their legal rights, some quarantine orders are likely to be challenged in court."[508] Public health strategies and the division of authority in the United States between state and federal entities in fighting a pandemic are very interesting topics,[509] but they are beyond the scope of this Article. Instead, this section of the Article centers on the litigation arising from state efforts to contain the COVID-19 virus, particularly those challenges under the Takings Clause of the Fifth Amendment.

Recent litigation[510] surrounding government actions in response to the virus has focused on issues involving the civil rights of people in

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[505] *Id.* at 384.

[506] *Id*. at 384–85.

[507] *See, e.g.*, Jacey Fortin, *Experts Back Mandatory Bike Helmets but not All Cyclists Are Sold*, N.Y. TIMES (Nov. 9, 2019), https://www.nytimes.com/2019/11/09/us/bike-safety-helmets.html; Dennis Wagner, *The COVID Culture War: At What Point Should Personal Freedom Yield to the Common Good?*, USA TODAY (Aug. 2, 2021), https://www.usatoday.com/story/news/nation/2021/08/02/covid-culture-war-masks-vaccine-pits-liberty-against-common-good/5432614001/.

[508] Rothstein, *supra* note 474, at 238.

[509] *See generally id.* at 239–46 (discussing Model State Emergency Health Powers Act (MSEHPA), Turning Point Model State Public Health Act (TPMSPHA), and federal Public Health Service Act (PHSA)); Kelly S. Culpepper, *Bioterrorism and the Legal Ramifications of Preventative and Containment Measures*, 12 QUINNIPIAC HEALTH L.J. 245 (2008–2009); Vickie J. Williams, *Fluconomics: Preserving Our Hospital Infrastructure During and After a Pandemic*, 7 YALE J. HEALTH POL'Y L. & ETHICS 99 (2007); Paul S. White, Dana Hentges Sheridan & Rina Carmel, *Industry Implications, The Impact of a Global Avian Flu Pandemic*, 49 NO. 5 DRI FOR DEF. 39 (May 2007); Gostin, *supra* note 485; Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 HEALTH MATRIX 265 (2001).

[510] *See, e.g.*, League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F.

institutionalized settings, such as prisons and nursing homes;[511] religious freedom and other first amendment rights; abortion rights;[512] voting rights;[513] the rights of tenants;[514] mortgage-holder rights;[515] and other individual civil rights and economic impacts.[516]

### *1. Takings Litigation*

This section discusses COVID-19 regulatory takings claims seeking compensation for losses as either categorical takings under *Loretto* or *Lucas*, or a partial taking under *Penn Central*. In addition, COVID-19 litigation involving other constitutional challenges may be helpful to determine how courts should approach claims involving a public health emergency. Most government responses to the pandemic will be lawful exercises of police powers unless the actions are arbitrary and capricious. However, a takings claim will require the court to determine whether the government's response constitutes a taking of property requiring compensation. This section will not address how the COVID-19 takings cases should be resolved under the traditional takings framework,[517] instead the goal is to illustrate why courts should only allow the nuisance and background principles of state law exceptions to serve as categorical defenses to takings claims.

Litigants in the COVID-19 cases have relied on *Jacobson* to assert a public health necessity defense and avoid judicial scrutiny of government measures

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App'x 125, 126 (6th Cir. 2020) (COVID-19 decisions have generated numerous legal challenges, some involving claims that require heightened scrutiny and some that require only rational basis review).

[511] *See* United States v. Rodriguez, 451 F. Supp. 3d 392, (E.D. Pa.) ("[p]risons are tinderboxes for infectious disease"); *see also* Berstein et. al., *COVID-19 and Prisoners' Rights*, *in* LAW IN THE TIME OF COVID-19 (Colum. L. Sch., 2020) *available at* https://scholarship.law.columbia.edu/books/240/.

[512] *In re* Abbott, 954 F.3d 772 (5th Cir. 2020).

[513] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020).

[514] David Zahniser, *Landlord Sues L.A. for $100 Million, Saying Anti-Eviction Law Caused 'Astronomical' Losses*, L.A. TIMES (Aug. 9, 2021), https://www.latimes.com/california/story/2021-08-09/apartment-building-owner-geoffrey-palmer-sues-los-angeles-saying-anti-eviction-law-caused-astronomical-losses.

[515] *In re* Ritter, 626 B.R. 35 (C.D. Cal. 2021).

[516] *Civil Rights and COVID-19*, U.S. DEPT. OF JUST. (May 12, 2021) https://www.justice.gov/crt/Civil_Rights_and_COVID-19.

[517] For excellent analysis under our takings jurisprudence, see, for example, Thomas, *supra* note 440, at 1–3; Timothy M. Harris, *The Coronavirus Pandemic Shutdown and Distributive Justice: Why Courts Should Refocus the Fifth Amendment Takings Analysis*, 54 LOY. L.A. L. REV. (forthcoming 2020).

to address the pandemic.[518] However, as pointed out by the Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo*, a decision involving religious liberty, "even in a pandemic, the Constitution cannot be put away and forgotten."[519] *Jacobson* does not give the government a "free pass" to avoid judicial scrutiny.[520] Courts should not use the public health necessity defense or any other emergency defenses to deny just compensation before or after determining whether a regulatory taking has occurred.

The first COVID-19 takings challenge ruled upon was the Pennsylvania Supreme Court's decision in *Friends of Danny Devito v. Wolf*.[521] Four businesses and one individual sought relief from Governor Wolf's Executive Order (order) that required all non-life-sustaining businesses in Pennsylvania to close in order to reduce the spread of COVID-19.[522] The challengers to the order were not designated as life-sustaining businesses and they argued, "the Governor lacks any statutory authority to issue the Executive Order and further claimed that it violated their constitutional rights under the United States and Pennsylvania Constitutions."[523] This decision illustrates how the distinction between the police power and eminent domain has endured over time, even when not used as the reason to deny compensation.

The court first determined that the COVID-19 pandemic is a "natural disaster" under the Emergency Code and justified the Governor's authority to act.[524] Second, the court found that the Governor did not exceed the scope

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[518] In *Hopkins Hawley LLC v. Cuomo*, 518 F. Supp. 3d 705, 710–11 (S.D.N.Y. 2021), the court provided insight regarding how courts have leaned on *Jacobson*'s reasoning and its application in *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). The court stated that while *Jacobson*'s reasoning allows for a narrow application that takes a "deferential approach to how Constitutional issues arise from the COVID-19 pandemic," courts have instead opted for a broad interpretation. This broad reading means that during times of a pandemic "the full panoply of Constitutional rights ought not to apply." *Hopkins Hawley*, 518 F. Supp. 3d. at 711.

[519] 141 S. Ct. 63 (2020) (enjoining "Governor's severe restrictions on applicants' religious services").

[520] *See id.* at 12–13 (Gorsuch, J., concurring in Per Curiam opinion) (noting that that "some [have] mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic," and that many lower courts have read the concurrence by C.J. Roberts in *South Bay Pentecostal Church* 140 S. Ct. 1613, "as inviting them to slacken their enforcement of constitutional liberties while COVID lingers").

[521] 227 A.3d 872 (Pa. 2020) (not *that* Danny Devito).

[522] *Id.* at 876 (parties include: a campaign to elect a candidate to the Pennsylvania State House of Representatives; a licensed real estate agent; a laundry; a public golf course and lounge; and a land company).

[523] *Id.* at 883.

[524] *Id.* at 888–90.

of the police power.[525] Third, the court addressed five constitutional arguments challenging the Governor's response.[526] For our purposes, the takings claim is the only focus here. The *Devito* court began its analysis by noting that there is a distinction between the exercise of the police power and takings under the eminent domain power, citing two Pennsylvania decisions as precedent for the distinction.[527]

The first case the *Devito* court cited, *Appeal of White*, held that a challenged zoning ordinance was not a legitimate exercise of police power because there was not a "rational relation to public safety, health, morals or general welfare."[528] The second case, *Balent v. City of Wilkes-Barre*, involved a takings claim by the owners of a building that fire partially destroyed and the City eventually razed, pursuant to its emergency authority when a building constitutes an immediate danger.[529]

In *Balent*, the City gave the owners more than six months' notice that it would raze the building if the owners did not repair it. The owners had not made any repairs and the building was unsafe and an immediate hazard because of "vandalism, rotting wood and wind damage."[530] The *Balent* court eventually barred the owners under res judicata from relitigating their claims for compensation.[531] It accepted the earlier court's determination that "only actions taken under a valid exercise of police power result in a non-compensable taking."[532] The reviewing court noted, "[w]ithout delineating its analysis, the majority simply held that the Owners' building was demolished pursuant to the City's police power and that it did not constitute a compensable taking."[533]

Although the *Devito* court did not rely on either of these Pennsylvania decisions for its final takings determination, it promulgated the distinction between eminent domain and the police power stated by both *Appeal of White* and *Balent*. The decision in *Devito*, that the Governor's exercise of police power was not a taking, did not rest on the police power exception, but

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[525] *Id.* at 890–92.
[526] *Id.* at 892–903.
[527] *Id.* at 893–94 (quoting Balent v. City of Wilkes-Barre, 669 A.2d 309, 314 (Pa. 1995)).
[528] 134 A. 409, 413 (1926).
[529] 669 A.2d at 312.
[530] *Id.*
[531] *Id.* at 314–15.
[532] *Id.* at 315.
[533] *Id.* ("we must assume that the court properly considered the constitutional implications, before making its final determination that the taking was non-compensable").

instead relied on a takings analysis from *Tahoe-Sierra* and *National Amusements, Inc*.[534]

The Pennsylvania Supreme Court concluded that the order "results in only a temporary loss of the use of the Petitioners' business premises" and is therefore not a regulatory taking.[535] Notably, the court did not apply a necessity defense to the takings claim, although Chief Justice Saylor dissented to the majority's reliance on the temporary nature of the shutdown.[536] Before performing a takings analysis, we presuppose that the order is a valid use of police power, otherwise it would violate substantive due process and no amount of compensation would allow the government to take action.[537] Unfortunately, as part of its conclusion in finding that no regulatory taking had occurred, the court stated:

> the Governor's reason for imposing said restrictions on the use of their property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to "protect the lives, health, morals, comfort, and general welfare of the people[.]"[538]

The persistent use of this artificial distinction between the eminent domain power and the police power continues to haunt our takings analysis and allows courts to reject a takings claim without appropriate analysis.

Courts have relied upon *Jacobson v. Massachusetts*[539] in many of the COVID-19 cases and this Section discusses how this reliance relates to the public health necessity defense. Some of the courts have relied on *Jacobson* to preclude constitutional analysis of the challenge; while other courts give absolute deference based on *Jacobson*, but also analyze the claim under the traditional takings framework. Some courts have dismissed takings claims because the right to operate a business for profit is not a property interest subject to taking, while others have dismissed taking claims because they are seeking injunctive relief rather than the appropriate remedy of just compensation.

The absolute deference to *Jacobson* position is present in the decision in *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer*, where the Sixth Circuit observed that in response to the COVID-19 pandemic there are difficult decisions "in honoring public health concerns while respecting

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[534] Friends of Devito v. Wolf, 227 A.3d 872, 895–96 (Pa. 2020).
[535] *Id.* at 895.
[536] *Id.* at 904–05 (Saylor, C.J., concurring and dissenting).
[537] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 545 (2005).
[538] *Devito*, 227 A.3d at 895–96 (alteration from *Devito* court).
[539] 197 U.S. 11 (1905).

individual liberties."[540] Relying on *Jacobson*, the court began by recognizing that "[a]ll agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts."[541] While the court noted that the police power "is not absolute," it also concluded that because the standard of review was rational basis, the Michigan Governor's Order "passes muster."[542]

Business owners, particularly restaurants and bars that have been subject to closure orders, have alleged a Fifth Amendment taking based on the financial impacts of lost income. In *McCarthy v. Cuomo*, the court analyzed the takings claim of a New York gentlemen's club that alleged "catastrophic financial losses" that could not be recouped under the Coronavirus Aid, Relief, and Economic Security Act because businesses depicting performances or displays of a prurient sexual nature are not eligible for Small Business loans.[543] The court found that because McCarthy could still offer food and drinks for take-out or delivery, the closure order did not deny all economically beneficial use of his property.[544] In addition, his voluntary choice to close his entire business instead of moving to a different business model would not likely succeed an ad hoc factual inquiry under *Penn Central*, thus making it unlikely he would succeed on the merits of his claim.[545]

Owners of bars and limited service restaurants in Tennessee also brought a takings claim alleging that the COVID-19 Closure Order prohibited all economically beneficial use of their property.[546] The court in *TJM 64, Inc. v. Harris* analyzed the takings claim, recognizing that under *Jacobson* "states and municipalities are granted broad powers to combat the spread of dangerous communicable diseases" and employing the traditional takings framework to find that the plaintiffs were unlikely to succeed on the merits of their takings claim.[547] The court found there was not a physical taking, nor a categorical taking under *Lucas*, but instead it pursued an ad hoc inquiry under *Penn Central*. The court determined that the first and second factors (economic impact and interference with investment-backed expectations) favored the plaintiffs, but the third factor (character of the government

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[540] 814 F. App'x 125, 126 (6th Cir. 2020).
[541] *Id.* at 127 (citing *Jacobson*, 197 U.S. at 29).
[542] *Whitmer*, 814 F. App'x at 128–29 (granting a governor's motion for an emergency stay of enforcement of a preliminary injunction against her executive order requiring the closure of indoor fitness facilities).
[543] No. 20-cv-2124, 2020 WL 3286530, at *2 (E.D.N.Y. June 18, 2020).
[544] *Id*. at *5.
[545] *Id*.
[546] *See* TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 832–33 (W.D. Tenn. 2020).
[547] *Id*. at 834.

action) outweighed the other two factors because the character of the government's action was a response to a public health emergency.[548] Thus, the public health emergency characterization outweighed the first two *Penn Central* factors that supported a taking claim.

The auto-racing industry also alleged a taking of their property because of COVID-19 restrictions on their operations. In *Lebanon Valley Auto Racing Corp. v. Cuomo*, the court reviewed the racing track's claim that banning spectators denied them the use of their property to make money.[549] The court analyzed the takings claim as a regulatory taking under the *Penn Central* ad hoc inquiry and found that while the first factor weighed in the plaintiffs' favor, the second and third factors outweighed the first and heavily favored dismissal.[550]

Courts have seen significant increases in cases surrounding rent moratoria provisions, whose goals were to prevent evictions during quarantine periods at the height of the COVID-19 pandemic. Landlords in *Heights Apartments, LLC and Walnut Trails, LLLP v. Tim Walz* argued that the imposition of the Minnesota Governor's Executive Orders (EOs) limiting their ability to evict residential tenants constituted a takings requiring just compensation.[551] The court noted there was "a perceived shift in courts' treatment of *Jacobson*" from a standard requiring significant deference to government action during a public health emergency to the Court's view in *Roman Catholic Diocese of Brooklyn v. Cuomo.* The Court in *Roman* viewed *Jacobson* as a "modest decision" that should not be interpreted as a "towering authority that overshadows the Constitution during a pandemic."[552] The court then held that the claim failed under *Jacobson* and traditional Takings Clause analysis because the orders were not a physical taking under *Loretto* and *Yee v. City of Escondido*.[553] The court also found that the EOs did not constitute a non-

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[548] *Id.* (finding that the emergency need to respond to the COVID-19 pandemic outweighs any other considerations that would indicate a taking); *see also* Case v. Ivey, No. 2:20-CV-777, 2021 WL 2210589, at *23 n.13 (M.D. Ala. June 1, 2021) (stating that the Alabama Governor's COVID-19 closure orders resulting in a barbershop's closure did not result in a *per se* taking under *Penn Central* even though the first two factors were met because the final factor–the character of the government action–outweighed the other two).

[549] No. 1:20-CV-0804, 2020 WL 4596921, at *6 (N.D.N.Y. Aug. 11, 2020).

[550] *Id.* at *8–9.

[551] No. 20-CV-2051, 2020 WL 7828818, at *4 (D. Minn. Dec. 31, 2020) (alleging other constitutional challenges as well).

[552] *Id.* at *10 (quoting Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 71 (2020)).

[553] *Id.* at *14 (because the EOs allow them to evict tenants in several different situations and landlords wishing to occupy the units themselves or allow their families to occupy them have the right to terminate or not renew leases); Yee v. City of Escondido, 503 U.S. 519 (1992).

categorical regulatory taking under the *Penn Central* framework, even though the restrictions impacted the landlords' investment-backed expectations.[554] As for a *Jacobson* analysis, the court determined that while "the EOs have a real and substantial relation to the pandemic," they "do not plainly and palpably infringe on the Landlords' Takings Clause rights."[555]

Similarly, the court in *Blackburn v. Dare County* analyzed a takings challenge under the modern takings framework and found that a regulation restricting access by nonresident visitors was not a physical taking, it did not deny all economically beneficial use, nor did it amount to a regulatory taking under *Penn Central*.[556] The court cited *Jacobson* only once to support the County's legitimate exercise of its emergency powers to protect public health when weighed against the plaintiffs' loss of personal access to their vacation home because they were temporarily restricted as nonresident visitors from entering the county.[557]

The courts have gone back and forth, on whether rent moratoria have created a burden that creates a cognizable claim for landlords to bring,[558] and whether the government has the authority to even enact these types of moratoria at all.[559] The U.S. Supreme Court determined in *Alabama Ass'n of Realtors v. Dep't of Health and Human Services* that the CDC does *not* have continuing authority to maintain rent moratoria beyond what Congress has allowed.[560] Thus, the landscape for takings claims remains speculative in this area.

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[554] *Id.*

[555] *Id.* at *15–16; *see also* Elmsford Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148, 162–68 (thoroughly analyzing landlords' takings claim as a physical taking and a regulatory taking and holding that no taking occurred from rental regulations); Auracle Homes, LLC v. Lamont, No. 3:20-cv-00829, 2020 WL 4558682, at *13–16 (D. Conn Aug. 7, 2020) (analyzing the landlords' takings claims based on the economic impact of the eviction restrictions and concluding that plaintiffs cannot establish a likelihood of success on the merits because they did not "establish that the Executive orders inflict 'any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking'").

[556] No. 2:20-CV-27-FL, 2020 WL 5535530, at *4–7 (E.D.N.C. Sept. 15, 2020).

[557] *Id.* at *8.

[558] *See* District of Columbia v. Towers, 260 A.3d 690, 691 (D.C. 2021) (determining the scope of landlord's rights and ability to bring eviction actions against tenants during rent moratoria); *see also* Complaint at 2, Cal. Rental Hous. Ass'n v. Newsom, 2021 WL 3470021, at *1 (E.D. Cal 2021) (arguing that inability to repossess property for failure to pay rent is a violation of the Takings Clause); *see also* Darby Dev. Co. v. United States, 2022 WL 1562156, at *10 (Fed. Cl. 2022) (holding that the CDC's rent moratorium was outside the scope of its power, but dismissing the plaintiff's claim of taking under the Fifth Amendment).

[559] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (attempting to determine the limits of the CDC in continuing to uphold rent moratoria).

[560] 141 S. Ct. 2485.

The impact on businesses from government-mandated closures may also constitute a taking of property or state inference with a contractual relationship under the Contracts Clause.[561] In evaluating claims that business shutdowns during the pandemic constituted Fifth Amendment violations, some courts held that there was no physical occupation or seizure of property as "the activity of doing business, or the activity of making a profit is not property in the ordinary sense."[562] The business must concretely allege that either real or personal property associated with their business was taken from them or "that the inability to sell goods and provide services for a limited period of time can, as a matter of law, constitute a taking of their property."[563] In *Savage v. Mills*, businesses challenged the Maine Governor's orders relating to COVID-19 measures.[564] The court evaluated the takings challenge from businesses alleging they were denied "'all economically beneficial' engagement in their respective business activity."[565] In dismissing their takings challenge, the court stated that the Plaintiffs did not plead sufficient facts because:

> [t]o state a taking claim, it is not enough to allege that government conduct frustrated a business enterprise, as Plaintiffs have alleged here. Takings jurisprudence is directed at government conduct that denies beneficial use of *property*, meaning things like legal interests in real or personal property, not the liberty interest to engage in business activity.[566]

In Florida, several bar operators sought money damages for inverse condemnation following temporary COVID-19 closures and restrictions on their businesses. The court in *Orlando Bar Group LLC v. DeSantis* affirmed the trial court's dismissal of the claims after analyzing the inverse condemnation claim under the standard takings framework.[567] The court's opinion did not cite *Jacobson* at any time. First, the court addressed the claim that the COVID orders "constituted a per se taking because the orders deprived them of their right to regulate access to their businesses."[568] It held

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[561] *See* Weitzman & Perry, *supra* note 14.
[562] *See* Antietam Battlefield KOA v. Hogan, No. CCB-20-1130, 2020 WL 6777590, at *5 (D. Md. Nov. 18, 2020) (quoting Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd. 527 U.S. 666, 675 (1999)).
[563] *Id.* (dismissing Fifth Amendment takings claim).
[564] No. 1:20-cv-00165, 2020 WL 4572314 (D. Me. Aug. 7, 2020).
[565] *Id.* at *9.
[566] *Id.* at *9–10; *see also* AJE Enter. LLC v. Justice, No. 1:20-CV-229, 2020 WL 6940381, at *7–8 (W. Va. Oct. 27, 2020) (analyzing whether closure orders resulting in financial losses were a taking under *Lucas* or *Penn Central*, but also citing *Savage* and noting that the right to do business is not a constitutionally protected property right).
[567] 2022 WL 1814256, at *1 (Fla. Dist. Ct. App. June 3, 2022).
[568] *Id.* at *2.

that because the COVID orders did not permit third parties to access their property, but instead *prevented* patrons from accessing their property, the per se takings analysis under the *Cedar Point Nursery v. Hassid* decision for a physical occupation was not relevant.[569] Second, the per se taking analysis under *Lucas v. South Carolina Coastal Council* was not applicable because although the economic impact on their businesses was significant, it was a temporary, not a permanent loss.[570]

Lastly, the *Orlando Bar* court applied the *Penn Central* factors to find that the COVID orders were not a taking.[571] First, it was undisputed that the COVID orders financially affected the businesses.[572] Second, the distinct investment-backed expectations of the bar operators included the knowledge that alcohol sales are highly regulated.[573] Third, the character of the government action was a valid use of police power "to limit the spread of a then poorly understood, highly contagious and deadly virus."[574]

Multiple courts have dismissed requests for injunctive relief from COVID orders because the appropriate remedy for a takings claim is compensation.[575] In response to California Governor Gavin Newsom's stay at home order, individuals and entities in the cosmetology industry sought a temporary restraining order (TRO) alleging constitutional violations in *Professional Beauty Federation of California v. Newsom*.[576] The court noted, "[t]his is not the first challenge to a stay at home order issued in response to the COVID-

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[569] *Id.* at *2 (citing Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021)).
[570] *Id.* at *3 (citing *Lucas*, 505 U.S. 1003, 1019 (1992) and Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan Agency, 535 U.S. 302, 319 (2002)).
[571] *Id.* at *4.
[572] *Id.*
[573] *Id.*
[574] *Id.*
[575] *See, e.g.*, Xponential Fitness v. Arizona, No. CV-20-01310, 2020 WL 3971908, at *9 (D. Ariz. July 14, 2020) (holding that even if the state orders requiring the temporary closure of gyms violated the Fifth Amendment, damages, not injunctive relief is the proper remedy); HAPCO v. City of Philadelphia, No. 20-3300, 2020 WL 5095496, at *12 (E.D. Penn. Aug. 28, 2020) (injunctive relief challenge to emergency housing protections as a taking denied because just compensation remedies are available); Hund v. Cuomo, No. 1:20-cv-01176-JLS, at *29–30 (W.D.N.Y. Nov. 13, 2020) (dismissing musician's taking claim resulting from the incidental-music rule that prohibited advertised, ticketed live music because Hund cannot receive injunctive relief if compensation is available for a taking); Baptiste v. Kennealy, No. 1:20-cv-11335, 2020 WL 5751572, at *19–23 (D. Mass. Sept. 25, 2020) (analyzing landlords' taking claims based on eviction restrictions and deciding that they were likely not a physical taking under *Loretto* and *Yee*, or a regulatory taking under *Lucas* or *Penn Central* and even if they were, injunctive relief would be precluded); *Daugherty Speedway, Inc. v. Freeland*, No. 4:20-CV-36-PPS, 2021 WL 633106, at *3 (N.D. Ind. Feb. 17, 2021) (denying the plaintiff's request for injunctive relief when their racetrack was shut down due to the Indiana Governor's stay at home orders since the Fifth Amendment did not support that type of redress).
[576] No. 2:20-cv-04275, 2020 WL 3056126, at *1 (C.D. Cal. June 8, 2020).

19 crisis," and observed that courts confronting similar disputes have relied on *Jacobson* for guidance.[577] Based upon *Jacobson*'s direction, the court "must uphold the Stay at Home Order's bar on Plaintiffs practicing their profession unless (1) the measure has no real or substantial relation to public health, or (2) the measure is 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'"[578] First, the order "bears a real and substantial relation to public health because 'the activities that Plaintiffs seek to engage in are especially vulnerable to spreading COVID-19.'"[579] The second standard from *Jacobson* "plainly puts a thumb on the scale in favor of upholding state and local officials' emergency public health responses."[580] The court then evaluated the plaintiffs' Fifth Amendment takings claim as to whether they were likely to prevail on the merits and held that because they were only seeking injunctive relief, not damages, their claim was not the appropriate remedy for a taking.[581]

Similarly, in *Talleywhacker, Inc. v. Cooper*, entertainment businesses challenged the Governor's closure orders in North Carolina and sought a preliminary injunction.[582] In reviewing the plaintiffs' constitutional claims as to their likelihood of success on the merits, the court relied on the *Jacobson* decision to "recognize the authority of a state to enact quarantine laws and health laws of every description."[583] However, the *Talleywhacker* court held that the plaintiffs were unlikely to prevail on their takings claims because "[a]s long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking."[584]

### *2. Other Constitutional Claims*

Several COVID-19 cases dealing with religious freedom claims from shutting down church services have also cited the *Jacobson* opinion. In *South Bay United Pentecostal Church v. Newsom*, the Ninth Circuit denied an emergency motion for injunctive relief pending appeal, concluding, "that appellants have not demonstrated a sufficient likelihood of success on appeal" as it was unlikely that the state action violates the First

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[577] *Id.* at *5.
[578] *Id.* (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905)).
[579] *Pro. Beauty Fed'n*, 2020 WL 3056126, at *6.
[580] *Id.* at *7 (quoting Best Supplement Guide, LLC v. Newsom, No. 2:20-cv-00965, 2020 WL 2615022, at *4 (E.D. Cal. July 22, 2020)).
[581] *Id.* at *8 (citing Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n, 125 F. Supp. 3d 1051, 1066 (D. Haw. 2015), *aff'd*, 950 F.3d 610 (9th Cir. 2020)).
[582] 465 F. Supp. 3d 523 (E.D. N.C. 2020) (asserting claims for equal protection violation, free speech violation, and due process).
[583] *Id*. at 538 (quoting *Jacobson*, 197 U.S. at 38).
[584] *Id.* at 541 (quoting Knick v. Township of Scott, 139 S. Ct. 2162, 2176 (2019)).

Amendment.[585] However, Judge Daniel P. Collins dissented stating, "Plaintiffs have established a very strong likelihood of success on the merits of their Free Exercise claim."[586] Judge Collins argued that *Jacobson* does not support "the view that an emergency *displaces* normal constitutional standards. Rather, *Jacobson* provides that an emergency may justify temporary constraints *within* those standards."[587] "*Jacobson* explicitly states that other constitutional limitations may continue to constrain government conduct."[588] On request for injunctive relief from California's Executive Order, the U.S. Supreme Court denied the application, with Justice Roberts concurring in the denial and citing *Jacobson* for the principle that the Constitution "entrusts '[t]the safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"[589]

In *Calvary Chapel Dayton Valley v. Sisolak*, the Court denied an application for injunctive relief based on the Governor of Nevada's directive that severely limited religious services attendance while allowing casinos to admit 50% of their maximum occupancy.[590] Justice Alito, joined by Justices Thomas and Kavanaugh dissented from the denial contending, "it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID–19 pandemic."[591]

The Seventh Circuit in *Elim Romanian Pentecostal Church v. Pritzker* similarly denied the churches' motion to enjoin the Governor of Illinois' executive order limiting the size of religious services as violating Free Exercise rights.[592] In contrast to the concerns expressed by the Court's dissent in *Calvary Chapel Dayton Valley*, the Seventh Circuit relied on *Jacobson* to sustain a public-health order against a constitutional challenge.[593] The Fifth Circuit in *Spell v. Edwards* denied a motion for an injunction by a church

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[585] 959 F.3d 938, 930–40 (9th Cir. 2020), *cert. granted*, No. 20-746, 2021 WL 1602607 (U.S. Apr. 26, 2021) (vacating and remanding the Ninth Circuit's judgment).
[586] *Id.* at 941 (Collings, J., dissenting).
[587] *Id.* at 942.
[588] *Id.* at 942–43 (citing Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015); United States v. Chalk, 441 F.2d 1277, 1281 (4th Cir. 1971) (confirming a narrower reading of *Jacobson* to analyze emergency orders "within the rubric of established First Amendment time, place, and manner principles")).
[589] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (alteration by the *Newsom* Court) (quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905)).
[590] 140 S. Ct. 2603 (2020) (mem.).
[591] *Id.* at 2603–09 (Alito, J., dissenting).
[592] 962 F.3d 341, 342 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1753 (2021).
[593] *Id.* at 347.

against a closure order. It held the claim against the Governor of Louisiana's closure order was moot after the Governor lifted a ten-person gathering restriction.[594] Concurring in the result, Judge James C. Ho relied on *Jacobson* to support the principle that "[o]fficials may take appropriate emergency public health measures to combat a pandemic,"[595] but reiterated, "[n]othing in *Jacobson* supports the view that an emergency displaces normal constitutional standards."[596]

In *Givens v. Newsom*, Governor Newsom's COVID-19 protective measures denied plaintiffs the permits needed to protest delays by the California Department of Justice in processing background checks to purchase firearms.[597] The plaintiffs applied for a TRO against Governor Newsom's order, alleging that California's ban on mass gatherings violated their freedom of speech, freedom to assemble, freedom to petition the government, and their right to liberty under the state constitution.[598] Relying on *Jacobson* to uphold "a state's exercise of general police powers to promote public safety during a public health crisis," the court held that the "stay at home order bears a real and substantial relation to public health."[599] The court also found "that Plaintiffs have not shown that the State's order is 'beyond all question' a 'plain, palpable invasion of rights secured by [ ] fundamental law.'"[600] Thus, because the plaintiffs were not likely to succeed on the merits of their claim, the court denied their TRO application.[601]

Businesses and individuals interested in lodging and campground facilities in Maine brought a preliminary injunction against the Governor of Maine for

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[594] 962 F.3d 175, 177–80 (5th Cir. 2020). In a later Fifth Circuit case, the court also denied a bar owner's claims for injunctive relief on similar grounds as *Spell v. Edwards*. *Big Tyme Investments, L.L.C. v. Edwards*, 985 F.3d 456, 470 (5th Cir. 2021). However, the court in *Spell* further held that the governor's differentiation of bars and restaurants violated the bar owner's equal protection rights. The owner's claim was not moot just because the bars received increase capacity allowances since the bars and restaurants were treated unequally *Id.* at 464–65. Through 2021, as state governments continued to lift restrictions on certain business, the Supreme Court noted that "even if the government withdraws or modifies a COVID restriction in the course of litigation that does not necessarily moot the case." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021).

[595] *Spell*, 962 F.3d at 181 (citing Jacobson v. Massachusetts, 197 U.S. 11, 30–31 (1905)).

[596] *Id.* (quoting S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., concurring)).

[597] 459 F. Supp. 3d 1302 (E.D. Cal. 2020).

[598] *Id.* at 1307–08.

[599] *Id.* at 1310–11.

[600] *Id.* at 1311–17 (alteration in original) (quoting *Jacobson*, 197 U.S. at 30) (analyzing First Amendment claims under constitutional principles).

[601] *Id.* at 1317.

imposing restrictions "that deprive non-Mainers of their fundamental right to travel and participate in the commerce that currently is available to Mainers."[602] The court in *Bayley's Campground v. Mills* determined that the plaintiffs did not show a likelihood of success on their claim that the Governor violated their fundamental right to travel.[603] The court discussed the applicability of *Jacobson* and noted that the Supreme Court has "refined its approach for the review of state action that burdens constitutional rights" in the eleven decades since it decided *Jacobson*.[604] The court also observed that "*Jacobson* has been thoughtfully criticized by legal scholars for lacking in limiting principles characteristic of legal standards," and instead "floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review."[605] Indeed, Professor Jeffrey D. Jackson remarked:

> *Jacobson* still remains good law for the propositions that state governments have wide-ranging police powers to regulate health, safety, and welfare, and that police powers can overcome even fundamental rights given sufficient justification. However, *Jacobson* does not set up any kind of framework for determining whether the justification is sufficient. That issue must be judged, not by the standards of 1905, but by the current law.[606]

Earlier litigation of the COVID-19 challenges employed a broad reading of *Jacobson*.[607] For example, the district court in *Slidewaters LLC v. Washington Department of Labor & Industries* stated, "[t]his Court joins the growing consensus of district courts that constitutional challenges to similar COVID-19 related measures are precluded by *Jacobson*."[608] In *Slidewaters*, a family-owned waterpark sought a TRO against the Washington Governor's stay at home order and other emergency rules issued in response to the virus.[609] In addition to contesting the Governor's authority to issue the rules, the waterpark contended that the government's actions violated its substantive due process rights under both the federal and state

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[602] Bayley's Campground, Inc. v. Mills, 463 F. Supp. 3d 22, 24 (D. Me. 2020).
[603] *Id.* at 35.
[604] *Id.* at 31.
[605] *Id.* at 32.
[606] *See* Jackson, *supra* note 15, at 43 (2020) (citing Kansas v. Hendricks, 521 U.S. 346, 356–57 (1997)).
[607] *See* Heights Apartments LLC v. Walz, No. 20-CV-2051, 2020 WL 7828818 (D. Minn. Dec. 21, 2020).
[608] No. 2:20-CV-0210, 2020 WL 3130295, at *4 (E.D. Wash. June 12, 2020) (citing Open Our Or. v. Brown, No. 6:20-cv-773-MC, 2020 WL 2542861, at *2 (D. Or. May 19, 2020)).
[609] *Slidewaters*, 2020 WL 3130295 at *2.

constitutions.[610] After finding that the emergency orders and rules were valid, the court turned to the substantive due process claim and held that the waterpark failed "to raise a serious question going to the merits of this claim."[611] It subsequently denied the TRO as not in the public interest.[612]

What is remarkable about the *Slidewaters* decision is its interpretation of *Jacobson* as completely precluding constitutional scrutiny of COVID-19 related measures. It is true "that state governments have the authority to enact 'quarantine laws and "health laws of every description"' pursuant to their police powers."[613] However, the *Slidewaters* court cited *Jacobson* for the principle that "[s]o long as a public health law is reasonable and not overly broad or unequally applied, it is permissible even where it infringes on other protected interests."[614] The *Slidewaters* court cited *Jacobson* at page twenty-eight for this startling outcome.[615] However, on page twenty-eight the *Jacobson* Court discussed the case of *Railroad Co. v. Husen*, which found that a quarantine violated the Constitution.[616]

> [T]his court recognized the right of a state to pass sanitary laws, laws for the protection of life, liberty, health, or property within its limits, laws to prevent persons and animals suffering under contagious or infectious diseases, or convicts, from coming within its borders. But, as the laws there involved went beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid.[617]

The court in *Carmichael v. Ige* evaluated a TRO request to enjoin the enforcement of the Hawai'i Governor's order imposing a fourteen-day quarantine to all persons (residents and non-residents) entering Hawai'i as violating the plaintiffs' Fifth and Fourteenth Amendment rights, including the right to travel, due process, and equal protection.[618] It observed, "[c]ourts presented with emergency challenges to governor-issued orders temporarily restricting activities to curb the spread of COVID-19 have consistently applied *Jacobson v. Massachusetts* to evaluate those challenges."[619] The

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[610] *Id.* at *3.
[611] *Id.* at *4.
[612] *Id.* at *6.
[613] *Id.* at *4 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 24–25 (1905)).
[614] *Id.* (citing *Jacobson*, 197 U.S. at 28).
[615] *Id.*
[616] 95 U.S. 465, 471–74 (1877) (holding that state statute was not a quarantine law or an inspection law, but was instead "a plain intrusion upon the exclusive domain of Congress").
[617] *Jacobson*, 197 U.S. at 28.
[618] 470 F. Supp. 3d 1133, 1137–38 (D. Haw. 2020).
[619] *Id.* at 1142.

*Carmichael* court cited *Jacobson* for the rule that "*all* constitutional rights may be reasonably restricted to combat a public health emergency"[620] and "the judiciary may not 'second-guess the state's policy choices in crafting emergency public health measures.'"[621] In evaluating the likelihood of constitutional claims succeeding on the merits, the court considered "the second *Jacobson* inquiry: whether the Emergency Proclamations are '*beyond question*, in palpable conflict with the Constitution . . . [and] whether they cause a 'plain, palpable invasion' of Plaintiffs' Fifth and Fourteenth Amendment rights."[622] The *Carmichael* court analyzed these constitutional claims "under traditional levels of scrutiny" and under "*Jacobson*'s highly deferential standard" and concluded they did not violate the plaintiffs' constitutional rights under either standard.[623]

As with the *Carmichael* decision, the court in *Altman v. County of Santa Clara* played it safe by analyzing the plaintiffs' Second Amendment challenge under both the current Second Amendment framework following *District of Columbia v. Heller*[624] and under *Jacobson*.[625] The court concluded it did not need to determine which standard applied because "the Order survives review under either test."[626] Our jurisprudential framework, as it exists now and in the future, should guide courts when they analyze the scope of the police power and whether the government has violated constitutional rights.

As indicated by the Court in *Roman Catholic Diocese of Brooklyn v. Cuomo*, *Jacobson* should not preclude constitutional challenges to government responses to the COVID-19 pandemic.[627] In fact, *Jacobson* recognized the duty of the judiciary to review state exercises of the police power and ensure that such laws do not interfere with federal authority or violate constitutional rights. *Jacobson* relied on its earlier decision in *Husen*, which invalidated a state quarantine law that obstructed commerce.[628] *Husen* concluded that the exercise of a state's police power "cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution

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[620] *Id.* at 1143 (emphasis added by *Abbott* court) (quoting *In re* Abbott, 954 F.3d 772, 786 (5th Cir. 2020).
[621] *Carmichael*, 470 F. Supp. 3d at 1143 (quoting *In re* Rutledge, 956 F.3d 1018, 1029 (8th Cir. 2020) (quoting *Abbott*, 954 F.3d at 784)).
[622] *Id.* at 1139 (quoting *Jacobson*, 197 U.S. at 31).
[623] *Id.* at 1145.
[624] 554 U.S. 570 (2008).
[625] Altman v. County of Santa Clara, 464 F. Supp. 3d 1106 (N.D. Cal. 2020).
[626] *Id.* at 1120.
[627] 141 S. Ct. 63, 70–71 (2020) (Gorsuch, J., concurring).
[628] R.R. Co. v. Husen, 95 U.S. 465, 473 (1877).

to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."[629]

### *3. The Evolving Interpretation of Jacobson*

Litigation over COVID-19 state measures to reduce the spread of the virus will likely continue for several years as the challenges make their way through the court system. The early deference to public health measures relying on *Jacobson* has evolved following the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*.[630] The court in *M. Rae, Inc. v. Wolf* addressed the level of scrutiny applicable to police power authority suspending indoor dining while permitting other indoor retail outlets to stay open with a reduced capacity, and noted that courts during the pandemic have not consistently applied *Jacobson*.[631] Some courts have applied "extraordinary deference" to police power authority in a public-health emergency, while other courts have applied the traditional tiers of constitutional scrutiny developed after *Jacobson* was decided in 1905.[632] The *M. Rae, Inc*. court observed that the Supreme Court has not directly ruled on the viability of *Jacobson*, but two of the Justices have criticized using the deference applied in *Jacobson* "as the answer to all pandemic-related constitutional claims."[633] While *Jacobson* instructs that public health can be protected at the expense of some limitations on individual liberties, "[t]he difficulty is in squaring that deference with the ordinary tiers of scrutiny developed in the 115 years since *Jacobson* was decided."[634]

The court in *Lawrence v. Polis* explored the disagreement in the courts about "just how far the *Jacobson* case allows state and local governments to go."[635] The *Lawrence* court explained that the position taken by some litigants and courts in response to the pandemic is that *Jacobson* precludes applying the traditional tiers of constitutional scrutiny during a public health crisis and that this "position is based in part on the Supreme Court's decision

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[629] *Id.* at 474.
[630] 141 S. Ct. 63.
[631] No. 1:20-CV-2366, 2020 WL 7642596, at *5–6 (M.D. Penn. Dec. 23, 2020).
[632] *Id.* at *6.
[633] *Id.*
[634] *Id.* (not resolving "that difficult question here, because *Jacobson* is easily reconciled with the rational-basis standard of review that would otherwise apply to the plaintiffs' class-of-one [equal protection] claim"). *Cf.* AJE Enter. LLC v. Justice, No. 1:20-CV-229, 2020 WL 6940381 *4 (N.D. W. Va. Oct. 27, 2020) (noting Chief Justice Roberts "support behind the continued vitality of Jacobson's deferential framework in the midst of this unfolding public health crisis" in S. Bay United Pentecostal Church v. Newson, 140 S. Ct. 1613, 1614 (2020)).
[635] No. 1:20-cv-00862, 2020 WL 7348210, at *4 (D. Colo. Dec. 24, 2020).

in *South Bay United Pentecostal Church v. Newsom*."[636] The court observed, "this position is an unnecessary and incorrect expansion" of the *Jacobson* opinion, which "instead fits within the constitutional doctrine that has been developed in the 115 years since its issuance."[637] In response to the plaintiff's argument that the pandemic is no longer an emergency, the court shared this concern:

> [W]hat were initially understood as short-term measures have now stretched into the better part of a year. There is a real danger to civil liberties if courts simply defer to government decisions about what constitutes a public-health emergency and what those governments are allowed to do about it.
>
> This helps explain why the court cannot accept Defendants' reading of *Jacobson*. If Defendants' view were correct, and the existence of a public-health emergency created an exemption from normal constitutional review of government action, then courts would have to be much more demanding in reviewing the government's assessment of what constitutes such an emergency. . . . [I]t isn't hard to imagine, if Defendants' approach were the law, any number of things that clever (or even not-so-clever) governments might claim to be a public-health crisis in order to evade effective constitutional scrutiny. Much better, in this court's view, to apply consistent constitutional principles and doctrine.[638]

Exactly. Please recall *TrinCo III*, discussed in Part II,[639] where the Federal Claims court established a "framework for determining when a necessity defense would excuse government-caused fire damage to private property while fighting a wildfire."[640] This creation of a new framework to evaluate whether the doctrine of necessity applies is the most troubling aspect of the decision. Similarly, the COVID-19 litigation is a perfect illustration of why courts should not apply the various common law necessity defenses to prevent constitutional scrutiny.

*Jacobson* should compel the judiciary to make certain that statutes "enacted to protect the public health, the public morals, or the public safety" have a "real or substantial relation" to such goals and do not violate the Constitution.[641] The *Jacobson* decision "remains alive and well—including

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[636] *Id.*
[637] *Id.* (citing Denver Bible Church v. Azar, No. 1:20-cv-02362, 2020 WL 6128994, at *5–8 (D. Colo. Oct. 15, 2020); Roman Cath. Diocese of Brooklyn v. Cuomo, 2020 WL 6948354, at *5–6 (2020); Bayley's Campground Inc. v. Mills, 463 F. Supp. 3d 22, 30–32 (D. Me. 2020); County of Butler v. Wolf, 486 F. Supp. 3d 883 (W.D. Pa. 2020)).
[638] *Lawrence*, 2020 WL 7348210, at *5.
[639] *See supra* notes 215–27.
[640] TrinCo Inv. Co. v. United States (*TrinCo III*), 130 Fed. Cl. 592, 600 (2017).
[641] 197 U.S. at 31.

during the present pandemic,"[642] however, courts must evaluate constitutional challenges under *Jacobson*'s second inquiry as to whether the challenged order affects a "plain, palpable invasion" of the plaintiff's constitutional rights.[643]

With over two hundred cases of COVID-19 litigation decided from March through December 2020, the public health necessity defense from *Jacobson* received extraordinary attention from the courts. Early on, many courts applied the *Jacobson* necessity defense to preclude constitutional scrutiny completely or to give highly deferential value to the pandemic emergency over civil liberties. Because of this intense attention, we have seen courts, including the Supreme Court, decide, "[e]ven in a pandemic, the Constitution cannot be put away and forgotten."[644] *Jacobson* does not require traditional constitutional scrutiny to be suspended, but instead reflects the high deference that must be given to local health authorities in a public health crisis.

The rapid evolution of the judicial interpretation of *Jacobson* serves as a great example for other common law emergency or necessity exceptions that have lingered over time to preclude traditional constitutional scrutiny as it has developed into this century. This Article has demonstrated that the antiquated doctrines of necessity should no longer be applied to suspend constitutional scrutiny in situations the government has deemed to be an emergency. In particular, courts should not apply these necessity exceptions to ignore the Fifth Amendment's requirement to pay just compensation when the action constitutes a taking.

Necessity defenses to takings claims should not prevent traditional regulatory takings analysis or deny just compensation to property owners based on "emergencies." The public health necessity, the doctrine of necessity destruction, the military necessity doctrine, the law enforcement necessity doctrine, the proposed defenses for climate change necessity and economic necessity, and the distinction between the eminent domain power and the police power are no longer acceptable defenses to constitutional violations. Nuisance law and background principles of state property law define the property rights that are subject to a government taking. If property rights do not exist under state law, such as the right to use your land as a nuisance, then the government cannot be liable for paying just compensation for a taking when it prevents a use that does not constitute property. If it is not property, the government cannot take it.

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[642] Altman v. County of Santa Clara, 464 F. Supp. 3d 1106, 1119 (N.D. Cal. June 2, 2020) (citing numerous district and circuit court rulings relying on *Jacobson* to determine the validity of various COVID-19 response orders).
[643] *Id.* at *8.
[644] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020).

## CONCLUSION

The doctrine of necessity has strong roots in the common law of tort and property going back hundreds of years. In the United States, courts have applied the doctrine in various situations to negate judicial review of constitutional challenges to government action, most recently in some of the wildfire and flood claims resulting from disasters. Now, the states' responses to the COVID-19 pandemic have brought one of these necessity doctrines—the public health necessity relying on *Jacobson v. Massachusetts*[645]—to the forefront as courts across the country review constitutional challenges to state public health measures. With such intense review of *Jacobson*'s public health necessity in a short timeframe, courts, including the Supreme Court, are recognizing that common law emergency exceptions cannot prevent constitutional review. This development supports the goal of this Article, which is to discourage using the necessity doctrine to bypass constitutional scrutiny of asserted rights, particularly as to Fifth Amendment takings claims.

The Article examined the historical development of the diverse categorical exceptions to takings claims under the Fifth and Fourteenth Amendments and addressed the continued viability of these exceptions following the decision in *Pennsylvania Coal v. Mahon*. It reviewed four categories of necessity exceptions including: 1) the doctrine of destruction (general, military, and law enforcement); 2) the public health exception; 3) the nuisance and background principles of property law exception; and 4) the police power exception. This Article posits that the only doctrinally acceptable categorical defenses to a regulatory taking are the nuisance and background principles of property law exceptions.

"The Fifth Amendment's [Takings Clause] . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[646] When the government takes property for a public purpose, either through condemnation under eminent domain or through inverse condemnation when the state regulation or action "goes too far," it must pay just compensation. Public necessity will likely justify the government's action to promote the health, safety, and general welfare of the community, but necessity should not preclude judicial review of whether the challenged action constitutes a taking of private property or is otherwise unconstitutional.

Nuisance and background principles of state law will determine whether the property owner has a property interest subject to a government taking. If

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[645] 197 U.S. 11 (1905).
[646] Armstrong v. United States, 364 U.S. 40, 49 (1960).

the property owner never had a right to use their property in a manner that constitutes a nuisance or interferes with a public resource, the government cannot take it and the property owner does not deserve compensation. Government actions that constitute a taking, but benefit the public as a whole whether by conferring a benefit or preventing a harm, should not burden individual property owners when, under the *Armstrong* principle, in all fairness and justice, we the public should share in paying for the public good.

# Hoʻokahe Wai:* An Analysis of a Proposed Exemption from Hawaiʻi's Water Leasing Process for Kalo Farming and Consistency with Hawaiʻi's Public Trust Doctrine

Kaulu Luʻuwai**

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* Roughly translated to "let the waters flow" as part of the philosophy "hoʻokahe wai hoʻoulu ʻāina," which means "make the water flow, make the land productive." *History*, *Ka Papa Loʻi ʻO Kānewai*, HAWAIʻINUIĀKEA SCH. OF HAWAIIAN KNOWLEDGE, https://manoa.hawaii.edu/hshk/ka-papa-loi-o-kanewai/history/ (last visited Oct. 10, 2021). This philosophy comes from the moʻolelo (history) of the gods Kāne and Kanaloa as they traveled throughout the Hawaiian Islands. *See id.* Wherever they settled, Kāne used his powers to find freshwater and bring it to the surface, allowing cultivation to follow. *Id.* Harry Kūnihi Mitchell presented this philosophy as the motto for Ka Papa Loʻi ʻo Kānewai when the traditional kalo patches located at Kānewai, Mānoa were reopened by Native Hawaiian students enrolled at the University of Hawaiʻi at Mānoa. *See id.*

** J.D., William S. Richardson School of Law, B.A., Hawaiʻinuiākea School of Hawaiian Knowledge, B.B.A., Shidler College of Business, University of Hawaiʻi at Mānoa. This Article is dedicated to the Waiʻoli Valley Taro Hui (Hui) and the kūpuna of Waiʻoli Valley who have continued the tradition of mahi kalo for the benefit of all of Hawaiʻi. The author would like to thank the Hui members for their patience, grace, and courage to endure the long and arduous legal process in pursuit of a better future for the generations of Waiʻoli farmers to come. Mahalo palena ʻole iā Polopeka D. Kapuaʻala Sproat no ke kūkulu ʻana i kēia mau papahana hoʻonaʻauao i pili i ke kānāwai ʻŌiwi a me ke kānāwai hoʻoulu ʻāina no nā haumāna e hana a ʻike hoʻi i nā hopena o ka hana pū ʻana me ke kaiāulu. I ulu ke kai, i ulu pū hoʻi ka lāhui Hawaiʻi.

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## INTRODUCTION

Make nō ke kalo a ola i ka palili.
The taro may die but it lives on in the young plants that it produces.[1]

"[F]or Hawai‘i's people, culture, and resources, ola i ka wai, 'water is life' . . . ."[2] This statement stands the test of time and is just as meaningful today as it was when the first settlers arrived in Hawai‘i more than one thousand years ago.[3] Historically, water translated to wealth[4] for ‘Ōiwi.[5] Presently, due in part to Hawai‘i's repressive colonial history,[6] this resource has come to symbolize the survival of one of Hawai‘i's most iconic traditional and customary Native Hawaiian practices: mahi kalo (taro farming).[7]

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[1] MARY KAWENA PUKUI, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 229 (1983) [hereinafter PUKUI, ‘ŌLELO NO‘EAU]. "Make nō ke kalo a ola i ka palili" poetically means the ancestors are dead, but survive in their offspring. *See id.* This translation is slightly adapted for the purposes of this footnote.

[2] H.R. Con. Res. 163, 31st Leg., Reg. Sess. (Haw. 2021).

[3] Hawai‘i was "well settled" by 750 C.E. *See* Kenneth P. Emory, *East Polynesian Relationships*, 72 J. POLYNESIAN SOC'Y 78, 99 (1963).

[4] *See* CAROL WILCOX, SUGAR WATER: HAWAII'S PLANTATION DITCHES 25 (1996) (Wai "is the root for the word for wealth, *waiwai* . . . .").

[5] KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION 233 (2014) (defining ‘Ōiwi as "synonymous with Native Hawaiian, [but] without the connotations of blood quantum as defined by US law").

[6] *See generally* D. Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 146 (2011) [hereinafter Sproat, *Wai Through Kānāwai*] (discussing how establishment of Hawai‘i's current legal regime for management of fresh water was a "direct response to years of repressive colonial interests that seized Native lands and took massive quantities of stream water"); Lu‘ukia Nakanelua, *Nā Mo‘o o Ko‘olau: The Water Guardians of Ko‘olau Weaving and Wielding Collective Memory in the War for East Maui Water*, 41 U. HAW. L. REV. 189, 213–14 (2018).

[7] *See generally* E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY WITH THE COLLABORATION OF MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT 71–115 (Bishop Museum Press rev. ed. 1991) [hereinafter HANDY, HANDY & PUKUI] (explaining traditional kalo cultivation in Hawai‘i and its role in ‘Ōiwi society).

While kalo was once the primary staple crop for ʻŌiwi,[8] and the main cultigen in Hawaiʻi prior to western contact,[9] its relationship with ʻŌiwi goes beyond sustenance.[10] The Kumulipo, an ʻŌiwi cosmogony comparable to Darwin's Theory of Evolution, recounts the direct lineal connection ʻŌiwi have to all natural forms and beings, including kalo, ʻāina (land), and wai (freshwater).[11] The Kumulipo also speaks of a reciprocal duty to mālama (take care of) biocultural resources as one would an elder.[12]

This duty to care for the ʻāina and wai is integral to the mahi kalo way of life. ʻŌiwi lifeways continue to be passed down, even though kupaʻāina (people with long-standing attachments to one piece of land or area) have been physically disconnected from their traditional ʻāina.[13] In Waiʻoli Valley on the island of Kauaʻi, this lifeway continues on in the techniques and practices of "small-scale family farmers who have lived and farmed in Waiʻoli for generations."[14] Their kuleana (privilege and responsibility) to care for the natural resources of Waiʻoli and the larger Hanalei Kalana,[15] passed down through hundreds of years of stewardship, predates any written environmental laws and continues to be "refined through actively working

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[8] *Id.* at 74. Kalo is interchangeable with the word taro. *Id.* at 13; *see also* Sproat, *Wai through Kānāwai*, *supra* note 6, at 48 n.225 (describing the significance of kalo for ʻŌiwi as "an important source of food and as the symbolic act of caring for an elder sibling").

[9] Natalie Kurashima et al., *The Potential of Indigenous Agricultural Food Production Under Climate Change in Hawai'i*, 2 NATURE SUSTAINABILITY 191, 191 (2019).

[10] *See* A. UʻILANI TANIGAWA LUM ET AL., WAIʻOLI VALLEY TARO HUI LONG-TERM WATER LEASE FOR TRADITIONAL LOʻI KALO CULTIVATION: FINAL ENVIRONMENTAL ASSESSMENT 37 (2021) [hereinafter HUI FEA].

[11] Melody Kapilialoha MacKenzie, *Religious Freedom*, *in* NATIVE HAWAIIAN LAW: A TREATISE 856, 860–61 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapuaʻala Sproat eds., 2015).

[12] *Id.* at 861 ("Out of th[e] familial relationship [between kalo as the elder sibling and ʻŌiwi as its younger sibling] arises the concept of mālama ʻāina, caring for and serving the land, an essential pattern of Hawaiian life. It is the duty of [ʻŌiwi], as the younger sibling, to care for and serve the ʻāina, which in turn provides food and shelter. This reciprocal relationship helps to create and preserve pono—balance and harmony in the universe.") (citation omitted).

[13] *See* HANDY, HANDY & PUKUI, *supra* note 7, at 42–43 (noting that kamaʻāina continue to show great attachment to their ancestral lands, even when they have been displaced).

[14] HUI FEA, *supra* note 10, at 13.

[15] A kalana is "a traditional Native Hawaiian land division term associated more with systematic biocultural resource management and community identity rather than governance." *Id.* at 5; *see also* Kawika B. Winter et al., *The* Moku *System: Managing Biocultural Resources for Abundance within Social-Ecological Regions in Hawai'i*, SUSTAINABILITY, 2018, at 1, 3 (describing kalana in more detail and examining the Hanalei Kalana, of which the Waiʻoli Ahupuaʻa is a part).

on the land."[16] These conservation methods also play a vital environmental role in preserving native species, many of which are only found in Hawai'i.[17]

After historic flooding in 2018 devastated Wai'oli, however, kalo farming in the ahupua'a was at risk of being regulated out of existence.[18] Ironically, laws meant to protect the public trust from being diminished by nontraditional and exploitative uses were the cause.[19] Specifically, after the floods, the Hawai'i Department of Land and Natural Resources (DLNR) informed the Wai'oli kalo farmers that the water they used for cultivation originates on state land, flows through the state Conservation District, and is later used for kalo cultivation on private land located within the state Agricultural District.[20] Therefore, kalo farmers were required to secure a long-term water lease through a complex process that had never been completed before.[21]

Although the Wai'oli kalo farmers are well into the process of securing a long-term water lease,[22] this Article explores why instream,[23] in-watershed[24]

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[16] HUI FEA, *supra* note 10, at 10.

[17] *Id.* at 13.

[18] *See* Written Testimony of Reid Yoshida, President, Wai'oli Valley Taro Hui, to the Haw. Comm'n on Water Res. Mgmt. (May 18, 2021), *available at* https://files.hawaii.gov/dlnr/cwrm/submittal/2021/sb20210518B1T.pdf [hereinafter CWRM Testimony]; Written Testimony of Clarence "Shorty" Kaona, Member, Wai'oli Valley Taro Hui, to the Haw. Comm'n on Water Res. Mgmt. (May 18, 2021), *in* CWRM Testimony, *supra*, at 7; Written Testimony of Chris Kobayashi, Member, Wai'oli Valley Taro Hui, to the Haw. Comm'n on Water Res. Mgmt. (May 18, 2021), *in* CWRM Testimony, *supra*, at 17.

[19] *See* Written Testimony of Reid Yoshida, President, Wai'oli Valley Taro Hui, to the Haw. S. Comms. on Hawaiian Affs. & Water & Land, 31st Leg., Reg. Sess. (Feb. 23, 2021), *available at* https://www.capitol.hawaii.gov/Session2021/Testimony/SCR22_TESTIMONY_HWN-WTL_02-23-21_.PDF [hereinafter Joint Hearing Testimony].

[20] HUI FEA, *supra* note 10, at 6. The Agricultural District is one of four major land use districts in Hawai'i. *See* HAW. REV. STAT. § 205-2 (2021) (defining the Agricultural District).

[21] HUI FEA, *supra* note 10, at 27; *see* Letter from D. Kapua'ala Sproat, Env't Law Clinic Dir., William S. Richardson Sch. of L., to Raina Gushiken, Senior Legal Couns., Off. of Hawaiian Affs. (Dec. 30, 2020) (on file with author).

[22] *See* HUI FEA, *supra* note 10, at 36.

[23] Under the Water Code, "instream use" is defined as beneficial uses of stream water for significant purposes, which are located in the stream and which are achieved by leaving the water in the stream. HAW. REV. STAT. § 174C-3 (2021). Instream uses include, but are not limited to: (1) maintenance of fish and wildlife habitats; (2) outdoor recreational activities; (3) maintenance of ecosystems such as estuaries, wetlands, and stream vegetation; (4) aesthetic values, such as waterfalls and scenic waterways; (5) navigation; (6) instream hydropower generation; (7) maintenance of water quality; (8) the conveyance of irrigation and domestic water supplies to downstream points of diversion; and (9) the protection of 'Ōiwi traditional and customary rights. *Id.*

[24] Watershed is defined as "[a]n area of land that is defined by ridgelines and drains into a distinct stream or river." HONOLULU BD. OF WATER SUPPLY, NORTH SHORE WATERSHED

kalo cultivation done in a traditional manner, as the Waiʻoli kalo farmers have done for generations, should be exempt from the water leasing process. It further analyzes why such an exemption does not violate the public trust. Part I reviews the public trust doctrine as it applies to water resources, as well as the history of Hawaiʻi Revised Statutes (HRS) section 171-58, the provision governing the water leasing process. This part also looks at constitutional protections for ʻŌiwi traditional and customary practices. Part II expounds on why traditional kalo cultivation is uniquely beneficial to the environment, bolstering the argument that such use of public trust resources does not violate the public trust doctrine. Part III provides background of the case study in this Article: the Waiʻoli Valley Taro Hui (Hui), and its struggle to secure a long-term water lease.[25] Tracing the Hui's journey towards compliance with HRS section 171-58 highlights the importance of an exemption for similarly situated groups. Part IV then analyzes why an exemption for instream, in-watershed kalo cultivation conducted in a traditional manner would not violate Hawaiʻi's public trust doctrine under the Hawaiʻi Constitution. This part also shows how regulating traditional and customary kalo farming out of existence could violate the public trust doctrine and article XII, section 7 of the Hawaiʻi Constitution, which protects ʻŌiwi practices.[26]

## I. KĀNĀWAI:[27] THE LEGAL REGIME GOVERNING WATER LEASES

### *A. Water as a Public Trust in Hawaiʻi*

The origins of the public trust doctrine in Hawaiʻi, including to safeguard water as a public trust resource, are predominantly rooted in ʻŌiwi custom.[28] The Kumulipo "traces the origin of humans through a process of evolution in nature . . . and down to several generations of chiefly ancestors" of ʻŌiwi, thereby articulating the interconnection between various elemental forces,

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MANAGEMENT PLAN, at ix (2016), https://files.hawaii.gov/dlnr/cwrm/planning/wudpoa2016ns.pdf.

[25] *See* HUI FEA, *supra* note 10, at 36.

[26] HAW. CONST. art. XII, § 7.

[27] *See generally* Sproat, *Wai Through Kānāwai, supra* note 6, at 140 ("In ʻŌlelo Hawaiʻi, the islands' Native language, the word for fresh water is wai. The term for law is kānāwai, because Hawaiʻi's early laws evolved around the management and use of freshwater.").

[28] *See* McBryde Sugar Co. v. Robinson, 55 Haw. 260, 297–98, 517 P.2d 26, 47 (1973) (Levinson, J., dissenting) ("Our system of water rights is based upon and is the outgrowth of ancient Hawaiian customs and the methods of Hawaiians in dealing with the subject of water. No modifications of that system have been engrafted upon it by the application of any principles of the common law of England.").

including water, land, and ocean, as well as the interconnection between those forces and ʻŌiwi.[29] Within the Kumulipo, Papa (Earth Mother) and Wākea (Sky Father) are attributed with "creat[ing] most of the principal Hawaiian Islands" and parenting a daughter, Hoʻohōkūkalani.[30] Hoʻohōkūkalani's union with Wākea led to the birth of Hāloanaka, the first kalo plant,[31] and his younger sibling, Hāloa, the progenitor of ʻŌiwi.[32] Accordingly, the Kumulipo explains that ʻŌiwi are "descended from, and thus inextricably related to, natural life forms and the spiritual life forces personified as deities."[33] Importantly, ʻŌiwi share the same ancestry as kalo and the very islands they live on, engendering a direct familial connection to both.[34] This shared moʻokūʻauhau (genealogy) creates a duty for ʻŌiwi "to care for and serve the ʻāina, which in turn provides food and shelter."[35]

While ʻŌiwi settlement throughout the Hawaiian Islands undoubtedly resulted in environmental changes to accommodate population growth,[36] the duty to care for the ʻāina persisted.[37] Vital to this system of resource stewardship was the belief that the mōʻī (reigning sovereign) and aliʻi (chiefs) administered natural resources on behalf of the gods (viewed as "natural life forms and spiritual life forces")[38] and held them in trust for the benefit of all people.[39] With respect to water, E.S. Craighill Handy, Elizabeth Green Handy, and Mary Kawena Pukui explain that "[w]ater, whether for irrigation, for drinking, or other domestic purposes, was something that 'belonged' to Kane-i-ka-wai-ola (Procreator-in-the-water-of-life)."[40] In turn, the mōʻī "in

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[29] DAVIANNA PŌMAIKAʻI MCGREGOR, NĀ KUAʻĀINA: LIVING HAWAIIAN CULTURE 13 (2007).

[30] MacKenzie, *supra* note 11, at 860.

[31] *Id.* at 860–61; HANDY, HANDY & PUKUI, *supra* note 7, at 74.

[32] MacKenzie, *supra* note 11, at 860–61.

[33] MCGREGOR, *supra* note 29, at 13. Deities, or akua, are defined as "[n]atural phenomena associated with the action of specific gods. Nature or processes of nature, cycles, [an] immortal element, high ranking aliʻi, wondrous beings, things that provide life or death to humans." Kalei Nuʻuhiwa, Makahiki – Nā Maka o Lono Utilizing the Papakū Makawalu Method to Analyze Mele and Pule of Lono and the Makahiki 15 (2020) (Ph.D. Thesis, University of Waikato), *available at* https://hdl.handle.net/10289/13955.

[34] *See* MacKenzie, *supra* note 11, at 860–61.

[35] *Id.* at 861. This concept is embodied in the ʻŌlelo Noʻeau: "He aliʻi ka ʻāina, he kauwā ke kanaka. *The land is a chief; man is its servant*." PUKUI, ʻŌLELO NOʻEAU, *supra* note 1, at 62. This ʻŌlelo Noʻeau alludes to the reciprocal relation between ʻŌiwi and ʻāina and the need for ʻŌiwi to maintain this relation as one would with a family member. *See id.*

[36] *See generally* HANDY, HANDY & PUKUI, *supra* note 7, at 17–18 (describing the various changes in the natural environment).

[37] *See* Kurashima et al., *supra* note 9.

[38] MCGREGOR, *supra* note 29, at 13. *See supra* text accompanying note 33.

[39] *See* HANDY, HANDY & PUKUI, *supra* note 7, at 41.

[40] *Id.* at 63.

old Hawaiian thinking and practice, did not exercise personal dominion, but channeled dominion. In other words, he was a trustee."[41]

Given the regard ʻŌiwi had for water as a physical manifestation of a god and critical resource for survival, they became experts in water management.[42] ʻŌiwi developed stringent practices and created systems that provided for all who required water.[43] As Hawaiʻi's government eventually evolved into a kingdom, the concept of water as a public trust remained.[44] This trust concept was formalized in the Constitution of 1840,[45] which also recognized a persisting need to care for and cultivate the land.[46]

As the influence of the sugar industry expanded in Hawaiʻi, water became a resource that was consumed and commodified for the benefit of a few rather than for all.[47] Whereas water previously had remained within the watershed of origin, water diversions outside the ahupuaʻa[48] or kalana system became more prevalent with the proliferation of ditch systems to serve the sugar and other plantation industries.[49] This had detrimental impacts on ʻŌiwi total wellbeing.[50]

Following statehood, however, a movement to return to ground and surface water resource management based on ʻŌiwi tradition and custom started to grow.[51] This shift was facilitated by locally-appointed judges rather than ones from Washington D.C., empowering decision makers who better-understood Hawaiʻi's history of water management.[52] For example, in an

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[41] *Id.*

[42] *See generally id.* at 58–64 (describing the different rituals and practices developed by ʻŌiwi around water and how water systems were constructed, as well as explaining that water rights were guaranteed in proportion to the land cultivated as well as the farmer's contribution to the communal system).

[43] *Id.* at 60–61, 63–64.

[44] D. Kapuaʻala Sproat, *From Wai To Kānāwai: Water Law in Hawai'i*, *in* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 13, at 522, 529 [hereinafter Sproat, *Water Law*].

[45] *See* HAW. CONST. OF 1840, *translated in* TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III, at 12 (photo. reprt. 1934) (1842) (recognizing that the land "was not [the mōʻīʻs] own private property;" rather, it "belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property").

[46] *See id.* at 33 (requiring land to be in a "good state of cultivation" and penalizing "all in every place who permit the land to be overrun with weeds").

[47] Sproat, *Water Law*, *supra* note 44, at 531; Sproat, *Wai Through Kānāwai*, *supra* note 6, at 128.

[48] Winter et al., *supra* note 15, at 3.

[49] *See* Sproat, *Water Law*, *supra* note 44, at 531–33.

[50] *See* WILCOX, *supra* note 4, at 61–63, 122–25; Sproat, *Water Law*, *supra* note 44, at 580 n.63.

[51] Sproat, *Water Law*, *supra* note 44, at 534.

[52] *Id.*

opinion penned by Justice Kazuhisa Abe,[53] the Hawai'i Supreme Court declared in *McBryde Sugar Co. v. Robinson* that water rights were founded on principles that existed under Kingdom law.[54] *McBryde* stands for the proposition that, in accordance with 'Ōiwi traditions and customs, "[t]he state holds all waters flowing in natural watercourses in trust for the people."[55] In turn, "there is no [guaranteed] right to divert waters outside the watershed."[56]

Following McBryde, and on the heels of what is known as "the first cultural renaissance in Hawai'i since the islands came under American control in 1898,"57 concerns grew over the State's affirmative responsibility to care for Hawai'i's natural resources.58 Thus, at the 1978 Hawai'i Constitutional Convention (1978 Constitutional Convention), an 'Ōiwi-led delegation crafted the language of article XI, section 1, enshrining the public trust doctrine into the Hawai'i Constitution:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[59]

The 1978 Constitutional Convention further ratified article XI, section 7 of the Hawai'i Constitution in an unequivocal effort to "regulate, protect, and manage" water resources as a public trust resource.[60] It provides that: "[t]he State has an obligation to protect, control and regulate the use of Hawaii's

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[53] Raised in a Hawai'i plantation town, Justice Abe was the target of racist attacks by white settlers in Hawai'i after he was nominated to the Hawai'i Supreme Court. *See* Williamson B.C. Chang, *Reversals of Fortune: The Hawaii Supreme Court, the Memorandum Opinion, and the Realignment of Political Power in Post-Statehood Hawai'i*, 14 U. HAW. L. REV. 17, 29 n.29, 32 n.35 (1992).

[54] *See* 54 Haw. 174, 184–85, 504 P.2d 1330, 1337–38 (1973).

[55] Sproat, *Water Law*, *supra* note 44, at 536; *see McBryde*, 54 Haw. at 191, 504 P.2d at 1341.

[56] *Id.*

[57] MCGREGOR, *supra* note 29, at 249.

[58] *See, e.g.*, William W. Paty, Jr., *Preface* to 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at iv (1980) ("Control of water resources and the need for a clean, healthful environment received considerable attention.") [hereinafter 1 CONVENTION PRO.]. Article XI, section 1 (protecting the environment) and article XI, section 7 (protecting water resources) of the Hawai'i Constitution were both adopted during the 1978 Constitutional Convention. *See* State Constitution, *in* 1 CONVENTION PRO., *supra*, at 1171–72.

[59] HAW. CONST. art. XI, § 1.

[60] ADVISORY STUDY COMM'N ON WATER RES., REPORT OF THE ADVISORY STUDY COMMISSION ON WATER RESOURCES TO THE THIRTEENTH LEGISLATURE, STATE OF HAWAI'I 10–11 (1985).

water resources for the benefit of its people,"[61] and impresses "a dual mandate of 1) protection and 2) maximum reasonable and beneficial use" on water as a public trust.[62] In addition to these provisions, another ʻŌiwi-led delegation crafted article XII, section 7 to protect traditional and customary Native Hawaiian practices.[63]

### *B. Hawai'i Revised Statutes Section 171-58: Securing a Long-term Water Lease*

Because water is a public trust resource, it must be prudently administered by DLNR and one of its divisions, the Commission on Water Resource Management (CWRM).[64] To guarantee long-term water rights, a water lease applicant must undergo a complex legal process that ensures the use does not harm the public trust or trust purposes.[65] HRS chapter 171 governs, among other things, the disposition of water by leases and revocable permits, and the appraisal methods by which these agreements are valued.[66]

Temporary revocable permits are limited "to a maximum term of one year."[67] Therefore, a lease is the legal mechanism most often sought to secure long-term water use.[68] HRS section 171-58, in conjunction with other governing statutes, outlines the requirements for a new water lease: an applicant must 1) request a water lease from DLNR; 2) develop a watershed management plan; 3) consult with the Department of Hawaiian Home Lands (DHHL) beneficiaries potentially affected by the water lease; 4) consult with the Office of Conservation and Coastal Lands; 5) comply with HRS chapter 343 environmental review; and 6) the interim instream flow standard (IIFS) for the water source from which water is drawn must be amended to a

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[61] HAW. CONST. art. XI, § 7. Although the constitutional amendment did not explicitly "use the term 'public trust[,]' . . . it intended nevertheless to impose a trust obligation on the State." ADVISORY STUDY COMM'N ON WATER RES., *supra* note 60, at 11.

[62] *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 139, 9 P.3d 409, 451 (2000).

[63] *See* HAW. CONST. art. XII, § 7 ("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.").

[64] *Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455 ("[T]he Commission must . . . take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process.") (citation omitted).

[65] *See* Kehaulani Cerizo, *State Official: No Profiteering From Water Use*, MAUI NEWS (Feb. 21, 2020), https://www.mauinews.com/news/local-news/2020/02/state-official-no-profiteering-from-water-use/ (DLNR official describing long-term water leasing process).

[66] *See* HAW. REV. STAT. § 171-58 (2021).

[67] *Id.* § 171-58(c).

[68] *See id.*

numeric standard by CWRM.[69] After these steps are completed, the lease is generally granted through public auction.[70] However, this may be avoided if "[the water is] used in nonpolluting ways, for nonconsumptive purposes."[71] This means that the water is returned to the same source from which it was drawn, essentially not affecting the volume and quality of water or biota in the stream or any other body of water.[72] Additionally, prior approval of the governor and authorization of the legislature, by concurrent resolution, is required.[73]

Among the water leasing requirements, the IIFS and environmental review are each governed by separate statutes.[74] Pursuant to article XI section 7 of the Hawai'i Constitution's charge to regulate water, HRS chapter 174C, or the Water Code as it is commonly known, was enacted in 1987 to outline the details of water management.[75] For surface water management, IIFSs are one of CWRM's principal mechanisms to legally determine the amount of water required to protect the public interest in a stream, after weighing present and potential instream,[76] public trust values, and offstream needs.[77] In accordance with article XII, section 7, traditional and customary 'Ōiwi practices, like kalo farming,[78] are public trust purposes that must be considered by CWRM.[79]

Modeled largely after the National Environmental Policy Act,[80] HRS chapter 343 is another statutory requirement that is triggered by a proposed use of State or conservation lands.[81] Once triggered, the applicant must conduct an environmental assessment (EA) to determine the impacts of a project on the environment and public trust, and whether a more in-depth analysis is required.[82]

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[69] *Id.* § 171-58(c) to (e), (g); *see* Written Testimony of Suzanne D. Case, Chairperson, Bd. of Land & Nat. Res., *in* Joint Hearing Testimony, *supra* note 19, at 3 (outlining the process for the Hui to comply with the water leasing process pursuant to HRS section 171-58).

[70] *See* HAW. REV. STAT. § 171-58(c).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *See id.* §§ 174C-71, 343-1.

[75] *See id.* § 174C-2(b) to (c).

[76] For the statutory definition of "instream use," see *supra* note 23.

[77] *See* HAW. REV. STAT. § 174C-71.

[78] HAW. REV. STAT. § 174C-101(c).

[79] *Waiāhole I*, 94 Hawai'i 97, 137, 9 P.3d 409, 449 (2000); *see* HAW. REV. STAT. § 174C-2(c).

[80] Sierra Club v. Dep't of Transp., 115 Hawai'i 299, 306, 167 P.3d 292, 299 (2007).

[81] HAW. REV. STAT. § 343-5(a) (2021). Chapter 343 is also triggered by proposed use within a shoreline area, historic site, and the Waikiki area of O'ahu as further described by the statute. *Id.*

[82] *See id.* § 343-5(b).

## II. KALO KANU O KA ʻĀINA: INNOVATION THROUGH INTIMACY WITH ʻĀINA[83]

As explained in Part I, ʻŌiwi have a direct connection with kalo derived from the Kumulipo.[84] Interwoven into the perspective of shared lineage with kalo is a deep sense of responsibility to care for the resources needed for cultivation: ʻāina and wai.[85] This reciprocal relationship created a worldview in which ʻŌiwi developed practices that would not only benefit the people, but also the environment.[86] Continued refinement of these practices, such as water management, developed into the optimal resource management model adapted to Hawaiʻi's unique environment.[87]

Wetland kalo cultivation, in particular, is one of the greatest innovations developed in Hawaiʻi.[88] The method allowed for intensive cultivation in extensive areas of valleys.[89] Describing the loʻi (terraced ponds) and ʻauwai (irrigation ditches) used to cultivate kalo, renowned anthropologist Marion Kelly wrote that they "were engineered to allow the cool water to circulate among the taro plants and from terrace to terrace, avoiding stagnation and overheating by the sun, which would rot the taro corms."[90] In addition to managing for kalo growth, "the flow of the water was controlled to prevent erosion of ditches and terraces, an engineering feat of no mean proportions."[91]

Kelly further documented that "irrigated pondfields could be as much as [ten] or [fifteen] times more productive than unirrigated taro gardens" over several years due to the reduced fallow time compared to dryland gardens,[92] and noted that "walled pondfields not only produce taro, but were also used

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[83] Literally translated as "Taro planted on the land," but poetically meaning, "Natives of the land from generations back." PUKUI, ʻŌLELO NOʻEAU, *supra* note 1, at 157.

[84] *See supra* text accompanying notes 29–35.

[85] MacKenzie, *supra* note 11, at 861; *see* Sproat, *Wai Through Kānāwai*, *supra* note 6, at 132 & n.22.

[86] Marion Kelly, *Dynamics of Production Intensification in Pre-Contact Hawaiʻi*, *in* WHAT'S NEW?: A CLOSER LOOK AT THE PROCESS OF INNOVATION 82, 89 (Robin Torrence ed., 1989) (describing how traditional kalo cultivation allowed some water to replenish the groundwater of downstream springs, while the rest returned to the original body of water); *see id.* at 94 (explaining that agricultural innovations such as kalo irrigation developed concomitantly with Hawaiʻi's growing population).

[87] *See id.* at 94–96 (illustrating various agricultural, legal, and societal innovations uniquely developed to maximize Hawaiʻi's natural resources).

[88] *See id.* at 82.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 82–83.

to raise an additional source of food, freshwater fish: primarily the Hawaiian goby . . . and certain kinds of shrimp (*'opae*)."[93]

Regarding the lo'i kalo irrigation system, Kelly wrote:

> A loose-rock dam built across the stream allowed water to flow between and over the top of tile rocks to provide for farmers living downstream. The dam functioned to raise the water level just high enough at that point to permit water to flow into the ditch leading to the terraces. In this way the amount and speed of the water could be controlled. If too much water was found to be flowing into the ditch, a few stones could be removed from the dam, thus lowering the water level and reducing the volume of water entering the ditch. The speed of the flow of water into the pondfields was controlled by the length and slope of the ditch. By varying the length and grade of the ditch, its builders were able to maintain a constant and low-level gradient over variegated terrain. The flow through the pondfields was controlled by the height of the terraces.[94]

Throughflow, or "water that flows through the lo'i and carries heat away," is required for kalo cultivation to meet the cooling requirements of the lo'i.[95] Throughflow, however, is distinct from "consumption," water that is diverted and never returned to the body from which it originates.[96] Consumption is also distinct from "used" water, or "water that is lost to percolation through the soil, transpiration by the plant, and evaporation."[97] Together, throughflow and used water comprise the total water flowing into the lo'i, or the "inflow."[98] Thus, with traditional kalo cultivation, water remains within the watershed of origin and is allowed to flow ma uka (from the uplands) to ma kai (seaward).[99] On the contrary, crops like sugarcane prefer dry, hot climates, making it prone to high water loss through evaporation.[100] Moreover, water for sugarcane must be diverted from wetter sources and never returns to its origins.[101]

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[93] *Id.* at 83.

[94] *Id.* at 89.

[95] HUI FEA, *supra* note 10, at 13; *see also* STEPHEN B. GINGERICH ET AL., U.S. GEOLOGICAL SURV., WATER USE IN WETLAND KALO CULTIVATION IN HAWAI'I 3 (2007), https://pubs.usgs.gov/of/2007/1157/of2007-1157.pdf.

[96] HUI FEA, *supra* note 10, at 13; *see also* GINGERICH ET AL., *supra* note 95, at 2.

[97] HUI FEA, *supra* note 10, at 13; *see also* GINGERICH ET AL., *supra* note 95, at 2.

[98] HUI FEA, *supra* note 10, at 13.

[99] GINGERICH ET AL., *supra* note 95, at 2; *see* HUI FEA, *supra* note 10, at 13.

[100] *See* Jenna Loiseau, *Plant Records: The Ever Thirsty Sugarcane*, BOTANY ONE (Dec. 22, 2017), https://www.botany.one/2017/12/plant-records-ever-thirsty-sugarcane/.

[101] *See* Haw. Comm'n on Water Res. Mgmt. Findings of Fact, Conclusions of Law, and Decision and Order at 22 (FOF 27–29), 'Iao Ground Water Management Area High-Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe'e, Waiehu 'Iao, & Waikapu Streams, No. CCH-MA06-01 (June 10, 2010) [hereinafter CWRM Nā Wai 'Ehā Decision & Order] (describing streams that remain

Historically, diversions for sugar have had detrimental effects on native flora and fauna[102] that depend on sufficient stream flow, and in turn, ʻŌiwi traditional and customary practices that involve these species.[103] By diverting almost all water from streams for sugarcane cultivation, stream biodiversity survival and reproduction rates are significantly diminished.[104] Further, considering the fundamental spiritual connection ʻŌiwi have with kalo, the presence of kalo in an ʻŌiwi diet is critical for wellbeing and is incorporated into many traditional dishes such as paʻiʻai (steamed, pounded kalo), poi (watered down paʻiʻai), kūlolo (pudding made of baked or steamed grated taro and coconut cream), laulau (meat or starch wrapped in lau (leaf) and steamed), and lūʻau (young taro tops cooked with meat or coconut cream).[105] Without throughflow and kalo cultivation, many other ʻŌiwi traditions are detrimentally affected.[106]

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completely dry below diversion intakes, which are used to divert water for sugarcane cultivation).

[102] *See id.* at 14–15 (explaining the detrimental effect of diversions of the Nā Wai ʻEhā streams in Central Maui on instream biodiversity).

[103] Sproat, *Water Law*, *supra* note 44, at 569.

[104] *See* CWRM Nā Wai ʻEhā Decision & Order, *supra* note 101, at 14–15.

[105] *See* Terry T. Shintani et al., *Obesity and Cardiovascular Risk Intervention Through the Ad Libitum Feeding of Traditional Hawaiian Diet*, 53 AM. J. CLINICAL NUTRITION 1647S, 1647S–51S (1991).

[106] Water diversions have devastating impacts on Native species, like ʻoʻopu (freshwater goby), ʻōpae (crustaceans), and hīhīwai (freshwater snail). *Ola i ka Wai: Water is Life*, KAMAKAKOI, https://www.kamakakoi.com/water (last visited Oct. 9, 2021) (click "Watch the Film"). These species are amphidromous, meaning they require ma uka to ma kai connection to complete their life cycles, so flowing, fresh water is vital for their survival. *Id.* Additionally, other fish species dependent on muliwai (estuaries) need continuous mountain to sea flow. *Id.* All of these species are crucial to ʻŌiwi lifeways and gathering them falls under constitutionally-protected traditional and customary Native Hawaiian practices, as enumerated in the Water Code. *See* HAW. REV. STAT. § 174C-101(c).

## III. AIA I WAI'OLI KE ALOHA 'ĀINA: THERE, AT WAI'OLI, IS ALOHA 'ĀINA[107]

The Hui is a truly unique group whose members have a personal and familial history with kalo, kalo cultivation, and Wai'oli Valley.[108] Many of the Hui's members have been farming in Wai'oli Valley for generations, using traditional knowledge to continue this customary practice.[109] Today, the Hui is a 501(c)(3) nonprofit[110] consisting of fourteen small-scale farms and sixteen kalo farmers who collectively steward approximately eighty-four acres of lo'i kalo within the complex on a rotating basis.[111] The cultural impact assessment, conducted as part of the EA, noted how all Wai'oli Valley taro farmers "highlighted that they take pride in feeding the larger community and supporting 'ai pono (healthy diet largely comprised of traditional 'Ōiwi foods), either through sharing kalo with other 'ohana or providing kalo to small community-based non-profit organizations."[112] Together, the Hui historically produced an estimated two to three million pounds of kalo annually.[113] Despite the commercial activity the farmers engage in,[114] profit

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[107] This lyric comes from *Aia i Wai'oli ke Aloha 'Āina*, a mele (song) composed by U'ilani Tanigawa Lum, a 2019 graduate of the University of Hawai'i at Mānoa's William S. Richardson School of Law, who was so inspired by the kalo farmers and her experiences in Wai'oli as a clinician that she composed this song. Letani Peltier, *Environmental Law Clinic Update: Aia i Wai'oli ke Aloha 'Āina*, KA HULI AO CTR. FOR EXCELLENCE IN NATIVE HAWAIIAN L., https://blog.hawaii.edu/kahuliao/environmental-law-clinic-update/ (last visited Oct. 9, 2021); *see also* U'ILANI TANIGAWA LUM, *Aia i Wai'oli ke Aloha 'Āina*, *on* HULIĀMAHI, VOL. 1 (2021). "Aloha 'āina" literally means "love for the land" and poetically "Hawaiian patriot."

[108] HUI FEA, *supra* note 10, at 13–14.

[109] *Id.*

[110] *Id.* at 14. An organization operating under section 501(c)(3) of the Internal Revenue Code (Code) is often referred to as a "501(c)(3)" or a "charitable organization," is tax-exempt, and operates exclusively for an exempt purpose as outlined in the Code. *Exemption Requirements - 501(c)(3) Organizations*, IRS, https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations (last visited Jan. 28, 2022). The Hui obtained its 501(c)(3) status through the Clinics' help.

[111] HUI FEA, *supra* note 10, at 25. Not all lo'i are in use at the same time to allow time for the patches to lie fallow. *Id.* at 51, 55 (discussing the purposes of fallowing the lo'i).

[112] *Id.* at 122.

[113] *Id.* at 25.

[114] *Id.* at 26 (explaining that the Hui sells kalo directly to local community organizations, often at far below cost); *see also* Written Testimony of JoAnne Kaona, Secretary, Wai'oli Valley Taro Hui, *in* Joint Hearing Testimony, *supra* note 19, at 30–31 (stating that the Waipā Foundation, a local Kaua'i organization focused on local food production, purchases seventy to ninety percent of its kalo for poi production from Wai'oli Valley kalo farmers).

is not the main driver for the Waiʻoli Valley farmers.[115] Instead, they seek to "continue to uphold the nohona [lifeway] of the North Shore of Kauaʻi."[116]

This lifeway in Waiʻoli is well documented. Located on the north-facing coast of Kauaʻi, in the traditional district of Haleleʻa and the State District of Hanalei, Waiʻoli is near the center of the Hanalei Bay Watershed, which comprises four traditional ahupuaʻa: Hanalei, Waiʻoli, Waipā, and Waikoko.[117] From these ahupuaʻa, four perennial streams flow ma uka to ma kai, emptying into Hanalei Bay.[118] The Hanalei Bay Watershed is considered a kalana,[119] which has been managed for centuries as a "single integrated system to maximize the cultivation of traditional crops and lifeways" and to mitigate flooding by distributing water resources.[120] The Waiʻoli Loʻi Kalo Irrigation System has been in operation for roughly five hundred years.[121] Conservatively, it is estimated that at least 34.57 acres were used for loʻi kalo cultivation in Waiʻoli in the mid-1800s.[122]

In 2018, "a record 24-hour rainbomb dropped 49.69 inches of rain on the north shore of Kauaʻi. Resulting floods swelled north shore rivers and streams, inundating the valleys and coastal plains of Waiʻoli, Hanalei, Waipā, Waikoko, Lumahaʻi, and Wainiha."[123] Hui members were not immune. Consequently, disaster recovery efforts revealed that the Hui's mānowai, or traditional rock structure that diverts some water from the Waiʻoli Stream into the Loʻi Kalo Irrigation System, was on State Conservation land.[124] This triggered the need for numerous administrative approvals.[125] In response to this news, the Hui began in January 2019 to collaborate with the University

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[115] HUI FEA, *supra* note 10, at 25.

[116] *Id.*

[117] *Id.* at 26–27.

[118] *Id.* at 27.

[119] *Id.* For the definition of kalana, see *supra* note 15.

[120] HUI FEA, *supra* note 10, at 27.

[121] *See* DOMINIQUE LEU CORDY & LILIA MERRIN, I MANO KA WAIʻOLI: SUSTAINING THE JOYOUS WATERS, A CULTURAL IMPACT ASSESSMENT OF THE WAIʻOLI LOʻI KALO IRRIGATION SYSTEM 31–32 (2020).

[122] *Id.* at 48. Many of the Hui members can trace their families' tradition of farming kalo in Waiʻoli Valley at least three generations back. *See* Written Testimony of Clarence "Shorty" Kaona, Member, Waiʻoli Valley Taro Hui, *in* Joint Hearing Testimony, *supra* note 19, at 28–29; Written Testimony of Chris Kobayashi, Member, Waiʻoli Valley Taro Hui, *in* Joint Hearing Testimony, *supra* note 19, at 40–41; Written Testimony of Robert "Bobby" Watari, Member, Waiʻoli Valley Taro Hui, *in* Joint Hearing Testimony, *supra* note 19, at 25–26; Written Testimony of Lillian Watari, Member, Waiʻoli Valley Taro Hui, *in* Joint Hearing Testimony, *supra* note 19, at 34–35; Written Testimony of Nathaniel Tin Wong, Member, Waiʻoli Valley Taro Hui, *in* Joint Hearing Testimony, *supra* note 19, at 32–33.

[123] CORDY & MERRIN, *supra* note 121, at 39 (citation omitted).

[124] HUI FEA, *supra* note 10, at 12.

[125] *See id.* at 31.

of Hawai‘i at Mānoa’s William S. Richardson School of Law’s Environmental Law and Native Hawaiian Rights Clinics “to establish a more streamlined process with government agencies to permit and repair the Wai‘oli Stream mānowai and ‘auwai.”[126] The Clinics first helped to organize the Hui as a nonprofit organization.[127] Then, the Hui obtained an easement for surface water diversion and irrigation purposes as well as a right of entry to maintain and repair the mānowai.[128] The Hawai‘i Board of Land and Natural Resources (BLNR)[129]granted the right of entry and a 55-year easement free of charge[130] in May 2019, which was made perpetual in February 2020.[131] Next, the Hui sought compliance with HRS section 171-58 to secure legal rights to the water they have been stewarding for generations.[132]

To date, the farmers have requested a water lease from DLNR; developed a draft watershed management plan; consulted with DHHL beneficiaries; conducted an informational briefing on the Instream Flow Standard Assessment for Wai‘oli Stream, which was unanimously approved and adopted by CWRM in May 2021;[133] and published a Final EA to comply with HRS chapter 343 environmental review, for which DLNR ultimately issued a Finding of No Significant Impact (FONSI).[134] Moreover, during the 2021 legislative session, the Hui introduced two concurrent resolutions pursuant to HRS section 171-58(c), one of which successfully passed both chambers.[135] The concurrent resolution allows the Hui to directly negotiate

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[126] *Id.* (footnote omitted).

[127] *Id.*

[128] *Id.*

[129] DLNR “is responsible for managing, administering, and exercising control over public lands, water resources, ocean waters, navigable streams, coastal areas (except commercial harbors), minerals, and all interests therein” and is headed by BLNR, the executive board that reviews and acts on DLNR staff submittals. *About DLNR*, HAW. DEP’T OF LAND & NAT. RES., https://dlnr.hawaii.gov/about-dlnr/ (last visited Jan. 28, 2022).

[130] HUI FEA, *supra* note 10, at 31.

[131] *Id.*

[132] *Id.* at 26.

[133] Haw. Comm’n on Water Res. Mgmt., Minutes 3 (May 18, 2021), https://files.hawaii.gov/dlnr/cwrm/minute/2021/mn20210518.pdf.

[134] *See id.* at 36; HAW. DEP’T OF LAND & NAT. RES., FINAL ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACTS FOR THE WAI‘OLI VALLEY TARO HUI LONG-TERM WATER LEASE FOR TRADITIONAL LO‘I KALO CULTIVATION PROJECT IN THE HANALEI DISTRICT ON THE ISLAND OF KAUA‘I 1 (2021). A FONSI is a document stating “why an action will not significantly affect the environment, thus voiding the requirement for an” Environmental Impact Statement. HAW. OFF. OF ENV’T QUALITY CONTROL, GUIDE TO THE IMPLEMENTATION AND PRACTICE OF THE HAWAII ENVIRONMENTAL POLICY ACT 86 (2012).

[135] H.R. Con. Res. 163, 31st Leg., Reg. Sess. (Haw. 2021); S. Con. Res. 22, 31st Leg., Reg. Sess. (Haw. 2021) (as passed by H.R. Comm. on Water & Land, Apr. 6, 2021); *see* HAW. REV.

for a water lease with DLNR, rather than compete at public auction for water, once the other water lease requirements are complete.[136] Without four semesters of assistance from the Clinics, the Hui admits that it would not have been this far along in the process.[137]

## IV. A MAU LOA:[138] ENSURING THE PRACTICE CONTINUES

The traditional method of farming kalo conducted by the Hui should be granted an exemption from the water leasing process because there is no violation of the public trust. In addition, failure to provide a reasonable means for kalo farmers to secure water rights may result in a violation of the public trust by regulating this public trust purpose out of existence. This section uses the Hui's journey to secure a long-term water lease as an illustration of the difficulties other kalo farming communities throughout Hawaiʻi, who cultivate kalo and steward their ecosystems in a similar way as the Hui, may face.

### *A. Consistency with Dual Mandate of Article XI, Section 1*

Granting a categorical exemption of instream, in-watershed kalo cultivation done in a traditional manner from HRS section 171-58 does not offend the dual mandate articulated under article XI, section 1 of the Hawaiʻi Constitution. Rather, it is the epitome of the dual mandate envisioned by the drafters of Hawaiʻi's Constitution.[139] The dual mandate protects conservation

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STAT. § 171-58(c).

[136] *See* H.R. Con. Res. 163, 31st Leg., Reg. Sess. (Haw. 2021); S. Con. Res. 22, 31st Leg., Reg. Sess. (Haw. 2021) (as passed by H.R. Comm. on Water & Land, Apr. 6, 2021). At the time this Article was published, the Hui was advocating during the 2022 legislative session for bills that would exempt "traditional and customary kalo cultivation practices, as well as commercial kalo cultivation conducted in a manner consistent with traditional and customary Native Hawaiian practices" from HRS section 171-58. *See* H.R. 1768, 31st Leg. Reg. Sess. (Haw. 2022); S. 2759, 31st Leg. Reg. Sess. (Haw. 2022); Written Testimony of Reid Yoshida, President, Waiʻoli Valley Taro Hui), to the H.R. Comm. on Agric., 32nd Leg., Reg. Sess. (Feb. 4, 2022), *available at* https://www.capitol.hawaii.gov/Session2022/Testimony/HB1768_TESTIMONY_AGR_02-04-22_.PDF (testimony begins on p. 14).

[137] Written testimony of Reid Yoshida, President, Waiʻoli Valley Taro Hui, to the H.R. Comm. on Water & Land, 31st Leg., Reg. Sess. (Mar. 23, 2021), *available at* https://www.capitol.hawaii.gov/Session2021/Testimony/HCR163_TESTIMONY_WAL_03-23-21_.PDF (testimony begins on p. 13).

[138] "A mau loa" has been interpreted as "perpetually." Keelikolani v. Manaku, 4 Haw. 263, 268 (Haw. Kingdom 1880).

[139] *Waiāhole I*, 94 Hawaiʻi 97, 192, 9 P.3d 409, 504 (2000) (Ramil, J., dissenting) ("Specifically, article XI, section 1 imposes a two-fold obligation on the State to (1) conserve

of the resources for present and future generations while balancing "the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state."[140] Instream, in-watershed kalo cultivation done in a traditional manner as described in Part II,[141] where throughflow water is diverted without substantially affecting the stream ecosystem and stays within the watershed, results in the conservation of natural resources.[142] Further, research shows that kalo cultivation improves water quality by removing phosphorus and sediment from the water as it flows downstream.[143] Kalo cultivation also conserves and protects the land—maintained traditional lo'i kalo complexes not only retain sediment, but also have a higher capacity to store water.[144] This suggests that lo'i kalo may slow down and retain water during large rain events.[145]

Kalo cultivation also protects biodiversity. Although article XI, section 1 of Hawai'i's constitution does not explicitly state that native flora and fauna or biodiversity are protected public trust purposes, it is necessarily implied given that plants and animals are considered natural resources protected under the constitutional language as public trust resources.[146] Following this reasoning, kalo cultivation does not harm these forms of natural resources and, in some cases, has conservation benefits in alignment with the public trust. The Hui monitors stream levels to ensure sufficient flow for lo'i, which also results in stream maintenance for biodiversity.[147] Recent studies show

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and protect Hawai'i's natural resources, and (2) develop the resources 'in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.' The framers further defined 'conservation' as 'the protection, improvement and use of natural resources according to principles that will assure their *highest economic or social benefits*.'") (citation omitted).

[140] *Id.* at 139, 9 P.3d at 451.

[141] *See supra* text accompanying notes 86–98.

[142] *See supra* text accompanying notes 94–98.

[143] HUI FEA, *supra* note 10, at 87.

[144] *See id.* at 339–40 (letter from Leah Bremer, PhD., Associate Specialist, University of Hawai'i Economic Research Organization and Water Resources Research Center, University of Hawai'i at Mānoa); Kelly, *supra* note 86, at 82 (explaining that lo'i kalo controlled water flow to prevent land erosion).

[145] *See* Leah L. Bremer et al., *Biocultural Restoration of Traditional Agriculture: Cultural, Environmental, and Economic Outcomes of Lo'i Kalo Restoration in He'eia, O'ahu*, SUSTAINABILITY, Nov. 29, 2018, at 16.

[146] Kylie Wha Kyung Wager, *In Common Law We Trust: How Hawai'i's Public Trust Doctrine Can Support Atmospheric Trust Litigation to Address Climate Change*, 20 HASTINGS W. NW. J. ENV'T L. & POL'Y 55, 95–96 (2014) (explaining that the Hawai'i Supreme Court implied that biodiversity was a protected resource under the public trust doctrine when it did not reject the argument in *Morimoto v. Board of Land and Natural Resources*, 107 Hawai'i 296, 301 n.16, 113 P.3d 172, 177 n.16 (2005)).

[147] *See* HUI FEA, *supra* note 10, at 14, 58 ("Farmers monitor water levels to ensure the soil is covered with water which reduces weeds from taking root and growing."); *id.* at 59 (water

that conservation is promoted because loʻi kalo provide habitat for endangered or threatened, endemic species such as the Koloa maoli (Hawaiian duck), ʻAlae keʻokeʻo (Hawaiian coot), ʻAlae ʻula (Hawaiian common moorhen), Aeʻo (Hawaiian stilt), and the Nēnē (Hawaiian goose).[148] In addition, at least eight endemic or native freshwater and saltwater aquatic animals benefit from kalo cultivation because it reduces sediment and other nutrient pollutants in the stream as well as estuary ecosystems.[149] Moreover, because the health of the entire ecosystem is necessary for kalo cultivation, the Hui and other communal kalo farming groups actively remove invasive plant and animal species, such as buffalo grass and feral pigs, that damage the system.[150]

Kalo cultivation further promotes "the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."[151] Kalo cultivated in a traditional manner can increase Hawaiʻi's self-sufficiency through local food production with research estimating that the loʻi kalo capacity before western contact could carry a population as large as 1,200,000 people.[152] Not only does traditional agriculture produce food, but it also offers local jobs and can potentially reduce energy dependence in food production.[153] In all, instream, in-watershed kalo cultivation meets both requirements of the public trust doctrine.

### *B. Consistency with Article XI, Section 7 and the Water Code*

Traditional kalo cultivation is consistent with the legal regime specific to water resources. As required by article XI, section 7 of the Hawaiʻi Constitution, the legislature enacted the Water Code to further impress the

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level must be monitored as kalo grows and matures); *id.* at 102–07 (detailing how loʻi kalo provide important habitat for endemic birds endangered and threatened by reductions in wetlands). For example, the Hui conducts regular stream cleaning and restoration as well as removal and control of invasive ungulates that damage the watershed. *Id.* at 112–13.

[148] *See id.* at 101–02, 105–06; Timothy Hurley, *Study by Hawaii Researchers Suggests Expansion of Taro Farming Could Help Save Endangered Hawaiian Stilts*, HONOLULU STAR ADVERTISER (May 9, 2021), https://www.staradvertiser.com/2021/05/09/hawaii-news/a-study-by-a-team-of-hawaii-researchers-suggests-expansion-of-taro-farming-could-help-save-endangered-hawaiian-stilts/?HSA=53b9dfb96a82884c749ec369d5fe717f5320b7a3.

[149] *See* HUI FEA, *supra* note 10, at 106–09 (describing native aquatic species found in streams, including hīhīwai (freshwater snail), ʻoʻopu (freshwater goby), native ʻōpae (crustaceans), āholehole (Zebra-head Flagtail), as well as ʻanae and ʻamaʻama (mullet)).

[150] *Id.* at 34–36.

[151] HAW. CONST. art. XI, § 1.

[152] *See* Kurashima et al., *supra* note 9, at 193.

[153] *See* Bremer et al., *supra* note 148, at 5–8.

dual mandate upon the administration of water resources, and to define, among other things, "beneficial and reasonable uses" of water to "protect ground and surface water resources, watersheds and natural stream environments."[154] The Water Code's definition of beneficial instream uses includes: (1) maintenance of fish and wildlife habitats; (2) outdoor recreational activities; (3) maintenance of ecosystems such as estuaries, wetlands, and stream vegetation; (4) aesthetic values such as waterfalls and scenic waterways; (5) maintenance of water quality; (6) and the protection of 'Ōiwi traditional and customary rights.[155]

Besides the ways in which kalo cultivation does not harm, and in fact benefits, fish and wildlife habitats, watersheds, and water quality, instream, in-watershed kalo cultivation conducted in a traditional manner does not interfere with outdoor recreation activities and aesthetic values. Instead, community groups who depend on the water system enhance these instream values by maintaining the stream and surrounding ecosystem through constantly removing debris, unblocking waterways, and managing invasive species that threaten to overgrow streams and harm native stream species.[156] Keeping streams clear of these threats enhances the natural aesthetics of streams and allows users to continue enjoying the streams for recreational values. Enhancing the water quality by retaining sediment and other nutrients also contributes to the aesthetic beauty of streams by reducing turbidity and harmful pollutants to both the ecosystem and people who enjoy the natural ecosystems.

Article XI, section 7 further requires "assuring appurtenant rights."[157] Water use for kalo cultivation is an appurtenant right and a recognized public trust purpose.[158] As a public trust purpose, providing an exemption from HRS

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[154] HAW. CONST. art. XI, § 7.

[155] HAW. REV. STAT. § 174C-3 (2021); *see In re* Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 417, 83 P.3d 664, 680 (2004) (explaining that the Water Code requires consideration of varying public interests, including "protection of the environment, traditional and customary practices of native Hawaiians, scenic beauty, protection of fish and wildlife, and protection and enhancement of the waters of the State").

[156] *See* HUI FEA, *supra* note 10, at 34–36.

[157] HAW. CONST. art. XI, § 7.

[158] *See Waiāhole I*, 94 Hawai'i 97, 137 n.34, 9 P.3d 409, 449 n.34 (2000) ("The trust's protection of traditional and customary rights also extends to the appurtenant rights recognized in [*Peck v. Bailey*, 8 Haw. 658, 661 (Haw. Kingdom 1867)]."); D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENV'T L.J. 157, 204 n.244 (2016) ("Appurtenant rights appertain or attach to parcels of land that were cultivated [at the time of the Māhele process that began around 1845], usually in the traditional staple kalo . . . ."); Debates in Committee of the Whole on Conservation, Control and Development of Resources, *in* 2 CONVENTION PRO. 855, 870 (transcribing Delegate John Waihe'e's remarks explaining that the language in article XI, section 7 requiring the legislature to "assur[e] appurtenant

section 171-58(c) would ensure legal rights to water for kalo farmers who may not be able to comply with its onerous requirements.

### *C. Consistency with Article XII, Section 7*

Traditional and customary ʻŌiwi practices protected under article XII, section 7 would be protected by an exemption from HRS section 171-58. Use of streams for kalo cultivation is a traditional and customary practice that is a "vital part of the cultural and agricultural traditions of [N]ative Hawaiians."[159] In line with case law stating that the "exercise of Native Hawaiian and traditional and customary rights [i]s a public trust purpose,"[160] the government must protect these practices to the extent feasible.[161] Although the exercise of traditional and customary practices are "subject to the right of the State to regulate such rights,"[162] the Hawaiʻi Supreme Court has cogently declared "the State does not have the unfettered discretion to regulate the rights of ahupuaʻa tenants out of existence."[163]

While the issue before the court in *PASH* was the extent to which Native Hawaiian "gathering rights on undeveloped land [should] be protected when that same land is under consideration for development permits," the court's articulation of the State's obligation to protect traditional and customary practices and refrain from over-burdensome regulation, nevertheless, is a guiding principle for an exemption from the water leasing process. Without an exemption, farmers would unlikely be able to comply with all the legal requirements of a water lease. To reach the Hui's current position—publishing a Final EA and obtaining a FONSI, completing consultation with DHHL beneficiaries, persuading the Water Commission to adopt amendments to the Waiʻoli Stream IIFS, and drafting a watershed management plan—has required thousands of hours over the course of four semesters of collaboration with the Environmental Law and Native Hawaiian Rights Clinics.[164] Further, to draft administrative documents such as the EA,

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rights and existing riparian and correlative uses" sets out a policy of protecting existing uses of, among others, "the small taro farmer as well as the agricultural users").

[159] GINGERICH ET AL., *supra* note 95, at 1.

[160] *Waiāhole I*, 94 Hawaiʻi at 137, 9 P.3d at 449.

[161] *See* Pub. Access Shoreline Haw. v. Haw. Cty. Plan. Comm'n (*PASH*), 79 Hawaiʻi 425, 451, 903 P.2d 1246, 1272 (1995).

[162] HAW. CONST. art. XII, § 7.

[163] *PASH*, 79 Hawaiʻi at 451, 903 P.2d at 1272. The *PASH* court concluded that "the State is authorized to impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits issued for the development of land previously undeveloped or not yet fully developed." *Id.*

[164] D. Kapuaʻala Sproat, Professor of Law, William S. Richardson Sch. of Law, Lecture in Native Hawaiian Rights Clinic (Spring 2021).

cultural impact assessment (within the EA), and the watershed management plan, the Hui has spent tens of thousands of dollars in contracting fees.[165] Considering the responsibility required to cultivate kalo, including the substantial tasks to maintain the entire surrounding ecosystem, the water leasing process would likely lead to the discontinuation of kalo cultivation due to the heavy regulatory burden of HRS section 171-58. Thus, the cautionary tale from *PASH* should be heeded by the Hawai‘i Legislature.

## CONCLUSION

For ‘Ōiwi, kalo cultivation is more than just sustenance; it is a spiritual and cultural connection perpetuated through generations. Kalo cultivation also contributes to the total wellbeing of the larger community that benefits from kalo as a food and to protect and improve the environment. These compelling reasons establish a foundation for categorically exempting instream, in-watershed kalo cultivation done in a traditional manner from the long-term water leasing process. There is no violation of the public trust doctrine under the Hawai‘i Constitution and an exemption is actually supported by constitutional protections for ‘Ōiwi traditional and customary practices. The fact that no organization, large or small, has been able to secure a long-term water lease in over sixty years since HRS section 171-58 was enacted is telling. The journey for the humble group of kalo farmers from Wai‘oli Valley makes the issue more palpable. Without a minimum partial exemption, kalo farmers in other regions of Hawai‘i who have keen knowledge of an area passed through generations, as in Wai‘oli, may be forced to leave their patches fallow, along with generations of place-based knowledge.

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[165] *Id.*

# Correcting the Legal Fiction of Legislative Deference for All Rezonings to Scrutinize Spot Zoning in Hawai‘i

Ellen R. Ashford*

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## INTRODUCTION

Zoning, the most important and widely used tool to implement land use planning, has benefitted from practically no judicial review since its national uptake in the twentieth century. In concept, zoning ordinances are designed to benefit the public by organizing land use according to a comprehensive plan while providing private landowners protection from nuisances, as well as notice of the permitted uses of their land. The U.S. Constitution protects the rights of property owners from the whims of overly politicized

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government regulation.[1] The Supreme Court has accordingly tasked state courts with determining whether a challenged zoning decision bears a *substantial relation* to the public health, safety, morals, or general welfare.[2]

Meanwhile, the tension between land use regulation and private property rights has calcified in courtrooms across America. The potential for costly challenges to land use regulations theoretically serves to deter regulatory excesses by local governments because the fear of liability is thought to motivate more cautious and appropriate regulation.[3] The Court has begrudgingly permitted flexible new tests to address novel issues arising out of modern regulatory takings, allowing landowners to recover when regulation goes too far.[4]

Overzealous regulation persists, however, because the real weakness in the system has yet to be addressed: the lack of meaningful judicial review.[5] Land use regulations are generally considered legislative acts, even when the local government authority is making a decision affecting a single parcel on a discretionary basis.[6] Zoning, the chief land use regulator, is widely accepted

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[1] *See generally* U.S. CONST. amend. V.

[2] *See* Vill. of Euclid v. Ambler Realty, Co., 272 U.S. 365, 395 (1926); Nectow v. City of Cambridge, 277 U.S. 183, 187–88 (1928) (citing *Vill. of Euclid*, 272 U.S. at 395).

[3] *See* Charles L. Siemon & Julie P. Kendig, *Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil"*, 20 NOVA L. REV. 707, 708–09 (1996).

[4] *See generally* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (finding that under the Takings Clause, where the government has "taken" property by land use regulation, the landowner may recover just compensation for the time before it is finally determined that the regulation constitutes a "taking" of her property); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (explaining that the government can use its police power to condition a property owner's land use so long as the condition has an essential nexus to a legitimate governmental purpose under the police power); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (holding that a regulation that renders a property without use is a per se taking due just compensation under the Takings Clause); Dolan v. City of Tigard, 512 U.S. 374 (1994) (finding that the government's power to condition permission for a landowner to use her property must be in proportion to the anticipated public harm of the planned development).

[5] Siemon & Kendig, *supra* note 3, at 710 ("The trouble is, limits are meaningful only if they are easily enforceable in court, the missing ingredient in contemporary planning law.").

[6] *See generally* Save Sunset Beach Coalition v. City & County of Honolulu, 102 Hawai'i 465, 474, 78 P.3d 1, 10 (2003) (holding that "a zoning ordinance is a legislative act and is subject to the deference given legislative acts."); DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAI'I 49 (2d ed. 2010) ("The local legislative body is responsible for enacting the zoning ordinance in its original form (usually upon recommendation of a zoning commission appointed for the purpose) and for adopting amendments.").

as a legislative act, and therefore presumed valid under legislative deference.[7] This presumption of validity creates an "anything goes" fairly debatable rule, which grants broad deference to local governments.[8] In turn, the deference severely imbalances public and private interests, making it "practically impossible to redress even outrageous abuses of the zoning power" in our courts.[9]

It is, however, a legal fiction that all zoning decisions are legislative in nature.[10] Accordingly, the due deference that plagues lower federal courts fails to meet the minimum review required by the Supreme Court due to an infectious misunderstanding of the federal standard.[11] Even if state courts find the federal standard unclear, states can—and should—apply a more exacting standard because they are not bound by the federal circuits. Piecemeal rezoning, which is a discretionary land use decision applied to a single tract, is often challenged as spot zoning. The legal fiction of legislative deference for zoning decisions is particularly concerning when a piecemeal rezoning decision is challenged as "spot zoning" because policy concerns, including unauthorized exertion of state authority, may be implicated. This Article suggests that in Hawai'i, the lack of meaningful judicial review of

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[7] *See generally* CALLIES, *supra* note 6, at 49.

[8] The so-called "fairly debatable rule" was devised out of a statement by the Court from *Village of Euclid*, that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Vill. of Euclid v. Ambler Realty, Co., 272 U.S. 365, 388 (1926). This standard has become the predominant standard, burdening the challenging party with rebutting a presumption that the ordinance or land use decision is valid beyond fair debate. 2 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 15:10 (5th ed. 2021).

[9] Siemon & Kendig, *supra* note 3, at 710.

[10] *See* Nicholas M. Kublicki, *Land Use By, For, and of the People: Problems with the Application of Initiatives and Referenda to the Zoning Process*, 19 PEPP. L. REV. 99, 157–58 (1991).

[11] *Id.* at 160 ("A legal fiction is engendered in states that have ruled that rezonings constitute legislative acts. These states seem to weigh pro-initiative policies more heavily than the actual substance of a rezoning decision and, thereby, apply form over substance in their approval of direct legislative zoning."). *E.g.,* Davidson v. City of Clinton, 826 F.2d 1430, 1433–34 (5th Cir. 1987) ("Upon assessing the reasonableness of zoning ordinances regulating intoxicating liquor, courts need recognize that judicial deference is the watchword, and such ordinances are not reviewable, absent a showing of arbitrariness or irrationality." (citation omitted)); Cap. Telecom Holdings II, LLC v. Grove City, 403 F. Supp. 3d 643, 654 (S.D. Ohio 2019) (adopting the "substantial evidence" standard as used in an 8th Circuit decision in reviewing the administrative decision by an immigration judge's denial of asylum in *Menendez-Donis v. Ashcroft*, 360 F.3d 915 (8th Cir. 2004) ("[U]nder the substantial evidence standard we cannot substitute our determination for that of the administrative fact-finder just because we believe that the fact-finder is clearly wrong.")).

spot zoning challenges can be remedied by both explicitly carving out an exception for spot zoning and tweaking the definition of spot zoning.

Part I discusses zoning, its constitutionality, and why the legal fiction of legislative deference fails to provide the actual judicial scrutiny required by the U.S. Constitution. Even if the constitutionally mandated level of scrutiny is unclear, state courts should apply meaningful judicial review. Part II covers the nature of "spot zoning" and comprehensive rezonings. Part III briefly examines zoning in Hawai'i before outlining the total absence of judicial review for spot zoning under current Hawai'i law and proposes a comprehensive new approach that will provide meaningful review for spot zoning claims. Part IV concludes that in a land-sensitive context like Hawai'i, the meaningful review proposed here is necessary to protect against the policy concerns raised by unconstitutional spot zoning.

## I. THE CONSTITUTIONALITY OF ZONING

Property rights, particularly rights in land, are fundamental to the preservation of liberty and individual freedom in the United States.[12] A number of provisions in the U.S. Constitution protect property rights, but the Fifth and Fourteenth Amendments are the most essential.[13] The Takings Clause of the Fifth Amendment provides "private property shall not be taken for public use, without just compensation," limiting federal power over private property.[14] The Fourteenth Amendment makes the federal Takings Clause applicable to the states, limiting state power over private property.[15]

The right to exclude and the right to freely use one's property are fundamental property rights, but these rights are tempered by government judgments about public welfare.[16] Property rights are thus best understood as

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[12] *See* Steve P. Calandrillo et al., *Making "Smart Growth" Smarter*, 83 GEO. WASH. L. REV. 829, 835–36 (2015) (explaining that land ownership is necessary to achieve success in many American communities).

[13] *See* U.S. CONST. amends. V, XIV. The U.S. Constitution also protects property rights through substantive due process, procedural due process, and equal protection. *See id.*

[14] *Id.* amend. V.

[15] *Id.* amend. XIV. In practice, the Takings Clause ensures that private landowners receive "just compensation" when their private property is condemned by the government through its powers of eminent domain for a "public use", a standard the U.S. Supreme Court long ago relaxed to mere "public purpose". *See* Kelo v. City of New London, 545 U.S. 469, 479–80 (2005) ("Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'" (citation omitted)).

[16] *See* Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (providing that the right to exclude is a fundamental property right).

a relationship defined by state governments.[17] Nonetheless, the U.S. Constitution protects private property rights from unreasonable interference by government.[18] Local governments can freely enact land use regulations under their police powers, which often define an owner's ability to use their property.[19] Government regulation under the police power does not come under the Takings Clause and does not require compensation.[20] However, when a regulation "goes too far" and excessively restricts the use of privately owned land without compensation, the Court has found the landowner has a regulatory taking claim.[21] The tension between property owners and government regulators must reach a sort of "constitutional equity" of private and public burdens borne respectively.[22]

### *A. The Utility of Zoning*

Zoning is the process of dividing land within a municipality into zones that designate certain land uses as permitted or prohibited.[23] As a tool for comprehensive land use management and control, zoning is a favored means of urban planning by local governments. Nuisance law—which separates noxious land uses from non-offensive ones—is as old as the common law itself and often understood as the genesis of zoning.[24] In combination with the common law of nuisance, restrictive covenants and the city planning

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[17] *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1951 (2017) (Roberts, C.J., dissenting) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984)) ("[P]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.").

[18] James E. Holloway & D. Tevis Noelting, *Takings Clause and Integrated Sustainability Policy and Regulation: The Proportionality of the Burdens of Exercising Property Rights and Paying Just Compensation*, 29 VILL. ENVTL. L.J. 1, 20–21 (2018).

[19] *See* KARL E. GEIER & SEAN R. MARCINIAK, MILLER AND STARR CALIFORNIA REAL ESTATE § 21:1 (4th ed. 2021).

[20] DANIEL R. MANDELKER, LAND USE LAW § 2.01 (5th ed. 2003).

[21] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[I]f regulation goes too far it will be recognized as a taking."); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (providing that a partial regulatory taking may occur depending on the economic impact of the regulation, extent to which the regulation has interfered with distinct, investment-backed expectations, and the character of the governmental action); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–19 (1992) (holding that a property owner suffers a taking when a regulation deprives the property owner of all economically beneficial use of her property).

[22] Holloway & Noelting, *supra* note 18, at 1–2.

[23] *See* MANDELKER, *supra* note 20, § 4.17.

[24] *See generally* 2 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 1:13 (5th ed. 2021) (discussing common law nuisance); *see generally* MANDELKER, *supra* note 20, §§ 4.02–4.10 (discussing the history of nuisance and its role in zoning).

movement were used to organize and promote orderly and attractive development of cities.[25]

At the turn of the twentieth century, zoning ordinances began popping up in some of the country's most congested cities.[26] Early, race-based zoning was struck down by the Supreme Court as a violation of the Fourteenth Amendment,[27] but local governments did not abandon their zoning efforts. In 1916, New York City adopted zoning regulations in response to citywide opposition to the construction of an enormous building that towered over neighboring residences and was plagued by nuisance-like qualities: the building completely covered all available land area within the property boundary, blocked windows of neighboring buildings, and diminished natural sunlight for people in the affected area.[28] The zoning commission was charged with implementing zoning that would reduce these nuisances (and, in turn, preserve property values) by organizing land use by types into different areas.[29] For example, height restrictions for the entire city were implemented, including ratios between the maximum building height and the width of adjacent streets.[30] Additionally, the zoning map prohibited industrial uses, like factories and warehouses, from encroaching on commercial retail and residential districts.[31]

In 1922, the Commerce Department published the Standard State Zone Enabling Act ("SZEA"),[32] which was written by a commission of planning lawyers assembled for the purpose of drafting model zoning statutes.[33] The SZEA permits local governments to divide the land under its jurisdiction into zones.[34] A typical zoning ordinance consists of a map upon which the

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[25] M. CHRISTINE BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING 84 (1983).

[26] *See* CALLIES, *supra* note 6, at 46–47.

[27] *See* Buchanan v. Warley, 245 U.S. 60, 81–82 (1917) (striking down a Louisville ordinance that violated the right to contract and the right to alienate property).

[28] BOYER, *supra* note 25, at 155–56.

[29] *See id.*

[30] *See id.* at 156.

[31] *See id.* at 157–58.

[32] U.S. DEP'T OF COM., ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (rev. ed. 1926) [hereinafter SZEA].

[33] *See id.* at III; Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-*Euclid *Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 372 (1994) ("The rapid proliferation of zoning legislation was encouraged in part by the issuance in 1922 of a Standard State Zoning Enabling Act by a committee within Herbert Hoover's Commerce Department.").

[34] *See* Lees, *supra* note 33, at 372 ("The standard act made it simpler for legislatures to initiate zoning in their states.").

districts are drawn and an accompanying text listing permitted uses, height and density allowances, and conditional uses for each zone. All fifty states have since adopted zoning enabling acts similar to the SZEA, usually with little to no amendment.[35] The adoption of local zoning, though widespread and voracious, was not met without opposition. As state and lower federal courts reviewed challenges to the constitutionality of zoning, the decisions revealed great disagreement over the validity of zoning.[36]

### *B. Judicial Blessing of Zoning and the Presumption of Validity, a Legal Fiction*

Soon after the SZEA was republished in 1926, the new sophisticated philosophy of zoning that encouraged rational land use planning was challenged before the Supreme Court in *Village of Euclid v. Ambler Realty Co.*[37] Unlike the race-based zoning ordinances challenged in precedent-setting cases that admonished zoning, the ordinance before the Court in *Euclid* baldly protected property values by restricting nuisance-type land uses to designated areas.[38] Unlike other ordinances that were scrutinized by the Court in later challenges,[39] the *Euclid* ordinance did not seek to exclude

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[35] *See* Sara C. Bronin & Dwight H. Merriam, *Nature of Police Power in Relation to Zoning*, *in* 1 RATHKOPF'S THE LAW OF ZONING & PLANNING § 1:9 (4th ed. 2019).

[36] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926) ("The decisions of the state courts [regarding the constitutionality of comprehensive zoning] are numerous and conflicting[.]"). *Compare* Brett v. Building Comm'r, 145 N.E. 269, (Mass. 1924) (approving the creation of a single-family residence zone as a valid exercise of police power), *and* State *ex rel.* Carter v. Harper, 196 N.W. 451 (Wis. 1923) (holding that zoning excluding commercial use from residential district is within police power), *with* Goldman v. Crowther, 128 A. 50 (Md. 1925) (holding that an ordinance creating separate zones for residential, commercial, and industrial uses was not within police power), *and* Spann v. City of Dallas, 235 S.W. 513 (Tex. 1921) (holding that an ordinance excluding businesses from residential zones does not fall within police power).

[37] 272 U.S. 365 (1926).

[38] *See id.* at 380–81. Note, however, that many commentators have suggested all zoning, even when the ordinance is not explicitly race or class-based, covertly seeks to segregate by race and socio-economic status. *See generally* Lees, *supra* note 33, at 375–77 (arguing the Court's decision of *Euclid* "legitimized," "reinforced," and "promoted" socioeconomic class segregation). As evidence of the prejudice from some advocates of exclusively private residential zoning, Lees quoted planner Robert Whitten, who wrote that "The so-called industrial classes will constitute a more intelligent and self-respecting citizenship when housed in homogenous neighborhoods than when housed in areas used by all of the economic classes. . . . A reasonable segregation is normal, inevitable and desirable[.]" *Id.* at 411–12.

[39] *See, e.g.*, Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974) (challenging a village ordinance that limited the occupancy of one-family dwellings to traditional families);

multi-family homes or apartment buildings.[40] It did, however, reduce the value of the subject parcel by at least seventy-five percent.[41] On appeal, the landowner facially challenged the constitutionality of zoning as an exercise of government power.[42]

In a surprising holding,[43] the Court reversed the lower court's decision, upholding zoning as a constitutional exercise of the police power to regulate for public health, safety, and general welfare.[44] In doing so, Justice George Sutherland—writing for a 6-3 Court—adopted the government's argument that zoning responds to two essential needs. First, zoning fairly provides advance notice that certain types of uses would be found incompatible with other (and often existing) uses in a particular district, which merely develops and extends nuisance law.[45] Second, zoning is a necessary instrument for local planning.[46] The Court declined to determine by "piecemeal dissection" whether "provisions of a minor character" may implicate substantive due

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Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (striking down a zoning ordinance that limited the type of "family" that can live in the neighborhood).

[40] *See Euclid*, 272 U.S. at 379–81.

[41] *Id.* at 384.

[42] *Id*. ("The ordinance is assailed on the grounds that it is in derogation of section 1 of the Fourteenth Amendment to the federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the state of Ohio.").

[43] The decision was uncharacteristic of the so-called "Lochner Court" that strongly protected economic interests and freedom of contract from legislative attempts at regulation. *But see* Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 Yale J. on Regul. 91, 140–41 (2011) (arguing the *Euclid* decision should be used to understand the Lochner Court as ruling with the people).

[44] *Euclid*, 272 U.S. at 395–97.

[45] *Id*. at 393 (quoting State *ex rel*. Civello v. City of New Orleans, 97 So. 440 (La. 1923)) ("[A]ny business establishment is likely to be a genuine nuisance in a neighborhood of residences."). For an interpretation of *Euclid* as a shift in Supreme Court jurisprudence toward understanding property ownership under populist theory, see Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REGUL. 91, 110 (2011) ("The zoning ordinance, therefore, did not merely codify nuisance law rules. It created new rules.").

[46] *Euclid*, 272 U.S. at 392 (quoting City of Aurora v. Burns, 149 N.E. 784, 788 (Ill. 1925)) ("The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the state the police power necessarily develops, within reasonable bounds, to meet the changing conditions.").

process in the application and administration of the ordinance.[47] Thus, *Euclid* upheld local governments' use of the police power to enact broad zoning ordinances.[48] Embedded in the Court's first blessing of zoning as a planning tool for "wis[e] or sound policy" is the degree of judicial review necessary to evaluate the legitimacy of zoning decisions: before zoning can be found unconstitutional, provisions must be found "clearly arbitrary and unreasonable, having no *substantial relation* to the public health, safety, morals, or general welfare."[49]

After the constitutionality of zoning was confirmed by the Court, zoning in the United States continued to flourish.[50] Two years after *Euclid*, the Court used its substantial relation standard from *Euclid* to evaluate an as-applied challenge to a municipal zoning ordinance in *Nectow v. City of Cambridge*.[51] There, the property owner challenged a municipal decision to draw a zoning district boundary along the edge of his property instead of along the road on which the property was fronted.[52] Because a 100-foot strip of the plaintiff's property was zoned residential, all sorts of business and industry uses were prohibited.[53] These restrictions caused the plaintiff to lose a $63,000 contract for the sale of the property.[54] The Court held that the zoning ordinance was applied arbitrarily.[55] Using the *Euclid* standard, the Court found that the location where the district zone was drawn was not substantially related to police power ends.[56] Writing again for the Court, Justice Sutherland cautioned that courts cannot merely substitute their judgment for that of the local authorities, even while finding this particular ordinance unconstitutional.[57]

Understanding *Euclid* and *Nectow* in tandem is important. While *Euclid* empowered states to write broad zoning legislation, *Nectow* preserved judicial power of review to determine whether the contested zoning legislation was substantially related to the public purposes justifying the use

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[47] *See id.* at 395.

[48] *Id.*

[49] *Id.* (emphasis added).

[50] Lees, *supra* note 33, at 372 ("Whereas eight cities had enacted zoning ordinances at the end of 1916, by the time Euclid was decided in 1926, 76 municipalities had passed such ordinances, and 1,322 cities were zoned by 1936.").

[51] 277 U.S. 183 (1928).

[52] *Id.* at 186–87 ("The effect of the zoning is to separate from the west end of plaintiff in error's tract a strip 100 feet in width.").

[53] *See id.*

[54] *Id.* at 187.

[55] *Id.* at 187–89.

[56] *Id.* at 188 (citing Vill. of Euclid v. Ambler Realty, Co., 272 U.S. 365, 395 (1926)).

[57] *Id.*

of the police power.[58] Thus, the Court adopted a standard of intermediate scrutiny to determine whether the challenged zoning decision passes constitutional muster: to survive judicial review, the challenged exercise of zoning power must further an important government interest by means that are substantially related to that interest.[59]

The Court modeled intermediate scrutiny in *Nectow* by conducting its own "inspection" of the zoning plat in connection with its review of the lower court's findings of fact before reaching its conclusion on the arbitrary nature of the zoning decision.[60] The Court restated the constitutional standard established in *Euclid*, requiring zoning to have a substantial relation to the public health, morals, safety, or welfare; restated the essential facts of the zoning decision; and then applied the substantial relationship test to find the challenged actions lacking a basis in the police power.[61]

Notably, the presumption of validity for zoning decisions or the "fairly debatable" standard misattributed to *Nectow* by lower courts is wholly absent from the *Nectow* decision itself.[62] Nonetheless, Justice Sutherland's warning in *Nectow* that a court should not substitute its own judgment for that of local authorities has precipitated a much more deferential standard of review in lower courts. The Supreme Court's substantial relation standard has been obfuscated by the legal fiction that zoning, as a legislative act, is presumed valid.[63] Courts should, instead, look to the level of scrutiny applied in *Nectow* to determine what constitutes an arbitrary and capricious zoning decision.[64] The *Nectow* Court affirmed the lower court's use of the constitutional standard established in *Euclid* and then applied judicial scrutiny clearly beyond abject deference to invalidate the zoning as applied to the subject parcel.[65] Any presumption of validity is therefore fundamentally flawed.

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[58] *See* Keith R. Denny, Note, *That Old Due Process Magic: Growth Control and the Federal Constitution*, 88 MICH. L. REV. 1245, 1249–51 (1990). *See also* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981) (citing *Euclid* and *Nectow* to emphasize the limited standard of review applied to zoning ordinances).

[59] *See Euclid*, 272 U.S. at 395; Erica Chee, *Property Rights: Substantive Due Process and the "Shocks the Conscience" Standard*, 31 U. HAW. L. REV. 577, 602 (2009).

[60] *Nectow*, 277 U.S. at 188.

[61] *Id.* at 188–89 (citations omitted).

[62] Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, a Source of Significant Confusion*, 23 B.C. ENV'T AFFS. L. REV. 301, 309 (1996).

[63] *Id.* at 319 ("While the Euclid presumption of validity became the ritualistic model in American land-use jurisprudence, courts have confused it, misused it, and ignored it, resulting in difficult-to-assess standards of judicial review and levels of judicial scrutiny.").

[64] *See Nectow*, 277 U.S. at 188.

[65] *See id.* at 187–88.

### *C. Modern Zoning and the Federal Courts*

Today, zoning ordinances appear relatively uniform across the country. The zoning power is typically delegated from the state to local government through a zoning enabling statute based on the SZEA.[66] The SZEA empowers local governments to adopt zoning regulations in accordance with a comprehensive plan to achieve purposes that the act identifies as components of a healthy urban environment.[67] Under the loose scrutiny of the legal fiction of presumed validity and "unfettered by meaningful state statutory standards" modeled after the SZEA, "local zoning system[s] developed into a highly irrational and politicized process."[68] Public dissatisfaction with both the process and the results in local land-use administration has translated into judicial unease with the presumption of constitutionality in land use law.[69] Save for grave constitutional concerns,[70] federal courts have maintained a strong resistance to adjudicating "garden variety" zoning challenges.[71] As Justice Thurgood Marshall famously remarked, the role of the Supreme Court "is not and should not be to sit as a zoning board of appeals."[72] Congress has continued to make efforts to hold state and federal officials accountable when individuals are deprived of their civil rights by government

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[66] *See e.g.*, HAW. REV. STAT. § 46-4 (2021).

[67] *See generally* SZEA, *supra* note 32.

[68] Thomas G. Pelham, *Quasi-Judicial Rezonings: A Commentary on the* Snyder *Decision and the Consistency Requirement*, 9 J. LAND USE & ENV'T L. 243, 246 (1994).

[69] Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 3–4 (1992).

[70] *See, e.g.*, Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974) (challenging a village ordinance that limited the occupancy of one-family dwellings to traditional families); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (striking down a zoning ordinance that limited the type of "family" that can live in the neighborhood).

[71] *E.g.* Burford v. Sun Oil Co., 319 U.S. 315 (1943) (cert. denied) (denying certiorari on state issue of law grounds); Poponio v. Fauquier Cnty. Bd. of Supervisors, 21 F.3d 1319, 1327 (4th Cir. 1994) (en banc) (recommending abstention "in practically every instance . . . in cases arising solely out of state or local zoning or land use law"); Coniston Corp. v. Vill. of Hofman Ests., 844 F.2d 461, 465–68 (7th Cir. 1988) (holding substantive due process claim is not stated where a zoning decision violates statutes, but only where the decision is irrational or violates a specific constitutional guarantee).

[72] *Vill. of Belle Terre,* 416 U.S. at 13 (1974) (Marshall, J., dissenting). This gatekeeping suggestion has been oft-repeated by federal courts struggling with overburdened dockets. *See*, *e.g.*, Chez Sez III Corp. v. Twp. of Union, 945 F.2d 628, 633 (3d Cir. 1991); Welch v. Paicos, 66 F. Supp. 2d 138, 167 n.50 (D. Mass. 1999); Cmty. Treatment Ctrs., Inc. v. City of Westland, 970 F. Supp. 1197, 1224 (E.D. Mich. 1997).

regulations.[73] The Court recognizes that civil rights unequivocally include personal rights in property.[74] Despite this, a survey of lower federal courts shows a prevailing tendency to "den[y] victims a federal remedy [even] when a discretionary land use decision is tainted by substantive wrongs such as arbitrariness, improper motive, and personal or partisan bias."[75] These federal courts that grant zoning decisions a presumption of validity fail to apply the minimum scrutiny prescribed by the Supreme Court in *Euclid* and *Nectow*.[76] Nevertheless, this troubling practice of legislative deference continues.

The federal circuits, for example, vary tremendously in defining "arbitrary" in the context of a zoning decision. Three distinct tests have emerged, all of which grant wholly insufficient scrutiny to determine whether the challenged decision bears a substantial relation to the police power: (1) conscience shocking, (2) any conceivable rationale, and (3) rational basis. The "conscience shocking" approach demonstrates extreme deference under which the First, Sixth, and Seventh Circuits have required conduct by the decision-making authority that is far beyond irrational or arbitrary such that the court finds "shocking or violative of universal standards of decency."[77] The "any conceivable rationale" approach allows courts to refuse interference with local zoning decisions so long as the government can put forth any legitimate reason to base its decision, even if the government can only muster a post hoc, hypothetical, or bad faith "legitimate" reason to support the challenged decision.[78] The Seventh, Eighth, Tenth, and Eleventh

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[73] The Civil Rights Act of 1871 created a private cause of action for violations of civil rights by governmental actors, which provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." Civil Rights Act of 1871, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (1984).

[74] Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

[75] Stewart M. Wiener, *Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467, 1468 (1996).

[76] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

[77] Licari v. Ferruzi, 22 F.3d 344, 350 (1st Cir. 1994) (quoting Amsden v. Moran, 904 F.2d 748, 757 (1st Cir. 1990)); Pearson v. City of Grand Blanc, 961 F.2d 1211, 1222 (6th Cir. 1991) (noting that substantive due process is denied in local zoning action only if it "shocks the conscience" due to its extreme irrationality); *see* Pro-Eco, Inc. v. Bd. of Comm'rs, 57 F.3d 505, 514 (7th Cir. 1995).

[78] *Pro-Eco, Inc.*, 57 F.3d at 514 (citing Northside Sanitary Landfill, Inc. v. City of Indianapolis, 902 F.2d 521, 522 (7th Cir. 1990)) ("[G]overnmental action passes the

Circuits have all applied this "any conceivable rationale" standard.[79] Finally, the "rational basis" approach, of course, requires little analysis or weighing of evidence because a court can simply accept any conceivable or plausible rationale, even by its own invention, to justify a zoning ordinance. A pair of decisions from the Second Circuit, for example, show that the fact-finder's identification impermissible political animus fails to satisfy the "rational basis" standard.[80]

However, under all three of these approaches the federal circuits appear to be applying various strains of effectively the same standard: a broad presumption of validity unless the decision cannot possibly be based in reason or otherwise shocks the conscience. As a result, the legislative deference afforded to local zoning decisions works as an irrebuttable presumption of validity, requiring local government defendants to pay mere lip service to hypothetical reasons for the most baseless regulatory actions. The reality of rezoning decisions that legislative deference ignores is that local zoning decision-makers are "simply not the equivalent in all respects of state and national legislatures."[81] Granting permits, making special exceptions, and deciding particular cases is not a legislative function, but

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rational basis test if a sound reason may be hypothesized. The government need not prove the reason to a court's satisfaction."); Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1214 (11th Cir. 1995) ("The second step of rational-basis scrutiny asks whether a rational basis exists for the enacting government body to believe that the legislation would further the hypothesized purpose."). However, the Tenth Circuit draws a distinction where the zoning decision is quasi-judicial, requiring the articulated reason to bear a rational relationship to a legitimate government objective. Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111, 1120 & n.7 (10th Cir. 1991). The Eleventh Circuit similarly distinguishes decisions made by an adjudicative zoning body, which need only offer a "plausible, arguably legitimate purpose" for its decision unless the plaintiff meets its burden of demonstrating the zoning authority could not have possibly relied upon its alleged purpose. *Restigouche, Inc.*, 59 F.3d at 1214. The Eighth Circuit has even gone so far as to hold that bad-faith violations of state law would not violate federal substantive due process. *See* Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1101, 1005 (8th Cir. 1992).

[79] *See supra* note 78 and accompanying text.

[80] *E.g.*, Brady v. Town of Colchester, 863 F.2d 205, 212–13, 215–16 (2d Cir. 1988) (finding that the owners of a commercial building alleged their permits were revoked because of "impermissible political animus[;]" the Second Circuit concluded that the finder of fact could reasonably determine there is no rational basis for a zoning decision that has no authority under state law.). *See also* Walz v. Town of Smithtown, 46 F.3d 162, 167–69 (2d Cir. 1995) (upholding a jury verdict that the town official was wrongfully motivated in attaching unreasonable conditions to a permit).

[81] *See* Fasano v. Bd. of Cnty. Comm'rs, 264 Or. 574, 580, 507 P.2d 23, 26 (1973), *disapproved of by* Neuberger v. City of Portland, 288 Or. 585, 607 P.2d 722 (1980).

administrative, quasi-judicial, or judicial in character.[82] As an Oregon court has observed, granting legislative deference to non-legislative rezoning decisions treats the decision makers as "legislative bodies, whose acts as such are not judicially reviewable," and thereby "open[s] the door completely to arbitrary government."[83] Further, small local governments have much greater incentive to please their neighbor-constituents than to consider adverse effects beyond their reach, unlike more politically accountable bodies such as state legislatures for whom legislative deference is designed. Meaningful scrutiny is particularly important in the context of land use where environmental concerns including loss of open space and natural resources must be solved through coordinated action, which is defeated by localized decisions that fail to account for impacts on the greater community.

Since *Nectow*, the Supreme Court has refused to develop the *Euclid*/*Nectow* standard for claims of arbitrary, discretionary land use decisions.[84] As a result, the exact standard to which zoning challenges should be held has not been clarified by the Court. Because the Court has provided little guidance, lower courts have been left to labor in obscurity.[85] The appropriate standard to analyze discretionary zoning decisions has generated chaos and disagreement among the courts dealing with substantive due process challenges to zoning decisions.[86] In turn, there is no consistent and appropriate rule established by consensus of the federal courts, leaving state courts with little guidance in creating their own standards.[87] Nevertheless, it is clear from *Nectow* that the constitutional standard requires actual judicial scrutiny of zoning decisions and meaningful application of the substantial relation test from *Euclid*.

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[82] *Id.*

[83] *See id.*

[84] Wiener, *supra* note 75, at 1471 ("However, no Supreme Court case since 1928 has granted substantive due process protection to a property interest in a case of arbitrary decision making in land use.").

[85] *See generally* David H. Armistead, Note, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 GA. L. REV. 769, 779–84 (1995) (discussing a range of cases variously defining property interests sufficient to implicate due process concerns).

[86] *See* Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?*, 16 U. DAYTON L. REV. 313, 345–46 (1991) ("Many of the decisions [of lower courts] reflect confusion regarding the proper scope of substantive due process as compared to procedural due process.").

[87] For a compelling argument for using statutory law to strengthen safeguards against arbitrary and capricious land use decisions, see Nisha Ramachandran, Note, *Realizing Judicial Substantive Due Process in Land Use Claims: The Role of Land Use Statutory Schemes*, 36 ECOLOGY L.Q. 381 (2009).

However, in its decision of *Lingle v. Chevron U.S.A.* in 2005, the Court abrogated the "substantially advances" test for takings claims from *Agins v. City of Tiburon*,[88] on the grounds that the test was rooted in substantive due process and therefore not appropriate for a Fifth Amendment Takings analysis.[89] In doing so, the Court affirmed a property owner can bring both a claim for a regulatory taking of property and government deprivation of property without due process of law, each as a separate claim "to be resolved using different legal standards."[90] The highly deferential "conscience shocking" and any "any conceivable rationale" tests are clearly derived from the standard for substantive due process claims.[91] The *Lingle* decision, as a result, clarifies that intermediate scrutiny, as modeled in *Nectow*, is the appropriate scrutiny for a distinct takings claim.

Intermediate scrutiny for zoning challenges is consistent with the Court's earlier jurisprudence. The Court has routinely held takings claims to a higher level of scrutiny than substantive due process claims rooted in property rights.[92] In *Penn Central Transportation Co. v. City of New York*, the Court held "a use restriction . . . may constitute a 'taking' if not reasonably necessary to the effectuation of a *substantial* public purpose."[93] In *Nollan v. California Coastal Commission*, the Court required an "essential nexus" between the public benefit for the offending regulation and the resulting burden on the landowner.[94] After *Dolan v. City of Tigard*, the Court further requires "rough proportionality" between the public purpose and private

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[88] 447 U.S. 255, 260–61 (1980), *abrogated by* Lingle v. Chevron U.S.A, 544 U.S. 528 (2005).

[89] Lingle v. Chevron U.S.A., 544 U.S. 528, 540, 545 (2005).

[90] Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. REV. 899, 900 (2007); *see* Robert G. Dreher, Lingle*'s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENV'T. L. REV. 371, 373 (2006); Mark Fenster, *Substantive Due Process by Another Name:* Koontz, *Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403, 413, 416 (2014) (*Lingle* "appeared to place institutional competence and deference to political and state and local institutions over the federal constitutional protection of property owners from all but the worst regulatory unfairness.").

[91] *See supra* note 78 and accompanying text (explaining the any conceivable rational basis standard). For background information on the "shocks the conscience" test, see Ramachandran, *supra* note 87, at 392–94. Review of substantive due process claims is subject to one of two different standards, determined by the interest at stake: "courts apply heightened scrutiny for so-called 'fundamental interests,' which are protected absent a 'compelling' government interest, and they apply more deferential review for non-fundamental interests." Ramachandran, *supra* note 87, at 384–85.

[92] *See* Chee, *supra* note 59, at 602.

[93] 438 U.S. 104, 127 (1978) (emphasis added).

[94] 483 U.S. 825, 837 (1987).

burden.[95] Intermediate scrutiny acknowledges that discretionary land use decisions may inherently present a heightened risk that local government will "manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation."[96] Takings claims clearly require greater scrutiny. While it should follow that substantive due process claims should also require a higher level of scrutiny as both claims seek constitutional protections, when a zoning decision is challenged under its usual host of claims—takings, substantive due process, section1963, etcetera—the takings claim should be scrutinized under intermediate scrutiny.[97] Some courts have even suggested that causes of action, like substantive due process claims relating to property rights, cannot exist apart from their Fifth Amendment counterparts.[98] The troubling legal fiction that zoning is due legislative deference echoes the same concern the Court has noted: the "shocks the conscience" test is "laden with subjective assessments" and fundamentally flawed.[99]

## II. THE ELUSIVE NATURE OF SPOT ZONING

### *A. Mismatched Zoning and Desired Use*

The very language of *Euclid* suggests zoning ordinances are not immutable.[100] Justice Sutherland's rationale for upholding zoning in *Euclid* relied upon the flexibility of the tool, as an extension of the police power, to adapt in light of changing public need.[101] At the time the map and text of

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[95] 512 U.S. 374, 375 (1994).

[96] Ehrlich v. City of Culver City, 911 P.2d 429, 439 (Cal. 1996) (emphasis added).

[97] There are six categories of claims typically raised in zoning challenges: (1) just compensation takings; (2) due process takings; (3) arbitrary and capricious substantive due process; (4) equal protection; (5) procedural due process; and (6) violation of the First Amendment. Pearson v. City of Grand Blanc, 961 F.2d 1211, 1215–16 (6th Cir. 1992).

[98] Stephen E. Abraham, Williamson County *Fifteen Years Later When is a Takings Claim (Ever) Ripe?*, 36 REAL PROP. PROB. & TR. J. 101, 109 (2001). *See also* Macri v. King County, 126 F.3d 1125, 1128 (9th Cir. 1997); S. Cnty. Sand & Gravel Co. v. Town of S. Kingston, 160 F.3d 834, 835 (1st Cir. 1998); Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610, 612–14 (11th Cir. 1997); Montgomery v. Carter County, 226 F.3d 758, 769 (6th Cir. 2000) (using the Takings Clause, rather than substantive due process, to guide review of the plaintiff's takings claim).

[99] County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J. and O'Connor, J., concurring).

[100] "In a changing world it is impossible that it should be otherwise." Vill. of Euclid v. Ambler Realty, Co., 272 U.S. 365, 387 (1926).

[101] *Id.*

zoning ordinances are enacted, choices are made to organize and encourage certain land uses in the area, but since zoning does not mandate such uses, the conditions of land and development opportunities actually availed upon continue to shape the developed nature of the area over time. The SZEA anticipates the need for amendments and explicitly authorizes local governing bodies to amend the text or the maps.[102] Thus, land use patterns require updates and change is the name of the zoning game.[103]

When a landowner seeks to develop a parcel that is not within the zoning allowances already prescribed, there are three options for a zoning change: a conditional use permit, a variance, or a rezoning.[104] A conditional use permit will typically satisfy benign and uncontroversial uses outside the scope of prescribed uses.[105] Zoning ordinances, upon passage, designate conditional uses that require site-specific permitting but have been preemptively deemed compatible with the other uses in the zoning district. Thus, the additional utility of the land under a conditional use allocation is marginal, and "[a] change in use that requires a spot zoning is not likely to be a conditional use."[106]

Similarly, variances are difficult to obtain because owners must show a significant hardship caused by the current zoning.[107] Variances are granted where enforcement of a zoning ordinance will result in unnecessary hardship.[108] A variance, if granted, permits the owner to use its land in a manner that is not otherwise permitted by the applicable zoning ordinance.[109] An applicant is entitled to a variance only to the degree necessary to overcome the unnecessary hardship, which functions as a waiver to specific requirements of the zoning ordinance.[110] It is the applicant's burden to prove its request for a variance satisfies all three requirements of the charter's test: strict application of the existing zoning would deprive the landowner of reasonable use of the land; the hardship is unique to the property; and, if approved, a variance will not alter the essential character of the neighborhood

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[102] SZEA, *supra* note 32, § 5; MANDELKER, *supra* note 20, § 6.24.

[103] Daniel R. Mandelker, *Spot Zoning: New Ideas for an Old Problem*, 48 URB. LAW. 737, 739 (2016).

[104] *See generally, e.g.,* HONOLULU, HAW., REV. ORDINANCES ch. 21 (2021); KAUA'I, HAW., COUNTY CODE ch. 8 (2021); MAUI, HAW., COUNTY CODE tit. 19 (2021); HAW. CNTY., HAW., COUNTY CODE ch. 25 (2021).

[105] *See generally*, 101A C.J.S. *Zoning and Land Planning* § 256 (2021).

[106] Mandelker, *supra* note 103, at 740.

[107] *See* Surfrider Found. v. Zoning Bd. of Appeals, 136 Hawai'i 95, 99, 358 P.3d 664, 668 (2015); Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan, 87 Hawai'i 217, 234–35, 953 P.2d 1315, 1332–33 (1998).

[108] *See* cases cited *supra* note 98.

[109] *See generally,* cases cited *supra* note 98.

[110] *See* cases cited *supra* note 98.

nor be contrary to the intent and purpose of zoning.[111] Variances have become increasingly difficult to obtain and most tend to be bulk, which do not substantially change the use allowance.[112] For example, where a landowner seeks a change in zoning allowance for multifamily or commercial use in a residential zone, there is rarely anything so unique about the land such that the landowner can satisfy the unique hardship mandates for a use variance.

Because a comprehensive revision of a zoning ordinance is also unlikely,[113] a piecemeal rezoning is frequently a developer's only viable option for a zoning change. A rezoning formally moves property from one zone to another, by either text or map amendment, typically to allow a more intensive use.[114] Because the three options for a zoning change serve distinct purposes and needs, a rezoning of one's individual parcel is often the owner's only option. Rezonings are the most common and yet most radical change, and the discretionary nature of rezonings have naturally become a topic of scholarly scrutiny.[115] Such targeted adjustments to the zoning ordinance are also known as "spot zoning," which has been widely and substantially critiqued by commentators and admonished by courts. Thus, an allegation that the government zoning authority committed so-called spot zoning is a serious accusation.

### *B. Defining Spot-Zoning*

Spot zoning is an ill-defined term across jurisdictions,[116] but is typically used to describe "the process of singling out a small parcel of land for a use classification different and inconsistent with the surrounding area, for the benefit of the owner of such property and to the detriment of the rights of other property owners."[117] A challenger describing the contested zoning

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[111] For a recent example of the Hawai'i Supreme Court's application of the variance test, *see Surfrider Found.*, 136 Hawai'i at 95.

[112] *See* Randall W. Sampson, *Theory and Practice in the Granting of Dimensional Land Use Variances: Is the Legal Standard Conscientiously Applied, Consciously Ignored, or Something in Between?*, 39 URB. LAW. 877, 894 (2007); CALLIES, *supra* note 6, at 64. Variances are broadly categorized as bulk or use variances. A bulk variance typically modifies the height or floor-area-ratio requirements for unique lots to allow substantially similar rights as enjoyed by owners of neighboring properties. Use variances allow a land use not typically permitted by the ordinance. *See* CALLIES, *supra* note 6, at 47–49.

[113] Mandelker, *supra* note 103, at 749 n.47 ("Around 20–25% of communities do not rezone after doing a comprehensive plan.").

[114] *Id.* at 737–38.

[115] *See* MANDELKER, *supra* note 20, § 6.29.

[116] *See* Mandelker, *supra* note 103, at 762–63.

[117] MANDELKER, *supra* note 20, § 6.28; Burkett v. City of Texarkana, 500 S.W.2d 242, 244 (Tex. Civ. App. 1973); Griswold v. City of Homer, 925 P.2d 1015, 1020

action as "spot zoning" believes it confers a zoning favor on a single landowner that promotes a private economic interest, typically by upzoning, without justification.[118] Some commentators have qualified spot zoning as presumptively arbitrary[119] and necessarily suspect.[120] There are sincere policy concerns and dangers with spot zoning that fairly necessitate such suspicion. The primary concerns with spot zoning are based in the wealth transfer and political capture involved with all zoning changes. The rezoning of a single parcel is often the response to an individual request, so courts must review rezoning decisions to ensure it was a valid use of the police power, made for the health, safety, and welfare of the general public, not just the individual property owner.[121] To be constitutional, zoning decisions must be made for the good of the community, regardless of advantages and disadvantages that flow to the proper owner and her neighbors. As the Texas Supreme Court commented, spot zoning "is piecemeal zoning, the antithesis of planned zoning."[122]

As to the first concern about wealth transfers, spot zoning gives landowners an unfair economic advantage.[123] Zoning always implicates land use value. When a parcel is rezoned, an "unearned increment in the value of land" accrues that has been criticized as a windfall when the rezoning is granted "without compensation or effort."[124] At the same time, rezoning creates a wealth transfer from neighboring parcels to the rezoned parcel because the more intensive use will likely "depress the value of neighboring property."[125] The wealth transfer symptom is not unique to rezoning. The Court has acknowledged that many forms of land use regulation result in a transfer of "wealth from the one who is regulated to another."[126] However, piecemeal rezoning is distinguishable because it does not apply uniformly to everyone. Instead, piecemeal rezoning favors individual landowners arbitrarily.

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(Alaska 1996).

[118] *See* 3 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 38:16 (4th ed. 2021).

[119] *See* Mandelker, *supra* note 103, at 742.

[120] CALLIES, *supra* note 6, at 62–63.

[121] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[122] City of Pharr v. Tippitt, 616 S.W.2d 173, 177 (Tex. 1981).

[123] Mandelker, *supra* note 103, at 742 n.19 (citing Foothills Cmtys. Coal. v. County of Orange, 166 Cal. Rptr. 3d 627, 635 (Cal. Ct. App. 2014) ("The essence of spot zoning is irrational discrimination.")).

[124] *Id.* at 743.

[125] *Id.*

[126] *See* Yee v. City of Escondido, 503 U.S. 519, 529 (1992) (finding no taking in a rent control case).

A second concern with spot zoning is the potential for political capture.[127] Where homeowners control local government decisions that affect their property interests, the decision-making body typically has no formal mechanism to ensure adequate representation and fails to consider planning and responsible growth and development.[128] The Seventh Circuit has observed this phenomenon, holding that land use cases are inherently political and noting that in zoning disputes, politicians frequently yield to political pressure from special interests.[129] This zoning reality, however, was viewed by the court as merely a feature of democracy at work and not necessarily an indication of arbitrary or irrational decision making.[130] This view that controlling, powerful local interests are a form of benign political influence has also been adopted by the First Circuit.[131] Of equal concern, but of a different flavor, is the reality that in many municipalities, developers and their allies control the process in which government bodies approve new development.[132] Bargaining and one-offs impair the democratic values underlying complex land use systems.[133]

When courts consider a spot zoning challenge, they must also keep the SZEA mandates in mind, which can serve as guiding principles to assess the zoning decision. The SZEA requires that all zoning decisions conform to the plan and are uniform. "[U]niformity does not prohibit classifications within a district so long as they are reasonable and so long as all similarly situated property receives the same treatment."[134]

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[127] *See* Mandelker & Tarlock, *supra* note 69, at 47.

[128] *See* Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 955 (2013) (arguing that the "public choice model thus yields an important insight: judicial review of land use decision making is largely driven by the desire to protect reliance interests –both those of developers and homeowners.").

[129] Coniston Corp. v. Vill. of Hoffman Ests., 844 F.2d 461, 466–67 (7th Cir. 1988) (finding the plaintiffs' allegation—that Village trustees were violating state law by denying their site plan approval which conformed with all applicable regulations, without reason for denial—was "so remote" from a plausible violation of substantive due process that it was unnecessary to address the property interest issue).

[130] *Id.* at 467 (acknowledging that the Constitution allows the government to yield to "selfish opposition").

[131] *See* Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 46 (1st Cir. 1992) (citing *Coniston Corp.* , 844 F.2d at 467).

[132] *See, e.g.*, Howard P. Speicher, *Land Court Invalidates Zoning*, 47 BOSTON BAR J. 14 (2003) (discussing negotiation tactics between developers and local government in Boston).

[133] *See generally* Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591 (2011).

[134] Rumson Ests. Inc. v. Mayor & Council, 828 A.2d 317, 321 (N.J. 2003).

### *C. Distinguishing Comprehensive Rezoning from Piecemeal Rezoning ("Spot Zoning")*

To address these significant concerns with spot zoning, many courts have tried to articulate different standards of judicial review. The first issue is distinguishing comprehensive rezoning from spot zoning. A comprehensive rezoning, or a comprehensive zoning ordinance amendment, "affect[s] a substantial portion of land within the zoning jurisdiction belonging to many landowners, and [is] usually undertaken in implementation of broad public policy and, typically, after studies and recommendations of planning staff or consultants[.]"[135] "Such a comprehensive rezoning, for purposes of judicial review, occupies the same posture of presumed validity as the original enactment of a zoning ordinance."[136] Piecemeal rezonings include all other rezonings that are considered less than comprehensive rezoning and are usually the subject of spot zoning claims.[137]

Piecemeal rezonings, however, are distinct from comprehensive rezonings in terms of the character of the decision. Comprehensive rezoning updates or changes the policy in effect for a large area; by changing policy, comprehensive rezonings are legislative in nature.[138] Piecemeal rezonings, however, merely apply or amend existing policy as-applied to a particular piece of land.[139] Arguably, all rezonings are not legislative because piecemeal rezonings are retroactive decisions that apply—or reapply—existing policy. While the terms courts use to describe the deference given to zoning vary, most courts that apply a high presumption of validity to zoning decisions view such acts as legislative. Presumptions of validity, which have lapsed into a total absence of review at all, are products of antiquated and idealistic faith in an involved democracy.[140] There is good reason to doubt the continued use of presumptions in general, but should at least be discarded as applied to piecemeal rezoning.[141] Due to the imprecise nature of applying presumptions and the politically apathetic nature of our modern democracy, presumptions in land use particularly "have become substitutes for analysis

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[135] EDWARD H. ZIEGLER, JR., *supra* note 118, § 38:14.

[136] *Id.*

[137] *Id.* § 38:15.

[138] *Id.* § 38:14.

[139] *See id.* § 38:26 ("[P]iecemeal rezonings constitute individualized, case-by-case application, rather than the establishment of legislative policy[.]").

[140] *See generally* Hopperton, *supra* note 62 (arguing a fundamental flaw in land use jurisprudence is the concept of presumptions).

[141] Judicial adherence to the presumptions is based upon an odd pair of theories: a modern "faith in scientific rationality and the Jeffersonian faith in the virtues of local control[;]" both philosophies "died in the Post-World War II disillusionment with the possibility of effective public action." Mandelker & Tarlock, *supra* note 69, at 5.

or [worse] have been used to mask an attempt to do something indirectly rather than directly."[142] Instead of the presumption of validity accorded to legislative acts, piecemeal rezoning that affects a single property should be held to a more exacting standard that considers the individual rights at issue. When a government body is acting legislatively—that is, enacting broad policy by law—it performs its traditional role and is entitled freedom from judicial knit-picking, in part, because courts are charged with wholly different powers and responsibilities. However, when local government is empowered to grant or deny special privileges to particular persons, insulation from judicial review melts away. As Richard Babcock, an expert in zoning and planning, observed, "[w]hen the municipal legislature crosses over into the role of hearing and passing on individual petitions in adversary proceedings it should be required to meet the same procedural standards we expect from a traditional administrative agency."[143] Under the distinctions between legislative and administrative acts, [144] as well as comprehensive rezoning and piecemeal "spot" rezonings, spot zoning should not be entitled the legislative deference of other legislative acts.

### *D.* Fasano *and the Quasi-Judicial Approach*

The *Fasano* approach undertakes meaningful analysis of the contested zoning ordinance.[145] The Supreme Court of Oregon's decision of *Fasano v. Board of County Commissioners* in 1973 was a landmark decision in which the court erased the legal fiction that rezonings are legislative acts.[146] Oregon had long been wary of limited judicial review, recognizing in earlier cases a decade prior the "antithetical character" of spot zoning and its corrosive effect on comprehensive planning.[147]

A significant issue in *Fasano* was the role of the courts in reviewing zoning cases.[148] The court observed that granting legislative deference to all zoning

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[142] Hopperton, *supra* note 62, at 308.

[143] Jeff C. Wolfstone, *The Case for a Procedural Due Process Limitation on the Zoning Referendum:* City of Eastlake *Revisited*, 7 ECOLOGY L.Q. 51, 80 n. 134 (1978) (quoting RICHARD F. BABCOCK, THE ZONING GAME 158 (1966)).

[144] *See id.* Note that quasi-judicial and administrative decisions are held to the same standard of review, and thus the distinction between quasi-judicial and administrative decisions is of minimal importance in this context.

[145] 507 P.2d 23, 26–27 (Or. 1973), *superseded by statute on other grounds as stated in* Menges v. Bd. of Cnty. Comm'rs, 606 P.2d 681, 685 (Or. Ct. App. 1980).

[146] *Id.* at 26.

[147] Smith v. Washington County, 406 P.2d 545, 547 (Or. 1965) (en banc); *see also* Roseta v. Washington County, 458 P.2d 405, 408–09 (Or. 1969).

[148] *See* 507 P.2d at 25 (stating that the court had granted review to answer, *inter alia*, "what is the scope of court review of such [zoning] actions?").

decisions would be "ignoring reality" and the accordingly full presumption of validity shields certain decisions from "less than constitutional scrutiny by the theory of separation of powers."[149] The distinction between legislative acts that establish policy and the application of established policy to specific circumstances was explicitly drawn out by the *Fasano* court, which noted:

> Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test . . . .
>
> Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interests, or situations, or whether it entails the application of a general rule or policy to specific individuals, interests or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial.[150]

The thrust of *Fasano* was distinguishing the nature of a rezoning decision, by applying a test of whether the action was legislative or quasi-judicial, which enlarged the scope and character of judicial review for rezoning decisions. Where the action is an exercise of judicial authority, the court burdened the party seeking the change with showing that the change sought conforms with the comprehensive plan, there is a public need for the change requested, and the need is met by the proposal.[151]

A significant number of states soon after embraced the *Fasano* rule, though not all jurisdictions have maintained the quasi-judicial standard of review.[152] Common factors considered across these jurisdictions are the size

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[149] *Id.* at 26.

[150] *Id.* at 26–27 (quoting Michael S. Holman, Comment, *Zoning Amendments–The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L. REV. 130, 137 (1972)).

[151] *Id.* at 29. Note that *Fasano* was sharply clarified—but not overruled—by the Oregon Supreme Court in *Neuberger v. City of Portland*, 607 P.2d 722, 727 (Or. 1980) (holding the substantive criteria for zone changes set forth in *Fasano* could "only apply in addition to, not instead of, other standards imposed by law.").

[152] *See, e.g.*, Margolis v. Dist. Ct., 638 P.2d 297 (Colo. 1981); Cooper v. Bd. of Cnty. Comm'rs, 614 P.2d 947 (Idaho 1980) (applying the *Fasano* rule); Golden v. City of Overland Park, 584 P.2d 130 (Kan. 1978) (citing *Fasano*, 507 P.2d 23 (1973)); Dufau v. Par. of Jefferson, 200 So.2d 335 (La. App. 4th Cir. 1967) (creating a "change of mistake" rule for reviewing zoning decisions that was not uniformly followed); Nw. Merchs. Terminal v. O'Rourke, 60 A.2d 743 (Md. 1948) (adopting the change of mistake rule for rezoning, which suggests more stringent review than the traditional fairly debatable rule); McNary v. Hais, 670 S.W.2d 494 (Mo. 1984) (en banc); Winslow v. Town of Holderness Plan. Bd., 480 A.2d 114 (N.H. 1984);

of the rezoned site, whether the rezoning serves a public purpose, compatibility with the surrounding area, and consistency with the comprehensive plan.[153] More than a decade after *Fasano*, the Supreme Court of Florida discarded the legal fiction that all zoning is legislative in *Board of County Commissioners v. Snyder*.[154] In *Snyder*, the rezoning sought by the landowners was consistent with the County's comprehensive plan and had been recommended for approval by both the county staff and local planning and zoning board.[155] During the hearing before the commission, community members opposed the rezoning before the County Commission denied the request anyway, providing no justification for its decision.[156] The *Snyder* court broadly swept piecemeal zoning decisions into the categories of legislative or quasi-judicial based on whether they were prospectively or retroactively directed. This is a mistake because, as the *Snyder* court acknowledges, a quasi-judicial decision determines the applicable law in relation to past transactions, while legislative ones prescribe the rules with respect to future transactions.[157]

## III. REZONING IN HAWAI'I

As the most regulated state in the nation subject to comprehensive statewide land use controls, Hawai'i is fertile grounds for getting judicial review of rezoning right. In addition to the typical local zoning, Hawai'i is the only state to have implemented state-wide zoning.[158] In 1961, the entire state was divided into use districts under the Land Use Law[159] after the state legislature determined a lack of effective controls caused Hawai'i's limited and valuable land to be developed for short-sighted gain for a relative few,

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Cherney v. Matawan Borough Zoning Bd., 534 A.2d 41 (N.J. Super. Ct. App. Div. 1987); Young Men & Women's Hebrew Ass'n v. Borough Council, 240 A.2d 469 (Pa. 1968); Chioffi v. Winooski Zoning Bd., 556 A.2d 103 (Vt. 1989); Kentview Props., Inc. v. City of Kent, 795 P.2d 732 (Wash. App. 1990); Kaufman v. Plan. & Zoning Comm'n, 298 S.E.2d 148 (W. Va. 1982); Holding's Little Am. v. Bd. of Cnty. Comm'rs, 670 P.2d 699 (Wyo. 1983). The *Fasano* approach has been criticized as linear and reductionist, for following an all too optimistic view of the omnipotence of the plan.

[153] For extended review of the multifactor tests for judicial review of spot zoning, see Mandelker, *supra* note 103, at 762–82.

[154] 627 So.2d 469, 474–75 (Fla. 1993).

[155] *Id.* at 471.

[156] *Id.*

[157] *Id.* at 474 ("Generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy.").

[158] *See* CALLIES, *supra* note 6, at 21.

[159] HAW. REV. STAT. § 205-2 (2021).

which caused long-term damage to the income and potential growth of the state's economy.[160] Under the framework of land use management established by the Land Use Law, the Land Use Commission (LUC) has placed all land into one of four land use districts—Urban, Rural, Agricultural, and Conservation—according to present and foreseeable use and the character of the land.[161] The Agricultural and Conservation districts have further classifications, two classifications[162] and five subzones[163] respectively, that specify use and potential development.

Like classic local zoning, Hawai'i's Land Use Law explicitly permits landowners to apply for a "special permit" for uses beyond those permitted in the agricultural and rural districts.[164] A landowner seeking more intensive use of her land than what is allowed under its current designation may petition the LUC to reclassify the land into another district by district boundary amendment.[165]

This system of land district classifications is "distinct from but overlay[s] the county zoning schemes."[166] Thus, land use in Hawai'i is subject to two layers of government zoning: by district at the state level and by zone at the county level.[167] Under the consistency doctrine, the most restrictive use governs.[168] Another unique feature of Hawai'i land use is that plans have the

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[160] *History*, STATE OF HAW. LAND USE COMM'N, https://luc.Hawaii.gov/about/history-3/ (last visited Mar. 1, 2020). To administer the state-wide land use law, the legislature established the Land Use Commission (LUC) to "preserv[e] and protect[] Hawaii's lands and encourag[e] those uses to which lands are best suited." *Id.*

[161] *See* HAW. REV. STAT. § 205-2(a) (2021).

[162] *See* CALLIES, *supra* note 6, at 21; HAW. REV. STAT. § 205-49 (2021).

[163] *See* CALLIES, *supra* note 6, at 23; HAW. CODE R. §§ 13-5-10 to -15 (LexisNexis 2021).

[164] *See* HAW. REV. STAT. § 205-2(c) (2021) ("Such petition for variance may be processed under the special permit procedure."); HAW. CODE R. § 15-15-95 (LexisNexis 2021).

[165] *See* HAW. REV. STAT. § 205-3.1 (2021).

[166] CALLIES, *supra* note 6, at 21.

[167] HAW. REV. STAT. § 46-4 (2021) (enabling zoning at the county level and providing that "[t]he powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in accordance with a long-range, comprehensive general plan to ensure the greatest benefit for the State as a whole.").

[168] Save Sunset Beach Coal. v. City & County of Honolulu, 102 Hawai'i 465, 482, 78 P.3d 1, 18 (2003) (citing GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (1998)) ("We believe that the 'consistency doctrine' enunciated in *GATRI* is somewhat instructive in the instant case. Because the uses allowed in country zoning, are prohibited from conflicting with the uses allowed in a State agriculture district, only a more restricted use as between the two is authorized.").

force of law,[169] which makes the state comprehensive plan unique as it transforms what is typically policy in other jurisdictions into legal requirements.[170]

### *A. Defining Legislative Acts and Spot Zoning in Hawai'i:* Life of the Land

In *Life of the Land, Inc. v. City Council of Honolulu*, the Supreme Court of Hawai'i avoided squarely deciding a spot zoning challenge to the Honolulu City Council's grant of a variance allowing developers to build a high-rise in the midst of a building moratorium.[171] The City Council enacted a moratorium to control development in the Kaka'ako area, including the project site, by preventing a rash of development in the interim period before the City Council updated the plans and policies for future development.[172] The moratorium reserved "legislative deference" to grant a variance or modification that was consistent with the spirit of the county zoning and applicable plans already in place.[173]

Before reaching the spot zoning challenge, the court adopted the following definitions to determine whether an action is legislative or non-legislative: (1) "[a] legislative act predetermines what the law shall be for the regulation of future cases falling under its provisions[;]"[174] and (2) "[a] non-legislative act executes or administers a law already in existence."[175] The *Life of the Land* court then defined spot zoning as "an arbitrary zoning action by which a small area within a large area is singled out and specially zoned for a use classification different from and inconsistent with the classification of the surrounding area and not in accord with comprehensive plan."[176] Under these definitions, the challenged land use mechanism, an ordinance, was non-legislative because it was neither a zoning ordinance nor an amendment to an ordinance. Applying the definition of spot zoning, the court concluded, in part, that the City Council's actions did not "single out the project site for a

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[169] *GATRI*, 88 Hawai'i at 114, 962 P.2d at 373 ("[T]he county general plan does have the force and effect of law insofar as the statute requires that a development within the SMA must be consistent with the general plan.").

[170] CALLIES, *supra* note 6, at 33.

[171] *See* 61 Haw. 390, 606 P.2d 866 (1980).

[172] *Id.* at 394, 606 P.2d at 871–72.

[173] *Id.* at 395, 606 P.2d at 872.

[174] *Id.* at 423, 606 P.2d at 887 (citing Forstner v. City and County of San Francisco, 243 Cal. App. 2d 625 (1966)).

[175] *Id.* at 424, 606 P.2d at 887 (citing Kelley v. John, 75 N.W.2d 713 (Neb. 1956) and Keigley v. Bench, 89 P.2d 480 (1939)).

[176] *Id.* at 429, 606 P.2d at 890 (citing Smith v. Skagit County, 453 P.2d 832 (1969) and Tennison v. Shomette, 379 A.2d 187 (Utah 1977)).

use classification different from and inconsistent with the . . . classification of the surrounding area[.]"[177]

### *B. Legislative Deference for Zoning in Hawai'i:* Lum Yip Kee

In *Lum Yip Kee, Ltd. v. City & County of Honolulu*, the Hawai'i Supreme Court reviewed an ordinance challenged as spot zoning.[178] The facts reveal a troubling back and forth, during which the land use designation of the subject property switched year-to-year as the Honolulu City Council buckled under political pressures from the community and the landowner.[179] Thus, *Lum Yip Kee* illustrates how legislative deference results in a total absence of meaningful judicial review.

Since 1945, the subject property—the "Date-Laau tract"—was zoned for high-density apartment use.[180] In 1973, development plans were created to control the development and zoning according to the general plan.[181] During the City Council's first annual review, the neighborhood board requested the development plan be amended to change the tract from "High Density Apartment" to "Medium Density Apartment."[182] Neighbors feared redevelopment of the low-rise apartment buildings would affect existing views, utilities, traffic, and the general character of the neighborhood.[183] The Planning Department disagreed, recommending against the proposed amendment because the High Density Apartment designation conformed with the planned and existing high density development of the area, and

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[177] *Id.* at 429–30, 606 P.2d at 890.

[178] 70 Haw. 179, 767 P.2d 815 (1989).

[179] *Id.* at 181–85, 767 P.2d at 817–19. Though the case is distinguishable from typical spot zoning challenges because the challenged ordinances amended the development plan and were not *per se* rezonings, the court reviewed the challenges using legislative deference and applied spot zoning analysis, so the analysis is still quite informative. *See id.*

[180] *Id.* at 181, 767 P.2d at 817.

[181] *Id.* at 182, 767 P.2d at 817 (citing CITY & CNTY. OF HONOLULU, DEP'T OF THE CORP. COUNS., REVISED CHARTER OF THE CITY & COUNTY OF HONOLULU § 5-408 (1973)). The development plan looks a lot like a zoning ordinance, consisting of a text and map component that, among other things, limits the various land uses to residential, recreation and parks, agricultural, commercial, military, and preservation. The Charter requires zoning ordinances to conform to and implement the development plan of the area. CITY & CNTY. OF HONOLULU, DEP'T OF THE CORP. COUNS., REVISED CHARTER OF THE CITY & COUNTY OF HONOLULU § 5-412(3) (2017). Typically, the development plan must be amended before a landowner can request a rezoning because the rezoning must be consistent with the development plan. *See* CALLIES, *supra* note 6, at 38.

[182] *Lum Yip Kee, Ltd.*, 70 Haw. at 183, 767 P.2d at 818.

[183] *Id.* at 183–84, 767 P.2d at 818.

neighbors' concerns relating to views and infrastructure were unwarranted.[184] Nonetheless, City Council adopted the neighborhood board's proposal, redesignating the Date-Laau tract to Medium Density Apartment.[185] To conform with the development plan, City Council then downzoned the tract.[186]

The following year, the landowner requested an amendment to the development plan to restore the High Density Apartment designation for the tract according to the Planning Department's recommendation that it was the "most suitable use" for the lot.[187] Despite strong opposition, City Council adopted the amendment, placing the tract back in High Density Apartment.[188] In anticipation of its next annual review, the Planning Department reviewed a proposed amendment that would redesignate the tract back to Low Density Apartment, at City Council's request.[189] The Planning Commission recommended "no action" to City Council, which has the effect of a denial.[190] Nonetheless, after a public hearing on the proposed amendment, the City Council approved redesignation of the tract from High Density Apartment to Low Density Apartment in 1985.[191]

In sum, City Council changed the designation of the subject tract from High Density Apartment, to Medium, back to High, and then to Low in the span of three years. The landowners, as the most recent losers of the battle for control over the whims of City Council, challenged the decision as spot zoning because it singled out the subject parcel "for a use different from and inconsistent with the surrounding area and not in accordance with the comprehensive plan."[192]

After reviewing the above facts, the court discussed the merits of the landowner's spot zoning challenge. The court recognized that spot zoning is outside of the police power and recited its definition of spot zoning from *Life of the Land*.[193] However, the court established that City Council's decision to redesignate the tract to Low Density Apartment was a legislative act and therefore entitled to a presumption of validity.[194] In reaching this conclusion, the court considered "the general rule that the courts will not and cannot inquire into motives of members of a municipal governing body or other

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[184] *Id.* at 184, 767 P.2d at 818.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.* at 184–85, 767 P.2d at 818–19.
[190] *Id.* at 185, 767 P.2d at 819.
[191] *Id.*
[192] *Id.* at 186, 767 P.2d at 820.
[193] *Id.* at 190, 767 P.2d at 822.
[194] *Id.* at 187, 191, 767 P.2d at 820, 822–23.

zoning authority where the validity of zoning plans or laws is under consideration."[195] As a legislative act, "the challenger of the ordinance bears the burden of showing that it is arbitrary, unreasonable or invalid."[196] Apparently finding the landowner had failed to show the redesignated use was inconsistent with the surrounding area, the court affirmed the lower court's ruling that the ordinance did not constitute spot zoning.[197] The court's result under legislative deference in analyzing the spot zoning challenged in *Lum Yip Kee* illuminates the effective immunity rezoning decisions receive given a presumption of validity.

### *C. A Cursory Holding:* Save Sunset Beach

In its landmark decision of *Save Sunset Beach Coalition v. City & County of Honolulu*, the Hawai'i Supreme Court considered whether rezoning by county ordinance is a quasi-judicial or legislative action.[198] The contested residential development was proposed on bluffs overlooking Sunset Beach on the North Shore of O'ahu.[199] The land in question totaled 1,143.6 acres and consisted of several parcels, which was generally composed of two plateaus divided by cliffs and ravines.[200] The land was zoned agricultural but unfit for agricultural use.[201] Steep terrain, poor access, lack of appropriate irrigation, and the isolation of the few pockets of feasible agricultural land caused the landowner to abandon several previous attempts to use the property for commercial farming.[202] The landowner proposed a residential development that integrated large country lots, single-family homes, elderly rental units, and a community facility that maintained a variety of trails, parks, and open space.[203]

After the LUC approved a district boundary amendment that reclassified a portion of the property from agricultural to urban land use, the landowner applied for a zoning reclassification of several hundred acres from general

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[195] *Id.* at 187, 767 P.2d at 820.
[196] *Id.*
[197] *Id.* at 190–91, 767 P.2d at 822–23. Notably, the court did not dispose of the spot zoning challenge here on the grounds that a development plan amendment is not zoning, as it did in *Life of the Land*. *See id.* This is curious because the moratorium passed by ordinance challenged in *Life of the Land* shares roughly the same characteristics of typical zoning as the development plan amendment, here, does.
[198] *See* 102 Hawai'i 465, 472, 78 P.3d 1, 8 (2003).
[199] *Id.* at 469, 78 P.3d at 5.
[200] *Id.*
[201] *Id.*
[202] *Id.* at 469, 78 P.3d at 5.
[203] *Id.*

agricultural to country designation.[204] Following recommendations from the State Department of Agriculture, the City Planning Department, and the City Department of Land Utilization, and after hearing hours of testimony, including that of the plaintiffs, the City Council granted the rezoning sought by the landowner.[205]

Residents and two activist organizations brought an action against the City and County of Honolulu and the developers.[206] The court held, in part, that the rezoning of the land was a legislative act, and accordingly applied the legislative deference prescribed by *Lum Yip Kee*, requiring that "the opponents of rezoning must demonstrate that the rezoning was 'arbitrary, unreasonable or invalid[,]' . . . in order to have the rezoning vacated or reversed."[207] On appeal, the plaintiffs raised several arguments, including that the rezoning was quasi-judicial and therefore directly reviewable on a *de novo* basis.[208] To support that argument, the plaintiffs invoked the *Fasano* standard, which the court swiftly rejected because "this standard appears applicable only to 'spot zoning.'"[209] Using its earlier definition of spot zoning from *Life of the Land*, the court found that spot zoning concerns were not implicated "inasmuch as the property encompasses a large area and substantial public comment and deliberation took place."[210] Because "the property encompasses a large area and substantial public comment and deliberation took place[,]" the court concluded that "there is no indication of arbitrariness or concern over whether rights have been properly safeguarded," glossing over greater constitutional concerns.[211] However, the court went on to expressly hold, for the first time, that all rezonings are legislative acts.[212]

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[204] *Id.* at 469–70, P.3d at 5–6.

[205] *Id.* at 470–71. The State Department of Agriculture wrote a letter to the City stating the project was "progressive" and "more agriculturally defined then [sic] most approved agricultural subdivisions." *Id.* at 470, 78 P.3d at 6.

[206] *Id.* at 468–71, 78 P.3d at 4–7.

[207] *Id.* at 468, 78 P.3d at 4 (citing Lum Yip Kee, Ltd. v. City & County of Honolulu, 70 Haw. 179, 187, 767 P.2d 815, 820 (1989)).

[208] *See id.* at 472, 78 P.3d at 8.

[209] *See id.* at 472–73, 78 P.3d at 8–9. The plaintiffs cited the *Fasano* standard as it was quoted in *Allison v. Washington Co.*, 548 P.2d 188, 190–91 (Or. Ct. App. 1976) (quoting Fasano v. Bd. of Cnty. Comm'rs, 507 P.2d 23 (Or. 1973)).

[210] *See Save Sunset Beach Coal.*, 102 Hawai'i at 473, 78 P.3d at 9 (quoting Life of the Land v. City Council of Honolulu, 61 Haw. 390, 429, 606 P.2d 866, 890 (1980)).

[211] *See id.*

[212] *See id.* at 474, 78 P.3d at 10 ("Accordingly, we conclude that a zoning ordinance is a legislative act and is subject to the deference given legislative acts."). The court noted that it had previously stated, as dictum, "that rezoning is a 'legislative action of the city council.'" *Id.* at 473, 78 P.3d at 9 (citing Kailua Cmty Council v. City & County of Honolulu, 60 Haw. 428, 432, 591 P.2d 602, 605 (1979)).

After the LUC approved a district boundary amendment that reclassified a portion of the property from agricultural to urban land use, the landowner applied for a zoning reclassification of several hundred acres from general agricultural to country designation.[213] Following recommendations from the State Department of Agriculture, the City Planning Department, and the City Department of Land Utilization, and after hearing hours of testimony, including that of the plaintiffs, the City Council granted the rezoning sought by the landowner.[214]

Residents and two activist organizations brought an action against the City and County of Honolulu and the developers.[215] The court held, in part, that the rezoning of the land was a legislative act, and accordingly applied the legislative deference prescribed by *Lum Yip Kee*, requiring that "the opponents of rezoning must demonstrate that the rezoning was 'arbitrary, unreasonable or invalid[,]' . . . in order to have the rezoning vacated or reversed."[216] On appeal, the plaintiffs raised several arguments, including that the rezoning was quasi-judicial and therefore directly reviewable on a *de novo* basis.[217] To support that argument, the plaintiffs invoked the *Fasano* standard, which the court swiftly rejected because "this standard appears applicable only to 'spot zoning.'"[218] Using its earlier definition of spot zoning from *Life of the Land*, the court found that spot zoning concerns were not implicated "inasmuch as the property encompasses a large area and substantial public comment and deliberation took place."[219] Because "the property encompasses a large area and substantial public comment and deliberation took place[,]" the court concluded that "there is no indication of arbitrariness or concern over whether rights have been properly safeguarded," glossing over greater constitutional concerns.[220] However, the court went on to expressly hold, for the first time, that all rezonings are legislative acts.[221]

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[215] *Id.* at 468–71, 78 P.3d at 4–7.

[216] *Id.* at 468, 78 P.3d at 4 (citing Lum Yip Kee, Ltd. v. City & County of Honolulu, 70 Haw. 179, 187, 767 P.2d 815, 820 (1989)).

[217] *See id.* at 472, 78 P.3d at 8.

[218] *See id.* at 472–73, 78 P.3d at 8–9. The plaintiffs cited the *Fasano* standard as it was quoted in *Allison v. Washington Co.*, 548 P.2d 188, 190–91 (Or. Ct. App. 1976) (quoting Fasano v. Bd. of Cnty. Comm'rs, 507 P.2d 23 (Or. 1973)).

[219] *See Save Sunset Beach Coal.*, 102 Hawai'i at 473, 78 P.3d at 9 (quoting Life of the Land v. City Council of Honolulu, 61 Haw. 390, 429, 606 P.2d 866, 890 (1980)).

[220] *See id.*

[221] *See id.* at 474, 78 P.3d at 10 ("Accordingly, we conclude that a zoning ordinance

### *D. Judicial Review of Spot Zoning under The Current Framework*

While the Hawai'i Supreme Court has yet to review a tenable spot zoning claim, *Life of the Land*, *Lum Yip Kee*, and *Save Sunset Beach* together suggest that any review would be minimal. Spot zoning is an arbitrary zoning action.[222] All zoning, including rezoning, is a legislative act.[223] Legislative acts are presumed valid.[224] Therefore, as a form of rezoning, the legislative act of spot zoning is presumed valid. The *Save Sunset Beach* court did at one point suggest that spot zoning may be exempt from the usual presumption of validity because of the unique concerns it raises.[225] However, the explicit holding was that *all* rezoning is legislative and therefore granted a presumption of validity, and the spot zoning exception was not clearly excluded from this blanket rule.[226] As a result, legislative deference is blindly applied to all zoning challenges, which allows politically-motivated and biased decisions by local government to go without review.

This is troubling because spot zoning should inarguably be granted heightened review due to the constitutional hazards it implicates. Under the Hawai'i rubric, spot zoning is effectively immune from judicial review. Legislative deference presumes the challenged action is valid and entitled to very limited judicial review. The challenger has the duty of proving the action is arbitrary, unreasonable, or invalid. In the context of a spot zoning challenge, legislative deference is obviously very deferential to the decision-making authority. To sustain its zoning decision, the government must merely present substantial evidence to place the validity of its decision in reasonable dispute or controversy. The standard simultaneously burdens the challenger to prove the zoning decision is not fairly debatable, and conclusively show that the zoning decision is invalid. As the *Lum Yip Kee* facts demonstrate, the current analytical framework to assess rezoning decisions, including spot zoning, immunizes these decisions from judicial scrutiny entirely. This is dangerous in a place like Hawai'i that is still struggling to free itself from a land ownership oligarchy[227] and where a vocal

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is a legislative act and is subject to the deference given legislative acts."). The court noted that it had previously stated, as dictum, "that rezoning is a 'legislative action of the city council.'" *Id.* at 473, 78 P.3d at 9 (citing Kailua Cmty Council v. City & County of Honolulu, 60 Haw. 428, 432, 591 P.2d 602, 605 (1979)).

[222] Life of the Land, Inc. v. City Council of Honolulu, 61 Haw. 390, 429, 606 P.2d 866, 890 (1980).

[223] *Save Sunset Beach Coal.*, 102 Hawai'i at 473, 78 P.3d at 9.

[224] Lum Yip Kee, Ltd. v. City & County of Honolulu, 70 Haw. 179, 189, 767 P.2d 815, 822 (1989).

[225] *Save Sunset Beach Coal.*, 102 Hawai'i at 473, 78 P.3d at 9.

[226] *See id.* at 474, 78 P.3d at 10.

[227] *See* David L. Callies, *It All Began in Hawai'i*, 45 J. MARSHALL L. REV. 317, 318

minority has already gravely influenced land use decisions that ascribe to legal procedures and planning.[228] Further, given a review of the actual language and analysis applied by the Supreme Court in its decisions of *Euclid* and *Nectow*,[229] this total absence of judicial review under legislative deference is wholly unconstitutional.

## IV. THE PROPOSAL: MEANINGFUL REVIEW OF SPOT ZONING

### *A. Carving Out an Explicit Exception from the Presumption of Validity for Spot Zoning: Clarifying* Save Sunset Beach

In *Save Sunset Beach*, the court made the necessary and important observation that spot zoning is exempt from the usual presumption of validity due to the policy concerns it often implicates, stating "[t]he usual presumption of validity may not be accorded spot zoning because of the absence of widespread community consideration of the matter."[230] The court did not scrutinize the ordinance as spot zoning due, in part, to the parcel size and shortly moved on to expressly hold, for the first time, that rezoning is a legislative function.[231] In doing so, the court did not reiterate an exception for spot zoning.[232] Because the court entertained several claims on appeal, there were about five key holdings in the case, which were summarized at the opening of its opinion.[233] No exception for spot zoning from the presumption of validity granted to all rezoning was noted in the introduction. Thus, a fair reading may view the court's exception for spot zoning from the presumption of validity as mere dictum, rather than a pronounced rule of law. Hawai'i law should clarify the rule that all rezoning is legislative and therefore granted a presumption of validity and carve out an explicitly asserted exception for spot zoning, which should be exempt from the presumption.

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(2012). *See also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (upholding the legislative intent to "attack certain perceived evils of concentrated property ownership in Hawai'i [as a] legitimate public purpose" under the Takings Clause).

[228] *See generally In re* Conservation Dist. Use Application HA-3568, 143 Hawai'i 379, 431 P.3d 752 (2018) (holding, *inter alia*, the Board of Land and Natural Resources fulfilled its constitutional mandates to protect native Hawaiian traditional and customary rights).

[229] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Nectow v. City of Cambridge, 277 U.S. 183, 187–88 (1928) (citing *Vill. of Euclid*, 272 U.S. at 395).

[230] *See Save Sunset Beach Coal.*, 102 Hawai'i at 473, 78 P.3d at 9.

[231] *See id.*

[232] *See id.*

[233] *See id.* at 468, 78 P.3d at 4.

### *B. A Workable Definition for Spot Zoning: Tweaking* Life of the Land

Hawai'i courts should instead apply meaningful review of spot zoning claims, which would require distinguishing piecemeal rezonings from comprehensive rezonings in order to apply a stricter standard of review to the former. There are fundamental differences between piecemeal rezonings and comprehensive rezoning, which the *Life of the Land* definition of spot zoning largely captures.[234] However, in addition to the size of the rezoned area, the test should also consider whether all affected parcels have a common owner, indicating a special benefit to an individual rather than a more widespread benefit. In *Save Sunset Beach* for example, the contested rezoning ordinance rezoned 765 acres from agricultural to country.[235] While the parcel is unusually large, the rezoning benefits a single landowner-developer. The *Save Sunset Beach* court stated that "[t]he usual presumption of validity may not be accorded spot zoning because of the absence of widespread community consideration of the matter[,]" citing a land use planning and control treatise:

> [A] determination of the use of a specific and relatively small parcel will affect only the parcel owner and the immediate neighbors. When that is the case, limited community interest will mean little or no public debate. *This limited interest, in turn, elevates concern over whether the rights of the individuals affected are adequately safeguarded, and deference is inappropriate.*[236]

The court correctly emphasized the controlling feature of spot zoning, that the limited interest benefited by the decision is what triggers the need for heightened scrutiny to determine whether the decision was constitutional and makes deference inappropriate. Despite recognizing that the limited interest is concerning, the *Save Sunset Beach* court seems to dismiss that the landowner's interest is limited solely because of the size of the parcel.[237] This is the problem with the current *Life of the Land* definition. To better distinguish piecemeal rezonings from comprehensive rezonings, the definition should list limited interest or individual benefit as an alternative factor to size of the parcel for finding spot zoning. The improved definition for spot zoning I recommend—adapted from *Life of the Land* and with changes emphasized—is as follows:

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[234] *See* Life of the Land, Inc. v. City Council of Honolulu, 61 Haw. 390, 606 P.2d 866 (1980).

[235] *See Save Sunset Beach Coal.*, 102 Hawai'i at 471, 78 P.3d at 7.

[236] *Id.* at 473, 78 P.3d at 9 (citing J.C. JUERGENSMEYER & T.E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 191 (1998)) (emphasis in original).

[237] *See id.* at 472–73, 78 P.3d at 8–9.

> Spot zoning is an arbitrary zoning action by which a small area within a large area is singled out, *or the action benefits a limited interest for one or a few landowners or neighbors,* [and the action constitutes special zoning] for a use classification different from and inconsistent with the classification of the surrounding area and not in accord with comprehensive plan.[238]

This definition would allow courts to directly consider whether the discretionary decision was made to benefit a limited interest, and therefore directly address the (potential) root of the spot zoning problem.

### *C. Shifting the Burden and Applying Meaningful Judicial Scrutiny*

Since spot zoning is not granted a presumption of validity, the level of judicial scrutiny a spot zoning claim should receive is an open question of law in Hawai‘i. However, the *Save Sunset Beach* court acknowledged that a claim of arbitrary spot zoning ought to be reviewed under a meaningful standard, rather than the unthinking deference of the rational basis test under legislative deference.[239] Given the intermediate scrutiny applied by the Supreme Court in *Nectow*, applying the standard of constitutionality from *Euclid* that requires a substantial relation between the decision and the purposes of the police power, I propose Hawai‘i should use a "meaningful review" standard loosely modeled by the Second Circuit.[240] My proposal, however, goes further by also shifting the burden from the challenger to the government once the challenger has established spot zoning is at issue.

If the burden of proving the rationality of the asserted benefit were shifted from the landowner to the government, the burden would be quite easy to meet in garden variety zoning disputes. Where there is open public conflict among legitimate community interests, the government's decision is likely to promote some valid and important goal. Under a more meaningful judicial examination, the government must merely show the asserted public purpose would be promoted by its decision.[241] Land use regulation should, after all, address legitimate and important public concerns about urban sprawl, protecting the environment, and preserving open space, agricultural land, and other natural resources while providing sustainable, mixed-use

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[238] Italics indicate added language and brackets indicate modified language. *See Life of the Land, Inc.*, 61 Haw. at 429, 606 P.2d at 890.

[239] *See Save Sunset Beach Coal.*, 102 Hawai‘i at 473, 78 P.3d at 9.

[240] *See* Nectow v. City of Cambridge, 277 U.S. 183, 188–89 (1928); Vill. of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926); Brady v. Town of Colchester, 863 F.2d 205, 211 (2d Cir. 1988).

[241] *See* Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 115–16 (1995).

neighborhoods.[242] Thus, it should not be particularly burdensome to require the zoning authority to provide a rational basis for how its decision is a valid land use regulation that benefits the public.

It is worth noting that Hawai'i did technically decline to follow the *Fasano* approach in *Save Sunset Beach*, but only because the court did not address spot zoning.[243] This rejection should not be construed too broadly. The court did not refuse to shift the burden to the government. Instead, the plaintiff's appeal to *Fasano* was declined because "spot zoning analysis [was] unnecessary" given the "large area and substantial public comment and deliberation" that preceded the decision.[244]

Under meaningful review, the court should uphold the challenged decision so long as the finder of fact finds that the proffered rationale for the decision furthers an important government interest and does so by means that are substantially related to that interest.[245] This would require the finder of fact to consider the case without being blinded by an insurmountable presumption that the decision is valid. This standard of review does not, however, require a court to disobey the general rule that courts cannot inquire into the minds or motives of individual members of the decision-making governmental body.[246] Further, treatment of rezonings as decisions that do not benefit from a presumption of validity as legislative acts is consistent with the court's jurisprudence relating to district boundary amendments, changes to the statewide zoning plan.[247] Thus, the jurisprudential interest in recognizing statewide zoning amendments are not granted legislative immunity would logically apply to zoning changes made at the county level.

## CONCLUSION

In sum, the proper standard for judicial review of zoning challenges requires actual scrutiny to determine that the decisions bear a substantial

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[242] *See* CALLIES, *supra* note 6, at 49; Siemon & Kendig, *supra* note 3, at 708.

[243] *Save Sunset Beach Coal.*, 102 Hawai'i at 473, 78 P.3d at 9.

[244] *Id.*

[245] *Nectow*, 277 U.S. at 188 ("Here, the express finding of the master . . . is that the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question.").

[246] Lum Yip Kee, Ltd. v. City & County of Honolulu, 70 Haw. 179, 187, 767 P.2d 815, 820 (1989).

[247] *See* Town v. Land Use Comm'n, 55 Haw. 538, 547–48, 524 P.2d 84, 90–91 (1974) ("It logically follows that the process for boundary amendment is not rule making or quasi-legislative, but it is adjudicative of legal rights of property interests in that it calls for the interpretation of facts applied to rules that have already been promulgated by the legislature.").

relation to the public health, safety, morals, or general welfare.[248] The legal fiction that all zoning, including piecemeal rezoning decisions challenged as illegal spot zoning, should be presumed valid as a legislative act results in an unconstitutional absence of judicial review at all. In a land oligarchy like Hawai‘i, a definition that flags rezonings as potential spot zonings based on parcel-size alone may not capture an actual spot zoning decision.[249] Further, the cursory holding that all rezoning, and not just comprehensive rezoning, is legislative and therefore presumed valid similarly oversimplifies the nature of rezoning decisions and, as a result, spot zonings evade judicial scrutiny of any significant sort.

The meaningful review of piecemeal rezoning under a tweaked definition of spot zoning that I put forth in this article has import beyond protection of an individual property owner's rights. Meaningful judicial scrutiny of land use decisions, particularly discretionary ones, will reinstate public faith in the efficacy and reason of planning. The effectiveness of planning relies on robust judicial review of its mechanisms. With a lack of judicially enforceable property rights, there is little incentive for local governments to effectively regulate land use. Thoughtful planning is not required to win in court; conceivable rationales suffice.

In addition, a standard of actual judicial review of regulatory challenges would allow property owners to meaningfully avail themselves to the tests created by the Court to bring a regulatory takings claim for zoning regulations that go too far.

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[248] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); *Nectow*, 277 U.S. at 188 (citing *Vill. of Euclid*, 272 U.S. at 395).

[249] *See generally* Save Sunset Beach Coal. v. City & County of Honolulu, 102 Hawai‘i 465, 78 P.3d 1 (2003).

# Legislation Codifying Energy Justice: Access to Energy for Drinking Water, Sanitation, and Agriculture

Lakshman Guruswamy* & Jenna Trost**

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## I. INTRODUCTION

While this article deals with access to energy for drinking water, sanitation, and agriculture, there are three other major areas in which lack of access to clean, affordable energy for cooking, lighting, and motive or mechanical power, has resulted in energy poverty. These problems will be briefly depicted.

### *A. Cooking*

According to the recent intergovernmental Energy Progress Report, close to 3 billion people have no access to clean cooking solutions, mainly in Sub-Saharan Africa.[1] These peoples rely on biomass-generated fire as their principal source of energy.[2] Cooking over an open fire, burning biomass such as dung, rotted wood, crop residues, and raw coal for cooking, is exceedingly inefficient, as only about eighteen percent of the energy from the fire transfers to the pot.[3] More significantly, the smoke generated causes indoor air pollution because it contains a variety of dangerous pollutants, such as carbon monoxide, nitrous oxides, sulfur oxides, formaldehyde, carcinogens

[1] WORLD HEALTH ORG., *The Energy Progress Report* (2021). https://www.who.int/news/item/07-06-2021-global-launch-tracking-sdg7-the-energy-progress-report, (last visited July 1, 2021).

[2] *Id.*

[3] *Id.*

(such as benzene), and small particulate matter.[4] According to the World Health Organization (WHO), exposure to high concentrations of indoor air pollution presents one of the most important threats to public health worldwide, resulting in diseases such as pneumonia, chronic pulmonary disease, lung cancer, asthma, and acute respiratory infections.[5]

Using biomass for cooking results in 3.5 million premature deaths per year (mortality) and the illness of many millions more (morbidity).[6]

Women are particularly affected by lack of access to energy for clean cooking because they are traditionally responsible for cooking and childcare in the home, and inhale the polluted air that is trapped indoors.[7] Consequently, women are about twice as likely to be afflicted with chronic pulmonary disease than men in homes using solid fuels.[8] The sad result is that women and children have the highest exposure to indoor air pollution and suffer more than anyone from these negative health effects.[9]

Apart from health effects, lack of access to cooking fuel forces women and children to spend many hours gathering fuel or spend significant household income purchasing fuel.[10] A reduction in time spent collecting fuel and cooking enables women to spend more time with their children, tend to other responsibilities, enhance existing economic opportunities, pursue income generating, educational, and leisure activities, as well as rest.

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[4] HUGH WARWICK & ALISON DOIG, SMOKE—THE KILLER IN THE KITCHEN 11 (2004).

[5] WORLD HEALTH ORG. [WHO], FUEL FOR LIFE: HOUSEHOLD ENERGY AND HEALTH 8 (2006).

[6] IEA: Biomass Fuels Linked to 3.5 Million Deaths Annually, BIOENERGY INSIGHT (July 18, 2016), https://www.bioenergy-news.com/display_news/10771/iea_biomass_fuels_linked_to_35_million_deaths_annually/.

[7] *Clean Cookstoves Can Save Lives and Empower Women*, GLOB. ALL. FOR CLEAN COOKSTOVES, http://cleancookingalliance.org/binary-data/RESOURCE/file/000/000/278-1.pdf.

[8] GWENAELLE LEGROS ET AL., THE ENERGY ACCESS SITUATION IN DEVELOPING COUNTRIES, WORLD HEALTH ORGANIZATION [WHO] & UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP] 23 (2009) https://www.undp.org/content/dam/undp/library/Environment%20and%20Energy/Sustainable%20Energy/energy-access-situation-in-developing-countries.pdf.

[9] *Clean Cookstoves Can Save Lives and Empower Women*, *supra* note 7.

[10] WORLD HEALTH ORG. [WHO], *supra* note 5 at 17–18.

### *B. Lighting*

Worldwide, 789 million people still do not have access to electricity for lighting.[11] Lighting is essential to human progress, and without it, humans would be comparatively inactive for about half of their lifetimes.[12]

Many peoples who have no access to artificial lighting live in extremely hot climates and depend on agriculture for food. The heat of the day hinders working during sunlight hours and severely reduces agricultural productivity, while the absence of artificial light inhibits working at night. Moreover, the lack of lighting creates physical insecurity when venturing out in the darkness and almost entirely prevents commercial activity after dark.[13]

The majority of those living without modern energy services rely on kerosene for lighting.[14] The hazards of kerosene, such as fires, explosions, and poisonings resulting from children ingesting it, are extensively documented.[15] An estimated 180 000 deaths every year are caused by burns (not only from kerosene) which occur mainly in the home or workplace.[16] Women and children are the most susceptible to kerosene burns.[17] A localized study done in Indore, India, found that women aged twenty-one to forty were disproportionately more likely to suffer burns than any other demographic, and that the main cause of this were kerosene-burning lamps.[18] There is evidence of kerosene linked to ailments such as the impairment of lung function, asthma, cancer, and tuberculosis.[19] The use of kerosene and candles is also costly. Households often spend ten to twenty-five percent of

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[11] *About*, LIGHTING GLOBAL, https://www.lightingglobal.org/about/ (last visited July 1, 2021).

[12] M. LUCKIESH, ARTIFICIAL LIGHT: ITS INFLUENCE UPON CIVILIZATION 8 (1920).

[13] *See generally* Jennifer Doleac & Nicholas J. Sanders, *Under the Cover of Darkness: How Ambient Light Influences Criminal Activity*, 97 REV. ECON. & STAT. 1093 (2015).

[14] Nicholas L. Lam, et al., *Kerosene: A Review of Household Uses and Their Hazards in Low and Middle Income Countries*, 15 J. OF TOXICOLOGY & ENV'T HEALTH 396, 396 (2012).

[15] *Id.* at 423.

[16] *Burns*, WORLD HEALTH ORG. (Mar. 6, 2018), https://www.who.int/news-room/fact-sheets/detail/burns.

[17] *Id.*; *see also* Ashkan Golshan et. al., A SYSTEMATIC REVIEW OF THE EPIDEMIOLOGY OF UNINTENTIONAL BURN INJURIES IN SOUTH ASIA, 35 J. PUB. HEALTH 384, 391 (2013) (highlighting how female mortality outnumbered male mortality in the literature on burns in South Asia); Katrine Lófberg & Christopher C. Stewart, *Pediatric Burn Injuries in the Developing World*, GLOB. HEALTH EDUC. CONSORTIUM 1, 9 (2012) (noting that children age five and under and the elderly suffer the highest mortality from burns globally).

[18] Shobha Chamania et al., *Pilot Project in Rural Western Madhya Pradesh, India, to Assess the Feasibility of Using LED and Solar-Powered Lanterns to Remove Kerosene Lamps and Related Hazards from Homes*, 41 BURNS J. 595, 595-96 (2014).

[19] Lam *et al*, *supra* note 16 at 399–401, 412–23.

their income on kerosene.[20] Over $36 billion is spent on kerosene annually, $10 billion of which is spent in sub-Saharan Africa.[21] In addition to the negative effects on health,[22] lack of lighting or poor lighting also inhibits children's education by not being able to read or study after the sun sets.[23]

### *C. Motive or Mechanical Power*

Despite the importance of mechanical or motive power in meeting every day energy needs at almost every level of human activity, it is generally under-appreciated and poorly considered. For example, while targets have been established by the least developed countries (LDCs) for access to modern cooking fuels and general access to electricity, not a single LDC has set a specific national target on access to motive power.[24] Access to mechanical energy or motive power is essential to satisfy three basic and sometimes overlapping human energy needs: (1) energy for carrying out household duties, (2) agriculture and subsistence, and (3) livelihood and income.

First, motive power is needed to help women and children carry out household labor. Household activities span several tasks that include carrying water and firewood, subsistence agriculture, food preparation, cleaning the house, and washing clothes. Equipment and appliances applying mechanical

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[20] Lighting the Way, THE ECONOMIST, Sept. 1, 2012, at 14–16.

[21] *Id.*

[22] For negative effects on health, see Piyush Gupta et al., *Kerosene Oil Poisoning – A Childhood Menace*, 29 INDIAN PEDIATRICS 979, 979-83 (1992), http://www.indianpediatrics.net/aug1992/979.pdf; Kristine Pearson, *Kerosene: A Burning Issue in Women's Rights, Human Rights*, LIFELINE ENERGY BLOG (Oct. 2, 2011), http://lifelineenergy.org/kerosene-a-burning-issue-in-human-rights/; William D. McNally, *Kerosene Poisoning in Children: A Study of 204 Cases*, 48 J. OF PEDIATRICS 296 (1956).

[23] For lighting's effect on education, see Simon Batchelor et al., *The Gender-Energy-Poverty Nexus: Finding the Energy to Address Gender Concerns in Development*, UK DEP'T FOR INT'L DEV. (2002), https://esmap.org/sites/default/files/resources-document/The%20Gender%20Energy%20Poverty%20Nexus.pdf. Children may not have time to complete their studies during daylight hours, and are therefore unable to take full advantage of their education since it is impossible to read at night without lighting sources. *Id.* at 7. It is postulated that there are approximately 1.3 billion people living in poverty and 70% of this population are women; many of these women live in female-headed houses in rural areas. *Id.* at 5, 10. The energy inequality hinders their decision making within the household and community and their abilities to perform rudimentary tasks with any degree of efficiency.). *Id.*

[24] SHONALI PACHAURI ET AL., ACCESS TO MODERN ENERGY: ASSESSMENT AND OUTLOOK FOR DEVELOPING AND EMERGING REGIONS v, 10 (2012), http://www.iiasa.ac.at/web/home/research/researchPrograms/Energy/IIASA-GEFUNIDO_Access-to-Modern-Energy_2013-05-27.pdf.

or motive power could relieve women and children of some of these onerous physical burdens of household labor. Water needs for drinking, irrigation and livestock watering may take up to 4 hours a day, and water collection often makes up a large part of a woman's day. Using mechanical power to find the water she needs allows her to focus more on other activities, such as spending time with her children and taking care of her own health. Examples of mechanical or motive power include diesel pumps, treadle pumps,[25] rope pumps,[26] ram pumps,[27] Persian wheels,[28] hand pumps,[29] river turbines,[30] wind pumps. While some of the equipment referred to may be too costly for a poor peasant, others are not.

Second, there is a need for motive power in agriculture and subsistence. According to the International Labour Organization, the UN agency for the world of work,[31] agriculture represents over half of all employment in Africa, and informal employment represents seventy-two percent of non-agricultural

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[25] A treadle pump is a human-powered suction pump that sits on top of a well and is used for irrigation. It is designed to lift water from a depth of seven meters or less. The pumping is activated by stepping up and down on a treadle, which is a system of levers that drives pistons, creating cylinder suction that draws groundwater to the surface. ALASTAIR ORR ET AL., THE TREADLE PUMP: MANUAL IRRIGATION FOR SMALL FARMERS IN BANGLADESH 9 (1991).

[26] A rope pump consists of a pipe that reaches down to the water, a rope or chain through the tube, washers attached to the rope that fit snugly inside the tube, and a wheel on top to draw the rope with washers through the pipe. Mark Tiele Westra, *The Rope Pump*, AKVO (Feb. 5, 2010), https://akvo.org/blog/the-rope-pump/.

[27] "The basic idea behind a ram pump is simple. The pump uses the momentum of a relatively large amount of moving water to pump a relatively small amount of water uphill." *How Does a Hydraulic Pump Work?*, HOWSTUFFWORKS, https://science.howstuffworks.com/transport/engines-equipment/question318.htm (last visited Apr. 20, 2022).

[28] "The Persian wheel, a mechanical water-lifting device, usually operated by drought animals like bullocks, camels, or buffaloes. This wheel is used to lift water from open wells for easy access to water sources." *The Persian Wheel*, THE NATIVE PICTURE, https://nativepicture.com/the-persian-wheel/ (last visited Apr. 20, 2022).

[29] "Hand pumps are manually operated pumps; they use human power and mechanical advantage to move fluids from one place to another." *Hand Pump*, WIKIPEDIA, https://en.wikipedia.org/wiki/Hand_pump (last visited Apr. 20, 2022).

[30] Once submerged under water, the river turbine generates electricity simply from the natural flow of a river. Its installation requires no cranes or heavy machinery: it just has to be lifted and positioned in the river and anchored to the river bed and sides. The river current enables the spinning movement of the turbine which activates a 100% waterproof, electrical generator. The produced energy is then converted into electricity thanks to an embedded smart converter. The system can provide up to 12 kWh daily - the energy a small home needs. *Meet the River Turbine: A Reliable Source Of Continuous Renewable Energy*, CIVIL ENGINEER (Dec. 16, 2016), https://www.thecivilengineer.org/news-center/latest-news/item/1137-meet-the-river-turbine-a-reliable-source-of-continuous-renewable-energy

[31] United Nations Dep't of Econ. & Social Affs., *Gender and Water*, UNITED NATIONS (Oct. 23, 2014), http://un.org/waterforlifedecade/gender.shtml.

employment in sub-Saharan Africa.[32] Energy is required for irrigation,[33] tillage and ploughing,[34] weed control, and harvesting.[35] Once harvested agricultural products need milling and pressing,[36] winnowing,[37] cutting, shredding[38] and drying.[39] In sub-Saharan Africa, these processes are still powered primarily by human labor. The mechanical power alternatives for planting and growing include: power tillers, two wheel tractors, harvesters and bed planters.[40] The mechanical alternatives in agro processing include powered mills, saw mills, powered shakers, spinners and fans.[41]

The use of mechanical or motive power improves the productivity and dependability of crops.[42] Irrigated land in general, is more than twice as productive as non-irrigated land. A simple irrigation system can reduce water consumption of a crop by fifty percent and increase the yield of a crop by as

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[32] INT'L LABOR OFFICE, WOMEN AND MEN IN THE INFORMAL ECONOMY: A STATISTICAL PICTURE 27 (3d ed. 2018), https://www.ilo.org/global/publications/books/WCMS_626831/lang--en/index.htm.

[33] Irrigation is the artificial application of water to grow crops. *Irrigation*, DICTIONARY, https://www.dictionary.com/browse/irrigation (last visited Apr 20, 2022).

[34] "[T]illage is the cultivation of arable land by plowing, sowing and raising crops while ploughing is the breaking of the ground into furrows (with a plough) for planting." *Tillage vs Ploughing – What's the Difference?*, WIKI DIFF, https://wikidiff.com/tillage/ploughing (last visited Apr. 20, 2022).

[35] "Harvesting is the process of gathering a ripe crop from the fields." *Harvesting*, WIKIPEDIA, https://en.wikipedia.org/wiki/Harvest (last visited Apr. 20, 2022).

[36] "The purpose of milling and pressing is to make the starch or sugar more available for enzyme action. Crushing and pressing (grapes and other fruits), milling (cereal grains), or a combination of milling and pressing (sugarcane) are used." *Milling*, BRITANNICA, https://www.britannica.com/topic/milling-food-processing (last visited Apr. 20, 2022).

[37] "Winnowing is a process by which chaff is separated from grain. Winnowing usually follows threshing in grain preparation. In its simplest form, it involves throwing the mixture into the air so that the wind blows away the lighter chaff, while the heavier grains fall back down for recovery." *Winnowing*, WIKIPEDIA, https://en.wikipedia.org/wiki/Winnowing (last visited Apr. 20, 2022).

[38] Leaves are shredded to make them more compact for compost formation. *Why Shred Leaves?*, ALLIUM FIELDS (Oct. 2018), https://www.alliumfields.org/2018/10/why-shred-leaves/.

[39] "The drying of foods and crops is a major operation in the food industry, consuming large quantities of energy. Dried foods are stable under ambient conditions, easy to handle, possess extended storagelife, and can be easily incorporated during food formulation and preparation." D.M.C.C. Gunathilake et al., *Drying of Agricultural Crops*, *in* ADVANCES IN AGRICULTURAL MACHINERY AND TECHNOLOGIES 331, 332 (Guangnan Chen ed., 2018).

[40] LIZ BATES ET AL., EXPANDING ENERGY ACCESS IN DEVELOPING COUNTRIES: THE ROLE OF MECHANICAL POWER 6 (2009).

[41] *Id.*

[42] R. Anil Cabraal et al., *Productive Uses of Energy for Rural Development*, 30 ANN. REV. ENV'T & RES. 117, 124 (2005).

much as forty percent.[43] An irrigation pump can lengthen a product's growing season and end the need to fetch water and irrigate fields by hand. However, as of 2008, only four percent of agricultural land is thought to be under irrigation in sub-Saharan Africa.[44]

Third, mechanical power improves quality of life, livelihood, and income. The time saved by using mechanical power will allow women, children, and men to engage in more economically productive and socially beneficial activities, such as attending school or pursuing some other economic endeavor. These other economic activities could include setting up a food business or establishing a tailoring shop to sew and repair clothes. Alleviating some of the negative impacts of strenuous work could beneficially affect maternal health, while reducing hunger and poverty through increased food productivity and reduction of harvest losses.

## II. MODEL LEGISLATION

What follows is the substantive core of this article: draft legislation dealing with Access to Energy for Drinking Water, Sanitation and Agriculture. Consistent with the purpose of this article to promote the use of legislation to combat energy poverty, the manner and form of legislation is left intact as draft legislation. The draft legislation has not been converted to a scholarly article. The rationale and explanation of the various provisions of the law are found in the Commentary. Upon enactment draft legislation becomes part of the actual laws of a country. The laws of a society are the most solemn and formal articulation of its values. The law dealing with Access to Energy for Water, Sanitation and Agriculture will recognize, reinforce and give permanence to the norms of the country in which it is enacted.

### I. Proposed Legislation on Access to Energy for Drinking Water, Sanitation, and Agriculture

#### § 1. Findings

I. [Name of country] is a member of the community of nations that has accepted well-recognized principles of international law and policy establishing the right of developing countries to sustainable development.

II. [Name of country] through this Act, seeks to support sustainable development directed at poverty and access to water for potable drinking

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[43] LIZ BATES ET AL., *supra* note 43 at 5.

[44] Sandra Postel, *Small-Scale Irrigation Boosts Incomes and Food Security in Sub-Saharan Africa,* NAT'L GEOGRAPHIC (Aug. 8, 2013), https://blog.nationalgeographic.org/2013/08/08/small-scale-irrigation-boosts-incomes-and-food-security-in-sub-saharan-africa/.

water, sanitation, and agriculture through affordable/appropriate sustainable energy technologies (ASETs).

III. By 2025, at least half of the world's population will live in water-stressed areas. Moreover, climate change may be changing weather patterns, along with the distribution of rainfall, snowmelt, groundwater, and water distribution, which cumulatively impact agriculture.

**§ 1a. The Water-Energy Nexus**

(a) Both metabolic and exogenous energy, as defined in Section --- is required for the collection, treatment and use of water for drinking, sanitation, and agriculture:

(b) Human or metabolic energy is used to walk to a water source, for collecting water, and for hauling water back. Human energy is used to hand-pump underground water and for manual irrigation.

(c) Exogenous or external energy is required to pump water through pipes, for agricultural irrigation, transport of water, and water treatment via ASETs such as reverse osmosis and boiling.

(d) Women and children disproportionately carry the burden of collecting water for drinking, sanitation, and irrigation. Depending on the environment and availability of water sources, women may walk for several hours to collect water. Globally, it is estimated that, women and girls spend over 200 million hours per day collecting water. In some regions where water sources are scarcer, women and girls risk rape and abduction, especially when traveling in the dark.

(e) In [name of country], children, on average, miss [N, number] of school days to fetch water. Studies have shown that girls have more absences than their male counterparts because females bear the duty of water collecting. With increasing age, the probability of a female missing school increases by [P, percent]. Further, [N, number] of girls in [name of country] miss [N, number] of school days due to menstruation and lack of adequate sanitation and supplies. Males miss school less frequently.

(f) United Nations Sustainable Development Goal (SDG) 7 calls for electricity for all by 2030, and electric energy remains the most desirable and important objective for the energy poor. However, the practicability of achieving electricity for all by 2030, remains dubious. Consequently, it is imperative to identify and embrace other forms of energy, that will serve as interim measures pending the arrival of electricity. ASETs can offer interim measures that supply some of the energy needs of the energy poor.

**§ 1b. Water for Drinking and Sanitation**

(a) According to the U.S. Center of Disease Control and Prevention, an estimated 790 million people do not have access to clean, sanitary and safe

drinking water. The water used by these peoples is fetched from polluted and unprotected wells or surface water ponds, pools and lakes.
(b) More than 3 million people each year die from water-borne illnesses. Of these 3 million, 2.2 million are children. Contaminated water can transmit diseases such as cholera, giardia, polio, typhoid, and dysentery. Diarrheal diseases, such as cholera, kill more children than malaria, HIV, and measles combined.
(c) Lack of adequate sanitation is estimated to cause roughly 432,000 diarrheal deaths per year. Inadequate sanitation transmits diseases such as cholera, dysentery, polio, hepatitis A, and typhoid. Poor sanitation also can transmit intestinal worms, trachoma, and schistosomiasis.
(d) According to the World Health Organization, approximately 2.0 billion people do not have access to basic sanitation facilities like toilets or latrines. Of those, one-third defecate in the open, either behind vegetation or buildings or in gutters, near or within bodies of water.
(e) [N, number of people] in [name of country] do not have access to adequate sanitation and [P, percent] of people in [name of country] defecate in the open.
(f) [N, number of people] in [name of country] do not have access to basic drinking water services and collect water from polluted ponds, pools, and unprotected wells.
(g) It is estimated that contaminated water accounts for nearly [N, number] of deaths (mortality) annually in [name of country]. [N, number] are sickened (morbidity) by diseases and contaminants in water sources

**§ 1c. Water for Agriculture**
(a) Agriculture is the common thread which ties many of the 17 United Nations' Sustainable Development Goals (SDGs), and is inextricably interwoven, inter alia, with the SDGs pertaining to poverty; water and energy use; climate change; women's rights, and unsustainable production and consumption.
(b) Agriculture is the economic backbone for most developing countries and is linked to economic development. More than 70% of developing country populations rely on agriculture as their main source of livelihood. Advances in the agricultural have helped to arrest severe economic decline.
(c) Rapidly increasing populations in developing countries have increased agricultural demand for food and energy. The failure of agriculture to meet these demands will have dire consequences such as economic recession and poor public health.
(d) Agriculture is a heavy consumer of water, and agricultural irrigation accounts for 70% of water use world-wide. Increasing food supply requires increases in water, and energy to access water, but diminishing water supplies

and lack of energy may result in famine and starvation in some developing countries.
(e) Many farmers in developing countries rely on the seasonal rains to water their crops. With shifting weather patterns, rains are becoming less reliable, resulting in lower crop production. Consequently, regions facing water scarcity will suffer from food insecurity and economic decline.
(f) There are many types of irrigation used for watering crops. While surface irrigation, based on gravity, does not require exogenous energy, many other forms of irrigation require energy. These forms of irrigation include drip irrigation where water is dripped out of pipes into soil, localized irrigation where water is pumped through pipes to each plant, and groundwater irrigation.
(g) Developing countries will need to rely on a combination of water-saving irrigation techniques based on surface and underground water.
(h) The use of livestock and animal manure are also important in crop production. Livestock is a source of energy providing draught animal power, while manure improves soil structure, fertility, and water retention. However, livestock requires more water and access to energy.

**§ 2. Policy**

The House of Parliament hereby declares it is the national policy of [name of country] to:
(a) Harness private enterprise and market forces as key elements in the search for energy water, sanitation and agricultural security.
(b) Appropriate financial resources towards the research and development of ASETs.
(c) Encourage the growth of water treatment, sanitation, agricultural, and irrigation methods and ASETs through tax incentives, loans, micro-, and other forms of financing that advance the objectives of this Act.
(d) Create standards for testing and certifying water treatment, sanitation, agricultural, and irrigation ASETs based on water quality, sanitation, and durability standards.
(e) Ensure to the extent possible, that:
(i) Sanitation services are accessible to all within, or in the immediate vicinity, of households, public institutions, health and educational institutions, and workplace.
(ii) Physical health or welfare is not threatened when visiting or using sanitation facilities.
(iii) The price of sanitation facilities be affordable to all without compromising the ability to pay for other necessities such as water, food, housing, and healthcare.
(iv) Water-efficient technology is affordable to all.

(f) Distribute ASETs in a manner that emphasizes accessibility while requiring, wherever feasible, that recipients contribute to the cost in currency, exchange, and/or sweat equity.
(g) Encourage community participation in financing, manufacturing, distributing, and promoting the objectives of this Act.
(h) Seek the assistance and expertise, guidance, and experience of nation states, non-governmental organizations (NGOs), intergovernmental agencies, and faith groups in the implementation of this Act.
(i) Promote awareness about water contamination, poor sanitation, and water-saving irrigation practices through national, local, and community-based educational endeavors.
(j) Promote the involvement of ASETs users, inter alia, in the research, design, development, manufacturing, distribution, monitoring, maintenance, evaluation, and marketing of water ASETs.
(k) Conduct training on use, maintenance, and safety of water ASETs.

**§ 3. Definitions**
For the purposes of this Act:
ASETs:
(a) Refer to Affordable/ Appropriate Sustainable Energy Technologies. They constitute interim technologies that help meet the needs of the energy poor, pending the arrival of electricity as called for by SDG 7.
(b) ASETs need to be demonstrated, tested, and certified as meeting the environmental health and safety standards outlined in sub section 4 (below).
(c) Examples of ASETs used for water for drinking, sanitation, and agriculture include, but are not limited, to the following:

I. Treadle pumps. A treadle pump is a human-powered suction pump that usually sits on top of a well, or source of less contaminated water, located close to homes or fields, providing water that can be used for domestic and irrigation purposes. The target price for a treadle pump is estimated at [N, number] dollars.

II. Ram pumps pump water uphill without electricity with no other external source of power except for the water flowing into it. Ram Pumps are more fully, but not exhaustively, described in the Annex to this Act. The target price for a ram pump is estimated at [N, number] dollars.

III. Hand pumps are manually operated pumps that use human power to move fluids from one place to another. The types of hand pumps are more fully, but not exhaustively, described in the Annex to this Act. The target price for a hand pump is estimated at [N, number] dollars.

IV. Hippo Rollers are a device used to carry clean water more easily and efficiently than traditional methods. It consists of a barrel-shaped container which holds the water and can roll along the ground, with a handle attached to the axis of the barrel. Hippos rollers are more fully, but not

exhaustively described in the Annex to this Act. The target price for a Hippo Roller is estimated at [N, number] dollars.

V. Inorganic filtration systems take advantage of low porosity materials such as clay to filter large contaminants out of water such as dirt, bacteria, and some minerals.

VI. Sari cloths can be used for water filtration. Saris are traditional garments worn by women in much of Southeast Asia. Studies have shown that using a sari cloth as a filtration device can filter cholera and debris from water. Additionally, saris are a form of sustainable technology because they can be dried to be used again. Sari filters are more fully, but not exhaustively, describe in the Annex to this Act.

VII. Solar water disinfection uses sunlight to eliminate bacteria. Water is placed in a clear plastic bottle or container and left out in the sun for a few hours. The UV-A rays heat the water and kill bacteria. Although it does not purify water, solar treatment can reduce water-borne illnesses. It is more fully but not exhaustively described in the Annex to this Act.

VIII. Biomass water filtration systems use organic matter as a filter to treat water. They can remove impurities such as organic compounds, pesticides, sediments, and heavy metals like magnesium and iron. These filters rely on gravity and require no electricity.

IX. Pedal-powered washing machines wash clothes by human pedal power. Some are pedaled by foot and others can be attached to bicycles. It requires only ten minutes of pedaling to clean clothes. If attached to the bicycle, the bike provides a mode of transportation. These machines are more fully, but not exhaustively described in the Annex to this Act. The target price of a pedal-powered washing machine is [N, number] dollars.

X. Latrines, or dry toilets, are a designated place for human bodily fluids and wastes. Some are connected to sewage systems while others are holes or trenches in the ground. Latrines are more sanitary than open defecation because all human waste is location in one place and not dispersed as in open defecation. This reduces the spread of diseases and water contamination by fecal matter. Latrines are more fully, but not exhaustively, described in the Annex to this Act.

XI. Bio Gasification is a technology that converts carbon-containing materials, including waste and biomass, into synthetic gas. in a process called biomass gasification. The biogas can be used as energy for lighting, cooking, and heating. Bio gasification is more fully, but not exhaustively discussed in the Annex to this Act.

XII. Composting toilets take advantage of organic carbon in human waste and nitrogen in urine to compost human excretions. All that is required is a collection container, human waste, and sawdust, grass, or leaves to block odor. The compost breaks down after a few months into organic matter that

can be used as fertile soil in agriculture. The target price of a composting toilet is [N, number] dollars.

XIII. Anaerobic digestion technologies break down human and biodegradable waste in the absence of oxygen to produce biogas. Similarly, to the biogas toilets, the biogas can be used as energy for lighting, cooking, and heating. Anaerobic digestion technologies can also process sewage sludge and animal manure. Some technologies include dry digesters, plug flow digesters, complete mix digesters, and covered lagoon digesters. The waste produced after the biogas reaction can be used as fertilizer, which can increase crop yield for agricultural communities. The target price of an anaerobic digestion technology ranges from [N, number] to [N, number] dollars.

XIV. Flo is a kit for washing and drying reusable sanitary pads. Women can spin Flo to wash their used pads quickly and discretely. They can remove the outer shell to spin the pads dry. This helps women have clean menstruation supplies which lowers the risk of infection and diseases and can help girls not miss school due to their period. The target price of Flo is [N, number] dollars.

XV. Freedom Cups are reusable menstruation cups that only need to be changed once every 12 hours and can be cleaned with water. This allows the product to be a one-time purchase and reduces the risk of infection and diseases. On average, one Freedom Cup costs [N, number] dollars.

(d) "Exogenous energy" refers to energy derived from sources other than metabolic (human) energy. Exogenous energy includes, but is not limited to, mechanical energy (i.e., pumping), chemical energy (i.e., reactions), and gravitational energy (i.e., potential energy).

(e) "Metabolic energy" refers to energy produced by a human being; frequently, energy used for labor and transportation.

(f) "Organization" means an entity other than a governmental body, which was established or organized under the laws of ------. This term refers inter alia to a corporation, company, guild, association, partnership, NGO, faith-based organization, trust, or trade union.

(g) "Sweat equity" refers to the labor, skill, goods, or community services offered by recipients, in part or in full, for ASETs. Sweat equity shall be transferable among households. The following activities shall qualify as sweat equity under this Act:

(i) Labor provided in building water pumping, purification, and agricultural irrigation ASETs.

(ii) Participation in public education and community outreach.

(h) "Energy Intensity" is used to assess energy efficiency. It is calculated by taking the ratio of energy use (or energy supply) to gross domestic product (GDP), to demonstrate how well the economy converts energy into monetary

output. Low energy intensity is the desired goal, and a smaller energy intensity ratio is one of the objectives of this Act.
(i) "Water efficiency" is the minimization of the amount of water used to accomplish a function, task or result. Water efficiency means doing more with less water; for example, washing dishes or flushing the toilet with the least amount of water necessary to accomplish the task.

**§ 4. National Minimum Standards and Certifications**

These water quality and sanitary standards, are predicated on practicability and feasibility, and may be reviewed and modified by the Administrator in the appropriate circumstances, prescribed in this statute.
Drinking Water Quality Standards

The term "drinking water quality standards" refers to water quality in which pollutants do not exceed the following:
(a) Inorganic chemicals
(i) Arsenic: less than 0.01 mg/liter
(ii) Barium: less than 0.7 mg/liter
(iii) Boron: less than 0.5 mg/liter
(iv) Cadmium: less than 0.003 mg/liter
(v) Chromium: less than 0.05 mg/liter
(vi) Fluoride: less than 1.5 mg/liter
(vii) Lead: less than 0.01 mg/liter
(viii) Manganese: less than 0.4 mg/liter
(ix) Mercury: less than 0.006 mg/liter
(b) Organics (volatile organic compounds (VOCs), hydrocarbons, etc.)
(i) 1,2-dichlorobenzene: less than 1000 µg/liter
(ii) 1,2-dichloroethane: less than 30 µg/liter
(iii) Benzene: less than 10 µg/liter
(iv) Carbon tetrachloride: less than 4 µg/liter
(v) Nitrate: less than 0.2 mg/liter
(vi) Styrene: less than 20 µg/liter
(vii) Toluene: less than 24 µg/liter
(viii) Xylene: less than 500 µg/liter
(c) Pesticides
(i) Diflubenzuron: less than 0.25 mg/liter
(ii) Methoprene: less than 1 mg/liter
(iii) Novaluron: less than 0.05 mg/liter
(d) Microorganisms (fecal matter, bacteria, etc.)
(i) *E. Coli*: must not be detectable in any 100 mL water sample
(ii) Thermotolerant coliform bacteria: must not be detectable in any 100 mL water sample
(iii) Total coliform bacteria: must not be detectable in 95% of water samples taken in a 12-month period

**§ 4b. Sanitary Standards**

(a) Must ensure the creation of safe sanitation systems including toilet design, construction, use, and waste management.

(b) Deal with how water used for sanitation purposes such as handwashing, cleaning, and bathing should meet the drinking water standards mentioned earlier in this Section.

(c) Applicable to groundwater used as a source of drinking water source, should be subject to a risk assessment ensuring

(i) A sufficient vertical and horizontal distance between the base of a permeable container, soak pit, or leach field and the local water table and/or drinking water source, and

(ii) At least 15 m horizontal distance and 1.5 m vertical distance between the container and the water source.

(d) Covering waste containers should require low permeability and be reusable.

(e) Applicable to sanitation workers should protect them from occupational exposure through adequate health and safety measures such as personal protective equipment (PPE). A multi-barrier approach (i.e., the use of more than one control measure as a barrier against any pathogen hazard) should also be considered.

(f) Should ensure that toilets safely contain excreta. Toilet design should include provision of culturally and context-appropriate facilities, for anal cleansing, handwashing, and menstrual hygiene management. Toilets may include gender specific facilities.

(g) Should create waste management practices that

(i) Protect workers from fecal and disease exposure,

(ii) Ensure that waste must go to designated soak pits or waste-specific areas, and

(iii) Not contaminate soil or groundwater

(iv) Both liquid and solid toilet waste should be treated before end use or disposal.

(h) Dealing with treatment facilities should be designed and operated according to the specific end use or disposal objective and operated according to the standards determined by the Ministry of Health. These standards should enable:

(i) Women and girls to have access to adequate, clean menstrual management materials to absorb menstrual blood, that can be changed in privacy as often as necessary for the duration a menstrual period.

(ii) Women and girls to dispose of used menstrual management materials safely and privately at sanitation facilities.

(iii) Women and girls to have access to soap and clean water to wash the body as required during a menstrual period.

**§ 4c. Irrigation and Agriculture Standards**

The purpose of these standards is to ensure that

(a) Irrigation ASETs should use the best practicable methods to reduce water traditionally used and delivered for irrigation by 80%.

(b) Ensure that transition from natural vegetation to agriculture should be assessed carefully to avoid topsoil erosion and other ecological damage

(c) Crop rotation should be practiced to maintain soil fertility.

(d) Soil erosion is prevented by not allowing livestock to overgraze pasture lands

(e) Agricultural chemicals such as pesticides, fungicides and insecticides are used in a manner that avoids unreasonable harm to human health and welfare, and that educational programs alert the public to the short- and long-term environmental, health and welfare impacts of the overuse of agricultural chemicals.

(f) National parks, sacred places, and protected lands should be protected.

**§ 4d. Interim Standards**

The Administrator, acting upon reasonable grounds, may determine that the standards in Subsections 4a, 4b, and 4c above cannot be achieved, and s/he may create interim standards that improve existing water quality, sanitation, and irrigation, even if they are unable to meet the standards in Subsections 4a, 4b, and 4c. Such interim standard may be in force for 2 to 5 years and reviewed 5 years after coming into force of this Act.

**§ 4e. Durability and Efficiency Standards**

The Administrator will establish minimum durability and efficiency standards based on the needs and conditions of the country, taking into account standards specified by the World Health Organization, Food and Agricultural Organization, World Water Quality Alliance, and other internationally recognized organizations.

Such standards will deal with the sustainable use ASETs across the water, sanitation, and agricultural sectors and should aim to ensure:

(a) Manufactured ASETs (including but not limited to toilets, irrigation pipes, water filters, and water pumping devices) remain functional for at least [N, number] years.

(b) Manufactured ASETs are energy and water efficient.

(c) The training and education of local and indigenous populations on the upkeep, maintenance, and care of ASETs.

(d) Materials for ASETs are resistant to corrosion, oxidation, degradation, and weathering.

(e) ASETs do not threaten or jeopardize human, animal, or environmental health and safety.

(f) ASETs are available and affordable to all regardless of location, gender, ethnicity, social class, or income.
(g) Reusable menstruation supplies and cloth water filters shall be easily cleaned and last for at least [N, number] uses.
The Administrator shall establish minimum durability and efficiency standards for ASETs based on the needs and conditions of the country. If these standards are unable to be met, the Administrator may establish interim standards which may be in effect for 2 years. Materials for ASETs are locally sourced to decrease importing costs and support the local economy.

**§ 4f. Testing and Certifications**
(a) All new ASETS and/or component parts sold and/or marketed under this Act in [name of country] shall be tested and certified.
(b) Testing and certification will be undertaken by approved public, private, or NGO owned and operated laboratories. Certification will affirm that the products and ASETs are capable of achieving the water quality, sanitation, and durability standards outlined in this Section.
(c) The Administrator will approve such laboratories based on relevant criteria to be determined after a public hearing and shall publicly announce and publicize such standards.

**§ 5. Administrative Discretion**
The Administrator, acting on reasonable grounds, which shall be determined after public hearing, may postpone and/or phase in the implementation of the Act, or any of its provisions, for a period that shall not exceed 5 years.

**§ 6. Establishment of Agency**
The Agency for Clean Water, Sanitation, and Agriculture (ACWSA) is hereby established to implement the provision of this act. The Administrator of the agency shall administer this statute by, inter alia:
(a) Conducting Needs Assessments and development Specifications.
(b) Within 120 days of the adoption of this act, the ACWSA shall deploy [N, number of provinces or sub-national governments] provincial assessment officers (PAOs), one in each of the country's [N, number] provinces. PAOs shall, in collaboration with [name of appropriate NGO] and local health personnel, conduct a needs assessment that will identify and investigate:

(i) Common drinking water sources, their distance from communities, and contamination levels.
(ii) Common modes of water transport.
(iii) Local exposure to water-borne illnesses such as cholera and giardia.
(iv) Location, infrastructure, and maintenance of sanitation facilities.
(v) Common sanitation, defecation, and menstrual hygiene practices.

(vi) Common irrigation and water storage techniques.
(vii) The needs and receptivity of the population to ASETs for clean water for drinking, sanitation, and agriculture.
(viii) Possible cultural or geographic barriers to the adoption of ASETs.
(ix) The extent of environmental degradation, and harm to human health and welfare caused by lack pf access to clean water and sanitation.
(x) The financial abilities of communities to pay for improved water and sanitation.
(xi) Population demographics.

(c) The ACWSA, in collaboration with the Ministry of Energy and the assistance of PAOs, will embark upon a search for ASETs that are culturally, economically, and religiously sensitive to the people of [name of country or name of province] that meets their needs for water for drinking, sanitation, and agriculture.

(d) Target Installation of ASETs – Pilot Programs

The PAOs, under the direction of the administrator of the ACWSA, shall implement pilot programs in each province, which can be replicated in the rest of the country for the purpose of identifying the technological, social, economic and environmental challenges raised by access to clean water for drinking, sanitation, and agriculture. The communities selected for the pilot programs by the ACWSA shall be those which:

(i) Suffer from lack of safe water for drinking, and /or sanitation, and/or agriculture.
(ii) A large majority of the community, as revealed by needs assessments, want to participate in the pilot project.
(iii) Consist of between 100 and 500 homes.
(iv) Demonstrate, as revealed in the needs assessments, that individual members of the community are willing and able to provide sweat equity, monetary compensation, or exchange goods or services for ASETs.
(v) Possess demographic and geographical characteristics that reflect and are representative of the [name of country]'s country as a whole.

(e) Completion and Review of the Pilot Programs

(i) At least two pilot programs shall be completed within targeted communities for each province before the wider installation of selected ASETs among the rest of the province. The data revealed by each pilot project and the analysis shall be analyzed and reviewed in a report.

Separate pilot programs may become necessary within provinces based on significant differences in drinking water sources, and/or sanitation practices, and/or irrigation techniques.

**§ 7. Implementation and Administration**

(a) Implementation

Based on the information provided by the pilot projects, the Administrator shall implement this act by:

(i). Consulting and collaborating with the Ministers of Health and Human Wellness, Energy, Environment & Natural Resources, Education, and Industry

(ii). Encouraging public participation in the implementation of this act by incorporating:

(1) Notice and comments prior to the adoption of any major rules implementing the provisions of this act, as required by the [name of country's Administrative Procedure Act].

(2) Convene public meetings to discuss the implementation of this Act.

(3) Select representatives to liaise with their respective communities with regard to the implementation of this Act.

(iii). Seeking international assistance, guidance, and aid, when appropriate, in the form of ASETs and/or expertise for monitoring and evaluation from, inter alia, other states, NGOs, faith groups, inter-governmental organizations, corporations, private individuals, and charitable trusts.

(iv). Establishing a nationwide program to train the citizenry on the design, production, marketing, distribution, sale, use, maintenance, and repair of ASETs used for access and/or treatment of clean water for drinking, sanitation, and agriculture.

(v). Using innovation, ASETs, and/or techniques that provide greater economic benefits to the end-user without increasing cost.

(vi). Utilizing ASETs and organizational methods that have been successfully developed, tested, and demonstrated by other developing countries.

(vii). Using sweat-equity or exchange as a method of payment for any ASET.

(viii). Using comprehensive and holistic cross-sectorial planning to encapsulate the complexity of the clean water for drinking, sanitation, and agriculture initiative.

(ix). Seeking to establish in-country networks and collaboration for the design, manufacture, marketing, and technological assistance of the ASETs.

(b) Strategic 5-Year National Clean Water for Drinking, Sanitation, and Agriculture Plan (5-Year Plan)

(i) After a widespread, open, inclusive, and public consultation process, the ACWSA shall draft renewable strategic 5-Year Plans with annual targets and objectives that shall be publicly announced, publicized, and communally distributed. The first Plan shall be completed within one year of the implementation of this act.

(ii) Once a 5-Year Plan has been completed, the ACWSA shall issue annual reports that are publicly announced and publicized on the actions taken pursuant to the 5-Year Plan and the extent to which the annual targets and objectives have or have not been met.

(iii) The annual reports must further disclose changes to targets and objectives which had not been met in the 5-Year Plan.

(iv) The annual reports will be reviewed once per year by the Parliament of [name of country].

(c) Stimulate the technology and markets for ASETs dealing with Clean Water for Drinking, Sanitation, and Agriculture by

(i) Improving access to capital by providing tax incentives and loans and removing restrictions on foreign investment in the clean water industry.

(ii) Establishing certification, durability, and standardization protocols for all ASETs.

(iii) Collaborating with the Ministry of Energy to disburse grants for research and development to qualified universities or private companies in [name of country] which can perform research and development.

(d) Monitoring and Inspection

(i) Pre-Installation quantitative monitoring, based on representative sampling, of water used for drinking, sanitation and agriculture.

(ii) Post-Installation quantitative monitoring – of the entities monitored in section (a) above.

(1) Phase 1 – within 1 year of installation.

(2) Phase 2 – within 18 months of installation.

(3) Phase 3 – within 3 years of installation; and

(4) Annual monitoring once every year thereafter.

(iii) Use Monitoring – Inspecting installed ASETs during the post installation monitoring set out in (b) above to ensure they are being used, are effective, and are working properly.

(iv) Reporting – Submitting to Parliament a report on the findings of the monitoring and inspection efforts under this Section twelve months after this Section comes into effect and annually thereafter.

**§ 8. Authorization and Appropriation**

[Appropriated amount (USD or national currency)] shall be authorized and appropriated every year, beginning in 202[_], continuing for the next 5 years and allocated as follows:

(a) [Appropriated amount (USD or national currency)] to the administrator for the administrative costs of implementing this act.

(b) [Appropriated amount (USD or national currency)] to a grant and loan mixed funding mechanism, which is administered by the CWDSAA, and encourages local entrepreneurship, large-scale manufacturing, and

distribution of ASETs for clean water for drinking, sanitation, and agriculture.
(c) No grant shall be made under this Section unless 75 percent of the products, materials, and supplies have been manufactured or sourced in [name of country]. This Section shall not apply where the administrator, after reasonable consideration of relevant factors such as cost, efficiency, availability, and international agreements, determines that is in the public interest to waive this requirement, either generally or with regard to specific materials.
(d) [Appropriated amount (USD or national currency)] to the Ministry of Energy, Ministry of Public Health, or Ministry of Agriculture to administer a program for the research and development of ASETs to improve clean water for drinking, sanitation, and agriculture. The appropriated amount to each Ministry shall be established by a needs basis and the appropriated amount shall remain available until expended.

**§ 9. Research and Development**

The Ministry of Energy is authorized to conduct, promote, coordinate, and accelerate research, development, studies, surveys, tests, trials, experiments, projects, and training related to:
(a) The development and application of ASETs for clean water for drinking, sanitation, and agriculture that inter alia, provide effective and efficient alternatives to current water treatment and collection, sanitation facilities and practices, and irrigation techniques. These ASETs shall meet or exceed the minimum standards and guidelines established in Section 4 and attempt to maximize the use of local materials.
(b) Health and safety in the application and maintenance of such ASETs.
(c) The Ministry of Energy will actively solicit foreign aid, assistance, expertise, and collaboration in implementing research and development from other governments, intergovernmental organizations, NGOs, scientific companies or bodies, and any other entity that will support objective scientific research and development for ASETs for clean water for drinking, sanitation, and agriculture.
(d) In conducting the activities authorized by this Section, the Ministry of Energy may enter into contracts with and make grants to qualified institutions, agencies, organizations, and persons. Priority shall be given to:

(i) The [appropriate scientific or academic institution in name of country].

(ii) Other public or private institutions that are scientifically equipped to conduct the required research and development.

(iii) Other organizations that are equipped to create appropriate educational campaigns and workshops to engage communities and individuals.

(e) Subject to the patent provision of [name of country's patent act or other intellectual property law], all discoveries, inventions, innovations, information, and data resulting from any research studies, experiments, tests, surveys, assessments, and projects conducted or financed under this Section shall belong to the public domain and be available for use by the public without charge.

**§ 10. Education and Information**

(a) The Ministry of Health shall be responsible for educating the public on the dangers and consequences of unsafe drinking water, poor sanitation. The Ministry of Health shall use existing health education channels to inform the public, including, but not limited to rural and urban hospitals and clinics; school health awareness programs; churches, religious buildings, and other places of worship; community leaders including chiefs, faith leaders, teachers, and mid-wives; and mass-media outlets including radio, television, social media, and cellular phone messaging.

(b) The Ministry of Health shall have final authority over all private programs for the propagation of information to the public and shall implement caution and discretion in determining the appropriateness of the message communicated under programs governed by this act.

(c) The Ministry of Health shall approve the health, science, and research aspects of marketing materials to ensure that only verifiable findings are used to objectively relay the nature of the problem(s).

**§ 11. Public Health**

The Ministry of Health shall encourage early treatment of signs and symptoms related to consumption of contaminated drinking water and practice of poor sanitation. To this end,

(a) Healthcare workers will report specific cases of water-borne illnesses by creating individual records of patients and monitoring their treatment.

(b) Data on water-borne illnesses will be shared with the Administrator in accordance with the mandate of this act

(c) The Ministry of Heath will solicit the help of other governments, intergovernmental organizations, and NGOs.

**§ 12. Enforcement**

(a) Civil Remedies

Non-compliance order – On the basis of information available to him/her, if the Administrator finds violations of this act, s/he may issue a non-compliance notice to the identified party. Non-compliance orders may be issued by the Administrator for violations of this act in accordance with [name of country's administrative procedure act]. In addition, the Administrator shall:

(i) Issue a notice of the alleged violation to the offending party within 15 days of discovery of a violation.

(ii) Allow the offending party 10 days to rebut the evidence against him/her and submit to agency-inspected corrective measures.

(iii) Institute immediate suspension of activities that have or are reasonably expected to impose serious health risk to the community and population.

(b) Citizen Enforcement

(i) Any citizen or resident of [name of country] may seek judicial remedies under this Section for violations of any mandatory specification of this act. These citizen suits may be lodged in any District Court against any government agency, department, or private party that violates or fails to carry out any mandatory provisions or specifications of this act. Prior to bringing an action, a citizen shall:

(1) Give notice to the defendant agency, department, or private party about the alleged violation(s) of this act.

(2) Allow a period of 2 months after receipt of notice to enable the defendant to rectify the alleged violation(s) of this act before filing a lawsuit.

(ii) If the plaintiff is successful, the court may order the defendant to comply with the act and award damages. A successful litigant is entitled to recover full costs and the court shall include and order such costs in its judgement.

(iii) In the event an action is dismissed, the court may, in its discretion, order the citizen plaintiff to pay the defendant such costs as it deems reasonable and necessary.

(c) Criminal Penalties

(i) Violation of the Non-Compliance Order – Any person who fails to comply within 3 months of receipt of a non-compliance order issued pursuant to Subsection (a) shall, after due inquiry by a District Court, be punished by a fine of not less than [N, number] USD [or national currency] nor more than [N, number] USD [or national currency] per day per violation, or by imprisonment for not more than 1 year, or by both.

(ii) Negligent Misrepresentation – Any person who negligently represents that ASETs for clean water for drinking, sanitation, and agriculture meet the minimum national standards or interim standards of Section 4 established pursuant shall be punished by a fine of [N, number] USD [or national currency] per ASET sold under negligent misrepresentation.

(iii) Knowing Endangerment – Any person who knowingly endangers another person or a community of persons by manufacturing, marketing, and/or distributing ASETs and/or ASET parts that do not conform to the provisions of Section 4 shall be subject to a fine of not more than [N,

number] USD [or national currency] or imprisonment of not more than 15 years. An organization shall be subject to a fine of not more than [N, number] USD [or national currency].

## II. Commentary

**Introduction.** The National Dissemination of Energy for Clean Water, Improved Sanitation, and Agriculture Act (Proposed Act) is a model law or proposed legislation, publicly made available for legislative adoption and enactment by developing countries. The aim of this project is to persuade legislatures in developing countries to adopt the Proposed Act. In pursuance of this objective, the Proposed Act is tailored as a national response to the global challenge posed by the failure to supply the water the needs of the world. These water problems relate predominantly to 785 million people who do not have access to an improved water source, 2.0 billion people who do not have access to basic sanitation facilities, and the increasing demands of water for agriculture.[45] A developing country adopting the Proposed Act, suitably adapted to its own needs, will be using the tools of law to achieve its social objective of promoting access to energy for water.

The enterprise, or machinery, of law encompasses public international laws that govern relationships between sovereign states, as well as national laws, enacted by sovereign states. When adopted or enacted as law by a state, the Proposed Act becomes national legislation binding on the peoples and institutions of that state. The Proposed Act incorporates a carefully constructed socio-legal architecture designed to ensure that the national objective of providing water for drinking, sanitation, and agriculture is successfully pursued. It is meant to serve as a template for advancing improved drinking water, better sanitation facilities, and efficient water deployment for agriculture.

The Proposed Act serves the self-interest of the developing country while simultaneously advancing international comity and law. The adoption of the Proposed Act by a significant number of developing countries will beneficially impact the global challenges posed by unmet water needs and address the importance of energy in so doing.

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[45] *See Drinking-water*, WORLD HEALTH ORG. [WHO] (June 14, 2019), https://www.who.int/news-room/fact-sheets/detail/drinking-water.

**§ 1. Findings**
**§ 1a. The Water-Energy Nexus**
**§ 1b. Water for Drinking and Sanitation**
**§ 1c. Water for Agriculture**

It behooves us to offer some idea of the practical or functional concept of energy on which the Proposed Act is predicated. For purposes of the Proposed Act, energy is the capacity to do work. While taking many different forms, energy enables humans to undertake work or provide services. The utilization of energy is worthy of note.

When dealing with utilization, what is crucial is that regardless of its type, energy needs to be transformed before it can be utilized to perform a useful function. For example, the energy stored in gasoline is not useful until it is burned and releases heat that drives an internal combustion engine. The energy stored in food is not useful until it is consumed and metabolized by humans to allow them to work in order to create useful goods or services.

From a pragmatic standpoint, the perception of energy as the capacity to do work, points to the incredible importance of energy as an elemental and indispensable part of nature and of our lives. To begin with nature, energy is the basis for the growth and sustenance of all organisms in nature. For example, plants are constantly transforming energy from the sun into useful energy that allows them to live and grow. Similarly, all parts of the human body— from muscles to the brain, heart, and liver—cannot function without energy. This energy comes from food. In humans, food is broken down by the digestive system to produce energy through metabolic pathways for breathing, thinking, moving, and reproduction.

Within human societies, raw materials like wood, iron ore, petroleum and minerals are transformed by the use of energy for the production of goods and services like food, clothing, shelter, communications, medicine, and education. Not surprisingly, the importance of energy is reflected in a wide range of development indicators including education, public health and welfare, food and water security, gender equality, and poverty reduction.

For example, studies have demonstrated how quality of life indicators are correlated with access and use of energy.[46] Quality of life indicators include gross domestic product (GDP), maternal health, improved water access, life expectancy, infant mortality rate, and education opportunity.[47] A significant study measured improved water access, life expectancy, infant mortality rate, and mean years of schooling against energy consumption per capita.[48] That

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[46] *See* Jessica Lambert et al., *Energy, EROI and Quality of Life*, 64 ENERGY POL'Y 153 (2014).

[47] *See id.* at 155.

[48] Cesar Pasten & Juan Carlos Santamarina, *Energy and Quality of Life*, 49 ENERGY POL'Y 468, 469 (2012).

study found, in general, that the more energy consumption per capita, the higher quality of life.[49] Similar results were obtained by others.[50]

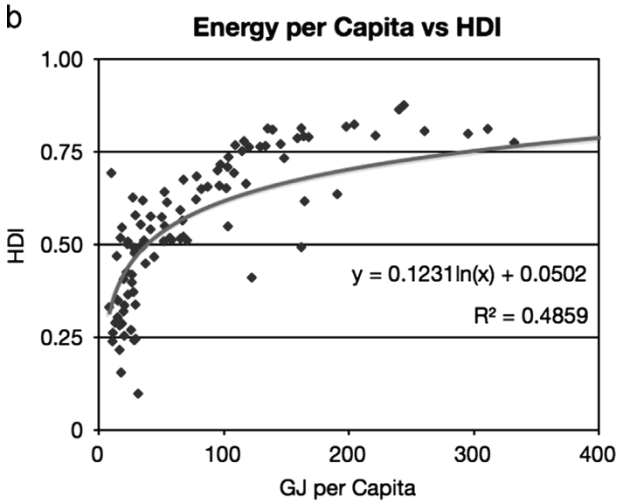


**Figure 1**. Plot of energy consumption versus human development. Each dot represents an individual country's energy consumption and how developed it is. The blue line is a model fit to demonstrate the general trend between energy consumption and development.[51]

In understanding and evaluating the impact of energy across the world, an inescapable reality is the immense chasm dividing the developed, high energy world from the least developed, low energy world. In the high energy world of developed countries, there is often an assumption of limitless energy.[52] If members in a high energy society wish to fuel their bodies, it is just a quick trip to the grocery store. If they need to power an electronic appliance, they simply plug it into an outlet. Lighting a dark room only requires a flip of a switch. Cooking dinner may require leftovers to be loaded into a microwave or a stove. As an astute commentator has observed, "energy is ubiquitous in our lives and is so common that we seldom even think about it."[53] While a second thought may be given to energy when the power goes out or the petrol tank nears empty, it does not linger after the power comes back on or after petrol is pumped in at the petrol station.

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[49] *See id.*

[50] *See* Lambert et al., *supra* note 49, at 153.

[51] *Id.* at 158.

[52] *See* HAROLD H. SCHOBERT, ENERGY AND SOCIETY: AN INTRODUCTION 2 (2nd ed. 2014) ("We simply assume that we can purchase and plug in a limitless number of electrically operated items).

[53] *Id.* at 3.

The high energy world stands in marked contrast to the low energy world of one billion people who do not have access to clean and affordable energy.[54] Living in "energy poverty," these people are the "energy poor" (EP) of the world. Most of the energy poor (95%) reside in the Least Developed Countries (LDCs), which encompasses mainly Sub-Saharan Africa and Southeast Asia.[55] They do not have access to energy for cooking, lighting and heating, water for drinking, sanitation and agriculture, or motive or mechanical energy for their household work or their livelihood.[56] Energy poverty disproportionately affects women and children.[57] Women and children have less assets and hardware than male counterparts, only increasing the challenge to move out of poverty.[58]

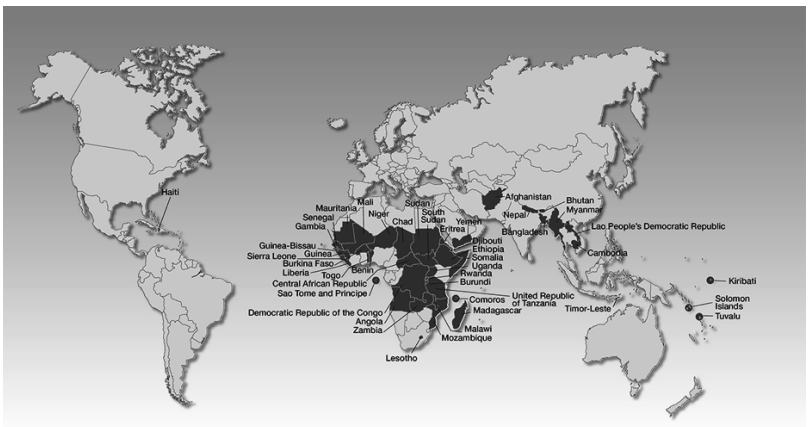


**Figure 2.** Map of Least Developed Countries as of June 2017.[59]

"Worldwide, one in three people do not have access to safe drinking water, two out of five people do not have a basic hand-washing facility with soap and water, and more than 673 million people still practice open defecation."[60]

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[54] *Access to Energy is at the Heart of Development*, THE WORLD BANK (Apr. 18, 2018), https://www.worldbank.org/en/news/feature/2018/04/18/access-energy-sustainable-development-goal-7.

[55] Guruswamy, *Global Energy Poverty: The Relevance of Faith and Reason*, *supra* note *, at 203.

[56] *Id.*

[57] *Id.*

[58] *See id.*

[59] *Map of the Least Developed Countries*, UNITED NATIONS CONF. ON TRADE AND DEV. [UNCTAD], https://unctad.org/topic/least-developed-countries/map (last visited Nov. 10, 2021).

[60] *SDG 6 – Clean Water and Sanitation*, AI FOR GOOD BLOG (Oct. 14, 2022, 10:30 AM), https://ai4good.org/blog/sdg-6-clean-water/ (citing *1 in 3 People Globally Do Not Have*

"Moreover, 698 million school-age children do not have basic sanitation services at school and more than half the world's population—4.3 billion—use sanitation services that release untreated human waste into the environment, contaminating water sources."[61] "In 2020, around 1 in 4 people lacked safely managed drinking water in their homes and nearly half the world's population lacked safely managed sanitation."[62] Diarrhea caused by poor sanitation, lack of hygiene, and unsafe drinking water, is the second leading cause of child death globally.[63]

In most developing countries, women are assigned have primary responsibility for management of household water supply, sanitation, and health. It is estimated that they spend a collective 200 million hours collecting water.[64] In addition to time spent collecting water, millions may also spend significant amounts of time finding a place to go. "This makes up an additional 266 million hours of time each day lost because they have no toilet at home."[65] "Waiting so long to defecate leads to increased chances for urinary tract infections, chronic constipation, and psychological stress.[66] "Many women [who go] out alone at night are also at an increased risk of physical and sexual assault."[67] A lack of access to sanitary products, menstrual hygiene education, toilets, hand-washing facilities, and waste management keeps people who menstruate from going to work, school, or leaving home.[68]

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*Access to Safe Drinking Water – UNICEF, WHO*, WORLD HEALTH ORG. [WHO] (June 18, 2019), https://www.who.int/news-room/detail/18-06-2019-1-in-3-people-globally-do-not-have-access-to-safe-drinking-water-unicef-who; *Water Facts*, UNITED NATIONS, https://www.unwater.org/water-facts (last visited Apr. 20, 2022); *'Transformational Benefits' of Ending Outdoor Defecation: Why Toilets Matter*, UNITED NATIONS NEWS (Nov. 18, 2019), https://news.un.org/en/story/2019/11/1051561).

[61] Delia Paul, *The Water and Sanitation Challenge*, INT'L INST. FOR SUSTAINABLE DEV. (Mar. 22, 2022), https://www.iisd.org/articles/deep-dive/water-and-sanitation-challenge.

[62] *Billions of People Will Lack Access to Safe Water, Sanitation and Hygiene in 2030 Unless Progress Quadruples – Warn WHO, UNICEF*, WORLD HEALTH ORG. [WHO]. https://www.who.int/news/item/01-07-2021-billions-of-people-will-lack-access-to-safe-water-sanitation-and-hygiene-in-2030-unless-progress-quadruples-warn-who-unicef.

[63] *See generally* Christa Walker et al., *Global Burden of Childhood Pneumonia And Diarrhoea*. 381 THE LANCET 1405 (2013) ("We estimated that, in 2011, 700 000 episodes of diarrhoea and 1·3 million of pneumonia led to death. A high proportion of deaths occurs in the first 2 years of life in both diseases—72% for diarrhoea and 81% for pneumonia.").

[64] *A Women's Crisis*, WATER.ORG, https://water.org/our-impact/water-crisis/womens-crisis/ (last visited Apr. 20, 2022).

[65] *Id.*

[66] Lakshman Guruswamy, *Energy Poverty, Justice, and Women*, *in* THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT § 24.3.3.2 (Sumudu Atapattu et al., eds. 2021) (citation omitted).

[67] *Id.* (citation omitted).

[68] Kailey Thompson, *Period Poverty: Celebrating Efforts to Destigmatize Menstruation*

Additionally, in some cultures, menstruation is taboo, and women are unable to care for themselves without fear of harassment.[69]

It is sometimes overlooked that energy is required to provide clean drinking water and sanitation. The lack of bicycles or vehicles using mechanical energy, to transport water compels women to walk miles to collect and carry water. Energy is required to pump water from wells or to push water uphill. Energy is required to boil water and engage in filtration processes. Energy is required to heat water in cold climates. In addition to energy for water and sanitation, access to energy is imperative for agriculture.[70]

SDG 7 is about access to affordable, reliable, sustainable, and modern energy for all. This has been interpreted as electricity for all by 2030. While this is a major step forward in providing access to energy it gives rise to a number of questions. As we have seen energy is required for various purposes ranging from energy for domestic purposes such as energy for cooking, lighting, water and sanitation, as well as for agriculture. The energy needed for domestic purposes can be distinguished from energy needed for livelihood purposes such as mechanical energy for farming, or lighting to keep open a shop at night or equipment for milling grain. In addition energy is required for community purposes provided by hospitals, schools, and street lighting. Energy requirements vary depending on the purpose for which they are intended.

The International Energy Agency (IEA) defines energy access as a household having reliable and affordable access to electricity, which is enough to supply a basic bundle of energy services initially, and then an increasing level of electricity over time to reach the regional average.[71] According to the IEA such a basic bundle consists of electricity to power four lightbulbs operating at five hours per day, one refrigerator, a fan operating 6 hours per day, a mobile phone charger and a television operating 4 hours per day.[72] This entails an annual electricity consumption of 1 250 kWh per household with standard appliances, and 420 kWh with efficient appliances.[73] The US consumes about 13,400 kWh of electricity per year, per

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*and Increase Access to Sanitation Supplies*, GOOD GOOD GOOD (Oct. 3, 2021), https://www.goodgoodgood.co/articles/period-poverty-celebrating-efforts-to-destigmatize-menstruation-and-increase-access-to-sanitation-supplies.

[69] *See generally* Mark A. Guterman et al., *Menstrual Taboos Among Major Religions*, 5 INTERNET J. WORLD HEALTH AND SOCIETAL POL., no. 2, 2007, at 2.

[70] For the importance of mechanical energy for agriculture, see discussion *supra* Section I.C.

[71] *See generally Defining Energy Access: 2020 Methodology*, INT'L ENERGY AGENCY (Oct. 13, 2020), https://www.iea.org/articles/defining-energy-access-2020-methodology.

[72] *See generally id.*

[73] *See generally id.*

person of electricity, while the consumption in Bulgaria and South Africa, which are at the bottom of the energy consumption ladder, is about 4,500 kWh.[74]

What might this cost? According to some estimates it will cost ($17 trillion) to achieve a level of worldwide access equivalent to that in Bulgaria of 4500 kWh, which is three times that of the IEA figure of 1250 KWh.[75]

Moreover, studies have concluded most of the LDCs are the most vulnerable to the effects of climate change – that is, the least able to adapt to changing weather patterns, temperatures, agricultural yields, water distribution, etc. Figure 2 shows a map of global vulnerability index as of 2018. However, the pursuit of reducing carbon dioxide emissions to address climate change will add to the cost of access to energy for all as renewable energies are prioritized. Action to combat climate change will cost between one and two percent of global gross domestic product.[76]

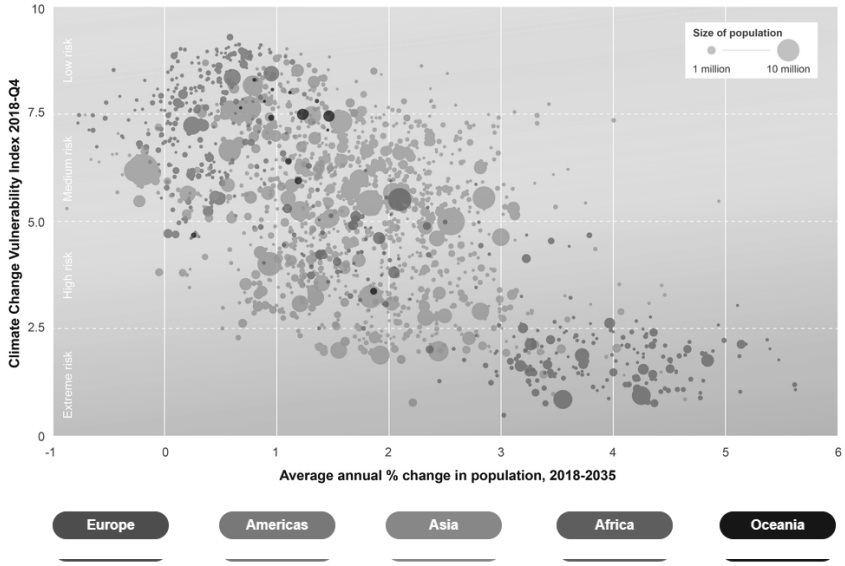


**Figure 3**. Climate Change Vulnerability Index Predictions of 2018.[77]

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[74] Morgan Bazilian & Roger Pielke, *Making Energy Access Meaningful*, 29 ISSUES IN SCI. & TECH. 4, 75 (2013).

[75] Id.

[76] Juliette Jowit & Patrick Wintour, *Cost of Tackling Global Climate Change Has Doubled, Warns Stern*, THE GUARDIAN (June 25, 2008), https://www.theguardian.com/environment/2008/jun/26/climatechange.scienceofclimatechange.

[77] *Climate Change Vulnerability Index*, MAPLECROFT, https://www.maplecroft.com/risk-indices/climate-change-vulnerability-index/ (last visited Apr. 20, 2022) (Data from United Nations Office for the Coordination of Humanitarian Affairs. Data visualized by Maplecroft.)

**§ 2. Policy**

The policy is based on the premise of a comprehensive solution to the problem of lack of motive power. The solution will need to harness private enterprise and market forces as key elements in the search for energy water, sanitation, and agricultural security. The pursuit of water, energy and agricultural security will involve research and development (R & D). It also involves public expenditures to encourage the growth of water treatment, sanitation, agricultural, and irrigation methods and ASETs through tax incentives, loans, micro-, and other forms of financing that advance the objectives of this Act. The Act prioritizes three critical areas: (1) research and development; (2) incentivizing entrepreneurship; and (3) certifying and creating standards. The policy is expressed in generic terms and could be adopted to suit the particular circumstances of each country after a comprehensive assessment that identifies particular motive power needs. The Act requires governments to seek foreign aid as well as the assistance, expertise, guidance, and experience of nation states, intergovernmental agencies, non-governmental organizations (NGOs), and faith groups.

**§ 3. Definitions**

**§ 3a. ASETs**

The purpose of this section is to clarify the meaning of certain terms used in the text of this Act. The definitions given in the Act will be determinative of the meaning of these terms.

The meaning and use of Affordable/Appropriate Sustainable Energy Technologies (ASETs) are spelled out in this section. ASETs constitute the core of this Act, and it is necessary to explain what they are and how they are applied in obtaining access to energy. Examples of ASETs are more fully referred to in the Appendix.

**§ 4. National Minimum Standards and Certifications**

**§ 4a. Drinking Water Quality Standards**

**§ 4b. Sanitary Standards**

**§ 4c. Irrigation and Agriculture Standards**

**§ 4d. Interim Standards**

These water quality and sanitary standards are predicated on practicality and feasibility and follow standards and recommendations of the World Health Organization (WHO) and Food and Agricultural Organization (FAO) wherever appropriate and viable. The Act takes account of the inability of countries, in some situations, to achieve the standards stipulated in the Act by providing for temporary interim standards.

**§ 4e. Durability and Efficiency Standards**
**§ 4f. Testing and Certifications**

Unlike water-quality standards that apply to drinking water, sanitation and agriculture, durability and efficiency standards apply to ASETs.

Technical specifications and standards establish the mandatory technical requirements that must be met during the design and operation of an industrial product. Standards define how a product is designed, operated, inspected, tested, and maintained, and protect both consumers and investors. For example, a durability standard that guarantees at least a minimum ASET lifespan of two years assures the consumer or buyer that s/he is buying a product that will last two years and offers recourse against the manufacturer in case it does not.

Standards are also needed by investors. An investor needs to know that the product s/he is investing in can be marketed. A product meeting manufacturing and durability standards has greater potential for market receptivity and widespread sales in contrast to products that do not. Providing a common global language for product development, standards make it possible for cell phones to communicate with each other anywhere in the world, for bank cards to fit into any cash machine, for consumers to buy a light bulb for just about any lamp in any store, and for them to be able to plug that lamp into an electrical outlet. When products and services comply with standards, devices work better for both consumers and investors.

Section 4f also deals with certification. Product certification, undertaken by independent entities, is the process of certifying that a certain product has passed performance and quality assurance tests or qualification requirements and standards. Examples of certification include those found in the electronic, timber, forest, fishery, sanitation, medical, organic, and renewable energy industries.

**§ 5. Administrative Discretion**

This Section grants discretion to the Administrator, after due process and public inquiry, to adapt the standards and regulations to the compelling conditions of the country.

**§ 6. Establishment of Agency**

A country adopting the model legislation is free to create its own administrative machinery, and does not need to create a new cadre of provincial assessment officials. It can choose its existing administrative structures to implement the provisions of this law.

A needs assessment is a systematic process for determining and addressing the needs, or gaps found in current conditions with a view to determining its wants or correct a current deficiency. In this legislation local needs assessments help discover the local needs and conditions, and craft an area-

specific, bottom-up ASETs program that addresses particular community needs.

A pilot program is a small-scale preliminary study conducted to evaluate feasibility, duration, cost, adverse events, and improve upon the study design prior to performance of a full-scale project. They help to identify logistical problems, which might occur using proposed methods: estimate variability in outcomes; collect preliminary data; determine what resources (finance, staff) are needed for the full program; and assess the proposed programmatic techniques to uncover potential.

**§ 7. Implementation and Administration**

Formidable administrative action is involved in translating laws and decrees made by politicians into action. The work of delivering the objectives of this law involves the Administration and Implementation referred to in this section. Whether administered and implemented through a new ACWSA or existing institutions, the adopting country should pay particular attention to the substantive components of this Section discussed below.

The Strategic Plan envisioned in Section 7(b) institutionalizes the need for the new ACWSA or other existing organization of an adopting country to define its strategy or direction and make decisions on allocating its resources to pursue this strategy. In doing so, the strategic planning process should keep in mind the pivotal objective of encouraging the creation of markets for ASETs and ensure that planning is an instrument for generating ASET markets. One aspect of this lies in creating standards and certifications. Second, public participation and consultation is important as part of bottom-up planning that incorporates the views of the people. Third, no ASET scheme can succeed unless the water-quality and durability standards are monitored on an ongoing basis. It is important to research and collect information about voluntary groups and trade associations dealing with the design, manufacture, deployment, or adoption of ASETs.

**§ 8. Authorization and Appropriation**

This Section authorizes and appropriates funds for three administrative/governmental units: the ACWSA, Ministry of Energy, Ministry of Public Health, or Ministry of Agriculture. As noted earlier, the adopting country could change or create new units to suit its own administrative structures. This Section deals with funds, including loans and other fiscal devices, to encourage markets in ASETs and underlines the importance of promoting private investment and markets for such ASETs.

NGOs are incorporated into the administration and implementation of the Act is based on compelling evidence that NGOs and other non-governmental entities are, in many cases, more effective and efficient distributors of goods and services than government agencies. Given that a number of NGOs are

committed to addressing the problems of water, sanitation and agriculture integrate these NGOs it is important that their services be integrated into the implementation of this law.

This section authorizes and appropriates funds for publicizing information about the serious hazards caused by bad drinking water, poor sanitation and better deployment of water for agriculture. The dangers of polluted drinking water and poor sanitation are often unknown and ASET programs should be premised on awareness and information. Consequently, the public health dangers of polluted water and bad sanitation need to be systematically and continuously publicized.

**§ 9. Research and Development**

ASETs are simple and practical tools, basic machines, and engineering systems that economically disadvantaged farmers and other rural people can purchase or construct from resources that are available locally to improve their well-being. They are designed to focus on people rather than machines, and aim to be more harmonious with the environment and traditional ways of life. Unfortunately, the design and manufacture of ASETs has attracted very little scientific funding.

The great scientific institutions of the developed world should turn their minds and attention to the vital importance of designing and manufacturing effective, cheap, and durable ASETs. However, the developing world would be in a much better position to attract scientific attention and funding by showing its own commitment and resolve to address this problem. Section 9 of this Act, places the prime responsibility for research and development on the Ministry of Energy and emphasizes the importance of soliciting and attracting foreign funds and assistance.

The adopting country is free to use an unit other than the Ministry of Energy, or make its own administrative arrangements, provided that the substantive importance of research and development is in fact institutionalized.

**§ 10. Education and Information**

The importance of communicating awareness and education about the dangers of polluted water, and the availability of remedies like ASETs, has been reiterated in this Commentary. This Act places primary responsibility on the Health Ministry to educate the public. As in all such allocation of duties, the adopting country can make its own administrative arrangements, provided it accepts the importance of and commits to promoting awareness and education.

**§ 11. Public Health**

This Section acknowledges the importance of treating the health problems caused by polluted drinking water and poor sanitation. Section 11 requires public health officials to be aware of the health impacts of polluted drinking water and poor sanitation, and that such conditions need to be treated. In doing so, Section 11 attempts to integrate the sometimes-ignored health hazards of polluted drinking water and poor sanitation, with other more recognizable ailments and conditions. Doing so brings water quality and sanitation within the ambit of officially recognized public health problems and instill them within the minds of public health officials. The recognition of polluted water and bad sanitation by public health officials will have a conscious and unconscious impact on the general public who deal with such officials.

**§ 12. Enforcement**

While civil and criminal enforcement by public officials is a familiar feature of the laws of many developed countries, the citizen-suit provisions may need some explanation in the context of developing countries. In essence, a citizen suit is a form of private enforcement. With private enforcement, the private litigant steps into the public domain by invoking the courts official enforcers or government agencies comply with the law For a variety of reasons, government agencies are often unable or unwilling to enforce regulatory laws. Four merit mention.

First, they may be hobbled by inadequate staff and information. Second, agencies may be slow off the mark and unaware of changing circumstances. Third, they may be "captured" by the very groups they are supposed to regulate. Fourth, they could be ensnarled in procedural red tape.

When armed with citizen-suit authority, private citizens are enabled to take over the enforcement of such laws, free of some of the bureaucratic and political constraints that can hobble government enforcers. In the United States, environmental laws that allow citizen suits include the Clean Water Act, Safe Drinking Water Act, Clean Air Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation, and Liability Act, Surface Mining Control and Reclamation Act of 1977, Endangered Species Act, and the Emergency Planning and Community Right to Know Act.

It is possible for some governments and their bureaucracies to consider citizen suits as potential instruments for embarrassing and attacking government institutions who are doing their best in difficult circumstances. They may also consider such suits a device for drawing national and even international attention to their country. From a more objective perspective, any government that enacts this statute is seeking to address the problems of water, sanitation and agriculture should not try to cover up the poor conduct

of their agencies. What a citizen suit does is to allow citizens of a country to draw attention to agency inaction and enables an independent judiciary to call for the implementation of mandatory and non-discretionary provisions of the Act. Bringing questionable conduct into the sunshine of judicial scrutiny will help governments meet the challenges they seek to address through this Act.

# These are the Drones You're Looking For: Toward a New Regulatory Scheme for Civilian Drones

Lauren E. Andrade*

*Unmanned aerial vehicles, or drones, are positioned precariously in the world of public international air law. As a type of aircraft, drones fall under the purview of the Chicago Convention, however they are not commonly perceived in the same light as airplanes. Because some drones can be extremely small, purchased inexpensively, and operated by average people, they are far less regulated than passenger aircrafts. Despite this, even the smallest drones run the risk of creating huge harms if left unchecked. This paper outlines the flaws in both national and international drone regulation. Using the United States as an example, this paper illustrates the ways in which the differentiation between commercial and recreational drone regulation fails to adequately address current issues. Moreover, this paper proposes that the ICAO promulgate SARPs relating to drones to promote global cooperation.*

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## INTRODUCTION

From December 19 to December 21, 2018, the London Gatwick Airport grounded hundreds of planes after an unidentified drone disrupted runway

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operations.[1] Thousands of passengers attempting to travel for the holidays had their trips interrupted by the actions of a still-unidentified culprit.[2] Despite the small size of the drone, airport officials simply could not risk a collision with the drone, which could have resulted in fatal damage.[3] To make the already chaotic situation worse, Sussex Police wrongfully arrested a local couple in relation to the incident, resulting in a £200,000 settlement.[4] Just nine months later, the London Heathrow Airport also faced the threat of drone interference, this time by environmental protestors.[5] While the drone protest was successfully thwarted,[6] both incidents raise timely questions about the nature of drone regulations. Grounding hundreds of flights is one way that the civilian use of small, readily available, hobby drones poses a massive international risk.

Drones, as unmanned or pilotless aircraft are colloquially called, typically conjure two distinct images: war machines or children's toys.[7] Perhaps the most well-known, military drones have been used for decades to deliver supplies and carry out reconnaissance, surveillance, and intelligence gathering missions.[8] This paper turns the spotlight on civilian drones, an oft overlooked category. Sales of both commercial and consumer drones grow yearly.[9] These range from small and inexpensive hobby planes, readily available at retailers, to highly advanced equipment.[10]

As aircraft, civilian drones are regulated by the 1944 Chicago Convention, which provides the framework for public international air law.[11] However, the Chicago Convention is ill-equipped to address the modern-day nuances

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[1] *See Gatwick Runway Reopens After Drone Chaos*, BBC NEWS (Dec. 21, 2018), https://www.bbc.com/news/uk-england-sussex-46643173.

[2] *See id.*

[3] *See id.*

[4] *Gatwick Drone Arrests: Sussex Police Pays out £200,000*, BBC NEWS (June 14, 2020), https://www.bbc.com/news/uk-england-sussex-53041256.

[5] Catrin Nye, '*Why I'm Using a Drone to Stop Heathrow Flights*,' BBC NEWS (Sept. 13, 2019), https://www.bbc.com/news/uk-england-london-49636149.

[6] Matthew Taylor, *Twelve Protestors Arrested over Heathrow Drone Threat*, THE GUARDIAN (Sept. 13, 2019), https://www.theguardian.com/uk-news/2019/sep/13/heathrow-protests-two-held-near-airport-as-activists-threaten-drone-disruption.

[7] *See Taking Flight: Civilian Drones*, in *Technology Quarterly*, THE ECONOMIST (June 8, 2017), https://www.economist.com/technology-quarterly/2017-06-08/civilian-drones.

[8] Seraine Page, *5 U.S. Military Drone Uses That May Surprise You*, SANDBOXX (Feb. 5, 2020), https://www.sandboxx.us/blog/5-u-s-military-drone-uses-that-may-surprise-you/.

[9] *Drone Technology Uses and Applications for Commercial, Industrial and Military Drones in 2021 and the Future*, INSIDER (Jan. 12, 2021), https://www.businessinsider.com/drone-technology-uses-applications.

[10] *Id.*

[11] *See* Convention on International Civil Aviation art. 8, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

that come with pilotless aircraft because many of the traditional methods of ensuring aviation safety are simply not feasible in the unique case of civilian drones.[12] Thus, this article contends that the International Civil Aviation Organization (ICAO), the body established by the Chicago Convention to address civil aviation needs, must issue Standards for states to follow to ensure international safety.

This article first addresses the common considerations in defining drones and outlines a brief history of drone development. Part I delves into the regulatory framework of public international air law as promulgated in the Chicago Convention. This section expands upon the role ICAO has in continually updating and modernizing the Chicago Convention through Standards and Recommended Practices. Further, Part I analyzes drones through the framework of the Chicago Convention and outlines current ICAO discourse on drone technology. Part II illustrates the pitfalls of the current regulatory regime through an examination of civilian drone laws in the United States. Part III illustrates the problem with the existing approach and regulatory scheme. Finally, Part IV outlines the need for standards and recommended practices relating to civilian drones and outlines necessary steps to achieving a safe and effective legal framework.

## I. BACKGROUND

### *A. Classifying Drones*

There are various ways to classify drones, including by number of propellers (tri-copters, quadcopters, hexacopters, etc.), size (nano, mini, regular, large), or range of travel (very close range, close range, short range, mid-range, endurance).[13] All drones contain some basic hardware, including a frame, propellers, motor, batteries, transmitters and receivers, electronic speed controllers, and flight controllers.[14]

Broadly defined, an unmanned aerial vehicle (UAV) is any aircraft without a human pilot aboard. The term "drone" is commonly used to describe any variety of UAV.[15] ICAO has adopted the term "unmanned aircraft system"

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[12] *See generally Elevating Safety: Protecting the Skies in the Drone Era*, DJI (May 2019), https://terra-1-g.djicdn.com/851d20f7b9f64838a34cd02351370894/Flysafe/190521_US-Letter_Policy-White-Paper_web.pdf.

[13] Sukant Khurana et al., *A Beginners' Guide to Understanding Drones*, MEDIUM (Jan. 13, 2018), https://medium.com/@sukantkhurana/a-beginners-guide-to-drones-38d215701c4e.

[14] *Id.*

[15] *See* Douglas Marshall, *Unmanned Aerial Systems and International Civil Aviation Organization Regulations*, 85 N.D. L. REV. 693, 694 (2009).

(UAS) to describe remotely piloted vehicles and their component parts.[16] Furthermore, ICAO defines an unmanned aircraft as "[a]ny aircraft intended to be flown without a pilot on board" and notes that "they can be remotely and fully controlled from another place (ground, another aircraft, and space) or pre-programmed" to fly "without intervention."[17] Nevertheless, the terminology surrounding drones varies greatly.[18]

### *B. Drones: A Brief History*

Despite the lack of international regulation, drones are not new.[19] In fact, some historians trace the first use of drone technology to 1849 when Austria used approximately two hundred unmanned balloons to deploy explosives in Venice.[20] In 1898, at Madison Square Garden, Nikolai Tesla presented an unmanned boat he operated using radio frequencies, demonstrating the growing ability to control pilotless vehicles.[21]

The popular quadcopter style of drones dates back to 1907 when Jacques and Louis Breguet pioneered the gyroplane, which later became the modern helicopter.[22] By 1916, the United States had begun testing drones for military

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[16] *Frequently Used Terms*, in *UAS Toolkit*, INT'L CIV. AVIATION ORG. [ICAO], https://www.icao.int/safety/UA/UASToolkit/Pages/Frequently-Used-Terms.aspx (last visited Oct. 7, 2021); *see also* Marshall, *supra* note 15, at 694 ("The term system describes the entire package of technology that is required to operate one of these aircraft. The system includes the aircraft or platform itself, the on-board payload—including cameras, sensors, and radar—data links, the communications and navigation equipment, the radio links that permit the operator to control and communicate with the aircraft, the ground control station where the pilot and operators do their work, and the crew members themselves.").

[17] *Background and General Recommendations,* in *UAS Toolkit*, INT'L CIV. AVIATION ORG. [ICAO], https://www.icao.int/safety/UA/UASToolkit/Pages/Narrative-Background.aspx (last visited Dec. 6, 2020); INT'L CIV. AVIATION ORG. [ICAO], *Unmanned Aircraft Systems (UAS)*, at vii, ICAO Circ. 328-AN/190 (2011), https://www.icao.int/meetings/uas/documents/circular%20328_en.pdf (deeming the term UAV "obsolete.").

[18] *See generally* Sarah J. Fox, *The Rise of the Drones: Framework and Governance— Why Risk it!*, 82 J. AIR L. & COM. 683, 687 (2017) (comparing the term RPA/S (Remotely Piloted Aircraft or Remotely Piloted Aircraft System), which is a commonly used abbreviation used by International and National Aviation Agencies, with the term UAV (Unmanned Aerial Vehicle), which is mostly used as a generic reference (alongside "drone") by the general population.).

[19] *See* Timothy M. Ravich, *Commercial Drones and the Phantom Menace*, 5 J. INT'L MEDIA & ENT. L. 175, 178 (2014) ("UAVs are not new.").

[20] Kashyap Vyas, *A Brief History of Drones: The Remote Controlled Unmanned Aerial Vehicles (UAVs)*, INTERESTING ENG'G (June 29, 2020), https://interestingengineering.com/a-brief-history-of-drones-the-remote-controlled-unmanned-aerial-vehicles-uavs.

[21] *See* Khurana et al., *supra* note 13.

[22] Vyas, *supra* note 20.

use.[23] In the 1940s, actor and aviation hobbyist Reginald Denny and his company developed the Radioplane drone.[24] He sold the drone to the U.S. Army for use before and during World War II.[25] Denny's Radioplane Company was purchased by the California-based aerospace company Northrop in 1952, which would later go on to produce the Global Hawk RQ-4A, a surveillance drone utilized by the U.S. Air Force and the U.S. Navy.[26] During the Vietnam War, drones were heavily utilized for surveillance.[27] Drone technology was—and still is—immensely valuable worldwide, particularly for surveillance and munitions. In particular, the U.S. military budgeted nearly $7 billion for drones in 2018.[28]

While drones offer obvious benefits for military use, non-military drone use in the United States reportedly began in 2006.[29] Civilian drones can be broadly divided into two categories: commercial and consumer. In 2016, approximately 2,000,000 consumer—also referred to as hobby or recreational—drones were sold worldwide, of which only about 110,000 were for commercial use.[30] A February 2021 report on the growth of the drone market estimated that global shipments of drones would rise to 2,400,000 by 2023.[31] The popularity of civilian drones is a result of rapidly evolving technology that has made drones cheaper, faster, and more reliable.[32] In December 2013, Amazon CEO Jeff Bezos unveiled the company's new venture: Prime Air, a drone-operated delivery service for

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[23] *See* Khurana et. al., *supra* note 13.

[24] *See* Ravich, *supra* note 19, at 178 & n.9; Jose M. Canaura, *Drones Have Arrived, with New Opportunities and Challenges: A Comparative Approach to Regulations Governing the Operations of Unmanned Aerial Vehicles in the United States, Italy, Costa Rica, United Arab Emirates, Canada*, 26 ILSA J. INT'L & COMP. L. 401, 404 (2020) (citing Nikola Budanovic, *The Early Days of Drones – Unmanned Aircraft from WWI & WWII*, WAR HISTORY ONLINE (May 12, 2018), https://www.warhistoryonline.com/military-vehicle-news/short-history-drones-aircraft.html).

[25] Canaura, *supra* note 24, at 404. ("Soon after, [Reginald Denny Industries] evolved into the Radioplane Company [sic], and Mr. Denny began to sell his target drones to the military for target practice. The company produced over 15,000 target drones for the military before and during WWII.").

[26] Ravich, *supra* note 20, at 178.

[27] Khurana et al., *supra* note 13.

[28] *Drones in the FY 2018 Defense Budget*, CTR. FOR THE STUDY OF THE DRONE AT BARD COLL., https://dronecenter.bard.edu/projects/defense-spending-on-drones/drones-2018-defense-budget/ (last updated Spring 2020).

[29] Illy, *The Evolution of Drones: From Military to Hobby & Commercial*, PERCEPTO (Jan. 15, 2019), https://percepto.co/the-evolution-of-drones-from-military-to-hobby-commercial/.

[30] *Taking Flight: Civilian Drones*, *supra* note 7.

[31] *Drone Market Outlook in 2021: Industry Growth Trends, Market Stats and Forecast*, INSIDER (Feb. 4, 2021), https://www.businessinsider.com/drone-industry-analysis-market-trends-growth-forecasts.

[32] *See id.*

packages weighing up to five pounds.[33] On August 31, 2020, Amazon received approval from the Federal Aviation Administration (FAA) to commence the Prime Air program.[34]

## II. THE CHICAGO CONVENTION

International civil aviation is governed by the Convention on International Civil Aviation (Chicago Convention).[35] From November 1 to December 7, 1944, fifty-two nation-states met in Chicago to develop international standards for civil air travel.[36] The Chicago Convention successfully "recognized and codified certain principles of substantive public international law" and "established an international organization and vested it with jurisdiction to accomplish certain objectives."[37] Of the fifty-two states present at the Chicago Convention, the United States benefited from its particular focus in aviation transport.[38] American delegates focused on protecting economic interests, especially in relation to international trade routes. Because of this, "the United States promoted the position that airlines of all States should have relatively unrestricted operating rights on international routes."[39] To achieve this goal, the delegates supported the adoption of the "five freedoms":

- *First freedom* – The civil aircraft of an airline holding an operating certificate issued by one State (known as the "flag State") has the right to fly over the territory of another State without landing, provided the overflown country is notified in advance and approval is given.
- *Second freedom* – A civil aircraft of one country has the right to land in another country for technical reasons, such as refueling or maintenance, without offering any commercial service to or from that point.

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[33] Annie Palmer, *Amazon Wins FAA Approval for Prime Air Delivery Fleet*, CNBC (Aug. 31, 2020, 9:48 AM), https://www.cnbc.com/2020/08/31/amazon-prime-now-drone-delivery-fleet-gets-faa-approval.html; *see* Charlie Rose, *Amazon's Jeff Bezos Looks to the Future*, 60 MINUTES (Dec. 1, 2013), https://www.cbsnews.com/news/amazons-jeff-bezos-looks-to-the-future/.

[34] Palmer, *supra* note 33.

[35] Chicago Convention, *supra* note 11, art. 3 para. (a).

[36] *Convention on International Civil Aviation – Doc 7300*, in *Publications*, INT'L CIV. AVIATION ORG. [ICAO], https://www.icao.int/publications/pages/doc7300.aspx (last visited Oct. 7, 2021).

[37] PAUL STEPHEN DEMPSEY, PUBLIC INTERNATIONAL AIR LAW 54 (2nd ed. 2017).

[38] *See id.* at 28.

[39] *Id.* at 29.

- *Third freedom* – An airline has the right to carry traffic from its flag State to another country.
- *Fourth freedom* – An airline has the right to carry traffic from another country to its own country.
- *Fifth freedom* – An airline has the right to carry traffic between two countries outside its own flag State so long as the flight originates or terminates in its own State.

Following the Chicago Convention, two subsequent agreements—the Air Services Transit Agreement[40] and the Air Transport Agreement[41]—solidified the importance of these freedoms in public international air law. Additionally, Article 5 of the Chicago Convention grants that "all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right" to "make flights into or in transit non-stop across its territory."[42] The Chicago Convention and subsequent agreements laid the foundation for international air law,[43] particularly in regard to the codification of international norms of air travel.[44]

### *A. ICAO Regulatory Framework*

The Chicago Convention established ICAO to be responsible for defining international practices and ensuring air safety.[45] In October 1947, ICAO became a specialized agency of the United Nations (UN) linked to the Economic and Social Council.[46] Headquartered in Montreal, the agency "[helps] States to achieve the highest possible degree of uniformity in civil aviation regulations, standards, procedures, and organization."[47] It is

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[40] International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, 84 U.N.T.S. 389 (entered into force on Jan. 30, 1945). The International Air Services Agreement focused on the multilateral application of the first and second freedoms. *See id.* at art. 1 §1.

[41] International Air Transport Agreement, Dec. 7, 1944, 59 Stat. 1701, 171 U.N.T.S. 387. The International Air Transport Agreement supported the multilateral application of all five freedoms. *See id.* at art. 1 §1.

[42] Chicago Convention, *supra* note 11, art. 5. Article 6 specifically requires authorization for overflight of scheduled air services. *See id.* at art. 6.

[43] *E.g.,* International Air Services Transit Agreement, *supra* note 41; International Air Transport Agreement, *supra* note 42.

[44] *See* DEMPSEY, *supra* note 37, at 37.

[45] *The History of the ICAO and the Chicago Convention*, INT'L CIV. AVIATION ORG. [ICAO], https://www.icao.int/about-icao/History/Pages/default.aspx (last visited Oct. 11, 2021).

[46] *ICAO and the United Nations*, INT'L CIV. AVIATION ORG. [ICAO], https://www.icao.int/about-icao/History/Pages/icao-and-the-united-nations.aspx (last visited Oct. 11, 2021).

[47] *The History of the ICAO and the Chicago Convention*, *supra* note 45.

comprised of the Assembly, Council, and Secretariat, as well as two chief officers: the President of the Council and the Secretary General.[48] While ICAO is "not an international aviation regulator," meaning that its decisions do not have authority over states, ICAO functions to establish airspace rules and regulations for safety, security, sustainability, and air travel rights.[49]

There are presently 193 ICAO member states that coordinate civil aviation standards.[50] One of ICAO's essential functions is the promulgation of Standards and Recommended Practices (SARPs).[51] In order for an SARP to become effective, it must be approved by a two-third vote of the ICAO Council.[52] The process for establishing SARPs is generally:

- First, proposed technical SARPs are reviewed by the Air Navigation Commission;
- Proposed SARPs are 'vetted' to States for comment and consultation;
- The Council approves new SARPs by a two-thirds majority;
- The 'Green Edition' is circulated to member States four months before the Effective Date;
- A majority of States can veto the SARPs by registering their disapproval (though this has never happened);
- States also may 'opt out' by registering their differences;
- After the Effective Date, the Secretariat issues a 'Blue Edition' of the SARPs;
- States are expected to comply except to the extent they have registered differences."[53]

Put simply, SARPs "cover all technical and operational aspects of international civil aviation, such as safety, personnel licensing, operation of aircraft, aerodromes, air traffic services, accident investigation and the environment."[54] ICAO SARPs are found in the nineteen Annexes to the

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[48] *How the ICAO Works*, INT'L FED'N AIR TRAFFIC CONTROLLERS' ASS'NS, https://www.ifatca.org/about-ifatca/icao-activities/how-icao-works/ (last visited Oct. 11, 2021).

[49] *See about ICAO*, INT'L CIV. AVIATION ORG. [ICAO], https://www.icao.int/about-icao/Pages/default.aspx (last visited Oct. 11, 2021).

[50] *Member States*, INT'L CIV. AVIATION ORG. [ICAO], https://www.icao.int/about-icao/pages/member-states.aspx (last visited Oct. 11, 2021) (follow "Member States List (Multilingual)" hyperlink to access the list of 193 member states).

[51] *How ICAO Develops Standards*, INT'L CIV. AVIATION ORG. [ICAO], https://www.icao.int/about-icao/AirNavigationCommission/Pages/how-icao-develops-standards.aspx (last visited Oct. 11, 2021); Chicago Convention, *supra* note 11, art. 37.

[52] DEMSPEY, *supra* note 37, at 69.

[53] *Id.* at 70 (internal citations omitted) (formatting altered).

[54] *Making SARPs: How Does it Work?*, INT'L FED'N AIR TRAFFIC CONTROLLERS' ASS'NS, https://www.ifatca.org/about-ifatca/icao-activities/making-standards-and-recommended-

Chicago Convention.[55] Standards refer to "any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention."[56] The first ICAO Assembly defined standards as "any specification . . . the uniform application of which is recognized as necessary for the safety and regularity of international air navigation and to which Contracting States will conform."[57] Recommended practices are a type of specification that are not mandatory; some characterize recommended practices as soft law.[58]

Article 12 of the Chicago Convention binds all flights crossing over the high seas to the SARPs listed in the Annexes.[59] In all other situations, "[a]nnexes are not self-executing, and depend upon the willingness of member States to promulgate national laws and regulations and implement and enforce them vigilantly."[60] Member states are expected to conform with ICAO SARPs, and if they are for some reason unable to do so, they must submit an Electronic Filing of Difference.[61] While the ICAO is not in itself a regulatory body, failure to comply with ICAO SARPs means that "other States have no duty to recognize the delinquent State's certificates of airworthiness and competency and licenses."[62]

### *B. Drones Under the Chicago Convention*

In July 2005, the ICAO Council adopted Annex 2 entitled "Rules of the Air."[63] Annex 2 defines an aircraft as "[a]ny machine that can derive support

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practices-sarps/making-sarps-how-does-it-work/ (last accessed Oct. 11, 2021).

[55] *Id.*

[56] Int'l Civ. Aviation Org. [ICAO], *Resolutions Adopted by the Assembly*, Assembly Res. A36-13, Appendix A, at 20 (Sept. 2007), https://www.icao.int/Meetings/AMC/MA/Assembly%2036th%20Session/A36_res_prov_en.pdf.

[57] Int'l Civ. Aviation Org. [ICAO], *Resolutions Adopted by the First Assembly*, Assembly Res. A1-31, at 28, Doc. 4411 (May 1947), https://www.icao.int/Meetings/AMC/Pages/Archived-Assembly.aspx?Assembly=a01 (follow "Resolutions Adopted by the First Assembly" hyperlink for access to document).

[58] DEMPSEY, *supra* note 37, at 71–72.

[59] *See* Chicago Convention, *supra* note 11, art. 12.

[60] DEMPSEY, *supra* note 37, at 74.

[61] *Making SARPS: How Does it Work?*, *supra* note 54.

[62] DEMPSEY, *supra* note 37, at 71.

[63] Int'l Civ. Aviation Org. [ICAO], *Annex 2 to the Convention on International Civil Aviation: Rules of the Air* (10th ed. July 2005), https://www.icao.int/Meetings/anconf12/Document%20Archive/an02_cons%5B1%5D.pdf [hereinafter Chicago Convention Annex 2].

in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface."[64] Annex 2 additionally defines aeroplane as "[a] power-driven heavier-than-air aircraft, deriving its lift in flight chiefly from aerodynamic reactions on surfaces which remain fixed under given conditions of flight."[65] By these definitions, even small hobby drones would fall under the purview of the Chicago Convention.[66] Further, "[t]here is no minimum size described, so even a radio-controlled model aircraft would be covered under a literal reading of the definition, and no legal authorities state otherwise."[67] Under the Chicago Convention, "no distinction is made between manned and unmanned aircraft" insofar as both are deemed aircraft.[68] Per Article 12 of the Chicago Convention, contracting states must ensure that the aircraft they register and crew members they license "comply with the rules and regulations relating to the flight and maneuver of aircraft there in force."[69] Thus, states are bound by the definitions provided by the Chicago Convention and its Annexes.

While Article 8 of the Chicago Convention addresses pilotless aircraft,[70] it does not contemplate modern drone technology and implications. Article 8 states that "[n]o aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization."[71] In effect, Article 8 establishes a clear delimitation between pilotless and piloted aircraft. Unlike piloted aircraft, which enjoy the freedom of overflight granted in Article 5, pilotless aircraft may only operate with state authorization.[72] By explicitly addressing pilotless aircraft in Article 8, the Chicago Convention recognizes a fundamental difference in the functioning and operation of drones. Further, Article 8 requires that "[e]ach contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate

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[64] *Id.* at 1-1.

[65] *Id.*

[66] Douglas Marshall, *Unmanned Aerial Systems and International Civil Aviation Organization Regulations*, 85 N.D. L. REV. 693, 698 (2009).

[67] *Id.* at 699.

[68] *Id.*

[69] Chicago Convention, *supra* note 11, art. 12.

[70] *See id.* at art. 8.

[71] *Id.*

[72] *Compare id.* at art. 8 ("No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State . . . ."), *with id.* at art. 5 ("[A]ll aircraft of the other contracting States . . . shall have the right . . . to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission . . . .").

danger to civil aircraft."[73] This specification obligates the contracting state to ensure pilotless aircraft are operated safely to obviate preventable danger.

Article 8's applicability turns on whether the aircraft in question is pilotless. While Article 8 uses the language "aircraft capable of being flown without a pilot," this definition is insufficient to fully understand the applicability of the article's limitations.[74] On this issue, ICAO takes the position that Article 8 specifically applies to situations where there is no pilot present on the aircraft at all.[75] This would mean that aircraft with a pilot present but operated on autopilot, for example, would not be subject to Article 8. In large part, Article 8 provided only the most basic framework for drone regulation under the Chicago Convention. While pilotless aircraft are clearly aircraft within the purview of the Convention, they are significantly limited by the overflight restrictions of Article 8. The lack of specificity in regulation is largely a product of the era, as "Article 8 was presumably included in recognition of the destruction of persons and property precipitated by Nazi Germany's deployment of guided missiles and bombs."[76] While still utilized for military purposes, the drone industry has rapidly expanded in the last two decades, bringing with it a slew of timely legal questions.

### *C. Expanding International Drone Regulation: ICAO Evolution*

On April 12, 2005 at the first meeting of the 169th Session, the Air Navigation Commission called upon the ICAO Secretary General "to consult selected States and international organizations with respect to: present and foreseen international civil unmanned aerial vehicle (UAV) activities in civil airspace[.]"[77] Accordingly, the first ICAO exploratory meeting regarding drones took place on May 23 to May 24, 2006 "to determine the potential role of ICAO in UAV regulatory development work."[78] At its second informal meeting in January 2007, the ICAO concluded that the main issue before the organization was "the need to ensure safety and uniformity in international civil aviation operations."[79]

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[73] *Id.* at art. 8.

[74] *See id.*

[75] *Unmanned Aircraft Systems*, *supra* note 17, § 2.1–2.

[76] Marshall, *supra* note 66, at 699.

[77] *Progress Report on Unmanned Aerial Vehicle (UAV) Work*, INT'L CIV. AVIATION ORG. [ICAO] (Nov. 13 2007), https://www.icao.int/WACAF/Documents/APIRG/APIRG16/Docs/apirg16ip15_en.pdf.

[78] *Id.* at § 1.2.

[79] *Id.* at § 1.3.

In 2011, ICAO published a circular titled "Unmanned Aircraft Systems (UAS)", which sought to apprise States of the emerging ICAO perspective on the integration of UAS into non-segregated airspace and at aerodromes; consider the fundamental differences from manned aviation that such integration will involve; and encourage States to help with the development of ICAO policy on UAS by providing information on their own experiences associated with these aircraft.[80]

The circular further clarified that unmanned aircraft "are, indeed, aircraft," and "therefore, existing SARPs apply to a very great extent."[81] It also confirmed that drones were subject to Article 8 of the Chicago Convention.[82]

On June 23, 2020, ICAO released a set of model UAS regulations intended to provide guidance for member states in crafting national drone regulations.[83] The model regulations draw upon current regulations in Vanuatu, New Zealand, Australia, Canada, and the United States and seek to include "usual and customary elements" from other member states.[84] ICAO intended for these model regulations to provide a model regulatory scheme for states to implement at the national level related particularly to the safety and certification of drones. In relevant part, the model regulations require drone registration:

> 101.5 Unmanned Aircraft Registration and Certificate of Registration
>
> (a) Every person lawfully entitled to the possession of a UA who will operate a UA in [specify country] shall register that UA and hold a valid certificate of registration for that aircraft from:
>
> (1) the [CAA][85] in compliance with [cite appropriate CAA registration rule]; or
>
> (2) the appropriate aeronautical authority of a contracting State of ICAO; or
>
> (3) the appropriate aeronautical authority of another State that is party to an agreement with the Government of [specify CAA country] which provides for the acceptance of each other's registrations.[86]

The model regulations provide a framework for states to align their national policies with the Chicago Convention.[87] In addition to providing

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[80] *Id.* at § 1.6.

[81] *Id.* at § 1.7.

[82] *See id.* at § 2.1–2.

[83] *See* Int'l Civ. Aviation Org. [ICAO], *ICAO Model UAS Regulation Part 101 and Part 102*, at 1, (June 23, 2020) [hereinafter *Model Regulations*], https://www.icao.int/safety/UA/UAID/Documents/Final%20Model%20UAS%20Regulations2%20-%20Parts%20101%20and%20102.pdf.

[84] *Id.*

[85] CAA refers to the "member State's Civil Aviation Authority." *See id.*

[86] *Model Regulations*, *supra* note 83, at 9.

[87] *See id.* at 1.

registration requirements, the model regulations also suggest operator licensing[88] and continued maintenance and inspection for airworthiness.[89] While the ICAO model regulations are a step in the right direction, there is no enforcement mechanism. The regulations are thus merely suggestions.

## III. ILLUSTRATING THE PROBLEM

### *A. United States' Approach to Civilian Drone Regulation*

While the United States has a well-developed statutory scheme for drone regulation,[90] it is nonetheless flawed. Commercial and recreational drones are subject to different standards based on their intended uses.[91] However, the fact that recreational drones are intended to be a leisure activity does not discount the possibility that this technology will be abused.[92] The two incidents at United Kingdom airports illustrated that drones do not need to be particularly sophisticated to have significant consequences.[93]

### *B. United States Regulatory Scheme*

At present, much civil drone usage in the United States does not comply with the Chicago Convention.[94] While the growing popularity of civilian drones has prompted state regulation, two problems have arisen: first, state regulatory schemes have varied requirements that often fail to fully comply with international standards, and second, the disparate treatment of commercial and recreational drones limits the regulations' effectiveness on an international scale.

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[88] *See id.* at 16.

[89] *See id.* at 22.

[90] *See generally Current Unmanned Aircraft State Law Landscape*, NAT'L CONF. STATE LEGISLATURES (Aug. 3, 2021), https://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx#overview (providing an overview of both federal and state regulations concerning unmanned aircraft systems).

[91] *See* 49 U.S.C.A. § 44809 (West 2021).

[92] *See Recreational Flyers & Modeler Community-Based Organizations*, FED. AVIATION ADMIN., https://www.faa.gov/uas/recreational_fliers/ (last visited Oct. 14, 2020).

[93] *See* discussion *supra* Introduction.

[94] *See generally* Therese Marie Jones, *International Commercial Drone Regulation and Drone Delivery Services*, RAND CORP. (2017), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1700/RR1718z3/RAND_RR1718z3.pdf (summarizing national-level commercial drone regulations across the world and discussing the regulatory approach taken by different countries).

In the United States, drones are regulated through the Federal Aviation Administration (FAA).[95] The Obama Administration passed the FAA Modernization and Reform Act of 2012, which sought to introduce drones into U.S. airspace over the next three years.[96] While commercial drone use was allowed prior to 2016, FAA policy conditioned commercial usage on the issuance of an expensive and difficult-to-obtain permit.[97] In August 2016, however, the FAA issued a new set of rules, known as "part 107," that outlined commercial drone use regulations.[98] With part 107, "[t]he default thus switched from 'commercial use is illegal' to 'commercial use is legal under the following conditions.'"[99] Part 107 defines a small UAS as an unmanned aircraft "weighing less than 55 pounds on takeoff, including everything that is on board or otherwise attached to the aircraft."[100] All drones covered by part 107 require certificates of airworthiness and registration.[101] To register a drone ranging from .005 to 55 pounds, commercial operators must register through FAA's DroneZone web portal.[102] In addition to registration, commercial drone users must also obtain a Remote Pilot Certificate from FAA.[103] The registration requirement for civilian drones reflects FAA's efforts to track growing drone usage across the United States.[104] Drone owners are required to provide their name, physical address, and email address to obtain a Certificate of Aircraft Registration and Proof of Ownership, as well as an identification number that must be displayed on the drone.[105]

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[95] *See Unmanned Aircraft Systems (UAS)*, FED. AVIATION ADMIN., https://www.faa.gov/uas/recreational_fliers/ (last visited Oct. 14, 2021).

[96] FAA Modernization and Reform Act, H.R. 658, 112 Cong. § 332 (2012) (codified at 49 U.S.C.A. § 40101 (West 2021)).

[97] *See Taking Flight: Civilian Drones*, *supra* note 7.

[98] *See id.*; 14 C.F.R. § 107 (2021).

[99] *Taking Flight: Civilian Drones*, *supra* note 7.

[100] 14 C.F.R. § 107.3 (2021).

[101] *Id.* § 107.13 ("A person operating a civil small unmanned aircraft system for purposes of flight must comply with the provisions of § 91.203(a)(2) of this chapter."); *see also id.* § 91.203(a)(2) ("An effective U.S. registration certificate issued to its owner or, for operation within the United States, the second copy of the Aircraft registration Application as provided for in § 47.31(c), a Certificate of Aircraft registration as provided in part 48, or a registration certification issued under the laws of a foreign country.").

[102] *FAA DroneZone*, FED. AVIATION ADMIN., https://faadronezone.faa.gov/#/ (last visited Oct. 14, 2021).

[103] 14 C.F.R. § 107.12(a)(1) (2021).

[104] Rebecca L. Scharf, *Drone Invasion: Unmanned Aerial Vehicles and the Right to Privacy*, 94 IND. L.J. 1065, 1074 (2019).

[105] *FAA Announces Small UAS Registration Rule*, FED. AVIATION ADMIN. (Dec. 14, 2015), https://faadronezone.faa.gov/#/.

The FAA's framework largely complies with the aircraft requirements outlined in the Chicago Convention.[106] The registration provisions satisfy Article 29, which requires that an aircraft have on board:

> a) Its certificate of registration;
>
> b) Its certificate of airworthiness;
>
> c) The appropriate licenses for each member of the crew;
>
> d) Its journey log book;
>
> e) If it is equipped with radio apparatus, the aircraft radio station license;
>
> f) If it carries passengers, a list of their names and places of embarkation and destination; and
>
> g) If it carries cargo, a manifest and detailed declarations of the cargo.[107]

By requiring registration, a certificate of airworthiness, and licensing for operators, Part 107 largely satisfies Article 29's provisions.[108] ICAO addressed the difficulty of some elements of the broader Chicago Convention mandates—like the requirement of having paper copies onboard—which ICAO stated must be reviewed in light of the new aircraft technology.[109] Part 107 also complies with Article 31, which similarly requires that aircrafts carry a valid certificate of airworthiness.[110]

The FAA Reauthorization Act of 2018 outlined exceptions for recreational drone use.[111] While the statute itself fails to define "recreational purposes," FAA defines a recreational drone user as someone who flies a drone "for fun or personal enjoyment."[112] To qualify for the recreational drone exemption, drones must be registered and marked with the registration information.[113] Recreational drones must be flown at or below 400 feet above the ground in uncontrolled airspace,[114] and authorization must be obtained before flying in controlled airspace.[115] Drone operation is further limited to the operator's

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[106] *Compare* 14 C.F.R. § 107 (2021), *and supra* text accompanying notes 94–105, *with* Chicago Convention, *supra* note 11.

[107] Chicago Convention, *supra* note 11, art. 29.

[108] *Compare id.*, *with* 14 C.F.R. §§ 107.12(a)(1), 107.13.

[109] *See Unmanned Aircraft Systems*, *supra* note 17, § 4.11.

[110] *Compare* 14 C.F.R. § 107.13, *with* Chicago Convention, *supra* note 11, art. 31 (indicating the similar requirement of a valid certificate of airworthiness under both sets of regulations).

[111] FAA Reauthorization Act of 2018, H.R. 302, 115th Cong. (2018) (codified at 49 U.S.C.A. § 44809 (West 2021)).

[112] *Recreational Flyers & Modeler Community-Based Organizations*, *supra* note 92.

[113] 49 U.S.C.A. § 44809(a)(8).

[114] *Id.* § 44809(a)(6).

[115] *Id.* § 44809(a)(5).

visual line of sight.[116] Additionally, the statute requires recreational drone operators to pass an aeronautical knowledge and drone safety test,.[117] While recreational drones must be registered, there is no requirement for a certificate of airworthiness, meaning that no regulatory body (here, FAA) has reviewed the aircraft.[118] In fact, hobby drone operators can purchase drones online or build them with little to no oversight.[119]

In regard to consumer drones, the conditions imposed by the Chicago Convention are *somewhat* met. The lax standards for recreational drones, however, do not comply.[120] The Chicago Convention's registration requirement is premised on possession of nationality, yet neither type of civilian drone requires registration of nationality. This concept originated under the 1919 Paris Convention, the predecessor of the Chicago Convention.[121] Article 6 of the Paris Convention requires that an "[a]ircraft possess the nationality of the State on the register of which they are entered."[122] Articles 7 and 8 mandate that aircrafts must be wholly registered to only one state.[123] Article 17 of the Chicago Convention, which requires that "[a]ircraft have the nationality of the State in which they are registered," reflects Article 6 of the Paris Convention.[124] Similar to Articles 7 and 8 of the Paris Convention, Article 18 of the Chicago Convention prohibits dual registration; it does, however, allow for registration transfer.[125] Further, Annex 7 of the Chicago Convention expounds upon the requirement of

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[116] *Id.* § 44809(a)(3).

[117] *Id.* § 44809(a)(7); *see The Recreational UAS Safety Test (TRUST)*, FED. AVIATION ADMIN., https://www.faa.gov/uas/recreational_fliers/knowledge_test_updates/ (last updated Sept. 14, 2021).

[118] *See* 49 U.S.C.A. § 44809(a) (listing the statutory requirements for recreational drone use).

[119] Jack Brown, *How to Build a Drone: Construct Your Drone from Scratch*, DRONELAB, https://www.mydronelab.com/blog/how-to-build-a-drone.html (last visited Oct. 15, 2021) (providing instructions on how to build a drone from scratch while omitting any mention of proper registration with any regulatory body).

[120] *Compare* Chicago Convention, *supra* note 11, art. 29 (outlining the ICAO's standards for drone usage), *and* 14 C.F.R. § 107 (outlining the FAA requirements for commercial drone users), *with* 49 U.S.C.A. § 44809(a) (outlining the FAA requirements for recreational drone users).

[121] Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173 [hereinafter Paris Convention].

[122] *Id.* at art. 6.

[123] *Id.* at arts. 7–8.

[124] Chicago Convention, *supra* note 11, art. 17. *Compare id., with* Paris Convention, *supra* note 123, art. 6 (where the guidelines established by both conventions require the aircraft to have the nationality of the State in which they are registered).

[125] *See* Chicago Convention, *supra* note 11, art. 18; *compare id.*, *with* Paris Convention, *supra* note 123, arts. 7–8 (where the guidelines established by both conventions prohibit dual registration).

registration and nationality marks.[126] Annex 7 requires that all aircrafts bear a nationality or common mark and a registration mark which "shall consist of a group of characters."[127] Each state must also maintain a registry of these marks.[128] These practices correspond with Chicago Convention Article 8's interest in state responsibility "as to obviate danger to civil aircraft."[129]

Lack of a coherent and codified regulatory scheme runs the risk of breeding "flags of convenience" in international aviation, obviating a clearly articulated purpose of the Chicago Convention. Commonly associated with maritime travel, "flags of convenience" describe the practice of swapping a watercraft's registered nationality to take advantage of the privileges of another, chosen state (i.e., the flag state), such as cheaper fees or favorable regulations, while in a given port.[130] Critics argue that flags of convenience increased the likelihood of criminal activity and subvert environmental and labor standards.[131] To mitigate this practice in international aviation, Article 17 of the Chicago Convention mandates that "[a]ircraft have the nationality of the State in which they are registered."[132] And, as already noted, Article 18 provides that aircrafts can only register in one state.[133] Together, Articles 17 and 18 recognize and try to preempt the problematic nature flags of convenience have played in the law of the seas.[134] At the Sixth Meeting of the Worldwide Air Transport Conference in 2013, the International Transport Workers Federation (ITF) presented a worker paper on the dangers of liberalized regulation.[135] In the paper, ITF warned about the detrimental

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[126] *See* Int'l Civ. Aviation Org. [ICAO], *Annex 7 to the Convention on International Civil Aviation: Aircraft Nationality and Registration Marks* (5th ed., July 2003) [hereinafter Chicago Convention Annex 7].

[127] *Id.* at § 2.1.

[128] *Id.* at § 6.

[129] Chicago Convention, *supra* note 11, art. 8.

[130] *See Flags of Convenience*, NGO SHIPBREAKING PLATFORM, https://shipbreakingplatform.org/issues-of-interest/focs/ (last visited Oct. 15, 2021); *see also* Kimbra Cutlip, *Flag of Convenience or Cloak of Malfeasance?*, GLOB. FISHING WATCH (Feb. 22, 2017), https://globalfishingwatch.org/fisheries/flag-of-convenience-or-cloak-of-malfeasance//.

[131] *See* Robert Neff, *Flags That Hide the Dirty Truth*, ASIA TIMES (Apr. 19, 2007), https://archive.globalpolicy.org/nations/flags/2007/0419dirtyflags.htm#author.

[132] Chicago Convention, *supra* note 11, art. 17.

[133] *Id.* at art. 18.

[134] *See* Brian Whitehead, *Article 83 Bis, ICAO Amendment Requires Give and Take*, AVIATIONPROS (Oct. 31, 2000), https://www.aviationpros.com/home/article/10388504/article-83-bis-icao-amendment-requires-give-and-take.

[135] Int'l Transp. Workers Fed'n (ITF), *The Need for a Strategy to Address the Negative Consequences of Continued Liberalization: Would Maritime Style "Flags of Convenience" Contribute to Sustainable Aviation?* (Int'l Civ. Aviation Org., Working Paper ATCfonf/6-

effects of deregulation in air transport where airlines have been allowed to register aircrafts in states with safety standards below the international baseline.[136]

In theory, the flags of convenience should not only be preempted by Articles 17 and 18, but also by the nature of the Chicago Convention as a binding set of normative standards. This is largely the case for piloted aircraft. However, the Chicago Convention is not frequently enforced with respect to drones, despite the fact that drones are *technically* subject to the Convention.[137] In actuality, the state-by-state variances in drone regulations invite flags of convenience. While aircraft cannot be registered to more than one state simultaneously, the ability to transfer registration via Article 18 opens the door for selective application of international standards.[138] Additionally, although piloted aircrafts operating both domestically and internationally often fly from one airport to another, this is not necessarily the case for drones. Drones so vastly differ in size that any traveler may pack a drone in their suitcase, fly internationally, and operate that drone in another state. This begs the question: what state's rules apply? This problem would be remedied if states were required to implement drone regulations in accordance with an international norm, via SARPs.

## IV. CALLING FOR A NEW INTERNATIONAL REGULATORY SCHEME

Unlike many conventions that lack a formal revisionary or amendment process, the Chicago Convention is uniquely suited to adapt with the times. ICAO SARPs provide a mechanism for constant modernization to meet the ever-changing needs of the civil aviation industry worldwide. Addressing the value of SARPs, former Council President and Secretary General of ICAO, Dr. Assad Kotaite, stated that "universally accepted and implemented standards are essential for transporting passengers and merchandise by air safely and efficiently around the world. Without such uniform rules and procedures, aviation would be at best chaotic and at worst unsafe."[139] At present, the status of drone regulation is both chaotic and unsafe.

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WP/99, 2013), https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf.6.WP.099.2.en.pdf.

[136] *Id.* § 2.4.

[137] *See* Kristian Bernauw, *Drones: The Emerging Era of Unmanned Civil Aviation*, 66 ZBORNIK PFZ 223, 243 (2016).

[138] *See* Chicago Convention, *supra* note 11, art. 18.

[139] Assad Kotaite, Attachment to "*Implementing SARPs – The Key to Aviation Safety and Efficiency": The Theme for the 2000 Edition of International Civil Aviation Day*, INT'L CIV. AVIATION ORG. [ICAO] (Dec. 6, 2000), https://www.icao.int/secretariat/SecretaryGeneral/aviation_day/

While legislation is evolving at the national and international level, there is a pressing need for harmonization.[140] Even in situations where a drone does not enter foreign airspace as contemplated in Article 8, "it is susceptible to encountering in its domestic airspace foreign aircraft registered in other member countries of the Chicago Convention."[141] Security risks like the Gatwick Airport drone incident can only be mitigated through cohesive regulation that ensures international cooperation with safety standards.[142] Furthermore, unlicensed and unregulated hobby drone users may be completely unaware as to where distinctions such as territorial and international water lines are drawn, potentially leading to the broadening of concerns about their use from domestic to international issues.

### *A. ICAO Standards: Registration & Certification*

Perhaps the most pressing safety issue for civilian drone regulation is the difficulty in effectively identifying the registered owner.[143] While drones in many states, including the United States[144] and United Kingdom,[145] require registration, "[v]isual identification of drones may be complicated by the combined effect of their small size and distant location."[146] Standardization of the size, location, and information that must be physically present on the drone itself is an essential element of an SARP relating to drone regulation. An SARP that integrates the nationality and registration marks presently found in Annex 7 specifically for drone use would aid lawmakers in standardizing the registration and identification process.[147] Integrating ICAO model UAS regulations as a standard would ensure that registration and certification became a mandated practice for all states regardless of the drone's designated use.[148] Additionally, requiring states to create and maintain online registration systems for recreational drones would increase accountability worldwide.

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2000/pio200012_e.pdf.

[140] *See* Bernauw, *supra* note 137, at 234.

[141] *Id.*

[142] *See id.* at 239–40.

[143] *See id.* at 240.

[144] *See* 14 C.F.R. § 107.13 (2021).

[145] *Drone and Model Aircraft Registration*, CIV. AVIATION AUTH., https://www.caa.co.uk/Consumers/Unmanned-aircraft/Our-role/Drone-and-model-aircraft-registration/ (last visited Oct. 15, 2021).

[146] Bernauw, *supra* note 137, at 240.

[147] *See* Chicago Convention Annex 7, *supra* note 126, § 2.1.

[148] See *Model Regulations*, *supra* note 83, for an example of ICAO suggested regulations and procedures that member States may consider for implementation to regulate the operation of Unmanned Aircraft Systems.

While SARPs do not bear the same force as international conventions, the standards "are arguably binding upon member states that fail to notify ICAO of the differences in their domestic law."[149] Under Article 84 of the Chicago Convention, the ICAO Council may settle disputes that the states fail to resolve.[150] If a state does not conform with a decision, "[t]he Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter."[151] At present, the implementation and enforcement of SARPs has been successful in promoting safe international airways.[152]

### *B. Recommended Practices: Digital Identification & Geofencing*

As the name implies, a recommended practice is an advisable, but not mandatory, specification. Like standards, recommended practices are "highly desirable to guarantee safety and/or efficiency," and "[s]tates are expected to do everything they can to comply with them."[153] Ongoing developments in drone technology would further aid in identifying the operators of rogue drones as well as protecting areas like airports from drone interference.

In November 2019, Chinese drone manufacturer DJI developed an application using the protocol "Wi-Fi Aware" to identify airborne drones.[154] While this form of digital identification is not foolproof, it would limit incidents like that at the Gatwick Airport.[155] Similarly, FAA has rolled out plans for Remote ID, which would provide "governmental and civil identification of UAS for safety, security, and compliance purposes."[156] The FAA released its proposal for Remote ID in December 2019, with a projected five-year timeline for implementation.[157] Implementation of digital identification practices would aid states not only in prosecuting violators of

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[149] Paul Stephen Dempsey, *Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety*, 30 N.C. J. INT'L L. & COM. REGUL. 1, 5 (2004).

[150] Chicago Convention, *supra* note 11, art. 84.

[151] *Id.* at art. 88.

[152] *See Making an ICAO Standard*, INT'L CIV. AVIATION ORG. [ICAO], https://www.icao.int/safety/airnavigation/Pages/standard.aspx#6 (last visited Oct. 15, 2021).

[153] *Making SARPs*, *supra* note 54.

[154] *See* Dave Lee, *DJI Makes App to Identify Drones and Find Pilots*, BBC NEWS (Nov.14, 2019), https://www.bbc.com/news/technology-50414108.

[155] *Id.*

[156] Amit Ganjoo, *The Deep Dive into Remote ID for Drones: What It Is, What it Means, and What's Next*, DRONELIFE (Feb. 19. 2020), https://dronelife.com/2020/02/19/the-deep-dive-into-remote-id-for-drones-what-it-is-what-it-means-and-whats-next/.

[157] Brian Garrett-Glaser, *A Christmas Present from the FAA: Proposed Rules for Unmanned Aircraft Remote ID*, AVIATION TODAY (Dec. 26, 2019), https://www.aviationtoday.com/2019/12/26/christmas-present-faa-proposed-rules-unmanned-aircraft-remote-id/.

drone laws but also in deterring others from engaging in similar acts and creating accountability for civil wrongs.

While additional identification measures certainly provide states with tools to prosecute offenders, prophylactic measures should also be taken to prevent the danger in the first place. In 2017, a team of researchers at the University of Massachusetts Amherst proposed the use of geo-fencing at airports to eliminate the risk of drone interference.[158] Geo-fencing "is the practice of using global positioning (GPS) or radio frequency identification (RFID) to define a geographic boundary."[159] The University of Massachusetts researchers proposed "a module, called the Airport Secure Perimeter Control System, that can be attached to every hobbyist's UAS for the purpose of notification and prevention."[160] This module system operates via a database containing the coordinates of major airports in the United States.[161] If a drone operator breaches the five-mile perimeter around the airport, "autopilot software takes over the manual controls, and the UAS is landed in a controlled manner."[162] This proposal would require installing GPS trackers in newly manufactured recreational drones and retrofitting older models.

While geo-fencing may be cost-prohibitive for some states, a 2016 study by the U.K. Department for Transport found that a drone strike to the windscreen of a helicopter or airplane runs the risk of "of critical windscreen damage."[163] Additionally, the risk of a drone striking an aircraft is not unheard of. In April 2016, a British Airways flight was struck by a drone while landing at London's Heathrow Airport.[164] Like the later incidents at Gatwick and Heathrow, the drone operator was never identified.[165] Because the damage that could be caused by these incidents could be astronomical, many states may find that the cost is likely worth the harm prevention.

## CONCLUSION

While national drone regulation exists in many states worldwide, measures to standardize these rules are lacking. An integral flaw in existing drone

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[158] Chris Boseli et. al., *Geo-fencing to Secure Airport Perimeter Against sUAS*, 5 INT'L J. INTELLIGENT UNMANNED SYS. 102 (2017).

[159] Lauryn Chamberlain, *GeoMarketing 101: What Is Geofencing?*, GEOMARKETING (Mar. 7, 2016), https://geomarketing.com/geomarketing-101-what-is-geofencing.

[160] Boseli et al., *supra* note 158, at Abstract.

[161] *Id.* at Design/Methodology/Approach.

[162] *Id.*

[163] *Small Remotely Piloted Aircraft Systems (Drones) Mid-Air Collision Study*, U.K. DEPT. FOR TRANSPORT 1, 4 (2016).

[164] *'Drone' Hits British Airways Plane Approaching Heathrow Airport*, BBC NEWS (Apr. 17, 2016), https://www.bbc.com/news/uk-36067591.

[165] *See id.; see also supra* text accompanying notes 1–6.

regulation, like that of the United States, is the differentiation between commercial and recreational civilian drones. While civilian drones are cheaper, often smaller, and sold to consumers for their entertainment value, they nonetheless pose a significant threat if unregulated. While many states have some regulation for commercial civilian drones, it is lacking, and the fact that the same, sub-par regulations are not extended to hobby drones is extremely problematic.

The ICAO is uniquely qualified to address the pressing need for civilian drone regulation. As the epicenter of civil aviation policymaking, it "has been the forum for negotiation of most of the world's major multilateral aviation conventions, in areas such as carrier liability for death, injury, loss and damage, and aviation security, hijacking terrorism."[166] Through the promulgation of SARPs, the very real danger of unchecked, and underregulated civilian drone operation would be mitigated internationally.

Standardization of civil drone regulation would not only aid in ensuring international safety, but it also would disincentivize practices like flags of convenience, which are premised on "playing the system." To avoid this problem, a singular set of registration and certification requirements for drone operators is essential. Supplementary recommended practices like digital identification and geo-fencing would further display an international commitment toward developing the safest drone policies and aid in fostering international norms.

[166] DEMPSEY, *supra* note 37, at 12.

# The Brazilian Environmental Regulatory Framework and the Paris Agreement: Challenges for the Forest Code as a Tool to Tackle Climate Change

Leonardo Munhoz*

*Abstract*

*As a party to the Paris Agreement, Brazil has committed to reduce its emissions. According to its Nationally Determined Contribution, this undertaking will be achieved by stopping illegal deforestation and restoring thousands of hectares of degraded forests, making the Forest Code key legislation in this context. However, the Forest Code's implementation has been facing severe challenges due to the lack of police power and budget. This Article discusses the importance of the Brazilian Forest Code in tackling climate change and how these challenges can be overcome.*

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## INTRODUCTION

Farming is a crucial economic activity, representing not only the jobs and livelihood of countless families worldwide but also the engine that ensures

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food security for all. Farming, however, is intrinsically related to land use, which consequently translates into the alteration of natural habitats and exploitation of natural resources.

In Brazil, agrarian legislation (i.e., Federal Law No. 4.504/1964[1]) evolved alongside environmental law. The result of that connection was the link between forest preservation, land use, and rural properties, known as the Forest Code, enacted by Federal Law No. 4.771/1965,[2] and later, replaced by Federal Law No. 12.651/2012.[3] With regard to climate change and Brazil's obligation as a party to the Paris Agreement,[4] the Forest Code plays a fundamental role in reducing the country's emissions.[5] Three main commitments support Brazil's Nationally Determined Contribution (NDC) and strategy to halt greenhouse gas emissions (GHG): (1) use of sustainable biofuels, (2) large-scale measures relating to land use, and (3) tripling the share of zero and low carbon energy supply by 2050.[6] Specifically, for sustainable land use, Brazil commits to restoring twelve million hectares of degraded forests and fifteen million hectares of degraded pasturelands and zero illegal deforestation by 2030.[7] Hence, enforcing the Forest Code with its Environmental Regularization Programs is crucial for Brazil's achievement of most of its NDC goals. However, this agenda has faced several challenges. First, enforcement of the 2012 New Forest Code was significantly postponed due to constitutional challenges in the Brazilian Supreme Federal Court from 2012 to 2018.[8] Second, although Brazil's

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[1] Lei No. 4.504, de 30 de Novembro de 1964, Diário Oficial da União [D.O.U.] de 30.11.1964 (Braz.).

[2] Lei No. 4.771, de 15 de Setembro de 1965, Diário Oficial da União [D.O.U.] de 16.09.1965 (Braz.), *repealed by* Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.).

[3] Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.).

[4] Paris Agreement, Dec. 12, 2015, T.I.A.S. No. 16-1104 ("Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.").

[5] *See* Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.).

[6] *See* Ministério das Relações Exteriores, Paris Agreement Brazil's Nationally Determined Contribution (NDC) (Dec. 9, 2020), https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Brazil%20First/Brazil%20First%20NDC%20(Updated%20submission).pdf [hereinafter Updated Brazil NDC].

[7] *Id.*

[8] Richard Perez, *Deforestation of the Brazilian Amazon Under Jair Bolsonaro's Reign: A Growing Ecological Disaster and How It May be Reduced*, 52 U. MIA. INTER-AM. L. REV. 193, 204 (2021); *see* Sue Branford & Maurício Torres, *Analysis: The Brazilian Supreme*

environmental regulatory framework is heavily based on command-and-control instruments,[9] the country currently does not have the economic resources and personnel to monitor and enforce punishments.[10] With no deterrent effect, the achievement of Brazil's NDC goals–especially its fight against illegal deforestation–is deeply undermined.[11] Finally, the country lacks market incentive policies that could be used to fill in these gaps and deficiencies from this system.[12] This Article assesses the importance of the Forest Code for Brazil to achieve its goals in the Paris Agreement and discusses how to overcome the challenges of enforcing this law, so the country can finally transition to a low carbon economy.

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*Court's New Forest Code Ruling*, MONGABAY (Mar. 7, 2018), https://news.mxongabay.com/2018/03/analysis-the-brazilian-supreme-courts-new-forest-code-ruling/.

[9] For a definition of command-and-control policies, see *infra* notes 93–94 and accompanying text.

[10] *See generally* Perez, *supra* note 8, at 207–08 (discussing the elimination of environmental fines and constricting of environmental agencies from enforcing environmental law).

[11] Ralph Trancoso, *Changing Amazon Deforestation Patterns: Urgent Need to Restore Command and Control Policies and Market Interventions*, 16 ENV'T RSCH. LETTERS 2 (2021), https://iopscience.iop.org/article/10.1088/1748-9326/abee4c/pdf (associating increased size of deforestation in recent years to current environmental policies and discontinuing of previous efforts to combat deforestation through monitoring and enforcement); *see* Perez, *supra* note 8.

[12] Andrea A. Azevedo et al., *Limits of Brazil's Forest Code as a Means to End Illegal Deforestation*, 114 PNAS 7653, 7656 (2017), https://www.pnas.org/content/pnas/114/29/7653.full.pdf (citation omitted) ("[T]he only economic incentive currently applicable to forest restoration is a 15% increase in the total amount of subsidized loans available to farmers who can demonstrate a commitment to full compliance with the Forest Code. No market initiative targets the forest debts of individual farmers under the Forest Code . . . ."); *see also* Trancoso, *supra* note 11, at 4–5 (citation omitted) ("[A]s markets are the fundamental drivers of changes in landscape and natural resource use, interventions in supply chains, credit restrictions, along with sustainable development programs and incentives are essential to ensure a transition to an environmentally sustainable economy.").

## I. THE BRAZILIAN NATIONALLY DETERMINED CONTRIBUTION

The Paris Agreement is a legally binding instrument of international law[13] that commits its 196 signatory parties to tackle climate change.[14] The Paris Agreement entered into force on December 12, 2015.[15] In short, the goal of the treaty is to limit global warming to below two degrees Celsius (preferably around 1.5) compared to pre-industrial levels.[16] To accomplish this goal, each party must set individual objectives through the preparation of a NDC.[17] The NDC is submitted to the United Nations Framework Convention on Climate Change Secretariat and details each party's individual goals and their strategies to achieve the NDC goals.[18] The Brazilian NDC was first submitted in 2016.[19] In the NDC, the country committed to reduce its GHG to 37% below 2005 levels by 2025 and 43% below 2005 levels by 2030.[20] Also, the NDC sets forth Brazil's strategy, divided into three main branches: (1) use of

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[13] Article 38 of the Statute of International Court of Justice provides four sources of international law:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice art. 38, ¶ 1(a)–(d).

[14] *The Paris Agreement*, U. N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last visited Oct. 22, 2021).

[15] Paris Agreement, *supra* note 4, at 25.

[16] *Id.* art. 2, ¶ 1(a) ("Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change . . . .").

[17] *Id.* art. 4, ¶ 2.

[18] NDCs are submitted every five years regardless of their respective implementation time frames and represent the party's progression and highest possible ambition. *Nationally Determined Contributions (NDCs)*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs (last visited Oct. 22, 2021).

[19] *All NDCs*, NDC REGISTRY (INTERIM), https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx (last visited Oct. 22, 2021).

[20] Ministério das Relações Exteriores, Federative Republic of Brazil Intended Nationally Determined Contribution Towards Achieving the Objective of the United Nations Framework Convention on Climate Change (Sept. 21, 2020), https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Brazil%20First/Brazil%20First%20NDC%20(Updated%20submission).pdf [hereinafter First Brazil NDC]. Brazil reconfirmed this commitment in its updated NDC. Updated Brazil NDC, *supra* note 6, at 1.

sustainable biofuels, (2) large-scale measures relating to land use, and (3) tripling the share of zero and low carbon energy supply by 2050.[21] Specifically, for land use measures, Brazil details that this must be done by strengthening and enforcing the Forest Code, especially by restoring twelve million hectares of degraded forests and fifteen million hectares of degraded pasturelands, and strengthening policies and enforcement measures to eliminate illegal deforestation.[22] On August 12, 2020, Brazil updated its NDC.[23] In this updated submission, Brazil did not present defined numbers regarding reducing deforestation.[24] This created some questions as to whether Brazil was truly pushing further its ambition to reduce GHG, as required by the Paris Agreement.[25] Nonetheless, the main three strategies remained the same, including Brazil's objective to strengthen the Forest Code as a land use measure.

## II. THE BRAZILIAN FOREST CODE

In Brazil, the most important regulation addressing forest protection for private properties is the Forest Code.[26] Enacted in 2012, the New Forest Code not only retained almost all legal obligations from the previous Forest Code of 1965, including the maintenance of Permanent Preservation Areas (*Áreas de Preservação Permanente* (APP)) and the Legal Reserve Areas (*Reserva Legal* (RL)), but also created a new environmental regularization process for rural properties, entitled the Environmental Regularization Program (*Programa de Regularização Ambiental* (PRA)).[27] Both APP and RL are areas of rural property that a farmer cannot use for agricultural purposes, and the farmer must maintain the native vegetation.[28] In other words, APP and RL are mandatory easements imposed on a farmer, without financial compensation by the government.[29] For purposes of comparison and clarification, the most analogous instruments available in the United States

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[21] First Brazil NDC, *supra* note 20, at 3.

[22] *Id.*

[23] *All NDCs*, *supra* note 19.

[24] *See* Updated Brazil NDC, *supra* note 6, at 3 ("Net emissions from 01/01/2005 to 31/12/2005 compared with net emissions from 01/01/2025 to 31/12/2025. Net emissions from 01/01/2005 to 31/12/2005 compared with net emissions from 01/01/2030 to 31/12/2030.").

[25] *See* Paris Agreement, *supra* note 4, art. IV, ¶ 3.

[26] Rebecca Catherine Brock et al., *Implementing Brazil's Forest Code: A Vital Contribution to Securing Forests and Conserving Biodiversity*, 30 BIODIVERSITY & CONSERVATION 1621, 1622 (2021).

[27] Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.).

[28] *Id.*

[29] *See id.*

are the Land Retirement[30] and the Agricultural Conservation Easement[31] programs, which similarly impose land and farming activity restrictions. However, this is the only similarity since the United States system is voluntary and compensates a farmer for the land use restriction, whereas the Brazilian system is mandatory and provides no compensation to a farmer.[32] The main differences between APP and RL are the intended functions and requirements.[33] APP aim for geological stability, soil stability, and the regulation of hydrological cycles.[34] APP consist of determined locations on

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[30] The American Land Retirement Programs consist of a government financial compensation for the farmer that temporarily retires part of the land from agricultural production (i.e., change the land use). MARCEL AILLERY, U.S. DEP'T OF AGRIC., CONTRASTING WORKING-LAND AND LAND RETIREMENT PROGRAMS (2006). The program is voluntary, meaning the farmer may decide whether or not to enroll in the program. *See id.* The most relevant Land Retirement Program is the Conservation Reserve Program (CRP). Once the farm is enrolled in the CRP, the land use restriction lasts from ten to fifteen years. 16 U.S.C. § 3831. This program is designed to benefit soil, water, and wildlife quality improvement. *Id.* However, the CRP has an acreage cap established in each Farm Bill renewal which can vary. *See id.*

[31] The American Easements Programs are quite similar to the Land Retirement Programs. These voluntary programs also impose a land use restriction from agricultural activities in exchange for government financial compensation. *See Easements*, U.S. DEP'T OF AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/ (last visited Oct. 22, 2021). However, they have a more long-term duration when compared to the CRP (i.e., up to thirty years). *Agricultural Conservation Easement Program*, U.S. DEP'T OF AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/ (last visited Oct. 22, 2021). Currently, the Easement Programs of the Farm Bill are mostly represented by the Agricultural Conservation Easement Program (ACEP), which replaced the former Wetlands Reserve Program, Farmland Protection Program, and Grassland Reserve Program. *See* 16 U.S.C. § 3865.

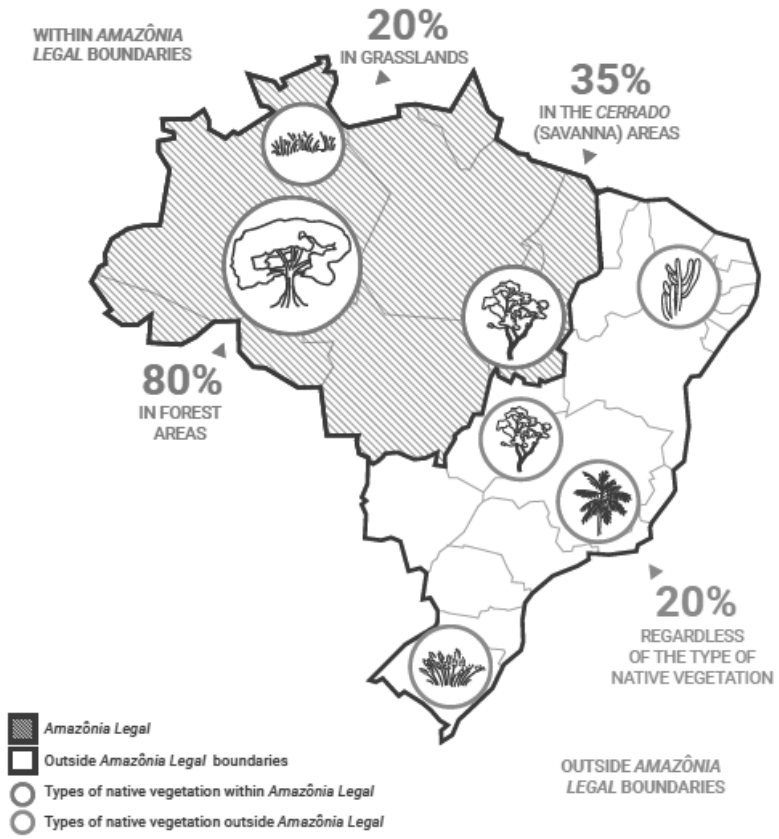
[32] *See* Leonardo Munhoz, The Environmental Limitations to Property Rights in Brazil and the United States of America 102 (Jan. 2014) (LL.M. thesis, Pace University School of Law), https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1014&context=lawdissertations ("Brazilian law and jurisprudence make it clear that to request compensation for environmental limitations, the governmental act must have somehow transferred part of the ownership of the property to the public power[,] . . . limiting the scope of compensation only to absolutely clear categorical takings performed by the government."). It is unlikely that the United States can adopt property limitations for environmental protection similar to Brazil since both legal systems have completely different concepts of property rights. *See id.* In Brazil, property rights are more flexible because of the social function of property and environmental rights established in the Constitution. *See id.* at 75–79, 100. The United States legal system and Constitution do not have the same flexibilities. *See id.* at 103.

[33] *See* Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.); Rayane Aguiar et al., *Public Conservation Policies on Private Land: A Case Study of the Brazilian Forest Code and Implications for the Agro-Industry Sector*, 34 PACE ENV'T L. REV. 325, 334–37 (2017).

[34] JOANA CHIAVARI & CRISTINA LEME LOPES, CLIMATE POL'Y INITIATIVE, BRAZIL'S NEW FOREST CODE: PART I: HOW TO NAVIGATE THE COMPLEXITY 3 (2015),

a property, such as rivers in riparian forests, lakes, mountain tops, cliffs, and water springs.[35] In contrast, RL focus on the preservation of the local native vegetation and habitat and thus is not considered a determined location.[36] Rather, the Forest Code requires that RL specify a percentage of the property covered in vegetation to be set aside.[37] This percentage varies between 20%, 35%, and 80%, according to the region of the country and biome (grasslands, savannas, and amazon forests) as seen below:

**Figure 1. Legal Forest Reserve Percentage Based on Type of Vegetation and Geographical Location**[38]




https://www.climatepolicyinitiative.org/wp-content/uploads/2015/11/Policy-Brief-Part-I-How-to-Navigate-the-Complexity.pdf [hereinafter Chiavari & Lopes Part I].

[35] *Id.*

[36] *See id.*

[37] *Id.*

[38] *Id.* at 4 fig. 1.

According to the Serviço Florestal Brasileiro, Brazil currently has approximately 102,024,137 hectares of RL and 18,538,737 hectares of APP, or between 110 and 120 million hectares of forests in private properties total.[39] For comparison, Brazil has a total of 113 million hectares of Conservation Units.[40] Thus, there is almost the same extension of forests in private properties as in all of Brazil's federal and state parks combined.[41] If a farmer does not reach the mandatory percentages established by the Forest Code (counting its APP with the RL available), the property is considered to have a deficit of forests and an illegal status that must be regularized.[42] Today, Brazil has approximately 19.4 million hectares of damaged APP and RL in private properties,[43] which will have to be restored within the next twenty years. This fact is extremely important in the context of Brazil's role in the Paris Agreement. In addition to increasing the use of biofuels and mandating zero illegal deforestation, Brazil has committed in its NDC to restore and reforest twelve million hectares of forests and fifteen million hectares of degraded pasturelands by 2030.[44] Thus, by merely enforcing the Forest Code and its rules for private properties, Brazil can significantly achieve most of its NDC land use goals.[45]

Indeed, the PRA is one of the Forest Code's most important new instruments as it enables the solution for environmental liabilities regarding APP and RL.[46] The PRA is a program composed of three main instruments:

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[39] *Boletim Informativo: Edição especial de 4 anos do CAR*, Cadastro Ambiental Rural (CAR) (Serviço Florestal Brasileiro, Braz.), May 29, 2018, at 11, 13, https://www.florestal.gov.br/boletins-do-car/3657-boletim-informativo-edicao-especial-4-anos-car/file.

[40] *Boletim Informativo – 2 Anos Brasil*, Cadastro Ambiental Rural (CAR) (Serviço Florestal Brasileiro, Braz.), Apr. 30, 2016, at 10), http://www.florestal.gov.br/documentos/car/boletim-do-car/68-boletim-informativo-car-2-anos-abril-2016-brasil/file.

[41] *See id.*

[42] To determine how much of the property must be preserved counting APP and RL, the farmer must first identify the APP (i.e., whether the farm has rivers, cliffs, springs, etc.) and then add those measures to count as part of the rest of the RL percentage demanded for that region. *See* Lei No. 12.651 art. 15, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.). For a study on the impacts of the New Forest Code including estimated RL deficits, see Britaldo Soares-Filho et al., *Cracking Brazil's Forest Code*, 344 SCI. 363 (2014).

[43] Vinicius Guidotti et al., *NÚMEROS DETALHADOS DO NOVO CÓDIGO FLORESTAL E SUAS IMPLICAÇÕES PARA OS PRAs*, SUSTENTABILIDADE EM DEBATE [SUSTAINABILITY IN DEBATE], May 2017, at 5.

[44] First Brazil NDC, *supra* note 20, at 3.

[45] *See id.*

[46] *See* JOANA CHIAVARI ET AL., CLIMATE POL'Y INITIATIVE, EXECUTIVE SUMMARY: WHERE DOES BRAZIL STAND WITH THE IMPLEMENTATION OF THE FOREST CODE? A SNAPSHOT OF THE CAR AND THE PRA IN BRAZIL'S STATES 2020 EDITION 4 (2020), https://www.climatepolicyinitiative.org/wp-content/uploads/2020/12/Where-does-Brazil-

the Environmental Rural Registry (*Cadastro Ambiental Rural* (CAR)),[47] the Forest Recovery Plan (*Projeto de Recuperação das Areas Degradadas e Alteradas* (PRADA)),[48] and the Commitment Agreements (*Termo de Compromisso* (TC)).[49] It is important to point out that only rural areas deforested prior to July 22, 2008 are eligible for this program.[50] After a farmer enrolls in the PRA and signs the TC, the farmer may enjoy several benefits, such as the suspension of ongoing administrative proceedings, fines, and embargoes, as well as more flexible APP restoration requirements, which may occur either through natural regeneration or planting of seeds and seedlings.[51] With respect to RL, a farmer can mitigate the area not only by choosing natural regeneration or planting seeds and seedlings like the methods for APPs, but also through compensation.[52] The compensation alternative is a method wherein a farmer with degraded forest can purchase

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Stand-With-the-Implementation-of-the-Forest-Code-2020-Edition.pdf. The PRA is the *Programa de Regularização Ambiental* (Environmental Regularization Program). *See supra* note 27 and accompanying text.

[47] The CAR is a mandatory national public digital registry with satellite images of all rural properties and possessions. Chiavari & Lopes Part I, *supra* note 34, at 3; Suhyun Jung et al., *Brazil's National Environmental Registry of Rural Properties: Implications for Livelihoods*, 136 ECOLOGICAL ECON. 53, 55 (2017). The CAR creates a database integrating the environmental information of the properties for more effective controlling, monitoring, and environmental/economic planning to tackle illegal deforestation. Chiavari & Lopes Part I, *supra* note 34, at 3. The registration of the rural property in the CAR is a mandatory requirement to enroll in the PRA. Jung et al., *supra*, at 53. To view the CAR system, see *Sicar*, CADASTRO AMBIENTAL RURAL, http://www.car.gov.br/publico/imoveis/index (last visited Oct. 25, 2021).

[48] PRADA is a technical plan that the owner of the rural property or possession will have to present to the environmental agency, demonstrating how they intend to regularize converted APPs and RLs until July 22, 2008. It also includes which restoration method will be adopted and whether the owner wants to use compensation (i.e., if applicable for the RL). In this sense, Federal rules are vague about PRADA and its formal aspects.

[49] As established in the Forest Code, the landowner must enroll in the PRA, sign the TC, and submit and obtain approval for the PRADA. JOANA CHIAVARI & CRISTINA LEME LOPES, CLIMATE POL'Y INITIATIVE, BRAZIL'S NEW FOREST CODE: PART II: PATHS AND CHALLENGES TO COMPLIANCE 11, 20 (2015), https://www.climatepolicyinitiative.org/wp-content/uploads/2015/11/Policy-Brief-Part-II-Paths-and-Challenges-to-Compliance.pdf [hereinafter Chiavari & Lopes Part II]. The TC consists of an extrajudicial executory instrument, binding the producer with the terms and obligations agreed in the TC and PRADA about how APPs and RL will be restored. *See* Lei No. 12.651 art. 18, § 2, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.).

[50] Chiavari & Lopes Part II, *supra* note 49. As to areas converted after July 22, 2008, the rules for APP and RL must be fully applied, without the flexibilities mentioned. *See id.* at 9–10.

[51] *See id.* at 13, 15.

[52] *Id.* at 15–16.

their deficit from another farmer with a surplus of native vegetation.[53] The compensation for RL, however, can only occur in areas with the same biome and extension (i.e., size) as the RL.[54] It also can occur between properties in different states (i.e., interstate compensation), but the requirements are even stricter since they must be defined as priority areas by the respective state or the federal government.[55]

A farmer with an illegal RL and APP status—who does not enroll in the PRA—is subject to full environmental liability. In Brazil, this full environmental liability consists of three independent spheres: civil, administrative, and criminal.[56] In other words, potential consequences include litigation, environmental fines, and criminal charges.[57] Concerning civil liability for damaged APP and RL, strict and joint liability may be applied to all persons responsible, directly or indirectly, for the activity that causes environmental deterioration, irrespective of fault.[58] This results in an obligation to indemnify or remedy the damage caused to the environment and third parties.[59] The law applies somewhat similarly to the United States' Comprehensive Environmental Response, Compensation, and Liability Act.[60] Brazil currently has a forest regulation strategy strongly grounded in a command-and-control approach.[61] Accordingly, it primarily acquires easements with no financial compensation.[62] This strategy could have serious consequences as to the full enforcement of environmental liability.[63] However, the compensation of RL is a new initiative which may lead Brazil to start adopting more market incentives and green payments instruments in the near future, potentially altering today's legal system.

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[53] *See* Aguiar et al., *supra* note 33, at 354; Sâmia Nunes et al., *Potential for Forest Restoration and Deficit Compensation in Itacaiúnas Watershed, Southeastern Brazilian Amazon*, FORESTS, May 2019, at 2.

[54] Chiavari & Lopes Part II, *supra* note 49, at 16.

[55] *See id.*

[56] Lei No. 6.938 art. 14, de 31 de Agosto de 1981, Diário Oficial da União [D.O.U.] de 02.09.1981 (Braz.).

[57] *See* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.).

[58] *See* Nicholas S. Bryner, *Brazil's Green Court: Environmental Law in the Superior Tribunal De Justiça*, 29 PACE ENV'T L. REV. 470, 496–98, 513–17 (2012); Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U] de 28.5.2012 (Braz.).

[59] *See* Bryner, *supra* note 58; Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U] de 28.5.2012 (Braz.).

[60] *Compare* Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U] de 28.5.2012 (Braz.) *with* 42 U.S.C. § 9607.

[61] *See* Trancoso, *supra* note 11.

[62] Munhoz, *supra* note 32, at 102.

[63] *See id.*

## III. FOREST CODE LITIGATION IN THE BRAZIL SUPREME FEDERAL COURT AND ITS OUTCOMES

Litigation in Brazil's Supreme Federal Court[64] severely delayed the Forest Code agenda.[65] The litigation started with the New Forest Code's enactment in 2012, prompting the Federal Public Prosecutor to file three actions challenging the code's constitutionality.[66] It is worth mentioning that Brazil incorporates a hybrid system that uses both the diffused and concentrated model of judicial review.[67] In the diffused model, judicial review is carried out by lower courts (*e.g.*, *Marbury v. Madison*) and the object of discussion is an individual right brought by any person with retroactive effects (*ex tunc*).[68] As for centralized judicial review, also known as abstract review and largely used in Europe, the constitutional challenge is brought by a select group of individuals (*e.g.,* the president, political parties, public prosecutor, and state governors) in which the constitutionality of a state or federal law is questioned at the highest court.[69] Consequently, these decisions of whether a state or federal law is constitutional have a general effect (*erga omnes*) and

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[64] *Supremo Tribunal Federal* – STF, in Portuguese, and hereinafter referred to as "Court." This Court is the highest Court in Brazil, and it only addresses constitutional matters. *See* https://portal.stf.jus.br/

[65] *See supra* note 8 and accompanying text.

[66] S.T.F., ADI. No. 4.901, Relator Luiz Fux; S.T.F., ADI. No. 4.902, Relator Luiz Fux; S.T.F., ADI. No. 4.903, Relator Luiz Fux and S.T.F., ADI. No. 4.397, Relator Luiz Fux, 28.02.2018, 225, Diário da Justiça Eletrônico [D.J.e], 10.09.2020 (Braz.).

[67] Samantha Lalisan, *Classifying Systems of Constitutional Review: A Context-Specific Analysis*, IND. J. CONST. DESIGN, Apr. 13, 2020, at 11–13; *see* Keith S. Rosenn, *Judicial Review in Brazil: Developments Under the 1988 Constitution*, 7 SW. J.L. & TRADE AMS. 291, 293 (2000) ("Brazilian judicial review combines the decentralized, incidental form of judicial review of a common law country like the United States with the centralized, abstract form of judicial review of civil law countries such as Germany and Italy.").

[68] *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 177–78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is." If "courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution . . . must govern the case"); *see generally* Dias Toffoli, *Democracy in Brazil: The Evolving Role of the Country's Supreme Court*, 40 B.C. INT'L & COMPAR. L. REV. 245, 246 (2017) (noting that Brazil adopted the diffuse control model of judicial review that allows any federal judge to "deny application of any law that conflicts with the Constitution").

[69] *See* Toffoli, *supra* note 68, at 247 ("[T]he constitutionality of legislation should be the exclusive responsibility of a constitutional court, designed specifically to be the guardian of the fundamental law and an institution outside the ordinary jurisdictional structure."); Marcus Flávio Horta Caldeira, *Concentrated Judicial Review in Brazil and Colombia: Which (or Whose) Rights are Protected?*, 8 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS [J. CONST. RSCH.] 161, 169 (2020) ("The Federal Supreme Court plays a very special role, not only as the last court of appeal in the hierarchy of the nation but also as a constitutional court.").

are retroactive (*ex nunc*).[70] However, the Court can modulate and direct the decision so that it is not applicable retroactively.[71]

Through his prerogative to litigate under the concentrated control model, Brazil's Federal Public Prosecutor challenged the constitutionality of the Forest Code by targeting the PRA provisions—especially those related to the standards and measures for restoration.[72] From the prosecutor's perspective, the new standards and measures were less restrictive than those established by the previous Forest Code of 1965 and thus provided less environmental protection.[73] The prosecutor argued that this was contrary to Article 225 of Brazil's Constitution, which established the constitutional right to an "ecologically balanced environment."[74] This led to a deeper discussion involving the principle of retrocession prohibition (*Princípio da Vedação do Retrocesso*), which states that social and environmental rights cannot be reduced or extinguished by new laws and regulations.[75]

On February 28, 2018, Brazil's Supreme Federal Court ruled that the New Forest Code, including all the PRA provisions and its measures for restoration, was constitutional.[76] As for the principle of retrocession prohibition, the Court clarified that this principle is to be applied whenever a social right is severely reduced or extinguished but not in a situation where technical standards, measures, or details of the law are altered.[77] The Court also based this argument on the rationale that this principle, if recklessly invoked for any reason, could block the entire legislative and rulemaking process.[78] The only provision ruled unconstitutional was Article 48, § 2º,

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[70] Caldeira, *supra* note 69, at 166.

[71] *See id.* at 165, 167.

[72] For example, the prosecutor challenged Article 61 of the New Forest Code requiring smaller areas for APP. *See* S.T.F., ADI. No. 4.901, Relator Luiz Fux; S.T.F., ADI. No. 4.902, Relator Luiz Fux; S.T.F., ADI. No. 4.903, Relator Luiz Fux and S.T.F., ADI. No. 4.397, Relator Luiz Fux, 28.02.2018, 225, Diário da Justiça Eletrônico [D.J.e], 10.09.2020 (Braz.).

[73] The Forest Code of 1965 did not have the Environmental Regularization Program and thus the differentiated measures for restoration. Due to this, the public prosecutor claimed the Forest Code of 2012 would be less protective. *See* S.T.F., ADI. No. 4.901, Relator Luiz Fux; S.T.F., ADI. No. 4.902, Relator Luiz Fux; S.T.F., ADI. No. 4.903, Relator Luiz Fux and S.T.F., ADI. No. 4.397, Relator Luiz Fux, 28.02.2018, 225, Diário da Justiça Eletrônico [D.J.e], 10.09.2020 (Braz.).

[74] *See* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.) ("All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.").

[75] *See* S.T.F., ADI. No. 3105, Relator: Ellen Gracie, 18.07.2004, D.J., 18.02.2005 (Braz.).

[76] *See* S.T.F., ADI. No. 4.901, Relator: Min. Luiz Fux, 28.02.2018, 225, Diário da Justiça Eletrônico [D.J.e], 10.09.2020 (Braz.).

[77] *Id.* at 539–560.

[78] *Id.*

which concerned the criteria used for compensation done through Environmental Quotas (*Cota de Reserva Ambiental* (CRA)).[79] The Court noted that, instead of compensation in the same biome, the New Federal Code should be altered to allow compensation for an area of the same "ecological identity."[80] However, different from the biome criteria, which has both technical and legal definitions, ecological identity is not stated in any part of the Brazilian legal framework. Hence, it is currently a totally subjective criterion lacking an official definition, [81] which is expected to be given by the Court in August 2022. However, this new interpretation due to law and economics directly affects compensation markets in Brazil, as discussed next.

Despite the Court's declaration of the constitutionality and validity of the New Forest Code, continued litigation led to a seven-year delay in implementing the regularization agenda.[82] Between 2012 to 2018, the uncertainty regarding the New Forest Code stalled its enforcement at both the federal and state levels.[83] For instance, in São Paulo, the state PRA law (State Law No. 15.684/2015)[84] was suspended by a state court after a state public prosecutor filed a complaint mirroring the federal case.[85] As a result, no regularization occurred. In 2019, even with litigation problems resolved and a valid New Forest Code in effect, the Bolsonaro Administration decided to again postpone the deadline for farmers to enroll in their respective PRAs.[86] Currently, farmers have between December 31, 2020 to December

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[79] *Id.* at 568–570.

[80] *Id.*

[81] *See* JOANA CHIAVARI & CRISTINA LEME LOPES, CLIMATE POL'Y INITIATIVE, DECISÃO DO STF SOBRE O NOVO CÓDIGO FLORESTAL ENFRAQUECE A COTA DE RESERVA AMBIENTAL (CRA) (2018), https://www.inputbrasil.org/wp-content/uploads/2018/03/CPI_Artigo_Decis%C3%A3o_do_STF_sobre_o_novo_C%C3%B3digo_Florestal_enfraquece_a_Cota_de_Reserva_Ambiental_CRA.pdf.

[82] *See* JOANA CHIAVARI & CRISTINA LEME LOPES, CLIMATE POL'Y INITIATIVE, AMENDMENTS TO A PROVISIONAL MEASURE THREATEN THE IMPLEMENTATION OF BRAZIL'S NEW FOREST CODE 1 (2019), https://www.climatepolicyinitiative.org/wp-content/uploads/2019/03/Nota-Tecnica-Medida-Provisoria-Prorroga-prazo-PRA-21Março2019-EN.pdf.

[83] *See id.*

[84] Lei No. 15.684, de 14 de Janeiro de 2015, Diário Oficial dos Estados de São Paulo [D.O.E.S.P.] de 15.01.2015 (Braz.). Although the New Forest Code is a federal law, the New Forest Code requests that states legislate their respective PRA regulations, taking into account the specificity of each state. *See* Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.04.2012 (Braz.).

[85] *See* T.J.S.P. ADI. No 2100850-72.2016.8.0000, Relator, Jacob Valente, 05.06.2019, Órgão Especial, [D.J.]: 07.06.2019 (Braz.).

[86] Lei No. 13.887, de 17 de Outubro de 2019, Diário Oficial da União [D.O.U.] de 18.10.2019 (Braz.).

31, 2022 to complete their enrollment, thereby starting most of the regularization programs and forest restoration in 2022, nearly ten years after the enactment of the New Forest Code.[87]

## IV. BRAZIL'S PROBLEMATIC COMMAND-AND-CONTROL REGULATORY FRAMEWORK

The Brazilian Forest Code of 2012 is a product of several combined and amended past laws, including the Forest Code of 1934,[88] 1965,[89] as well as the amendments of 1989[90] and 2001.[91] These laws share a strong command-and-control approach.[92] Under a command-and-control approach, policymakers directly regulate activities with environmental impacts by granting permissions, establishing prohibitions, and setting and enforcing standards.[93] Command-and-control policies differ from other regulatory techniques like financial incentives.[94] As discussed in Part III, the environmental liability in Brazil has three independent spheres: civil, administrative, and criminal.[95] Strict and joint civil liability apply to all persons responsible, directly or indirectly, for activities that cause environmental deterioration irrespective of fault, resulting in the obligation to indemnify or remedy the damage caused to the environment or third parties.[96] Also, the obligation to redress damages has a retroactive effect for all potentially responsible parties.[97] Different from civil liability, the administrative and criminal liability are neither strict nor joint, so as not to

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[87] *See id.*

[88] Decreto No. 23.793, de 23 de Janeiro de 1934, Diário Oficial da União [D.O.U.] de 09.02.1934 (Braz.).

[89] Lei No. 4.771, de 15 de Setembro de 1965, Diário Oficial da União [D.O.U.] de 16.09.1965 (Braz.), *repealed by* Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.).

[90] Lei No. 7.754, de 14 de Abril de 1989, Diário Oficial da União [D.O.U.] de 14 de Abril de 1989 (Braz.).

[91] Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.); Medida Provisória No. 2.166-67, de 24 de Agosto de 2001, Diário Oficial da União [D.O.U.] de 25.08.2001 (Braz.).

[92] *See* Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.).

[93] *See Command-and-Control Policy,* ORG. FOR ECON. COOP. & DEV., https://stats.oecd.org/glossary/detail.asp?ID=383 (last visited Jan. 3, 2022).

[94] *See id.*

[95] *See supra* note 56 and accompanying text.

[96] *See supra* note 58–59 and accompanying text.

[97] *See supra* note 60 and accompanying text; Lei No. 6.938, de 31 de Agosto de 1981, Diário Oficial da União [D.O.U.] de 02.09.1981 (Braz.).

affect indirect violators.[98] The administrative liability applies to parties engaged in the installation or operation of potentially polluting activities, without permit or authorization from the proper environmental bodies, and subjects the violators to fines, permit suspensions, and embargoes.[99] Criminal liability applies to an organization or person that commits infractions characterized as crimes under the Environmental Crimes Law, and subjects the infringing parties to criminal sanctions, such as prohibition from doing business with the government and detention.[100] Under the New Forest Code, violators who damage APP or RL, or otherwise fail to restore degraded forest areas through the PRA as requested by the law, may be subject to all the liabilities mentioned above.[101] It can lead to environmental fines,[102] environmental crimes,[103] and civil action for environmental damages, including punitive damages.[104]

From this perspective, the command-and-control approach appears to be extremely effective. However, this has not proven to be true in practice as the approach is expensive to maintain due to costs of personnel and administrative infrastructure.[105] Also, for a system strongly based on command-and-control to be productive, the regulator must have the capacity to enforce and escalate such punishments, thereby creating the desired deterrent effect by making it more costly to break the law than to adhere to it.[106] This can be problematic and difficult to achieve for institutions and agencies with limited resources and little history of full or aggressive enforcement, as is often the case with Brazilian government agencies.[107] This

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[98] *See* Robert F. Blomquist, *The Logic and Limits of Environmental Criminal Law in the Global Setting: Brazil and the United States - Comparisons, Contrasts, and Questions in Search of a Robust Theory*, 25 TUL. ENV'T L.J. 83, 89–90 n.26 (2011).

[99] Decreto No. 6.514, de 22 de Julho de 2008, Diário Oficial da União [D.O.U.] de 23.07.2008 (Braz.).

[100] Lei No. 9.605, de 12 de Fevereiro de 1998, Diário Oficial da União [D.O.U.] de 13.02.1998 (Braz.).

[101] *See supra* note 57 and accompanying text.

[102] Decreto No. 6.514, de 22 de Julho de 2008, Diário Oficial da União [D.O.U.] de 23.07.2008 (Braz.).

[103] Lei No. 9.605, de 12 de Fevereiro de 1998, Diário Oficial da União [D.O.U.] de 13.02.1998 (Braz.).

[104] *See* Lei No. 6.938, de 31 de Agosto de 1981, Diário Oficial de União [D.O.U.] de 02.09.1981 (Braz.).

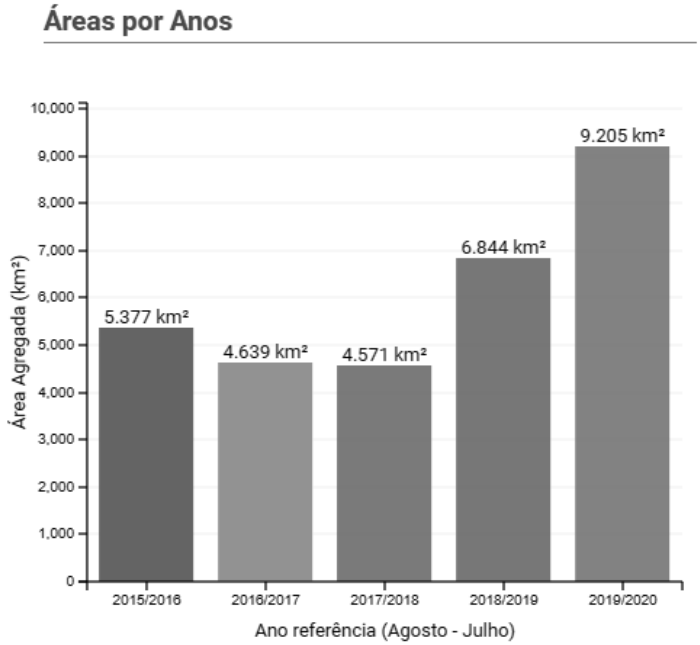
[105] *See* JOHN BRAITHWAITE, TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY 119–21 (1985).

[106] *See id.* at 182–83.

[107] *See* John Braithwaite, *Responsive Regulation in Developing Economies*, 34 WORLD DEV. 884, 886 (2006); IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 19, 40 (Donald R. Harris et al. eds., 1992) ("[R]egulatory agencies are often best able to secure compliance when they are benign big guns. That is,

fact is evident in the well-reported increase in Amazon rainforest deforestation from 2019 to 2020.

**Figure 2: Deforested Area (km$^2$) in the Amazon Region from 2015 to 2020**[108]




According to the National Institute for Space Research, Amazon deforestation increased by 50% between 2018 and 2019, and 34% between 2019 and 2020.[109] This is a total increase of 84% in the past two years.[110] In addition to the difficulties arising from Brazil's long history of deforestation and the countless legal appeals that have frustrated enforcement and punishment measures, the recent deforestation spike can be attributed to policies adopted by the Bolsonaro Administration in 2019.[111] The Bolsonaro Administration aimed to reduce both environmental fines and monitoring by the Brazilian Institute of the Environment and Renewable Natural Resources

regulators will be more able to speak softly when they carry big sticks (and crucially, a hierarchy of lesser sanctions).").

[108] Herton Escobar, *Desmatamento da Amazônia dispara de novo em 2020*, JORNAL DA USP (Aug. 7, 2020), https://jornal.usp.br/ciencias/desmatamento-da-amazonia-dispara-de-novo-em-2020/.

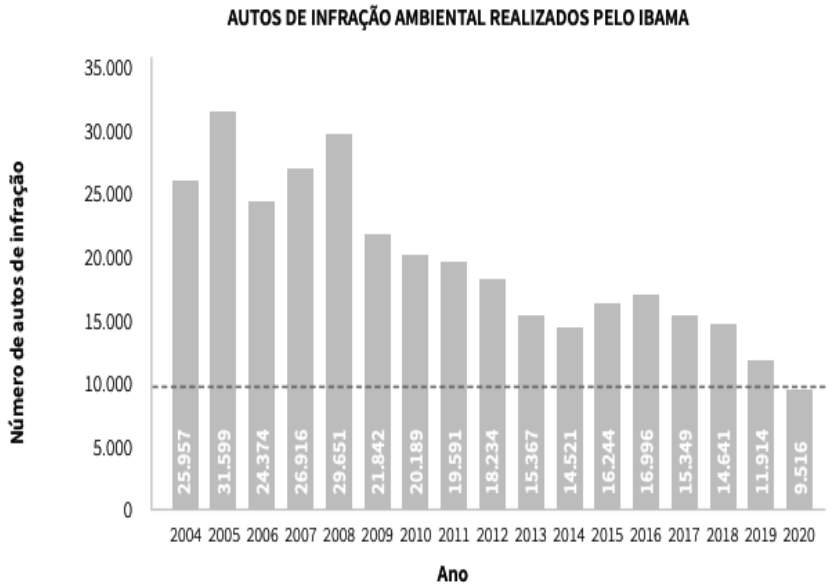
[109] *Id.*

[110] *See id.*

[111] *Id.*

(IBAMA), the federal environmental agency.[112] The administration argued that the "industry of fines" blocked economic activity.[113] This certainly hindered the police power and capacity of escalating and enforcing punishments, which are essential components of a command-and-control approach.[114]

**Figure 3: Number of Environmental Fines Issued by IBAMA from 2004 to 2020 in the Amazon Region**[115]




This police power blackout occurred partly due to Federal Decree No. 9.760 of 2019[116] and Normative Instruction MMA/IBAMA/ICMBIO No. 1 of 2021[117] (i.e., the Ministry of Environment and Federal Environmental

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[112] Sabrina Rodrigues, *Bolsonaro: 'O homem do campo não pode se apavorar com a fiscalização do Ibama"*, OECO (June 12, 2019), https://oeco.org.br/salada-verde/bolsonaro-o-homem-do-campo-nao-pode-se-apavorar-com-a-fiscalizacao-do-ibama/.

[113] *See id.*

[114] *See id.*

[115] FELIPE WERNECK ET AL., OBSERVATÓRIO DO CLIMA, "PASSANDO A BOIADA": O SEGUNDO ANO DE DESMONTE AMBIENTAL SOB JAIR BOLSONARO 14 (2021), https://www.oc.eco.br/wp-content/uploads/2021/01/Passando-a-boiada-1.pdf.

[116] Decreto Federal No. 9.760, de 11 de Abril de 2019, Diário Oficial da união [D.O.U.] de 11.04.2019 (Braz.).

[117] Instrução Normativa No. 1, de 12 de Abril de 2021, Diário Oficial da União [D.O.U.] de 14.04.2021 (Braz.). This is a rule jointly issued by the Ministério do Meio Ambiente (MMA),

Agency Regulation). These new regulations enacted in 2019 and 2021 respectively, sought to modernize the environmental fine administrative procedure set forth in Federal Decree No. 6.514 of 2008[118] by further creating the option of settlement before a fine can be issued by the agency.[119] This was an act exclusively performed and organized by the *Núcleo de Conciliação Ambiental*,[120] which also created a new department concentrated on all administrative procedure.[121] Since its enactment in 2019, however, the *Núcleo de Conciliação Ambiental* has not scheduled many settlement meetings and consequently, has not issued any fines for illegal deforestation.[122] The attempt to modernize the procedure instead resulted in more bureaucracy and inefficiency.[123] Currently, this decree faces litigation before Brazil's Supreme Federal Court. While awaiting the court's ruling, four parties in opposition have claimed that this regulation poses a threat to the environment.[124] The parties argue that the regulation violated Article 225 of Brazil's Constitution by stalling Brazil's environmental administrative liability.[125] In addition, the federal government has reduced the Ministry of the Environment's budget, which included financial resources for IBAMA's monitoring activities.[126] In 2021 alone, the budget was reduced by approximately 27.4%.[127] The following figure depicts the changes in budget from 2000 to the 2021 Budget Bill (*Projeto de Lei Orçamentária Annual*):

**Figure 4: Ministry of the Environment's Budget from 2000 to 2021**[128]

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the Instituto Brasileiro do Meio Ambiente e Recursos Naturais (IBAMA) and the Instituto Chico Mendes de Conservação da Biodiversidade (ICMBio).

[118] Decreto No. 6.514, de 22 de Julho de 2008, Diário Oficial da União [D.O.U.] de 23.07.2008 (Braz.).

[119] *See* Normative Instruction No. 1 of 2021 (Braz.).

[120] The Núcleo de Conciliação Ambiental is a settlement body with the purpose to settle environmental violations prior to the issuance of a fine. The violator could have the option to already mitigate or compensate the pollution without administrative fine.

[121] *See* Decreto No. 9.760, de 11 de Abril de 2019, Diário Oficial da União [D.O.U.] de 11.04.2019 (Braz.).

[122] Although IBAMA was supposed to schedule a total of 7,205 settlement meetings, only 5 were conducted from April 2019 to February 2020. *See* S.T.F., ADPF No. 755, Relator: Min. Rosa Weber, 22.10.2020 (Braz.).

[123] *See id.*

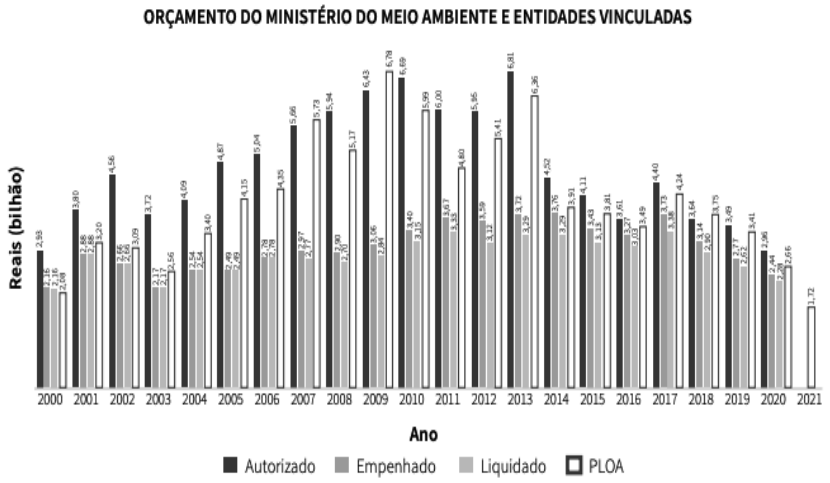
[124] The parties include Partido Socialista Brasileiro, Partido Socialismo e Liberdade, Partido dos Trabalhadores, and Rede Sustentabilidade. *See* S.T.F., ADPF No. 755, Relator: Min. Rosa Weber, 22.10.2020 (Braz.).

[125] *See id.*

[126] *See* WERNECK ET AL., *supra* note 115, at 11.

[127] *Id.* at 8.

[128] *Id.* at 11. This figure shows the Ministry of the Environment's budget over the years




For now, Brazil's command-and-control approach is compromised, making it difficult to achieve the NDC's commitments to eliminate illegal deforestation and enhance forest preservation.[129]

## V. RESPONSIVE REGULATION AS A SOLUTION

A responsive regulation may be appropriate to minimize or mitigate the deficiencies of an environmental regulatory framework based exclusively on a command-and-control approach that is subject to political influence and a lack of economic resources.[130] A responsive regulation is a regulatory scheme that escalates the intensity of government intervention to enable enforcement, while also adapting to the situation.[131] This scheme can be understood as a pyramid structure, combining persuasion with command-and-control instruments.[132] At the base of the pyramid are tactics that encourage self-regulation (i.e., persuasion, mostly done through financial incentives).[133] As you move up the pyramid, harsher punishments are implemented (i.e., command-and-control).[134] Persuasion is generally

(differentiating authorized, planned, and spent money), illustrating that, since 2019, it has been dropping. 2021 was the smallest budget since 2000.

[129] *See* Updated Brazil NDC, *supra* note 6, at 1.

[130] *See generally supra* note 105.

[131] AYRES & BRAITHWAITE, *supra* note 107, at 4–5.

[132] *Id.* at 35–39.

[133] *Id.*; Braithwaite, *supra* note 107, at 886.

[134] AYRES & BRAITHWAITE, *supra* note 107, at 35–39*;* Braithwaite, *supra* note 107, at 886.

preferrable over command-and-control as the strategy of first choice.[135] The latter approach, despite appearing to be more effective, is more expensive than self-regulation (i.e., cost from the need for more personnel and administrative infrastructure).[136] Also, for a system heavily based on command-and-control to be effective, the regulator must have the capacity to escalate the punishments, creating a deterrent effect and making it cost more to break the law than to adhere to it.[137] In contrast, a system based solely on self-regulation instruments rests on the belief of nurturing voluntary compliance by the virtuous citizen.[138] However, this approach does not always reflect reality.[139] It can be difficult to obtain desired outcomes using such a self-regulatory system even when the rewards for compliance (e.g., tax benefits) appear significant.[140] Thus, the responsive regulation approach uses both self-regulation and command-and-control instruments to allow for a more balanced and efficient system. In other words, "it comes up with a way of reconciling the clear empirical evidence that sometimes punishment works and sometimes it backfires, and likewise with persuasion."[141] It should be noted, however, that responsive regulation can be more challenging for developing economies like Brazil to implement effectively.[142] As scholars have pointed out, developing economies often have more difficulty implementing this type of system because they have less regulatory capacity and fewer resources and are more susceptible to corruption.[143]

Networked governance is another strategy that could work well for Brazil and could be used alongside responsive regulation.[144] Networked governance relies on connecting weak actors or regulators together in a system to join forces to become stronger.[145] This system enables an environment of pluralism in which other players can assist public authorities by reducing corruption and addressing the costs associated with infrastructure and monitoring.[146] The networked governance approach would make the most of the limited resources available in Brazil.[147] Third parties, such as

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[135] AYRES & BRAITHWAITE, *supra* note 107, at 26.
[136] *Id.*
[137] *See id.* at 44.
[138] *See id.* at 19, 43–45.
[139] *See id.* at 43.
[140] *See id.*
[141] Braithwaite, *supra* note 107, at 887; *accord* AYRES & BRAITHWAITE, *supra* note 107, at 25–26.
[142] Braithwaite, *supra* note 107, at 896.
[143] *See id.*
[144] *See id.* at 884.
[145] *See id.* at 890–91.
[146] *See id.* at 896.
[147] *See id.* at 890.

nongovernmental organizations, could have a fundamental role in this strategy, mainly through assistance with monitoring activities and encouraging whistleblowing among private actors to help identify problems in sectors that have capacity deficits.[148] In sum, Brazil's implementation of its environmental regulatory framework based on a command-and-control approach is not effective and does not allow the country to achieve its NDC goals.[149] Implementation of a responsive regulation strategy could be extremely helpful and should become a priority.[150]

## VI. BRAZIL AND MARKET INCENTIVES

One type of self-regulation that could attenuate the command-and-control approach flaws is the market incentive, once it has the potential to transform a protected forest into an economic asset, hence persuading a person to protect the environment by self-regulating its activities expecting financial compensation. Thus, instead of applying the "polluter pays" principle, which demands the internalization of the costs of pollution (i.e., externalities), a market incentive approach applies the "receiving protector" principle, which compensates the person for protecting the environment and ecosystem services, in other words, a framer that preserves the forests in his property exceeding the percentage demanded by law and profiting from it.[151]

### *A. Compensation in the Forest Code and Law and Economics*

In Brazil, the most effective modern large-scale instrument available to initiate the transition from the command-and-control approach to a market incentive approach is the compensation of RL in the Forest Code. Compensation is also a very effective instrument in fighting deforestation. Compensation via the Forest Code can be done through any of the following methods: (1) designating surplus areas in other properties of the same owner as RL on property that lacks sufficient restored area, (2) establishing a Conservation Easement Agreement, (3) buying land from a private owner in a Protected Area and donating it to the government, or (4) obtaining a

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[148] *See id.* at 889–94.

[149] *See id.* at 888–89.

[150] *See id.*

[151] U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, ¶ 16, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) ("National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.").

CRA.[152] However, among the methods, purchasing a CRA is the most promising.

A CRA is a certificate issued by the State Environmental Agency equivalent to one hectare of vegetation surplus (i.e., extra from the 20%, 35%, or 80% already mandatory by the Forest Code),[153] which can be negotiated by farmers through private contracts to compensate RL deficits.[154] The CRA was the only part of the Forest Code that had its interpretation changed by Brazil's Supreme Federal Court.[155] In his ruling, Justice Marco Aurélio proposed a new interpretation of Article 48, Section 2º of the New Forest Law,[156] altering the CRA compensation criteria from using areas sharing the same "biome" for areas sharing the same "ecological identity."[157] However, the court did not address Article 66, Section 6 of the New Forest Code, which lists the compensation criteria not only for CRA, but for all methods.[158] The decision created a severe contradiction between Articles 48 and 66, thereby causing uncertainty regarding which criteria will be used for compensation through CRA (i.e., biome or ecological identity) and leading to more litigation.[159] This uncertainty could stall or even invalidate all of the CRA transactions, which has the potential to become a green market of around 40 billion reais (8 billion USD) corresponding to 8.6 million hectares of vegetation surplus in rural properties.[160]

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[152] *See* Lei No. 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.).

[153] Decreto No. 9.640, de 27 de Dezembro de 2018, Diário Oficial da União [D.O.U.] de 28.12.2018 (Braz.).

[154] Contracts are typically valid for a certain period such as 5, 10, or 15 years and need renewal thereafter.

[155] *See* S.T.F., Ação Direta de Inconstitucionalidade No. 4.901, Relator: Min. Luiz Fux, 28.02.2018, 225, Diário da Justiça Eletrônico [D.J.e], 10.09.2020, 624 (Braz.).

[156] *See* Lei No 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.04.2012 (Braz.). Translated by the author: "Article 48. The CRA can be transferred, for a fee or free of charge, to individuals or legal entities under public or private law, by means of a term signed by the CRA holder and the acquirer. § 2 The CRA can only be used to offset the Legal Reserve of rural property located in the same biome as the area to which the title is linked." *See id.*

[157] *See* S.T.F., Ação Direta de Inconstitucionalidade No. 4.901, Relator: Min. Luiz Fux, 28.02.2018, 225, Diário da Justiça Eletrônico [D.J.e], 10.09.2020, 624 (Braz.).

[158] *See id.*; Lei No 12.651, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.04.2012 (Braz.). Translated by the author: "Article 66, § 6. The areas to be used for compensation in the form of § 5 must I - be equivalent in extension to the Legal Reserve area to be offset; II - be located in the same biome as the Legal Reserve area to be offset . . . ."

[159] Some appeals already have already been filed. *See ADI 4901*, SUPREMO TRIBUNAL FEDERAL, http://portal.stf.jus.br/processos/detalhe.asp?incidente=4355097 (last visited Nov. 23, 2021).

[160] LUCIANA CHIODI, MERCADO DE TERRAS PARA COMPENSAÇÃO DE RESERVA LEGAL 16 (2018), http://www.inputbrasil.org/wp-content/uploads/2018/03/Mercado-de-Terras-para-

The relationship between a legal decision regarding a regulatory framework with markets and asset prices can be explained by the Coase Theorem.[161] According to Ronald Coase, the efficiency of private markets to internalize externalities depends on property rights and low transaction costs.[162] Thus, the legal uncertainty created by Brazil's Supreme Federal Court concerning which criteria will be used for CRA offsets, along with the possibility of changing the current pricing system of green assets, may drive transaction costs extremely high and consequently invalidate the market.[163]

By invalidating CRA, in theory, farmers with vegetation surplus interested in CRA could require legal deforestation of those areas, therefore increasing the rate of legal deforestation along with the rate of illegal deforestation, which is already high.[164]

In this sense, by late August 2022, the Court is expected to issue a sentence on this issue, since the Brazilian Federal Prosecutor (i.e., plaintiff) filed an appeal questioning this incongruence of the previous decision (i.e., *Embargos de Declaração*, in Portuguese).

Despite this legal uncertainty surrounding CRA, there are other compensation methods already available making the vegetation surplus an asset, such as the Conservation Easement Agreement, decreasing both legal and illegal deforestation on private properties. This allows the federal and state environmental agencies to better focus on the severe and crucial problem of illegal deforestation on public lands and Conservation Units, which promotes better resource allocation and an improvement of the command-and-control approach. It is imperative for the Court to clarify the CRA criteria issue and overcome this uncertainty.

### *B. Brazil's Attempt to Create Green Payments*

Although Brazil's command-and-control instruments within written laws are vast and thorough, they still face severe problems. The use of green payments as part of a self-regulation initiative could act as a supplement to this system. Apart from the compensation of RL in the Forest Code, Brazil has tried to regulate a market incentive policy to address the country's lack of specific regulation for several years.[165] This eventually changed with the

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Compensacao-de-Reserva-Legal_Agroicone_FINAL.pdf.

[161] *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECONS. 1 (1960).

[162] *Id.*

[163] *See id.*

[164] Lei No. 12.651 art. 15, de 25 de Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.).

[165] According to Imperial College London and Fundação Getulio Vargas, the lack of proper regulation is one of the main problems for the development of green payment programs in

newly enacted Federal Law No. 14.119 on January 14, 2021, which set forth a main payment structure for the environmental services policy.[166] Generally, the policy establishes definitions and creates the basic structure to distribute payments for environmental services programs.[167] It also creates a federal program for environmental services with the primary purpose of enforcing this policy at the federal level.[168] This regulation also allows the disbursement of payments for both public and private programs.[169] As previously mentioned, different from the conservation programs in the United States, private green payments in Brazil are possible once APP and RL are mandatory limitations applicable to all rural properties.[170] Federal Law 14.119 offers an "innovative [federal] system" to preserve forested land.[171] A landowner that fails to maintain his minimal preservation percentage of native forested land can either enroll in a government program to restore the lost vegetation, or he may purchase a permit from another land owner who is in excess of his preservation percentage.[172] The system encourages maintenance and expansion of existing native forested lands by creating a market where delinquent parties can purchase a permit from complying parties to avoid government intervention on their land.[173] This can lead to countless applications, such as contracts with environmental purposes. These purposes may include forest preservation and strong environmental practices.[174] This is important because Brazil has never had a contractual framework pursuing practices in farming, such as the Working Lands Programs of the Farm Bill, which does not require a land use restriction (i.e., farm remains in production), but rather an improvement of agricultural practices addressing specific natural resources.[175] As for the Forest Code, this

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Brazil. *See* ALEXANDRE KOBERLE ET AL., BARREIRAS PARA O AUMENTO DE FLUXOS FINANCEIROS PARA INVESTIMENTOS EM SETORES DE BAIXO CARBONO NO BRASIL: RELATÓRIO REVISADO E RESULTADOS DO WORKSHOP (2019), http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/30545/flow_cca_relatorio-revisado_09_2019.pdf?sequence=1&isAllowed=y.

[166] *See* Lei No. 14.119, de 13 de Janeiro de 2021, Diário Oficial da União [D.O.U] de 14.1.2021 (Braz.).

[167] *See id.*

[168] *See id.*

[169] *Id.*

[170] ORG. FOR ECON. COOP. & DEV., EVALUATING BRAZIL'S PROGRESS IN IMPLEMENTING ENVIRONMENTAL PERFORMANCE REVIEW RECOMMENDATIONS AND PROMOTING ITS ALIGNMENT WITH OECD CORE ACQUIS ON THE ENVIRONMENT 36–37 (2021).

[171] Lei No. 14.119, de 13 de Janeiro de 2021, Diário Oficial da União [D.O.U] de 14.1.2021 (Braz.).

[172] ORG. FOR ECON. COOP. & DEV., *supra* note 170, at 36.

[173] *See id.*

[174] *See id.*

[175] The primary Working Land Programs are the Conservation Stewardship Program (CSP)

law establishes CAR as a mandatory requirement to participate in those green payment programs.[176] By using CAR, all parties including the state environmental agency, private investors, and farmers will have transparency about the real situation of the farm and whether it is actually keeping its forests preserved.[177] This results in the strengthening of Forest Code enforcement and more. The Forest Code certainly is an important and positive step for Brazil in its transition from an exclusive and deficient command-and-control approach to a market incentive one. However, some points must be addressed in this respect, specifically that this is a general policy requiring further regulation such as decrees clarifying details and specifications which allow for more predictability for the creation of programs. Without predictability and certainty, other issues arise, namely, funding. Investors will hardly adopt a legal framework which does not ensure details about how such programs will work, especially with regard to which standards and eco-services will be used and how it will be managed.

In this sense, the use of green payments through this new law also faces issues regarding additionality. The additionality requirement is stated in the Kyoto Protocol for emissions reductions in cap and trade programs, which demands that these projects can only occur where there is an extra factor of environmental protection that would not happen in a typical business situation, in other words, the activity or project must generate protections which would not be possible without the project or activity.[178]

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and the Environmental Quality Incentives Program (EQIP). 16 U.S.C. §§ 3839aa-22, 3839aa. Both the CSP and EQIP provide financial and technical assistance to plan and install better and more sustainable structure and practices. *See id.* Thus, the program is centered on farming activities instead of property limitations. *See id.*

[176] *See* art. 6, § 4. As translated by the author, article 6, section 4 provides: "The general requirements for participation in PFPSA are: II - in private properties, except for those referred to in item IV of the caput of art. 8 of this Law, proof of use or regular occupation of the property, through registration in the Rural Environmental Registry (CAR) . . . ."

[177] *See supra* note 47.

[178] Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 12, ¶ 5(c), Dec. 11, 1997, 2303 U.N.T.S. 162 ("5. Emission reductions resulting from each project activity shall be certified by operational entities to be designated by the Conference of the Parties serving as the meeting of the Parties to this Protocol, on the basis of: (c) Reductions in emissions that are additional to any that would occur in the absence of the certified project activity."); *see also* Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, *Decisions Adopted by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol*, ¶ 43, U.N. Doc. FCCC/KP/CMP/2005/8/Add.1 (Mar. 30, 2006) ("A CDM project activity is additional if anthropogenic emissions of greenhouse gases by sources are reduced below those that would have occurred in the absence of the registered CDM project activity.").

Although Federal Law No. 14.119 of 2021 allows for the use of APP and RL for green payments,[179] a challenge to the law is that the use of APP and RL for green payments must be further regulated.[180] This argument is based on the rationale that because the Forest Code already demands retired lands within a rural property as RL and APP, its preservation is already considered an obligation, hence, not providing any additionality for the ecosystem or for the producer to be compensated.[181] This would only occur if a property has a surplus of retired areas like the compensation of RL.[182] Apart from academic debates and future specific regulation about this issue, with PRA operational and the reforestation of degraded RL and APPs areas, ecoservices that were previously destroyed will now be restored, thereby generating additionality. Thus, under this new light of PRA, APP and RL should be considered, opening new possibilities of green payments for forest protection on private properties.[183]

In sum, despite the issues presented and the need for more regulation on the subject, this is still a positive step toward market incentives.[184] In the case where market incentives and green payments programs are not implemented and Brazil remains solely as a command-and-control system, Brazil will likely continue to witness the same rate of pollution and deforestation and not achieve its commitment to climate change.[185]

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[179] Lei No. 14.119, de 13 de Janeiro de 2021, Diário Oficial da União [D.O.U] de 14.1.2021 (Braz.). Article 9, as translated by the author, provides: "The Areas of Permanent Preservation, Legal Reserve and others under administrative limitation under the terms of the environmental legislation will be eligible for payment for environmental services using public resources, according to regulation, with a preference for those located in hydrographic basins considered critical for the public water supply, thus defined by the competent body, or in priority areas for the conservation of biological diversity in the process of desertification or advanced fragmentation."

[180] *See* Lei No. 14.119, de 13 de Janeiro de 2021, Diário Oficial da União [D.O.U] de 14.1.2021 (Braz.).

[181] *See* Lei No. 12.651 § 2, de 25 Maio de 2012, Diário Oficial da União [D.O.U.] de 28.05.2012 (Braz.).

[182] *See id.* In Brazil, under Article 41 of the Forest Code, there is already an opportunity to use green payments for forest preservation programs, which future law will better regulate. *See id.* Concerning the additionality factor imported from the Kyoto Protocol, the Forest Code expressly states the need for programs aimed at emissions reductions. *See id.* On the other hand, for programs merely aiming to preserve and restore native forests and natural habitats, the Forest law allows green payments and is omissive about additionality. *See id.*

[183] *See* Karen Bennett, *Additionality: The Next Step for Ecosystem Service Markets*, 20 DUKE ENV'T. L. & POL'Y F. 417, 419 (2010).

[184] *See id.* at 422.

[185] *See* JULIANO ASSUNÇÃO & CLARISSA GANDOUR, CLIMATE POL'Y INITIATIVE, BRAZIL KNOWS WHAT TO DO TO FIGHT DEFORESTATION IN THE AMAZON (2019), https://climatepolicyinitiative.org/wp-content/uploads/2019/11/PB-Brazil-Knows-What-To-Do-To-Fight-Deforestation.pdf.

## CONCLUSION

As demonstrated, the enforcement of the Forest Code along with the PRA is imperative for Brazil to achieve most of its climate goals in the Paris Agreement.[186] By restoring APP and RL deficits on farms through application of the PRA, Brazil can reforest around twenty-two million hectares, which is almost the entire twenty-five million hectares that Brazil committed to in its NDC. Despite the delay and litigation issues concerning the Forest Code, Brazilian states can now finally start the regularization agenda.

As for the illegal deforestation goal, Brazil currently protects its forests on private properties through an exclusive command-and-control approach. However, this system is flawed. Brazil not only has problems related to the enforcement of laws, but, since 2019, Brazil has also had a political perspective that has weakened the power of the federal environmental agency. Consequently, this has left Brazil with a smaller budget and a more bureaucratic administrative procedure to issue environmental fines, resulting in an ever-increasing deforestation rate.

In this sense, Brazil's attempt to use green payments for environmental protection is helpful to supplement the command-and-control deficiencies. Market incentive approaches such as compensation in the Forest Code and green payments will certainly strengthen self-regulation among farmers, thereby allowing better monitoring and enforcement for illegal deforestation and a better allocation system for financially scarce resources, which consequently enables Brazil to achieve its commitment to achieving zero illegal deforestation and expanding forest preservation on its NDC.

Brazil clearly faces significant challenges. However, once these challenges are overcome by implementing the PRA and more market incentive approaches, like compensation and green payments, the Forest Code will be a useful tool for Brazil to achieve its climate goals.

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[186] *See infra* text accompanying notes 20–23.

# Ex Parte Communications Between Sentencing Judges and Probation Officers: A Need for Full Disclosure

Saige Miller*

*Federal probation officers, who prepare documents that are provided to federal sentencing judges and typically make specific sentence recommendations, may significantly affect judicial criminal sentencing decisions. Although probation officers play an important role in sentencing outcomes for individuals convicted of crimes, the precise characterization of their position within the broader architecture of the criminal justice and court systems is unclear. Despite this lack of clarity, courts often permit ex parte communications between judges and probation officers prior to the final issuance of a judge's sentencing decision. The only general regulation of such communications, when they are permitted, is that the officer can disclose no facts relevant to a convicted individual not already disclosed in the presentence report. Beyond this general rule, the content and conduct of permitted ex parte discussions or other communications between officers and judges remain essentially unregulated. Given the extreme importance of sentencing decisions to the lives of individuals convicted of crimes and the wide latitude judges continue to be afforded in sentencing determinations in most U.S. jurisdictions, this Comment argues that there is a pressing need to revisit the potential problems stemming from permitting ex parte communications between officers and judges. More specifically, this Comment suggests that the best course of action would be full disclosure of ex parte communications between probation officers and judges in situations where both are assigned a common individual convicted of a crime and the ex parte communications take place before a sentencing hearing. Absent a bright-line rule requiring disclosure of all such communications, the current rule should at least be clarified through the adoption of a uniform definition of what constitutes "new facts" and rule regarding whether and when these facts should be disclosed even if a sentencing judge did not expressly rely on them. This will help to resolve the current lack of clarity in this area that fosters ambiguity, inefficiencies,*

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*additional disadvantages, and the risk of bias and decrease in trust within the sentencing process.*

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## INTRODUCTION

During the life of a criminal proceeding, there is no doubt that sentencing is an extremely important stage.[1] In fact, most people who are charged with crimes are convicted.[2] The vast majority of convicted defendants are convicted via guilty pleas rather than findings of guilt following trials.[3] At the federal level, 90% of the roughly 80,000 total criminal defendants in federal criminal cases—approximately 72,000 people—entered guilty pleas in 2018.[4] For the vast majority of defendants convicted via pleas, the sentencing phase is by far the most critical component of the criminal process.[5] Guilty pleas are usually induced by "the promise of leniency in sentencing, a reduced charge, or the desire to avoid pretrial detention[.]"[6] Although guilty pleas help with managing court calendars and save resources, time, and money, the frequency of defendants pleading guilty also means that fewer defendants are having trials altogether.[7] Without a trial, once a defendant is convicted, the next crucial stage for them is sentencing.[8] During sentencing, investigations conducted by probation officers and the resulting presentence reports these officers submit to sentencing judges play a major role in determining the ultimate sentence imposed on a convictee.[9] Indeed, the importance of presentence reports has grown significantly at the federal level since the adoption of the Federal Sentencing Guidelines.[10] Under the current system, probation officers recommend specific sentences, including recommendations to increase sentences outside of the standard term mandated by the basic application of the Guidelines, based on their independent investigations.[11] Despite these powers, convictees continue to lack certain procedural safeguards during sentencing, including the power to

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[1] *See* Jacob Mishler, *The Right of Confrontation Versus the Need to Know at Sentencing*, 45 BROOK. L. REV. 887, 887 (1979).

[2] *See id.*

[3] *See* ADMIN. OFF. OF THE U.S. CTS., FEDERAL JUDICIAL CASELOAD STATISTICS 2018 TBL. D-4, at 1 (2018), https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf.

[4] *See id.*

[5] Mishler, *supra* note 1, at 887 n.2.

[6] Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 293 (1975).

[7] *See id.* at 293–94.

[8] *See* Mishler, *supra* note 1, at 887 n.2.

[9] *See id.* at 887–88 (discussing a sentencing judge's reliance on a defendant's presentence report).

[10] William H. Pryor, *The Integral Role of Federal Probation Officers in the Guidelines System*, 81 FED. PROB. 13, 15 (2017) (discussing the implementation of the new Federal Sentencing Guidelines and their effect on the value of presentence reports).

[11] *See id.*

determine the precise nature and substance of permitted ex parte communications between probation officers and sentencing judges.[12]

In light of the extreme importance of probation officers to the sentencing of federal convictees,[13] this Comment argues that the current rule permitting ex parte communications between sentencing judges and probation officers should be abandoned in favor of a simpler, bright-line requirement of full disclosure of all such communications to the defense. Moreover, in the absence of such a bright-line rule, additional clarification regarding what constitutes "new facts" and when such facts must be disclosed[14] is needed to avoid ambiguity and inconsistency in the application of existing rules.

This Comment makes these arguments in four parts. First, it discusses the history of federal sentencing and explains how the role of probation officers has significantly changed over time.[15] Second, it explains current federal rules regarding ex parte communications between judges and probation officers, highlighting key issues that have arisen from the current rule.[16] Third, it explains why a bright-line rule requiring full disclosure to the defense of all ex parte communications between sentencing judges and assigned probation officers prior to a sentencing hearing is preferable to the current unclear, locally-determined rules.[17] Lastly, it discusses why such a

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[12] *See* Benjamin C. McMurray, *Challenging Untested Facts at Sentencing: The Applicability of* Crawford *at Sentencing after* Booker, 37 MCGEORGE L. REV. 589, 593 (2006) ("Much of this information would be gathered by probation officers 'who ha[d] been trained not to prosecute but to aid offenders.' In conducting this investigation, probation officers were permitted to gather information 'outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine.' Often, probation officers would then communicate their findings to the judge 'in private and ex parte.'").

[13] *See* Pryor, *supra* note 10, at 13–17.

[14] *See* United States v. Bramley, 847 F.3d 1, 7 (1st Cir. 2017) (holding that an ex parte communication between a sentencing judge and a probation officer was permitted because there was nothing in the evidence to prove that the probation officer had relayed new facts and that probation officers are generally allowed to offer their advice); United States v. Christman, 509 F.3d 299, 310–11 (6th Cir. 2007) (holding that a probation officer relaying new facts to a sentencing judge during ex parte communications constituted an error which was not harmless).

[15] *See generally* Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy of Presentence Reports Under the Federal Sentencing Guidelines*, 46 CRIM. L. BULL., no. 1, art. 2 (2010) (discussing the changing role of the probation officer under the Federal Sentencing Guidelines).

[16] *See Bramley*, 847 F.3d at 7; *Christman*, 509 F.3d at 310–11; United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991) (finding an ex parte presentence conference between a judge and a probation officer was not a critical stage for the purposes of sentencing proceedings); United States v. Spudic, 795 F.2d 1334, 1343–44 (7th Cir. 1986) (holding that the use of a probation officer's sentencing council concept cannot be sanctioned regardless of its supposed benefits).

[17] *See, e.g.*, Thomas L. Root, *Careless Whisper: 1st Circuit Says Judge and Probation*

rule requiring disclosure could feasibly be adopted and why it would be preferable to the currently ambiguous state of affairs in this area of critical importance to individuals convicted of federal crimes.[18]

## I. HISTORICAL OVERVIEW OF FEDERAL SENTENCING: THE SHIFTING ROLE OF PROBATION OFFICERS

### *A. The Discretionary Sentencing System*

Prior to the adoption of the Sentencing Reform Act of 1984[19] and resultant creation of the Guidelines, federal judges enjoyed significant discretion in issuing criminal sentences.[20] Within this discretionary sentencing system, judges were empowered to impose sentences within a broad range to create individualized sentences that fit offenders, not just their crimes.[21] Federal sentencing judges could choose to be severe or lenient.[22] The sentencing range was often determined from facts of the offense and the convictee's personal background.[23] Due to the amount of discretion and significant authority sentencing judges had, similar offenders often received substantially different sentences.[24] Studies, moreover, repeatedly confirmed

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*Officer's Sidebar Without Defense Present is Fine – Update for February 1, 2017*, LEGAL INFO. SERVS. ASSOCS. (Feb. 1, 2017), https://www.lisa-legalinfo.com/tag/ex-parteprobation-officerpresentence-report/ (discussing the ambiguity of the current rule regarding ex parte communications between probation officers and sentencing judges); Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 58–59 (2010) (discussing the questionable character of probation officers under the Guidelines).

[18] *See, e.g.*, 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 528 (4th ed. 2021) (discussing the difficulty that was encountered when amending the rule to allow for disclosure of presentence reports).

[19] Pub. L. No. 98-473, 98 Stat. 1837 (codified at 28 U.S.C. § 991).

[20] *See* Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 190–95 (2014) (discussing the history of the discretionary sentencing system and its resulting issue of sentencing disparity).

[21] *See id.* at 190–92.

[22] José A. Cabranes, *Reforming the Federal Sentencing Guidelines: Appellate Review of Discretionary Sentencing Decisions*, 1 HARV. LATINO L. REV. 177, 179 (1994).

[23] Hessick & Hessick, *supra* note 20, at 190 ("[J]udges often considered a wide range of factors including the defendant's criminal history, employment history, family ties, educational level, military service, charitable activities, and age; harm caused by the criminal act; and the defendant's motive.").

[24] *See, e.g.*, James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 271–76 (1999) (finding the expected difference between two judges in average sentence length dropped from seventeen percent to eleven percent after the implementation of the Guidelines).

that sentences varied widely, leading to backlash from critics that such sentences were being influenced by other factors such as race and class.[25]

### *B. The Federal Sentencing Guidelines*

In 1984, Congress passed the Sentencing Reform Act[26] as part of an effort to reduce sentencing disparities among similar offenders.[27] In order to achieve this goal, the Act created the United States Sentencing Commission and tasked it with drafting a set of comprehensive Federal Sentencing Guidelines.[28] The primary purposes of the Guidelines were to incorporate the purposes of sentencing (i.e., just punishment, deterrence, incapacitation, and rehabilitation), structure the discretion that federal trial judges had through the promotion of certainty and fairness in sentencing, and reflect advancement in the knowledge of human behavior as it relates to the criminal justice process to the extent practicable.[29] In pursuit of uniformity, the Guidelines outline specific factual findings that trigger mandatory punishment enhancements which increase the length of sentences and render the process through which such factual findings are made critically important to the rights of convicted persons.[30] In fact, for a judge to depart from the Guidelines and assign a convictee a lesser sentence because of mitigating evidence, such mitigating evidence must be relevant to the Guidelines.[31] Due to mandatory punishment enhancements, legal experts "began to raise questions about the need for procedural protections at sentencing[.]"[32] Despite these concerns, the Guidelines were passed in 1987, imposing strict limitations on sentencing judges.[33]

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[25] *See, e.g.*, *id.* at 276–77 (discussing an experimental study consisting of 50 district court judges which resulted in sentences ranging from 20 years in prison and a $65,000 fine from the most severe judge to three years in prison from the most lenient judge); Hessick & Hessick, *supra* note 20, at 190–91.

[26] Pub. L. No. 98-473, 98 Stat. 1837 (codified at 28 U.S.C. § 991).

[27] Anderson, Kling & Stith, *supra* note 24, at 272 (discussing how the Sentencing Commission was created to discourage disparity in sentencing).

[28] *Id.*

[29] U.S. SENT'G COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2011), https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf.

[30] *See* Hessick & Hessick, *supra* note 20, at 192–94.

[31] *See* Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 955 (1995) ("The only characteristics considered relevant in determining whether a departure is warranted are the defendant's role in the offense, the defendant's criminal history, and the degree to which the defendant depends upon criminal activity for livelihood.").

[32] Hessick & Hessick, *supra* note 20, at 193.

[33] *See* U.S. SENT'G COMM'N, *supra* note 29, at 2; *see also* Pub. L. No. 98-473, 98 Stat. 1837 (codified at 28 U.S.C. § 991).

This change, however, did not come easy as many federal judges opposed the Guidelines, leading to many constitutional battles.[34] In 1989, the U.S. Supreme Court found that the creation of the Commission and the Guidelines did not amount to an excessive delegation of Congressional authority and therefore were constitutional in *Mistretta v. United States*.[35] In response to this failed constitutional attack, the Commission embarked on a series of trainings on how to apply the Guidelines and engaged stakeholders, including federal judges, in discussions concerning how they could be improved.[36] The Commission started this process by engaging federal probation officers, based on the theory that the officers would be the best situated to educate and influence federal judges because of their position as "arms of the court."[37]

### *C. The Role of Probation Officers Prior to the Adoption of the Guidelines*

At a National Probation Association meeting in 1928, federal probation officers, although not truly social workers, were taught to consider themselves as such and further instructed that if they did not, they would eventually change their minds.[38] Recommended educational requirements for federal probation officers also included coursework in psychology, news writing, and family casework or fieldwork.[39] In 1938, the Attorney General established minimum standards that required probation officers to have two years of experience in social work, a requirement which was eventually modified by the Joint Commission on Correctional Manpower and Training in 1973 to include an undergraduate degree in the social sciences.[40] Additionally, the officers were viewed as social workers of the court, the court's "eyes and ears," and as neutral information gatherers who were only loyal to the court itself.[41] As neutral parties, probation officers were to

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[34] *See* Pryor, *supra* note 10, at 15 ("Federal judges all around the country decried the new guidelines' curtailment of what previously had been virtually unbridled sentencing discretion, and over 200 district judges declared that the guidelines were unconstitutional before the [U.S.] Supreme Court eventually upheld their constitutionality in 1989.").

[35] *See* 488 U.S. 361, 374–80 (1989); Pryor, *supra* note 10, at 15.

[36] *See* Pryor, *supra* note 10, at 15.

[37] *See id.*

[38] *See* Bunzel, *supra* note 31, at 944 ("At a 1928 meeting of the National Probation Association, federal probation officers were told: 'If there is any probation officer here . . . who does not consider himself or herself to be a social worker, . . . you are either going to change your mind and develop a social work consciousness, or you are a member of a passing race.'").

[39] *Id.*

[40] *Id.*

[41] *Id.* at 945.

conduct investigations of convicted offenders and create presentence reports, which judges would use to create individualized sentences that would fit the offenders rather than focusing solely on the convictions themselves.[42] A presentence report included information about the offender's family history, childhood, education, interests, health, and employment.[43] In other words, the probation officer's job was helpful to offenders because the officer helped present the best available information to the judge rather than aid the prosecution.[44]

### *D. The Evolution of the Probation Officer's Role Under the Guidelines*

After the Guidelines were implemented, federal probation officers—previously viewed as social workers who helped promote rehabilitation—took on a new role:[45] aid in the application of the Guidelines.[46] Since the Commission believed probation officers would be the best source of education about the Guidelines for judges, the Commission engaged in a series of probation officer trainings concerning the proper application of the Guidelines.[47] Since the initial adoption of the Guidelines, many commentators have discussed the changing role of the probation officer and labeled their vital role as "guideline guardians" for the Commission.[48] As

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[42] *See* Glass, *supra* note 15 ("Especially in the absence of a trial, it was important for officers to conduct an independent investigation, often uncovering information about the defendant that went beyond the elements of the instant offense to create a 'broad and comprehensive picture of the defendant . . . necessary for the judge to impose an individualized sentence based on the circumstances of the particular case.'").

[43] *Id.* ("The model report used in federal sentencing consisted of thirteen sections, seven of which (family history, home and neighborhood, education, religion, interests and activities, health, employment) might include mitigating evidence about the defendant.").

[44] *See id.* ("[P]robation reports were the ideal source for the information that judges used to apply their discretion because '[p]robation workers making reports of their investigations have not been trained to prosecute but to aid offenders.'"); *see also id.* (discussing how the Probation Division instructed officers to shed light on the personality of the offender for the judge to create an individualized sentence); Williams v. New York, 337 U.S. 241, 249 (1949) (stating that probation officers' "reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information.").

[45] *See* Bunzel, *supra* note 31, at 944.

[46] *See* Glass, *supra* note 15 ("In order to fulfill their new role as 'preliminary adjudicat[ors],' probation officers were required to become expert in the complex and technical law governing the application of the Guidelines.").

[47] *See* Pryor, *supra* note 10, at 14–15.

[48] *See, e.g.*, Glass, *supra* note 15 ("The Commission was criticized at its inception for making probation officers into 'guardians' of the Sentencing Guidelines."); Bunzel, *supra* note 31, at 965 ("'In a practical sense, federal probation officers have become guardians, a role which results from the probation officer being closely connected with the Commission's

probation officers came to be viewed as the "guardians" of the Guidelines, some scholars began to question whether the officers' primary duties remained to the court alone.[49] When asked about their job, one officer commented that "[t]he Commission is here to stay, and if you have a good relationship with the Commission, it's going to make your job a lot easier—you're going to attract a lot more flies with honey than you are with vinegar."[50] Meanwhile, probation officers' presentence reports remain the main source of data that the Commission has used to improve the Guidelines, further complicating the officers' roles.[51] In fact, the Commission has made hundreds of amendments to the Guidelines since 1987, and probation officers continue to advise the Commission regarding improvements.[52]

Presentence reports, however, still remain important in sentencing determinations. Sentencing judges continue to rely heavily on presentence reports, which are still prepared by assigned probation officers and are based on an independent investigation of a convictee carried out by assigned officers.[53]

While the adoption of the Guidelines did not significantly change the importance and substance of presentence reports, the role of such reports in sentencing has shifted in subtle, yet important ways. Prior to the Guidelines, presentence reports helped sentencing courts determine sentences that were purportedly individualized and suitable for a convictee by presenting significant facts about the convictee's offense, background, criminal history, and other factors.[54] Those factors, however, became markedly less significant following the adoption of the Guidelines.[55] Although presentence reports arguably became more important to post-Guidelines sentencing decisions,

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training efforts and becoming well versed in the Commission's view of the guidelines.'").

[49] *See* Bunzel, *supra* note 31, at 965.

[50] *Id.* (citation omitted).

[51] *See* Pryor, *supra* note 10, at 16.

[52] *See id.*

[53] Glass, *supra* note 15 ("In keeping with this new approach, probation officers were given a new role. They were now designated the 'special master' of facts relevant to sentencing and were entrusted with the responsibility of conducting an independent investigation on behalf of the court.").

[54] *Id.* ("Especially in the absence of a trial, it was important for officers to conduct an independent investigation, often uncovering information about the defendant that went beyond the elements of the instant offense to create a 'broad and comprehensive picture of the defendant . . . necessary for the judge to impose an individualized sentence based on the circumstances of the particular case.'").

[55] *See id.* ("Probation officers were instructed that their role was no longer to delve into the social history of offenders: 'Although the judge will have some discretion to take into account the defendant's potential for change, the dominant task in guideline sentencing is to apply a set of legal rules—the guidelines—to the facts of the case.'").

their role has significantly changed.[56] Presentence reports today typically include similar general information to pre-Guidelines reports, such as that relating to the nature of the offense and the convictee's specific conduct related thereto, along with overviews of a convictee's criminal history, mental health history, family history, and finances.[57] However, these details now must be deemed relevant to the Guidelines to be properly considered at sentencing.[58] Probation officers, moreover, must now calculate a recommended sentence within the Guidelines based on their investigation.[59] The probation officer's calculation and sentencing recommendation are important sources of information for judges,[60] who are similarly tasked in each case with identifying an appropriate general sentence range and specific sentence term falling therein.[61] Based on this subtle shift in the main role of probation officers at sentencing—from seeking to identify and recommend an appropriate rehabilitative-oriented sentence to seeking to properly interpret the Guidelines to identify a "correct" sentence—many convictees and defense attorneys ceased viewing probation officers as truly neutral officers of the court.[62] Rather, following adoption of the Guidelines, convictees and defense attorneys increasingly view probation officers as aligned with the prosecution or an additional third party.[63] In turn, this raises serious questions concerning how and under what circumstances probation officers are permitted to communicate with sentencing judges.

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[56] *See id.* ("With the institution of the Guidelines, presentence reports changed from being primarily about the defendant to focusing primarily on the offense.").

[57] *See id.* (explaining that presentence reports require information about "offense conduct, related cases, the plea agreement, impact on victims, and the defendant's acceptance of responsibility. It also covers the defendant's criminal history and personal characteristics: information about parents and siblings, 'significant problems' in the family history, marital status, children, physical and mental health, history of alcohol or drug abuse, level of education, military service, employment history, and financial status.").

[58] *See id.* ("Certain factors, some of which might include mitigating evidence, are placed out of bounds by the Guidelines, so the judge may not consider them in deciding whether to depart downward from the applicable Guideline range.").

[59] *See* Pryor, *supra* note 10, at 15.

[60] Jerry D. Denzlinger & David E. Miller, *The Federal Probation Officer: Life Before and After Guideline Sentencing*, 55 FED. PROB. 49, 52 (1991) ("Virtually all participants in the sentencing process rely upon the officer, especially the sentencing judge.").

[61] Glass, *supra* note 15.

[62] *See id.*

[63] *See id.* (discussing how the duty of probation officers to calculate appropriate sentencing ranges by understanding the law and applying the facts is similar to adding another lawyer to the process).

## II. CURRENT REGULATIONS OF EX PARTE COMMUNICATIONS BETWEEN SENTENCING JUDGES AND PROBATION OFFICERS

### *A. Ex Parte Communications and Their Serious Ethical Complications*

Due to the close working relationships between judges and probation officers, and the latter's vital role in sentencing outcomes, judges often seek the opinions of assigned officers before sentencing hearings.[64] When these communications occur ex parte, serious legal and ethical implications related to a convictee's rights arise.[65] For example, judges may rely on untested, potentially inaccurate or incomplete versions of relevant facts, or may be influenced by personal biases of the party engaging in the communication.[66] Even if there are no improper intentions, the mere existence of ex parte communications may create the appearance of bias and adversely affect the perceived fairness of judicial processes.[67]

### *B. Types of Ex Parte Communications Between Sentencing Judges and Probation Officers That Are Permitted*

Although ex parte communications are usually prohibited and considered unethical, there are exceptions.[68] Courts have reasoned that a presiding judge may consult with probation officers behind closed doors because probation officers understand the presentence reports they author in great depth and such knowledge can be beneficial to sentencing judges.[69] Such communications are exceptions to general rules forbidding ex parte communications, including those ethical principles laid out in the Code of Conduct for United States Judges.[70] Along these lines, Canon 3 of the Code states:

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[64] *See* McMurray, *supra* note 12, at 593.

[65] *See* Standing Comm. of the Am. Judicature Soc'y, *Dangers of Ex Parte Communications*, 74 JUDICATURE 288, 288 (1991).

[66] *See id.*

[67] *See id.*

[68] *See* ADMIN. OFF. OF THE U.S. CTS., *Code of Conduct for U.S. Judges* 6, https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf (last updated Mar. 12, 2019) [hereinafter *Federal Judicial Code*].

[69] *See* United States v. Bramley, 847 F.3d 1, 1–9 (1st Cir. 2017) (holding that a sentencing court's brief ex parte communication with a probation officer during sentencing did not amount to plain error); United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991) (holding that "an ex parte presentence conference between a court and a probation officer is not a critical stage of the sentencing proceedings").

[70] *See Federal Judicial Code*, *supra* note 68, at 6.

> Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested.[71]

Among the exceptions to this rule are situations involving communications for scheduling, administrative, or emergency purposes.[72] Even in such exceptional circumstances, the Code requires that a judge reasonably believe that no party will gain an advantage as a result of the communication or the matter being discussed is not substantive.[73] Judges are also allowed to "consult with other judges or court personnel whose function is to aid the judge in carrying out adjudicative responsibilities."[74]

One issue that frequently arises in this area relates to the unclear definition of the term "court personnel."[75] Although there are no formal published advisory opinions from the Committee on Codes of Conduct regarding ex parte communications and the meaning of "court personnel,"[76] many federal circuits have ruled on this particular issue.[77] In these cases, courts have continuously held that probation officers who have authored the presentence report for a convictee[78] are to be considered court personnel, permitting them to have ex parte communications with a sentencing judge prior to a sentencing proceeding.[79] For example, in *United States v. Johnson*, the Fourth Circuit held that an ex parte communication between a probation officer and sentencing judge did not violate the convictee's right to

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[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 10.

[75] *See* United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991) (finding that probation officers provide information to a sentencing court as a neutral agent of the court).

[76] *See generally* ADMIN. OFF. OF THE U.S. CTS., *Published Advisory Opinions*, https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf (last visited Nov. 1, 2021).

[77] *See, e.g.*, United States v. Bramley, 847 F.3d 1, 1–9 (1st Cir. 2017); United States v. Christman, 509 F.3d 299, 310–12 (6th Cir. 2017); *Johnson*, 935 F.2d at 50.

[78] *See* United States v. Spudic, 795 F.2d 1334, 1343 (7th Cir. 1986) ("There could be legitimate concern, for instance, that one of the probation officers, not the one who prepared the presentence report, may have contributed some additional pertinent adverse information about the defendant. That would leave the defendant without the Rule 32 opportunity to challenge it since the judge at sentencing may not reveal the things taken into consideration in arriving at the sentence.").

[79] *See Bramley*, 847 F.3d at 6–7; *Johnson*, 935 F.2d at 49–50.

confrontation because such communications are standard practice.[80] The court reasoned that probation officers are generally characterized as a neutral arm of the court when preparing presentence reports as their role is to gather information not used for prosecution.[81]

Nevertheless, circuit courts have also imposed limitations on ex parte communications between sentencing judges and probation officers.[82] The Sixth Circuit in *United States v. Christman*, for example, held that ex parte communications between a judge and officer could not involve the disclosure of facts not already disclosed in the presentence report.[83] There, a sentencing judge had relied on subjective impressions of a probation officer that the convictee had acted on his pedophilia and molested children.[84] These impressions, however, were contrary to the presentence report wherein the officer had opined that the convictee's pedophilia was just an unacted-upon fantasy.[85] The Sixth Circuit reasoned that the ex parte communication was improper because the sentencing judge relied on facts and opinions not mentioned in the presentence report.[86]

This rule against the disclosure of information not contained in a relevant sentencing report was applied by the First Circuit in *United States v. Bramley*, wherein the Court held that a probation officer may offer advice or analysis but cannot reveal new facts to be relied on in the judge's ultimate sentencing calculus.[87] There, the First Circuit also held that the appellant convictee has the burden of showing a clear and obvious error resulted due to the ex parte communication.[88]

Additionally, in *United States v. Spudic* before the Seventh Circuit, a convictee argued that the sentencing process was flawed because the trial judge engaged in ex parte communications with numerous probation officers.[89] The Seventh Circuit held that the communication was improper because probation officers who did not prepare the convictee's presentence report were present during ex parte communications with the sentencing judge.[90] The Seventh Circuit reasoned that there is a legitimate concern that probation officers who did not prepare the presentence report may have

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[80] *See Johnson*, 935 F.2d at 49–50.

[81] *See id.*

[82] *See, e.g.*, *Bramley*, 847 F.3d at 6–8; *Christman*, 509 F.3d at 310–12; *Spudic*, 795 F.2d at 1343.

[83] *See* 509 F.3d at 310–12.

[84] *Id.* at 310.

[85] *Id.* at 311.

[86] *See id.* at 311–12.

[87] *See* 847 F.3d at 7.

[88] *Id.*

[89] 795 F.2d 1334, 1336 (7th Cir. 1986).

[90] *See id.* at 1343.

contributed additional facts to the sentencing judge without fully knowing the exact facts of the case.[91]

From these various circuit court rulings it appears that, as a general matter, a probation officer who prepared a presentence report[92] may have ex parte communications prior to the sentencing hearing with the sentencing judge as a presumed neutral court officer.[93] During these communications, the officer can offer analysis or advice but must not relay any new facts.[94] A judge's reliance on any new facts from the probation officer would amount to reversible error.[95] Even if a convictee discovers that an ex parte communication existed, however, he has the burden of showing such communication resulted in a clear and obvious error.[96] This is an incredibly high burden since, due to the very nature of ex parte communications, the defense is unlikely to be aware of its substance, let alone be in a position to demonstrate the judge's specific reliance on the disclosed facts when making a sentencing determination.[97]

## III. THE CASE FOR A RULE MANDATING FULL DISCLOSURE OF ALL EX PARTE COMMUNICATIONS BETWEEN PROBATION OFFICERS AND SENTENCING JUDGES

### *A. The Current Rule Is Ambiguous*

In *Bramley*, the First Circuit distinguished between new facts and advice.[98] If the probation officer reveals new facts relevant to the Guidelines during an ex parte communication, and the judge relies on them in sentencing, the communication must be disclosed to the parties.[99] This rule is ambiguous because the probation officer's advice will be based on what the officer believes the facts to be.[100] Those facts may be different from what the sentencing judge or convictee perceives them to be, but the defense has no chance to dispute them.[101] This rule, moreover, is also ambiguous because it does not clearly state whether facts that were brought to the judge's attention

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[91] *Id.*

[92] *See, e.g.*, United States v. Christman, 509 F.3d 299, 310–12 (6th Cir. 2017); *Bramley*, 847 F.3d at 6–8; *Spudic*, 795 F.2d at 1343.

[93] *See* United States v. Johnson, 935 F.2d 47, 49–50 (4th Cir. 1991).

[94] *Bramley*, 847 F.3d at 7.

[95] *Id.*

[96] *See id.*

[97] *See id.*

[98] *Id.*

[99] *See id.*

[100] *See* Root, *supra* note 17.

[101] *See id.*

but do not seem to be relied upon should be disclosed.[102] Disclosure should be mandated as a general rule because it is difficult and almost impossible to know whether previously undisclosed facts relayed by a probation officer ex parte to a sentencing judge informed or played a role in the judge's sentencing decision.[103]

### *B. The Current Rule Is Inefficient*

Due to skepticism resulting from these ex parte communications, convictees often view their sentences as unjust and appeal.[104] In addition to the cases already mentioned in this Comment,[105] there are other cases that have resulted in an appeal by a convictee due to ex parte communications between sentencing judges and probation officers that occurred before or during a sentencing hearing.[106] For example, in *United States v. Pryor*, the convictee raised an issue regarding the sentencing judge's ex parte conference with the probation officer and his inability to respond to the information provided during the communication.[107] In *United States v. Rightsell*, the convictee appealed and contended that the sentencing court violated her due process because it relied on a sentencing recommendation that was not included in a presentence report.[108]

Thus, as a result, the current rule is not only inefficient as it has led many convictees to appeal their sentence, but it also has the potential to lead to further appeals.[109] Such appeals, likely avoided through a rule mandating full disclosure,[110] may not necessarily flood a court's calendar, but they will definitely take up resources and time.

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[102] *See Bramley*, 847 F.3d at 7 ("The short of it is that a sentencing court has the right to confer ex parte with a probation officer to seek advice or analysis—but if the probation officer reveals new facts relevant to the sentencing calculus, those facts cannot be relied upon by the sentencing court unless and until they are disclosed to the parties and subjected to whatever adversarial testing may be appropriate.").

[103] *See* Root, *supra* note 17.

[104] *See, e.g.*, *Bramley*, 847 F.3d at 2–5; United States v. Christman, 509 F.3d 299, 300–04 (6th Cir. 2007); United States v. Rightsell, 40 F. App'x 360, 361 (9th Cir. 2002); United States v. Pryor, 957 F.2d 478, 479–81 (7th Cir. 1992); United States v. Johnson, 935 F.2d 47, 48–50 (4th Cir. 1991); United States v. Spudic, 795 F.2d 1334, 1336–43 (7th Cir. 1986).

[105] *See Bramley*, 847 F.3d at 7; *Christman*, 509 F.3d at 310–12; *Johnson*, 935 F.2d at 50; *Spudic*, 795 F.2d at 1343.

[106] *See Rightsell*, 40 F. App'x at 361; *Pryor*, 957 F.2d at 480–81.

[107] 957 F.2d at 480–81.

[108] 40 F. App'x at 361.

[109] *See, e.g.*, *Bramley*, 847 F.3d at 2–5; *Christman*, 509 F.3d at 300–04; *Rightsell*, 40 F. App'x at 361; *Pryor*, 957 F.2d at 479–81; *Johnson*, 935 F.2d at 48–50; *Spudic*, 795 F.2d at 1336–43.

[110] *See, e.g.*, *Bramley*, 847 F.3d at 2–5; *Christman*, 509 F.3d at 300–04; *Rightsell*, 40 F.

### *C. The Spirit of Rule 32 of the Federal Rules of Criminal Procedure Is Contrary to the Current Rule*

After the sentencing phase, the presentence report continues to be the major source of information about an offender and is extremely influential in determining the type and length of sentence an offender receives.[111] Rule 32 of the Federal Rules of Criminal Procedure, which applies during the sentencing phase, requires that a probation officer "conduct a presentence investigation and submit a report to the court[.]"[112] It also sets out the requirements regarding the contents, investigation, disclosure, and any objections to the report.[113] The ultimate goal of Rule 32 is to afford the convictee due process and assure that they are sentenced on information that is not materially incorrect or false.[114] To achieve this overarching goal, Rule 32 was amended in 1975.[115] The amendment afforded a convictee the right to comment on the presentence report concerning any disputable facts at the sentencing hearing.[116] Additionally, it required sentencing judges to disclose all factual information relied on for sentencing.[117]

The amendment to Rule 32 aimed to promote transparency in the sentencing phase, yet the current rule regarding ex parte communications has taken a route in the complete opposite direction.[118] The current rule regarding ex parte communications lacks the transparency needed to assure that a

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App'x at 361; *Pryor*, 957 F.2d at 479–81; *Johnson*, 935 F.2d at 48–50; *Spudic*, 795 F.2d at 1336–43.

[111] *See* Note, *A Proposal to Ensure Accuracy in Presentence Investigation Reports*, 91 YALE L.J. 1225, 1229 (1982) ("The report is influential in determining an inmate's conditions of confinement, participation in programs in prison, level of supervision both while in prison and on probation or parole, and actual length of incarceration.").

[112] FED. R. CRIM. P. 32(c)(1)(A).

[113] *Id.* 32(d)–(f).

[114] *See Bramley*, 847 F.3d at 5–6; United States v. Curran, 926 F.2d 59, 61 (1st Cir. 1991) ("This rule essentially requires both disclosure of the presentence report to the defendant and an opportunity for the defendant to contest the accuracy of the information contained therein. Rule 32 does not itself apply in this situation because the letter referenced by the district court in the sentencing hearing was not made part of the presentence report.").

[115] Note, *supra* note 111, at 1231 ("To mitigate the problem of inaccurate information in [Presentence Investigation Reports], Congress amended Rule 32(c) of the Federal Rules of Criminal Procedure in 1975.").

[116] *Id.*

[117] *Id.* at 1231–32.

[118] *See id.* at 1237–38 ("Fundamental to this interest is the right to be sentenced on the basis of accurate and reliable information. Although the procedures constitutionally required to ensure such sentencing accuracy have not been clearly established, the Supreme Court held over 30 years ago in *Townsend v. Burke* that a sentence founded on materially false information about the defendant violates due process.").

convictee is sentenced on factual information that is trustworthy.[119] Without disclosure of ex parte communications between probation officers and sentencing judges, many convictees may never have the chance to comment on any disputable communication, simply because they will never know about the conversation or the substance of what was said.[120] This leaves greater room for unreliable information to slip through the cracks.[121] Thus, when unreliable information has a chance of playing a role, it will be difficult to determine whether an offender was sentenced based on information that is materially incorrect or false.[122] Giving materially incorrect or false information a chance to play a role in sentencing is contrary to the spirit of Rule 32 because it hinders the Rule's overarching goal of affording an offender the right to due process.[123]

The effects of nondisclosure can be detrimental. In *Christman*, for example, the defendant pled guilty to the possession of materials constituting child pornography, in which a final presentence report was prepared noting that the convictee had acknowledged possession.[124] However, despite possession, the report stated that the defendant claimed that he was different from other individuals who molested children because he did not stalk or actually harm children.[125] In response, the defense attorney argued at the sentencing hearing for a downward departure from the recommended guideline sentencing range because the convictee had no prior criminal history.[126] The defense attorney submitted a Psychological Assessment Report prepared by a psychologist for support[127] that contended the convictee's attraction to children was "at purely a fantasy level and that he would never harm children by acting out sexually against them."[128] Despite

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[119] *See* United States v. Christman, 509 F.3d 299, 310–12 (6th Cir. 2007) (holding that a probation officer's communications with the sentencing judge, disclosed to the defendant three months after sentencing, was improper because the officer relayed information that was not included in the presentence report, which ultimately influenced the sentencing judge).

[120] *See* United States v. Bramley, 847 F.3d 1, 7 (1st Cir. 2017) (finding that the contents of conversations between a probation officer and a sentencing court were unknown, and nothing in the record suggested that there was reliance on any new facts in the sentencing calculus); *Christman*, 509 F.3d at 301, 310–12 (remanding a convictee's sentence because a sentencing judge admitted three months later that she relied on ex parte communications with a probation officer which were not included in the presentence report).

[121] *See Christman*, 509 F.3d at 310–12.

[122] *See id.*

[123] *See Bramley*, 847 F.3d at 5–6; United States v. Curran, 926 F.2d 59, 61–62 (1st Cir. 1991).

[124] *Christman*, 509 F.3d at 300–02.

[125] *Id.* at 302.

[126] *See id.*

[127] *Id.*

[128] *Id.*

this report, the "court declined to deviate downward from the recommended Guidelines sentencing range."[129]

Three months later, however, the sentencing judge admitted to having off-the-record conversations with probation and pretrial officers, during which the officers expressed their shared belief that the defendant had acted on his pedophilia.[130] The sentencing judge further admitted that the discussion was not only contrary to the presentence report, but it also ultimately influenced her sentencing decision.[131] If the sentencing judge had not come forward about how awful she felt about having these types of conversations, it would have been impossible for the defendant to learn that there was more than what was in the presentence report that was influencing the court's decision.[132] This case not only demonstrates the detrimental outcome of nondisclosure, but also the consequence an offender may face such as receiving a lengthier incarceration.[133] If judges render sentences with the belief that they have not relied on new information, they may not feel the need to disclose ex parte communications that occurred; further, these judges may not take the initiative to disclose the ex parte communications at a later time, denying offenders the opportunity to challenge any inaccurate information that may have been relied upon in determining their term of incarceration.[134]

In *Bramley*, moreover, the defendant pled guilty and was sentenced to a fifty-month prison term for conspiracy to distribute and possession with intent to distribute marijuana.[135] During the sentencing hearing, the judge took a short recess and engaged in an off-the-record conversation with the assigned probation officer for approximately five minutes.[136] Toward the end of the hearing, "a second off-the-record conversation took place between the judge and assigned probation officer."[137] This conversation lasted approximately ten seconds at sidebar and occurred while the court was considering the monetary punishment of the sentence.[138] On appeal, the First Circuit held that the sentencing court had the right to engage in ex parte communications with the officer as long as the officer did not reveal "new facts relevant to the sentencing calculus."[139] The court reasoned that there

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[129] *Id.* The defendant was subsequently sentenced to serve concurrent terms of fifty-seven months of incarceration with three years of supervised released and additional fines. *Id.*

[130] *Id.* at 303.

[131] *Id.*

[132] *See id.*

[133] *See id.*

[134] *See id.*

[135] 847 F.3d at 3–5.

[136] *Id.* at 4.

[137] *Id.* at 5.

[138] *Id.*

[139] *See id.* at 5–7.

was no basis for concluding that the conversations involved new facts or raised new matters because the defendant did not show that the outcome would have been different but for the conversation, and thus, the plain error standard was not met.[140]

It is almost impossible, however, to learn what was said during an ex parte communication without disclosure.[141] In this way, *Bramley* illustrates the difficulty that convictees face to prove their burden.[142] Additionally, *Bramley* demonstrates that without disclosure, the chance that false information will be relied upon is greater because the convictee is never given a fair chance to challenge such communications.[143] Hence, without awareness of the substance of ex parte communications, the convictee will be unfairly placed at a disadvantage when it comes to proving that such communications improperly influenced the sentencing judge's determination in the first place.[144]

### *D. The Current Rule Plus the Lack of Procedural Safeguards at Sentencing Amount to a Greater Disadvantage*

At sentencing, convictees—the vast majority of whom pled guilty and thus did not have a trial[145]—are put at an additional disadvantage when it comes to ex parte communications because of their lack of rights in comparison to trial proceedings.[146] The Federal Rules of Evidence, which heavily guard against hearsay, do not apply at sentencing.[147] Although due process does apply, it only requires that the hearsay information be reliable to support its probable accuracy.[148] Constitutional trial rights of confrontation and cross-examination have also been held inapplicable to sentencing proceedings.[149] One of the main purposes of the Sixth Amendment right to confrontation is to prevent the use of ex parte examinations of witnesses as evidence against the accused.[150] The right to confrontation also promotes evidentiary

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[140] *See id.* at 7–9.
[141] *See id.*
[142] *See id.*
[143] *See id.*
[144] *See id.*
[145] Mishler, *supra* note 1, at 887.
[146] *See* United States v. Rodriguez, 336 F.3d 67, 71 (1st Cir. 2003).
[147] *See id.* (first citing United States v. Robinson, 144 F.3d 104, 108 (1st Cir. 1998); then citing United States v. Gonzalez-Vazquez, 34 F.3d 19, 25 (1st Cir. 1994)).
[148] *See* United States v. Beaulieu, 893 F.2d 1177, 1181 (10th Cir. 1990).
[149] *See id.* at 1180 ("The Supreme Court has made clear that the constitutional requirements mandated in a criminal trial as to confrontation and cross-examination do not apply at non-capital sentencing proceedings.").
[150] Crawford v. Washington, 541 U.S. 36, 50 (2004).

reliability, predicated on the notion that cross examination is the best method of establishing reliability.[151] Not only may hearsay,[152] including ex parte communications between a probation officer and sentencing judge, be allowed at sentencing so long as it is found to be reliable, but the defense also cannot cross examine the probation officer about the substance of such ex parte communications or test the reliability of underlying assertions that an officer may have made.[153] These problems are compounded by the fact that sentencing courts have broad discretion to determine whether hearsay evidence is sufficiently reliable to warrant a finding of probable accuracy.[154]

In 1980, *Ohio v. Roberts* had been the controlling decision, holding that adverse evidence could be brought before a jury so long as there was an "indicia of reliability."[155] Fast forward approximately twenty-five years later, in *Crawford v. Washington*, the U.S. Supreme Court overturned *Roberts* and held that testimonial evidence is not admissible unless the witness is unavailable and the defense previously had an opportunity to cross examine the witness.[156] In *Crawford*, a defendant charged with assault and attempted murder argued that his wife's out-of-court statement to the police violated his right to confront the witnesses against him.[157] The Court held that the defendant was required to have an opportunity to cross examine his wife because her statement was testimonial.[158] Today, courts continue to apply this well-accepted rule.[159]

Yet, despite the testimonial nature of ex parte communications, courts have held that the right to confrontation at sentencing does not apply.[160]

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[151] *See id.* at 61–62.

[152] *Beaulieu*, 893 F.2d at 1181 ("We believe the better rule, therefore, is that reliable hearsay–including testimony from a separate trial–may be used at sentencing to determine the appropriate punishment.").

[153] *See* United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991) ("During these nonadversarial communications, the court confers with its own agent in the absence of the defendant or any representative of the prosecution.").

[154] United States v. Rodriguez, 336 F.3d 67, 71 (1st Cir. 2003) (first citing United States v. Tardiff, 969 F.2d 1283, 1287 (1st Cir. 1992); then citing United States v. Zuleta-Alvarez, 922 F.3d 33, 36–37 (1st Cir. 1990); then citing U.S. SENT'G GUIDELINES MANUAL § 6A1.3(a) (U.S. SENT'G COMM'N 2021).

[155] *See* 448 U.S. 56, 65–66 (1980), *abrogated by Crawford*, 541 U.S. at 66–69.

[156] 541 U.S. at 53–68.

[157] *Id.* at 38–40.

[158] *See id.* at 68.

[159] *Cf.* Davis v. Washington, 547 U.S. 813, 826–28 (2006) (holding that statements made to law enforcement during a 911 call or at a crime scene were not testimonial because they were made to help an ongoing emergency rather than prosecution).

[160] *See, e.g.*, United States v. Rodriguez, 336 F.3d 67, 71 (1st Cir. 2003) (quoting United States v. Tardiff, 969 F.2d 1283, 1287 (1st Cir. 1992)) ("[A] defendant's Sixth Amendment right to confront the witness against him does not attach during the sentencing phase.").

Beginning with *Williams v. New York*, the U.S. Supreme Court declared that the right to confrontation does not apply at sentencing.[161] There, the defendant was convicted of first degree murder and sentenced to death.[162] At sentencing, the judge considered the defendant's prior criminal conduct and facts from a presentence report that noted thirty other burglaries in and about the same vicinity where the murder was committed, and described the defendant as having a "morbid sexuality" and as a "menace to society."[163] The defendant argued that the sentence violated his constitutional due process rights because he did not have a chance to cross examine or refute such information within the presentence report, which ultimately came from out-of-court sources.[164] The Court held that the defendant's due process rights were not violated when the sentencing judge acquired information from the presentence report, even if there was no opportunity for cross examination of the out-of-court sources that were included.[165] It reasoned that the practice of individualizing punishments required probation officers, who are considered neutral parties, to investigate and create reports for the sentencing judge.[166] Without such reports, judges would lack the necessary guidance to impose fair sentences.[167] The Court also found that "[t]he type and extent of this information make totally impractical if not impossible open court testimony with cross examination."[168]

As followed in *Johnson*, in which a district judge met with two probation officers prior to a sentencing hearing regarding two defendants, the defendants argued that the assigned probation officers' ex parte communication with the sentencing judge violated the Sixth Amendment.[169] The defendants reasoned that they did not have a chance to cross examine the officers "regarding the substance of communications not disclosed in the presentence report."[170] The defendants, however, did not argue that the "ex parte communications between a court and probation officer have always been constitutionally suspect on confrontation clause grounds."[171] Rather, the defendants argued that such communications were only problematic during

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[161] *See* 337 U.S. 241, 244–52 (1949).
[162] *Id.* at 242.
[163] *Id.* at 244.
[164] *See id.* at 244–45.
[165] *See id.* at 252.
[166] *See id.* at 249.
[167] *Id.* at 249–50 ("To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.").
[168] *Id.* at 250.
[169] 935 F.2d 47, 49–50 (4th Cir. 1991).
[170] *Id.* at 50.
[171] *Id.*

the era of the Guidelines because of the new role probation officers took on.[172] The Fourth Circuit disagreed and held that "the interests underlying the confrontation clause [were] not implicated" because a probation officer was still considered a neutral party of the court during the sentencing stage.[173]

Similarly, in *United States v. Roche*, a defendant appealed his sentence and argued that the district judge erred in sentencing him based on facts not found by a jury beyond a reasonable doubt, which violated his right to confrontation.[174] The court held that the district judge did not err, as hearsay is admissible at sentencing and sentencing judges are entitled to consider information that has a "sufficient indicia of reliability to support its probable accuracy."[175] The court applied the *Williams* rationale that "witnesses providing information to the court after guilt is established are not accusers within the meaning of the confrontation clause."[176] The court further stated that the main constitutional provision applicable to sentencing proceedings is the due process clause and that "[s]entencing judges were entitled to use any 'procedures adequate to reach informed and accurate decisions in the main.'"[177] The Eighth Circuit also held in *United States v. Due* that "[h]earsay is admissible at sentencing, if the Court finds it reliable, and the Confrontation Clause does not apply."[178]

In light of the consistent denial of the existence of confrontation rights during sentencing proceedings, convictees will, in most cases, never know the substance of ex parte communications that may have occurred between the judge and the assigned probation officer.[179] A rule mandating full disclosure of ex parte communications will allow a convictee to uncover the substance of such communications that are often hidden.[180] Hence, even a rule requiring only the disclosure that such communications took place is insufficient.[181] Due to the lack of confrontation rights at sentencing, convictees will face great difficulty in uncovering the substance of these communications, as in *Bramley*.[182] Thus, a more appropriate rule would be

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[172] *See id.*
[173] *See id.*
[174] *See* 415 F.3d 614, 617–18 (7th Cir. 2005).
[175] *Id.* at 618.
[176] *Id.*
[177] *Id.* (quoting United States v. Escobar-Mejia, 915 F.2d 1152, 1154 (7th Cir. 1990)).
[178] *See* 205 F.3d 1030, 1033 (8th Cir. 2000).
[179] *See* United States v. Bramley, 847 F.3d 1, 6 (1st Cir. 2017); United States v. Christman, 509 F.3d 299, 301 (6th Cir. 2007).
[180] *See Bramley*, 847 F.3d at 6; *Christman*, 509 F.3d at 301.
[181] *See Bramley*, 847 F.3d at 6.
[182] *See id.* at 6–7.

not only to mandate disclosure of the occurrences of ex parte communications, but also the substance of such communications.[183]

### *E. The Current Rule Conflicts with the Questionable Characterization of the Probation Officer*

The general prohibition of ex parte communications serves the vital purpose of "accord[ing] to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."[184] Without this prohibition, parties could gain an advantage in their presentation of information and could cause excluded parties to lose their opportunity to rebut unfavorable or incorrect information.[185] Yet, the current rule permits off-the-record communications between judges and probation officers because the probation officers are, in theory, viewed as officers of the court.[186] As officers of the court, probation officers are believed to have zero legal interest in a sentencing proceeding.[187] There is no doubt, however, that probation officers play a crucial role when it comes to the sentencing phase as they provide the sentencing judge guidance when calculating a convicted offender's sentence,[188] and many probation officers fulfill their duties with integrity.

Even if the majority of probation officers do their job with integrity and engage in such communications with no ulterior motive, it remains unfair to convictees and defense attorneys, as many believe probation officers are ideologically—if not officially—aligned with prosecutors and law enforcement.[189] This questionable characterization of the probation officer has been commented on by many scholars in relation to the right to confrontation at sentencing.[190] However, this questionable character also

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[183] *See id.* at 6–8.

[184] Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications,* 37 HOUS. L. REV. 1343, 1355 (2000) (footnote omitted) (discussing the definition of ex parte communications, the purpose of prohibition, and permissible communications).

[185] *Id.*

[186] *See* United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991).

[187] *See id.*

[188] *See id.*

[189] *See* Bascuas, *supra* note 17, at 58–59 ("Probation officers are adversarial to a defendant in the same way and for the same reason that police and prosecutors are. Police and prosecutors are said to be partial only because it is their job to uncover and apprehend criminals and their interest in achieving particular results may cloud their objectivity. What makes courts impartial, on the other hand, is that they *do not investigate crimes or defendants* and theoretically at least are agnostic as to whether a defendant is convicted or acquitted. Probation officers, on the other hand, *do* actively investigate defendants and charges.").

[190] *See, e.g.*, Megan E. Burns, *The Presentence Interview and the Right to Counsel: A Critical Stage Under the Federal Sentencing Structure*, 34 WM. & MARY L. REV. 527, 538–

remains extremely important in the context of ex parte communications. As discussed above,[191] the previous goal of sentencing was individualization.[192] This model focused on rehabilitation through the creation of individualized sentences for each offender by looking at an individual's background, the nature of their offense, and their likelihood of rehabilitation.[193] The probation officer was once viewed as a friend or confidante of the convictee.[194] Judges depended on reports by the probation officer because probation workers were considered akin to social workers, rather than prosecutors.[195]

The probation officer's role, however, has shifted, and the current rule regarding ex parte communications has failed to follow.[196] After the Guidelines were enacted to structure the discretion of federal judges, the main goal at sentencing was to promote certainty and create sentences for specific offenders.[197] Under this new system, probation officers investigate an offender and calculate an appropriate sentencing range based on the Guidelines and results of their investigations.[198] The new system required probation officers to "become expert[s] in the complex and technical law governing the application of the Guidelines."[199] It is not surprising then that this shift in the probation officer's role caused many convictees and defense attorneys to view probation officers as a non-neutral party, perhaps even as an additional attorney or prosecutor.[200]

### *1. Additional Attorney*

The new role of probation officers required officers to understand the law and apply it to the facts of each case, meaning that they had to become experts on the law.[201] Today, presentence reports require that probation officers

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39 (1993).

[191] *See supra* note 19–23 and accompanying text.

[192] *See* Burns, *supra* note 190, at 539.

[193] *Id.* at 537.

[194] Julian Abele Cook, *The Changing Role of the Probation Officer in the Federal Court*, 4 FED. SENT'G REP. 112, 113 (1991).

[195] *See id.* at 112.

[196] *See* Burns, *supra* note 190, at 542–45.

[197] *See* U.S. SENT'G COMM'N, *supra* note 29, at 1.

[198] *See* Glass, *supra* note 15 ("In another Guidelines-era change in federal probation, probation officers were given the responsibility of ensuring that the proper Guideline sentence was applied in every case. While probation officers serve as the independent investigators of sentencing judges, they also owe a "dual loyalty" to the U.S. Sentencing Commission.").

[199] *Id.* (footnote omitted).

[200] *See id.*

[201] *See id.* ("When the Guidelines were introduced, legal analysis became the bread and butter of probation officers' jobs. In order for officers to calculate the appropriate sentencing ranges for defendants, they must understand the law and apply it to the facts.").

advocate for specific sentences that they believe offenders should receive in the addenda.[202] To advocate for a particular sentence, probation officers must include references to the Guidelines to support their calculation and recommendation.[203] They may additionally cite to case law and are encouraged to make legal arguments to support their position.[204] Over time, this has resulted in more probation officers obtaining law degrees and U.S. Probation Offices seeking to hire more lawyers.[205] For example, the U.S. Probation Office in the Central District of California "only hired lawyers to presentence positions" from 1997 to 2004.[206] Although this standard procedure is no longer followed, in 2010, four of the five probation officers hired by the office since 2004 were lawyers.[207] In fact, in the Central District of California, "nearly every officer who writes presentence reports has a law degree[,]" and the officers agreed that having a law degree "was a great asset."[208] A district court judge also agreed that law degrees were helpful to probation officers and compared the role of the probation officer to that of a law clerk.[209] In sum, this shift in the probation officer's role has led to many defense attorneys and convictees to view the probation officer as an additional third attorney to the process.[210]

### *2. Arm of Prosecution*

Many convictees and defense attorneys view probation officers as not only an additional party, but also as an arm of prosecution.[211] For example, similar to prosecutors and law enforcement, and unlike the court, probation officers investigate crimes.[212] During the presentence stage, the probation officer investigates the convictee's criminal history, acceptance of the crime, role in the crime, and more.[213] These factors ultimately lead to a sentencing

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[202] Bascuas, *supra* note 17, at 71.

[203] *Id.*

[204] *Id.*

[205] *See* Glass, *supra* note 15.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.* ("A judge agreed that it is helpful for probation officers to have law degrees: 'It's like having another law clerk to look to. It's not like you're going to slavishly do what the probation officer says, but it's very valuable.'").

[210] *See id.* ("In a sense we are a third advocate because we're taking a different position and we're trying to persuade the court that it's the right position . . . .").

[211] *See* Bascuas, *supra* note 17, at 58–59 ("Probation officers are adversarial to a defendant in the same way and for the same reason that police and prosecutors are.").

[212] *Id.* at 59.

[213] *See* Burns, *supra* note 190, at 562–63.

recommendation based on the Guidelines.[214] Due to the nature of these factors, many convictees are led to believe that the probation officer will look for things that will contribute to the highest possible sentence.[215] In fact, probation officers often presented more damaging evidence than prosecutors themselves.[216] In turn, this led probation officers to compute higher sentences than prosecutors.[217] For example, in *United States v. Woods*, the probation officer's facts of the case involved a significantly larger amount of drugs than the prosecutor stipulated.[218] The defendant argued that "since the district court accepted the plea agreement, it also was bound to accept the parties' stipulation as to the amount of drugs involved."[219] The defendant's argument, however, was refuted by the Guidelines, which state that a court "is not bound by the stipulation, but may[,] with the aid of the presentence report, determine the facts relevant to sentencing."[220] This allowed the court to consider a higher quantity of drugs than the prosecutor stipulated, resulting in a higher sentencing range.[221]

In response, many convictees became reluctant to discuss personal information and acceptance of a crime to the probation officer.[222] In *United States v. Fraza*, the defendant "complain[ed] of the court's refusal to grant a downward adjustment for his minor role in the offense, a position which was not opposed by the government."[223] The defendant argued that the court had refused to grant the downward departure after the probation officer interrupted the proceeding and engaged in ex parte communication with the court.[224] During the communication, the probation officer advocated for the rejection of the two-point reduction based on his own sentencing

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[214] *See id.* at 544–45.

[215] *Id.* at 563.

[216] *See* United States v. Woods, 907 F.2d 1540, 1543–44 (5th Cir. 1990) (holding that the probation officer's recommendation to the court to consider a higher quantity of drugs than what was stipulated by the prosecutor was valid in assisting the court to arrive at a fair sentence).

[217] *See id.*

[218] *See id.* at 1542–44.

[219] *Id.*at 1542.

[220] *Id.* (alteration in original) (footnote omitted).

[221] *See id.* at 1543–44 ("In his case, Woods maintains, the probation officer was more prosecutorial than the prosecutor-while the prosecutor stipulated that only 440 grams of amphetamine were involved in the conspiracy, the probation officer recommended that the court disregard that stipulation and base Woods's sentence upon a larger quantity of drugs.").

[222] *See* Glass, *supra* note 15 (stating that with respect to seeking out mitigating evidence about defendants that "many defense attorneys confirmed that they are reluctant to provide this information to probation officers.").

[223] 106 F.3d 1050, 1055 (1st Cir. 1997).

[224] *Id.*

calculation.[225] Although the court held that the probation officer's role was to provide the judge with as much information as possible information to enable the judge to make an informed decision and that the officer could exercise his own independent judgment, this case demonstrates how convictees may view an officer to be adverse.[226]

Offenders were also often reluctant to speak to officers because they were advised by their attorneys that they could be charged with obstruction of justice if their accounts did not match the government's version or were otherwise found to have lied.[227] Due to the increased importance of the probation officer's role in the sentencing process, defense attorneys have stated that they always attended the presentence interview.[228] These attorneys mentioned that it was important for them to advise their client on what could be said during the process, as any statement made during the interview could be the basis for a sentencing enhancement.[229] Other attorneys went so far as to advise their clients to waive the interview if they felt that the probation officer would be hostile or their client would come across negatively to the officer.[230]

In other aspects, the probation officer is also known to be adverse to the convictee, which is not only similar to the role of the prosecution, but will create doubts that the probation officer is truly acting as a neutral party of the court.[231] For example, probation officers are often viewed as adverse to a convictee in revocation hearings.[232] At revocation hearings, the officer instigates the proceeding, then advocates for an outcome that is often not in the interest of the defendant.[233]

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[225] *Id.*

[226] *See id.* at 1056 ("We would expect the officer to exercise his independent judgment as to the application of the guidelines and we see no error in his interruption of the proceedings to make his judgment known. Anything less would be a dereliction of duty.").

[227] *See* Glass, *supra* note 15.

[228] *Id.*

[229] *Id.* ("Although there is no right to counsel during the probation interview, defense attorneys said that it was vital for a lawyer to be present during these interviews because the defendant's statements may be submitted to the court and could be the basis for a sentencing enhancement.").

[230] *Id.*

[231] *See* United States v. Gonzales, 765 F.2d 1393, 1398 (9th Cir. 1985) ("Although it is true that the probation officer is adverse to the defendant in some respects, when the officer is preparing a presentence report he is acting as an arm of the court and this permits ex parte communication.").

[232] *See* United States v. Jack, No. 3:98-CR-22, 2008 WL 4279862, at *1 (E.D. Tenn. Sept. 15, 2008).

[233] *See id.*

### *3. Possible Bias*

Even if the majority of probation officers do not intend to act in a prosecutorial form, defense attorneys and convictees still consider the officers' biases because they often share a close relationship with the U.S. Attorney's Office.[234] Probation officers not only have a close relationship, but they often rely on the prosecution's files when conducting their independent investigation on behalf of the court.[235] Prior to the Guidelines, two versions of an offender's offense would be used, including both the prosecutor's and the defense's versions.[236] However, under the Guidelines, a single version of the facts must be created,[237] which may lead to bias if the officer relies heavily on the prosecutor's files.[238] The Administrative Office of the U.S. Courts even advised probation officers that "[m]ost of the essential offense data" for presentence reports "may be found in the U.S. Attorney's file."[239] These files have never been tested through adversarial means and could cause inaccuracies in a presentence report.[240] To prevent such inaccuracies, many jurisdictions have required disclosure of the report before a sentencing hearing in order for the convictee to dispute any erroneous information.[241] Hence, ex parte communications should be disclosed because it is essential that a probation officer remain unbiased in communications with a sentencing judge, which might be involuntarily difficult for an officer to do when an officer may highly depend on only one side of the parties.[242]

### *4. The Questionable Characterization of the Probation Officer's Role Overall*

The characterization of the probation officer is questionable. As the new era of the Guidelines emerged, the probation officers took on many roles.[243]

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[234] Burns, *supra* note 190, at 563–64.

[235] *See Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 837 (1968) ("Consequently, for information on the defendant's crime, [probation officers] are likely to rely uncritically on reports supplied by the prosecutor, who cannot be expected to be disinterested.").

[236] Burns, *supra* note 190, at 544.

[237] *Id.*

[238] *See* Peter B. Pope, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 YALE L.J. 1258, 1277 (1986).

[239] Burns, *supra* note 190, at 563 (alteration in original) (footnote omitted).

[240] *See* Pope, *supra* note 238, at 1277.

[241] *Id.*

[242] *See* Burns, *supra* note 190, at 563.

[243] *See* Glass, *supra* note 15 (discussing the various roles of probation officers in the pre-

Essentially, they had to become legal and Guideline experts, who were often viewed as additional attorneys, similar to the role of the prosecution in the proceeding.[244] They also gained a close relationship to the U.S. Attorney's Office and relied heavily on its files for presentence reports.[245] Even if such communications were meant to be truly innocent, it would be impossible to know whether the outcome of a sentence was influenced in some way.[246] A bright line rule that would require all ex parte communications to be fully disclosed would help to increase convictees' and their attorneys' trust in the criminal justice system, as many believe probation officers are adverse to them.[247]

## IV. A NEW RULE DEMANDING FULL DISCLOSURE OF EX PARTE COMMUNICATIONS IS POSSIBLE DESPITE CHALLENGES

### *A. The Possible Opposing Viewpoints and Why They Should Not Prevent a Rule Mandating Full Disclosure*

A new rule that would mandate full disclosure of ex parte communications between sentencing judges and probation officers will allow officers to engage in important conversations with sentencing judges, yet will not undermine a convictee's right to be sentenced based on fair and true information.[248] Although there are no current articles or studies that explore the possible oppositions that may arise from a rule mandating full disclosure of ex parte communications between sentencing judges and probation officers, oppositions will likely come to light.

#### *1. Pure Speculation*

One opposing viewpoint that may arise is that such a rule would create pure speculation that the probation officer and sentencing judge are engaging in wrongdoing.[249] In *United States v. Gonzales*, the defendant requested an evidentiary hearing on the sentencing process after he learned that the

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Guideline and post-Guideline contexts).

[244] *See id.*; Burns, *supra* note 190, at 561–62.

[245] *See* Burns, *supra* note 190, at 563–64.

[246] *See* Standing Comm. of the Am. Judicature Soc'y, *supra* note 65, at 288 (stating that "the evil of these communications is their effect on the judicial process" include "[s]eemingly innocuous contacts [that] can have an influence on a judge that even the judge, in all good faith, does not recognize[,]" and that a "judge may be misled or provided with an inaccurate or incomplete version of the facts or the relevant area of expertise.").

[247] *See* United States v. Gonzales, 765 F.2d 1393, 1398 (9th Cir. 1985).

[248] *See* United States v. Curran, 926 F.2d 59, 61 (1st Cir. 1991).

[249] *See Gonzales*, 765 F.2d at 1399.

probation officer and sentencing judge engaged in ex parte communications.[250] The Ninth Circuit denied this request and reasoned that there was no evidence to support the theory that the probation officer had disclosed facts that were not already disclosed in the presentence report.[251] The Ninth Circuit reasoned that it would not infer that something improper took place when the sentencing judge, probation officer, and sentencing council engaged in an ex parte discussion.[252] The court further stated that such inference would be pure speculation motivated only by the convictee's displeasure with the end result.[253]

Although the Ninth Circuit's reasoning is true to some degree, disclosure of ex parte communications should be mandated because there is no alternative way for a convictee to gain knowledge of possible inaccurate information that was discussed during those communications.[254] As mentioned,[255] the current rules place an unfair burden on the convictee to present evidence that the ex parte communications resulted in bias or new facts being disclosed, when there is no procedure for the convictee to gain that information.[256]

Moreover, in *United States v. Spudic*, in which a defendant challenged the sentencing process due to a secret meeting between several probation officers and the sentencing judge, the Seventh Circuit opined that it did not intend to find a sentencing judge guilty of any possible abuse based on no other evidence.[257] Further, a sentencing judge did not have to explain or defend such deliberations.[258] Yet, the Seventh Circuit refused to "sanction the use of the probation officer sentencing council concept, regardless of its supposed benefits" as the court was concerned with the doubts that ex parte communications can understandably foster in the minds of convictees, their counsel, and the public.[259] The Seventh Circuit further reasoned that there was a potential for abuse, which could create a doubtful appearance and misunderstandings about the ex parte process.[260] Although the Seventh Circuit applied this reasoning to a sentencing judge engaging in ex parte communications with multiple probation officers, this reasoning can further

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[250] *Id.* at 1398.
[251] *See id.* at 1399.
[252] *Id.* at 1398–99.
[253] *See id.*
[254] *See id.*; United States v. Bramley, 847 F.3d 1, 7 (1st Cir. 2017); United States v. Christman, 509 F.3d 299, 311 (6th Cir. 2007).
[255] *See supra* notes 118–83 and accompanying text.
[256] *See Bramley*, 847 F.3d at 7; *Christman*, 509 F.3d at 311.
[257] *See* 795 F.2d 1334, 1343–44 (7th Cir. 1986).
[258] *Id.* at 1344.
[259] *See id.*
[260] *See id.*

be applied to a rule mandating full disclosure of all ex parte communications.[261]

#### *2. Unnecessary Discovery and Evidentiary Hearings*

Secondly, some may argue that a new rule will open the door to unnecessary discovery and evidentiary hearings.[262] In *Gonzales*, the Ninth Circuit also mentioned that the convictee's argument regarding a request for an evidentiary hearing pertaining to ex parte communications between a sentencing judge and probation officer would "effectively open the entire sentencing process to discovery and adversarial evidentiary hearings."[263] Although, as mentioned earlier, the majority of defendants plead guilty and are never given a trial,[264] their rights to test adversarial evidence should not suddenly disappear to make the process easier and simpler. However, a rule mandating full disclosure of such communications could help to prevent unnecessary evidentiary hearings because it will promote transparency through mandating disclosure rather than an evidentiary hearing. It could help to restore convictees' trust in the sentencing process, which will ultimately lead to fewer convictees feeling doubtful about their sentencing proceeding and wanting an evidentiary hearing to cross examine a probation officer.

### *B. A Slow Road to Change: Other Similar Rules Have Been Implemented Despite Their Gradual Timeline*

#### *1. The Disclosure of the Presentence Report*

Similar to the disclosure of the presentence report, opposing viewpoints will not halt the adoption of a new rule, but they may instead create a gradual timeline for change.[265] Comparably, many judges frowned upon the idea of

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[261] *See id.* at 1343–44 ("There could be legitimate concern, for instance, that one of the probation officers, not the one who prepared the presentence report, may have contributed some additional pertinent adverse information about the defendant. That would leave the defendant without the Rule 32 opportunity to challenge it since the judge at sentencing may not reveal the things taken into consideration in arriving at the sentence.").

[262] *See* United States v. Gonzales, 765 F.2d 1393, 1398–99 (9th Cir. 1985).

[263] *Id.* at 1398.

[264] *See* Mishler, *supra* note 1, at 887.

[265] *See* 3 WRIGHT & MILLER, *supra* note 18, § 528 (discussing the lengthy timeline to the adoption of a rule requiring disclosure of presentence reports); William F. Gary, *Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion*, 26 HASTINGS L.J. 1527, 1530–34 (1975) (discussing how the proposed rule that would require disclosure of presentence reports was met with great opposition from those in the legal community).

disclosure of presentence reports.[266] In fact, it was believed that the disclosure of presentence reports to the defense would strain the probation officer's relationship with the convictee, as they often supervise them after they serve their sentence.[267] Additionally, since the probation officer plays an important role in rehabilitation, it was believed that a strained relationship between the officer and convictee would decrease the chance of rehabilitation.[268] There was also a presumption that the disclosure of presentence reports to the defense would prevent the probation officer from the collection of important information from certain persons because of fear of public notoriety or retaliation.[269]

The many hurdles to finalizing a rule that would mandate disclosure of the presentence report did not prevent the creation of such a rule.[270] Like other changes to the law, the change did not come easily or quickly.[271] Prior to 1966, the Federal Rules of Criminal Procedure did not address the disclosure issue of presentence reports, and even after many opposed the current rule, it took years before a change occurred.[272] In 1962, the American Law Institute added a provision for disclosure in its Model Penal Code, which was followed by an amendment to Rule 32 of the Federal Rules of Criminal Procedure by the Rules Advisory Committee.[273] This amendment also included a provision that would require the court to give the convictee, on request, a summary of the presentence report and allow the convictee an opportunity to comment.[274] However, in 1964, the Committee revised the amendment and proposed that disclosure of the report to the convictee's counsel be allowed with certain confidential sources deleted.[275] Convictees without an attorney would have the essential facts of the report apprised.[276] Although the revised draft no longer required confidential sources to be revealed, it was "met with substantial opposition from the judiciary."[277] In

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[266] *See* Gary, *supra* note 265, at 1532 ("A survey of district judges revealed that of the 270 judges who responded, only 18 favored the proposed rule."); 3 WRIGHT & MILLER, *supra* note 18, § 528 ("In the face of strong opposition from most federal judges to compulsory disclosure, including such opposition from many judges who themselves habitually disclosed reports, a compulsory rule, such as was proposed in 1964, would have had a hostile reception.").

[267] *See* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.5(c) (4th ed. 2021).

[268] *See id.*

[269] *See id.* ("The primary argument against disclosure was that it would impair the collection of vital information from persons afraid of reprisal or public notoriety.").

[270] *See* 3 WRIGHT & MILLER, *supra* note 18, § 528; Gary, *supra* note 265, at 1530–34.

[271] *See id.*

[272] *See* Gary, *supra* note 265, at 1530–31.

[273] *Id.* at 1531.

[274] *Id.* (footnote omitted).

[275] *Id.* at 1531–32.

[276] *Id.* at 1532.

[277] *Id.*

fact, a survey revealed that only 18 of 270 judges favored the new rule.[278] Additionally, the Administration of the Probation System also recommended that the proposed rule not be adopted.[279] The result of the opposition left no finalized proposed rule by the Rules Advisory Committee and left the discretion of disclosure to the courts.[280] As a result, "[t]here is no evidence that this amendment had any impact on the frequency with which [presentence] reports have been disclosed[.]"[281]

Although the road to disclosure may have looked like a dead end, support for a rule requiring mandatory disclosure did not subside.[282] In 1975, an amendment to Federal Rule 32 that required disclosure upon request went into effect.[283] Despite the many fears regarding disclosure of presentence reports, the 1975 amendment improved, and continued to improve, the sentencing process without adverse consequences.[284] In 1983, more changes were adopted, including one mandating disclosure "a reasonable time before sentencing to both defendant and his counsel."[285] In 1994, another amendment made this reasonable time more specific (at least thirty-five days before a sentencing hearing to a convictee, the defense counsel, and the government).[286] This assured that the parties were given enough time to resolve any objections to the report.[287] Although the rule regarding disclosure of presentence reports was slow to change, the pressure to change the rule never stopped.[288] In fact, many started to understand that there were advantages to disclosing the presentence report, which assured that the convictee was not sentenced on immaterial facts.[289]

Today, under Federal Rule 32, the probation officer is required to give a copy of the report to the convictee, the defense attorney, and the government at least thirty-five days before sentencing.[290] There are exceptions to this rule, however, including "any diagnoses that, if disclosed, might seriously disrupt

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[278] *Id.* (footnote omitted).
[279] *Id.* (footnote omitted).
[280] *See id.*
[281] *Id.*
[282] *Id.*
[283] 3 WRIGHT & MILLER, *supra* note 18, § 528 ("By 1971 the Advisory Committee on Criminal Rules was proposing a new amendment to make disclosure mandatory. That proposal, with minor changes, was approved by the Supreme Court in 1974, and became effective in December 1975.").
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] *See id.*
[289] *See id.*
[290] FED. R. CRIM. P. 32(e)(2).

a rehabilitation program; any sources of information obtained upon a promise of confidentiality; and any other information that, if disclosed, might result in physical or other harm to the defendant or others."[291] Comparably, a new rule mandating full disclosure of ex parte communications between sentencing judges and probation officers is possible despite anticipated challenges and could include similar exceptions to curtail possible negative side effects. Although the new rule may be slow to change and opposing viewpoints may arise, those should not prevent a change from taking place.

### *2. The Right to Confrontation at Non-Capital Sentencing*

Additionally, some states have even applied the right to confrontation at non-capital sentencing, despite various challenges.[292] Implementation of the right to confrontation at non-capital sentencing continues to be opposed by many due to the belief that cross examination is unnecessary and could cause excessive delay.[293] Similar to the argument opposing the disclosure of presentence reports and ex parte communications, it has been argued that if the right to confrontation was applied, then sentencing judges would be starved of the information they need to make intelligent decisions regarding the imposition of sentences.[294] Most of the information would not be available, as the right to confrontation would open the doors to cross examination, and witnesses and others would become reluctant to relay information.[295] As Justice Murphy stated in *Williams*, most of this "important" information is hearsay, damaging, and not subject to the convictee's scrutiny.[296]

Although most jurisdictions have repeatedly held that the right to confrontation does not apply at sentencing,[297] Arkansas has implemented the right to confrontation at non-capital sentencings.[298] In *Vankirk v. Arkansas*,

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[291] *Id.* 32(d)(3)(A)–(C).

[292] *See, e.g.*, Vankirk v. Arkansas, 385 S.W.3d 144, 146 (Ark. 2011).

[293] Shaakirrah R. Sanders, *Making the Right Call for Confrontation at Felony Sentencing*, 47 U. MICH. J.L. REFORM 791, 812–13 (2014).

[294] Cassandra Howell, *Constitutional Law–Sixth Amendment–Braving Confrontation: Arkansas's Progressive Position Regarding Criminal Defendant's Confrontation Rights at Sentencing*, 35 U. ARK. LITTLE ROCK L. REV. 691, 694–95 (2013).

[295] *See id.*

[296] *Id.* at 695 (citing Williams v. New York, 337 U.S. 241, 253 (1949) (Murphy, J., dissenting)).

[297] *See, e.g.*, *Williams,* 337 U.S. at 244–45; United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005); United States v. Due, 205 F.3d 1030, 1033 (8th Cir. 2000); United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991).

[298] *See* Vankirk v. Arkansas, 385 S.W.3d 144 (Ark. 2011).

the defendant was charged with three counts of rape.[299] At sentencing, the state attempted to introduce a videotaped interview of a victim.[300] The defendant argued that his right to confrontation was violated, but the circuit court overruled his objection because it found that the rules of evidence did not apply during sentencing.[301] However, the Supreme Court of Arkansas held that the *Williams* case was unpersuasive and instead decided to follow *United States v. Mills*,[302] wherein the U.S. District Court for the Central District of California concluded that the right to confrontation applied to federal capital sentencing.[303] Although this was not a capital case like *Mills*, the Arkansas Supreme Court reasoned that applying the Confrontation Clause to sentencing is consistent with other rights that apply at sentencing.[304] Additionally, the court held that sentencing is a critical stage and "the [government] is not relieved of the obligation to observe fundamental constitutional guarantees."[305] Since *Vankirk*, multiple states have applied the right to confrontation at sentencing in different contexts, especially when a "court asked the jury to find facts during the sentencing phase that could increase the possible punishment."[306] *Vankirk* demonstrates that a new rule can be feasibly adopted and that the obstacles that might result from the adoption of greater procedural safeguards—such as the right to confrontation and the disclosure of ex parte communications—is a small price to pay in comparison to helping to aid and pave a way to transparency and fairness at a crucial stage of a criminal proceeding.[307]

### *C. Taking a Step Forward: Few States' Judicial Ethics Committees Issued Advisory Opinions Regarding Ex Parte Communications Between Judges and Probation Officers*

Although the Committee on Codes of Conduct has not issued a formal advisory opinion regarding ex parte communications between probation officers and sentencing judges, it is more than capable of doing so.[308] The Judicial Conference of the United States has not only authorized its Committee on Codes of Conduct to publish formal advisory opinions on

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[299] *Id.* at 146.
[300] *Id.*
[301] *Id.*
[302] 446 F. Supp. 2d 1115 (C.D. Cal. 2006).
[303] *Vankirk*, 385 S.W.3d at 150 (discussing the holding in *Mills*, 446 F. Supp. 2d 1115).
[304] *Id.* at 151.
[305] *Id.* (alteration in original) (quoting *Mills*, 446 F. Supp. 2d at 1130).
[306] Howell, *supra* note 294, at 695–96.
[307] *See Vankirk*, 385 S.W.3d at 144–52.
[308] *See generally Federal Judicial Code*, *supra* note 68.

ethical issues that are frequently raised,[309] but other states' ethics committees have done so.[310] Thus, the proposed rule recommended in this Comment is achievable on the federal level, as similar advisory opinions have been adopted by other states' judicial ethics committees.[311]

In California, the Judicial Ethics Committee of the California Judges Association has commented on Canon 3B(7)(a), which allows a judge to engage in ex parte communications with "court personnel."[312] In the commentary, the Committee stated that "[a] sentencing judge may not consult ex parte with a representative of the probation department about a matter pending before the sentencing judge."[313]

In Virginia, the Judicial Ethics Advisory Committee provided more in-depth advice and advisory opinions on a similar issue regarding "Circuit Court Judge Having Ex Parte Communications with Probation Officers."[314] The Committee advised that ex parte communications with probation officers had to be based on administrative matters only, and was considered improper when the conversation involved a "discussion of facts, factors, or opinions that might tend to influence the court's determination[.]"[315] The Committee also stated that those communications should "take place 'on the record' in the presence of the defendant, his counsel, and the Commonwealth's Attorney with the probation officer being available for cross examination."[316] Even if the communication involved only administrative matters, Canon 3B(7) of Judicial Conduct proscribed that the judge promptly disclose such communication.[317]

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[309] *See id.* at 2.

[310] *See* JUD. ETHICS COMM., CAL. JUDGES ASS'N, FORMAL ETHICS OPINION NO. 77 (2019), https://www.caljudges.org/docs/Ethics%20Opinions/Op%2077%20Final.pdf (discussing ex parte communications between circuit court judges and probation officers) [hereinafter CAL. OPINION]; JUD. ETHICS ADVISORY COMM., JUD. INQUIRY & REV. COMM'N, COMMONWEALTH OF VIRGINIA JUDICIAL ETHICS ADVISORY COMMITTEE OPINION 00-4 (2000), https://www.courts.state.va.us/programs/jeac/opinions/2000/00_4.html (discussing ex parte communications between sentencing judges and a representative of the probation office) [hereinafter VA. OPINION].

[311] *See* CAL. OPINION, *supra* note 310; VA. OPINION, *supra* note 310.

[312] CAL. OPINION, *supra* note 310, at 2.

[313] *Id.* at 3.

[314] *See* VA. OPINION, *supra* note 310.

[315] *Id.*

[316] *Id.*

[317] *Id.*

## CONCLUSION

This Comment has demonstrated the need for a rule mandating full disclosure of ex parte communications between sentencing judges and probation officers that occur before sentencing hearings. The current rule that has been adopted and expanded by many circuit courts is not only ambiguous and lacks uniformity, but it introduces a number of issues to the sentencing process. The current rule is contrary to the spirit of Rule 32 of the Federal Rules of Criminal Procedure and may increase doubts due to the questionable characterization of the probation officer. Even if these ex parte communications do not amount to a reversible error and are completely innocent, convictees and defense attorneys often feel doubtful about these communications occurring behind the scenes. This may lead to further appeals by convictees, which will take up resources and time. Often, these communications may never be challenged, as it is extremely difficult for a convictee to learn about the substance of these communications without a rule mandating disclosure or by applying the right to confrontation. Ultimately, this will place a high burden on the convictee to prove that these communications played a role in their sentencing calculation. This will lead to convictees and defense attorneys feeling cheated by the system, leading to distrust, as they believe that the probation officer is averse to them because the officer shares a closer relationship and role with the prosecutor and might even be viewed as an additional attorney.

Perhaps the only course of action to be taken would be to create a new rule mandating full disclosure of ex parte communications between sentencing judges and probation officers. It will not only help to address the particular issues with the current rule, but it will increase transparency and trust in the sentencing process, as well as create uniformity. When convictees and defense attorneys increase their trust for the process, there will likely be fewer appeals overall. As with other changes to the law, a new rule will bring many oppositions and disadvantages to light. Many may become hesitant to adopt such a rule for various reasons, but such disadvantages and oppositions can be overcome. In light of the greater challenges that were overcome when implementing a rule requiring the disclosure of presentence reports and the right to confrontation at sentencing, a new rule can be adopted. In fact, some states have issued advisory opinions already addressing this similar issue. As sentencing continues to be a major step in a criminal proceeding, the continuing support and trend toward greater procedural safeguards at sentencing will not subside, and it will become a matter of "when" rather than "if" such a rule that will mandate full disclosure of ex parte communications will go into effect.

# *Chatman v. Otani* Sheds Light on Eighth Amendment Rights Violations in Hawai‘i Prisons During the COVID-19 Era

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*"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."*
*– Nelson Mandela*[1]

## INTRODUCTION

By Nelson Mandela's standards, then, the State of Hawai'i should be judged harshly on how it treated inmates during the COVID-19 pandemic. In *Chatman v. Otani*, five plaintiffs ("Plaintiffs")[2] who were incarcerated in Hawai'i correctional facilities during the pandemic brought suit, alleging that the State failed to follow its own Pandemic Response Plan, which led to multiple COVID-19 outbreaks and inmate deaths.[3] The Plaintiffs argued that the State's failure to comply with the Response Plan violated their Eighth and Fourteenth Amendment rights prohibiting cruel and unusual punishment and rights to Due Process.[4] The Plaintiffs sought a provisional class certification,[5] a preliminary injunction for the implementation of the Response Plan, and the appointment of a special master to oversee the implementation.[6]

This Note argues that *Chatman* has the valuable potential to be the blueprint for future lawsuits brought by incarcerated individuals against the State of Hawai'i and may lead to stricter adherence to state prison policies. Part I provides background on various prison conditions that violated inmates' Eighth Amendment rights in Hawai'i and across the continental United States. Part II examines the State's efforts to address overcrowding. Part III analyzes the ruling of *Chatman*. Part IV acknowledges that this case opens the door for future inmates to bring suit for inhumane prison conditions. Lastly, this Note applies the ruling in *Chatman* to future Eighth Amendment violation lawsuits, such as the unsettled issue of overcrowding.

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[1] *Nelson Mandela Rules*, UNITED NATIONS, https://www.un.org/en/events/mandeladay/mandela_rules.shtml (last visited Jan. 29, 2022).

[2] The five plaintiffs were Anthony Chatman, Francisco Alvarado, Zachary Granados, Tyndale Mobley, and Joseph Deguair.

[3] No. 21-00268, 2021 WL 2941990, at *1 (D. Haw. July 13, 2021).

[4] *Id.*

[5] *Id.* at *6 (stating that provisional class certifications are for the purposes of preliminary injunction proceedings and that "Class actions are 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'").

[6] *Id.*

## I. HISTORICAL LEGAL CONTEXT

### *A. Eighth Amendment and Prison Conditions*

Under the Eighth Amendment to the United States Constitution, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[7] The amendment's final clause was held to protect individuals in the criminal justice system.[8] In *Rhodes v. Chapman*, the U.S. Supreme Court first considered whether conditions at a prison may constitute cruel and unusual punishment.[9] The Court found that prison conditions "must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment."[10] Additionally, the Court implied that "deprivations of essential food, medical care," "sanitation[,]" "increase[d] violence among inmates," and "other conditions intolerable for prison confinement" were forms of cruel and unusual punishment, which violated the Eighth Amendment.[11]

In the landmark case *Farmer v. Brennan*, a federal inmate was allegedly beaten and raped by a fellow inmate after being transported to the United States Penitentiary in Terre Haute, Indiana.[12] She later brought suit claiming that prison officials deliberately and indifferently failed to protect her by placing her in the general male inmate population despite their knowledge of the violent environment.[13] The Court found that for a prison official to violate the Eighth Amendment, two requirements must be met.[14] "First, the deprivation alleged must be, objectively, 'sufficiently serious,'" whereby "a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.'"[15] Second, the "prison official must have a 'sufficiently culpable state of mind,'" which is one of "'deliberate indifference' to inmate health or safety."[16]

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[7] U.S. CONST. amend. VIII.

[8] *See, e.g.*, Ingraham *ex rel.* Ingraham v. Wright, 430 U.S. 651, 666–67 (1977) (stating that the Cruel and Unusual Punishments clause of the Eighth Amendment protects those in the criminal justice system).

[9] 452 U.S. 337, 345 (1981).

[10] *Id.* at 347.

[11] *See id.* at 348.

[12] 511 U.S. 825, 829–30 (1994).

[13] *Id.* at 830–31.

[14] *Id.* at 834.

[15] *Id.* (citation omitted).

[16] *Id.*

To demonstrate "deliberate indifference," the inmate must show that the prison official was aware of the risk to the inmate's health or safety,[17] which can be satisfied by showing that the risk should be obvious to a reasonable person acting in the same capacity.[18] The inmate must also show that the prison official "disregard[ed] that risk by failing to take reasonable measures to abate it."[19] The Court explained that "[t]he Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones."[20] Applying the test established in *Farmer*, subsequent courts have found that denial of exercise for a prolonged period of time[21] and failure to transfer an inmate being threatened by other inmates are some examples of Eighth Amendment violations.[22]

### *B. History of Overcrowding Suits in Hawai'i*

In the 1984 case, *Spear v. Waihee*, inmates confined at the O'ahu Community Correctional Center (OCCC) and the Hawai'i Women's Correctional Facility (HWCF) filed a class-action lawsuit on behalf of all inmates confined or to be confined at these two facilities.[23] Represented by the American Civil Liberties Union (ACLU), the plaintiffs sought "declaratory and injunctive relief for deprivations . . . of the rights, privileges, and immunities secured by the Constitution of the United States, and, in particular, those secured by the Eighth and Fourteenth Amendments thereof."[24] The plaintiffs alleged that overcrowding increased health risks, including the spread of communicable diseases, by intensifying "stress, tension, and violence" among inmates, thus deteriorating their physical and mental conditions.[25] Some inmates in *Spear* were "forced to sleep on the floor due to lack of space."[26] There were no toilets in one cellblock.[27] Additionally, there were "leaking and flooded toilets, showers, and lavatories with evidence of water spilling onto the tiers creating health risks, especially for

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[17] *See id.* at 836–37.

[18] *See id.* at 842.

[19] *See id.* at 847.

[20] *Id.* at 832 (citation omitted)

[21] *See* Thomas v. Ponder, 611 F.3d 1144, 1151–52 (9th Cir. 2010) (holding that prison officials' denial of out-of-cell exercise for thirteen months and twenty-five days constituted an Eighth Amendment violation).

[22] *See* Pope v. Shafer, 86 F.3d 90, 91–92 (7th Cir. 1996).

[23] Complaint at 1, Spear v. Waihee, No. 84-1104 (D. Haw. Sept. 14, 1984).

[24] *Id.*

[25] *Id.* at 6.

[26] *Id.* at 7.

[27] *Id.* These conditions were similar to those found in the "fishbowl" described in *Chatman*.

inmates forced to sleep on the floor."[28] The alleged living conditions were "generally unsanitary and unhealthy and vermin [was] commonplace . . . [with i]nsects . . . enter[ing] throughout most of the old cellblock."[29] The *Spear* complaint foreshadowed the current situation plaguing Hawai'i's correctional facilities, alleging, for example, that "overcrowding ha[d] seriously exacerbated the deficiencies in staff and services and increase[d] the likelihood of the transmission of communicable diseases and create[d] other health risks."[30]

The *Spear* complaint led to fourteen years of mandated monitoring of Hawai'i's correctional facilities.[31] Director Emeritus of the ACLU's National Prison Project, Alvin J. Bronstein, had high hopes that, after the fourteen-year monitoring program, overcrowding in Hawai'i's correctional facilities would no longer be an issue.[32] Unfortunately, as evidenced by *Chatman*, this was not the case.[33]

In 2017, thirty-three years after the *Spear* suit, the ACLU filed a formal complaint against the State of Hawai'i for unconstitutional prison conditions stemming from overcrowding.[34] As of 2016, seven of the nine facilities owned and operated by the State were overcrowded.[35] In the ACLU complaint, an inmate stated that at Maui Community Correctional Center (MCCC), "four inmates (sometimes five) [were] being packed into each 12' x 4' cell designed for only two, with the result that two must sleep on the floor with cockroaches, centipedes, and ants, only inches from the toilet."[36] Another inmate expressed that "one toilet and one shower [were] often broken, [forcing] 43 men [to] share one single toilet and one single shower."[37] Furthermore, the ACLU found that in July 2015, O'ahu Community Correctional Center (OCCC) was "reported as suffering from a 'severe

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[28] *Id.* at 9.

[29] *Id.*

[30] *Id.* at 15.

[31] Stipulation of Substantial Compliance and Dismissal at 5, Spear v. Waihee, No. 84-1104 (D. Haw. 1984); *see 14 Years Later, State Prison Monitoring in Hawaii to End,* ACLU (Sept. 16, 1999), https://www.aclu.org/press-releases/14-years-later-state-prison-monitoring-hawaii-end [hereinafter, ACLU, *14 Years Later*].

[32] *See* ACLU, *14 Years Later*, *supra* note 31.

[33] *See* Chatman v. Otani, No. 21-00268, 2021 WL 2941990, at *19 (D. Haw. July 13, 2021).

[34] Letter from Mateo Caballero, Legal Dir. of Am. Civ. Liberties Union of Haw. Found., to Vanita Gupta, Principal Deputy Assistant Att'y Gen., Civ. Rts. Div., U.S. Dep't of Just. and Steven Rosenbaum, Chief, Special Litig. Section, Civ. Rts. Div., U.S. Dep't of Just. 1 (Jan. 6, 2016), https://acluhawaii.files.wordpress.com/2017/01/acluhidojcomplaintprisonovercrowding.pdf [hereinafter ACLU 2017 Complaint].

[35] *Id.* at 3.

[36] *Id.* at 9.

[37] *Id.* at 12.

doctor shortage' in its medical unit, having only one full-time physician to care for the facility's approximately 1,200 inmates."[38] While one condition alone may not rise to the level of an egregious constitutional violation, "the myriad of unsafe conditions in [the Department of Public Safety's] facilities operate together to render inmates effectively deprived of shelter, sanitation, medical and mental health care, food, and protection from harm."[39]

Most recently in 2019, in *Pitts v. Ige*, the plaintiff alleged that state prison officials acted with "deliberate indifference to his health and safety when they housed him in unconstitutionally overcrowded conditions at OCCC."[40] Specifically, he expressed that "overcrowding at OCCC led to inhumane conditions of confinement, including tiny, filthy, vermin-infested cells, inadequate food, deficient medical and mental health care, increased violence, limited recreation and showers, and inmates sleeping on the floor."[41] These allegations are substantially similar to those found in *Spear* and the 2017 ACLU complaint.[42] These cases demonstrate that overcrowding continues to be a pervasive issue in Hawai'i.

## II. THE STATE'S EFFORTS TO ADDRESS OVERCROWDING

To combat the issue of overcrowding, the State proposed to transfer Hawai'i inmates to private correctional facilities in the continental United States.[43] The city of Honolulu found that fifty-four percent of Hawai'i's prisoners are incarcerated in private prisons in the continental United States, according to a study by the University of Hawai'i at Mānoa's Department of Sociology and the Department of the Attorney General of Hawai'i.[44] The study found that it cost the State considerably less to send the inmates to the continental United States' private correctional facilities than to keep them in Hawai'i.[45] According to a report by the Office of Hawaiian Affairs, however, this is not the most optimal solution since "out-of-state incarceration results

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[38] *Id.* at 14.

[39] *Id.* at 26.

[40] No. 18-00470, 2019 WL 3294799, at *9 (D. Haw. July 22, 2019).

[41] *Id.* at *2.

[42] *See* Complaint at 7–9, Spear v. Waihee, No. 84-1104 (D. Haw. Sept. 14, 1984); ACLU 2017 Complaint, *supra* note 34.

[43] *See* DEP'T OF SOCIO. UNIV. OF HAW. AT MANOA & DEP'T OF THE ATT'Y GEN. OFF. STATE OF HAW., HAWAII'S IMPRISONMENT POLICY AND THE PERFORMANCE OF PAROLEES WHO WERE INCARCERATED IN-STATE AND ON THE MAINLAND 6 (2011), https://ag.hawaii.gov/cpja/files/2013/01/AH-UH-Mainland-Prison-Study-2011.pdf.

[44] *Id.* at 1.

[45] *Id.* (noting that it cost $62 per day to house inmates on the mainland versus $118 per day to house them in-state).

in significant trauma to prisoners and their families."[46] One inmate, for example, lost his family during his sentence on the continent.[47]

Hawai'i Revised Statutes (HRS) Section 706-606.5 also contributes to overcrowding by requiring the court to give certain repeat offenders a mandatory minimum sentence, without regard to the unique details or circumstances of the offense.[48] These mandatory minimum policies have "increased the number of people imprisoned and the lengths of their imprisonments, as well as limited opportunities for release, causing the population of federal and state prisoners to soar."[49]

On the other hand, the State has attempted to come up with more effective solutions to reduce overcrowding in Hawai'i state prisons.[50] Hawai'i is "one of the strictest" in the nation for drug-related prison sentences.[51] According to a recent study, drug offenders in Hawai'i serve the fifth-longest prison sentences in the nation, an average of nearly eight years, and half of all prison sentences in Hawai'i are related to drugs.[52] Appallingly, enforcement costs state taxpayers "over $13,000,000 each year to incarcerate low-level, non-violent offenders."[53] These drug possession offenses, classified as felonies, result in "lengthy prison sentences and exacerbate the severe overcrowding conditions in Hawai'i's prisons."[54] To address these problems, the state legislature sought to decriminalize "possession of dangerous drugs in the smallest amounts" and possession of certain drug paraphernalia in 2020.[55]

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[46] H.R. 1080, 31st Leg., Reg. Sess. (Haw. 2021) (alteration in original).

[47] *Id.*

[48] *See* HAW. REV. STAT. § 706-606.5 (2021).

[49] AM. CIV. LIBERTIES UNION, OVERCROWDING AND OVERUSE OF IMPRISONMENT IN THE UNITED STATES 2 (2015), https://www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/ACLU.pdf.

[50] *See Aloha State One of the Strictest in the Nation for Drug-Related Prison Sentences, Study Says*, KITV (May 30, 2019), https://web.archive.org/web/20190530224308mp_/https://www.kitv.com/story/40569009/aloha-state-one-of-the-strictest-in-the-nation-for-drug-related-prison-sentences-study-says.

[51] *Id.*

[52] *Crimes and Convictions: Examining United States Sentencing Commission Federal Sentencing Statistics*, SECURITY.ORG (Mar. 14, 2019), https://www.security.org/resources/crime-sentencing-by-state/.

[53] *Id.*

[54] *Id.*

[55] S. 2793, 30th Leg., Reg. Sess. (Haw. 2020) ("[T]he purpose of this Act is to: (1) Establish a new misdemeanor offense of promoting a dangerous drug in the fourth degree, to include possession of dangerous drugs in the smallest amounts; and (2) Limit the class C felony offense of promoting a dangerous drug in the third degree to include possession of certain dangerous drugs in an amount or weight equal to one-sixteenth of one ounce or more.").

The previous year, the legislature had sought to decriminalize marijuana by: "(1) Provid[ing] for the expungement of criminal records pertaining solely to the possession of three grams or less of marijuana; (2) Decriminaliz[ing] the possession of three grams or less of marijuana and establish[ing] that possession of that amount is a violation punishable by a monetary fine of $130."[56] These decriminalization measures would "help reduce prison overcrowding, save taxpayer dollars, and free up resources to be reinvested into more effective treatment programs."[57]

## III. DISCUSSION

The rapid spread of COVID-19 over the past two years has prompted actions by both the state and federal governments. The State of Hawai'i implemented temporary lockdowns and vaccination requirements to minimize the spread of COVID-19. Nonetheless, the COVID-19 pandemic has illuminated the issue of overcrowding in Hawai'i correctional facilities. *Chatman v. Otani* provides an illustration of Hawai'i's prisons and the inhumane conditions the inmates are confined in, particularly throughout the COVID-19 pandemic.

### *A. Case Background*

The State of Hawai'i Department of Public Safety (DPS) oversees four jails and four prisons on the islands of O'ahu, Kaua'i, Maui, and Hawai'i.[58] As of August 18, 2021, there were 2,897 inmates in these eight facilities.[59] According to DPS' own reports, however, the total design capacity of the eight facilities is limited to only 2,491 inmates.[60] During the wake of the COVID-19 pandemic, DPS created the Response Plan to provide "an outline of infection prevention and control information that should be considered for correctional facilities."[61]

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[56] H.R. 1383, 30th Leg., Reg. Sess. (Haw. 2019).

[57] S. 2793.

[58] *Corrections Division*, HAW. DEP'T OF PUB. SAFETY, https://dps.hawaii.gov/about/divisions/corrections/ (last visited Jan. 31, 2022).

[59] *Department of Public Safety Weekly Population Report*, HAW. DEP'T OF PUB. SAFETY (Aug. 16, 2021), https://dps.hawaii.gov/wp-content/uploads/2021/08/Pop-Reports-Weekly-2021-08-16.pdf.

[60] *Id.*

[61] HAW. DEP'T OF PUB. SAFETY, PANDEMIC RESPONSE PLAN COVID-19 3 (2020), https://dps.hawaii.gov/wp-content/uploads/2020/08/COVID-19-Pandemic-Response-Plan-Revised-August-2020.pdf.

On August 7, 2020, the first Hawai'i inmate tested positive for COVID-19 at OCCC.[62] That same week, four corrections officers tested positive at three DPS facilities.[63] COVID-19 continued to spread at other facilities, including Waiawa Correctional Facility, Halawa Correctional Facility, Maui Community Correctional Center (MCCC), and Hawai'i Community Correctional Center (HCCC).[64] As of August 2021, at least nine inmates had died and more than 2,600 inmates had tested positive for COVID-19 at DPS facilities.[65]

In response to the outbreak within the correctional facilities, multiple detainees filed suit contending that DPS, headed by Max Otani (collectively, the "State"), "mishandled the pandemic and failed to implement its Pandemic Response Plan" violating their "Eighth and Fourteenth Amendment rights."[66] The Plaintiffs asserted that the "unsanitary" and cramped "conditions in holding areas" allowed the highly-contagious COVID-19 virus to spread among the detainees and employees.[67] To support their claims, the Plaintiffs provided an example of an instance where more than forty to sixty detainees with unknown COVID-19 statuses were packed in rooms that were not properly sanitized and left without adequate resources, like running water.[68]

In addition to claiming that the State had violated their Eighth and Fourteenth Amendment rights, the Plaintiffs sought a provisional class certification[69] and a temporary restraining order and preliminary injunction.[70] The injunction requested that the court appoint a special master to oversee the development and implementation of a new Response Plan ("Proposed Response Plan").[71] The Plaintiffs' Proposed Response Plan would require the State to adhere, among other things, to the following:

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[62] *See* Kevin Dayton, *First Hawaii Inmate Tests Positive for COVID-19 Along With 4 Corrections Officers*, HONOLULU CIV. BEAT (Aug. 7, 2020), https://www.civilbeat.org/2020/08/first-hawaii-inmate-tests-positive-for-covid-19-along-with-3-corrections-officers/.

[63] *Id.*

[64] *See* Chatman v. Otani, No. 21-00268, 2021 WL 2941990, at *1 (D. Haw. July 13, 2021).

[65] Kevin Dayton, *Covid-19 Is Surging Again At Hawaii Prisons. The Oahu Jail Is Especially Hard Hit*, HONOLULU CIV. BEAT (Aug. 26, 2021), https://www.civilbeat.org/2021/08/covid-19-is-surging-again-at-hawaii-prisons-the-oahu-jail-is-especially-hard-hit/.

[66] *Chatman*, 2021 WL 2941990, at *1.

[67] *See id.* at *1–2.

[68] *Id.* at *1.

[69] *Id.* at *6–7 (explaining that the Plaintiffs fulfilled the legal standard of provisional class certification pursuant to Federal Rules of Civil Procedure Rule 23).

[70] *Id.* at *1.

[71] *Id.*

> a. Physically distance all residents from one another and staff within DPS correctional facilities, which imposes at least six feet of distance between individuals at all times;
>
> b. Provide all residents in DPS custody sanitary living conditions (*i.e.*, ensure regular access to a working toilet, sink, and drinking water);
>
> c. Identify residents who may be high-risk for COVID-19 complications, in accordance with guidelines from the CDC, and prioritize these individuals for medical isolation or housing in single cells;
>
> d. On a daily basis, thoroughly and professionally disinfect and sanitize the DPS correctional facilities;
>
> e. Provide hygiene supplies that are not watered down, including supplies to wash hands and disinfect common areas, to inmates at all times and free of charge . . . .[72]

U.S. District Court[73] Judge Jill A. Otake granted the Plaintiffs' Motion for Provisional Class Certification and granted in part and denied in part the Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order.[74] As discussed in the following section, Judge Otake's perspective and criticism of the State's dereliction of duty shed light on the objectively harsh living conditions within the correctional facilities.

### *B. Judge Otake's Strict Criticism of the State's Dereliction of Duty*

At the core of *Chatman*, Judge Otake addressed the Plaintiffs' request for injunctive relief by determining whether the detainees' living conditions violated their Eighth Amendment rights.[75] The Plaintiffs argued that "the harm from COVID-19 [was] sufficiently serious and [although the State] recognize[d] the seriousness, [the State] nevertheless continue[d] to violate [their] own policies."[76] In determining whether the Plaintiffs were entitled to injunctive relief, Judge Otake utilized the test in *Winter v. Natural Resources Defense Council, Inc.*[77] There, the U.S. Supreme Court held that the party seeking injunctive relief must establish: "(1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of preliminary

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[72] *Id.* at *4–5.

[73] The Plaintiffs first filed suit in state court. The State, however, later removed the action to the U.S. District Court for the District of Hawai'i. *Id.* at *4.

[74] *Id.* at *25.

[75] *See id.* at *4.

[76] *Id.* at *13.

[77] 555 U.S. 7, 20 (2008).

relief, (3) the balance of equities tip[ping] in favor of the plaintiff, and (4) an injunction is in the public interest."[78]

### *1. Likelihood of Success on the Merits*

Judge Otake first explained that the Eighth Amendment requires prison officials to "provide humane conditions of confinement" like "ensur[ing] that inmates receive adequate food, clothing, shelter, and medical care" and "tak[ing] reasonable measures to guarantee the safety of the inmates."[79] A party seeking relief for a violation of their Eighth Amendment rights is required to "show that the prison officials acted with 'deliberate indifference.'"[80] Moreover, the party must "objectively show that [they were] deprived of something 'sufficiently serious,' and 'make a subjective showing that the deprivation occurred with deliberate indifference to [an] inmate's health or safety.'"[81]

#### *a. Objective Deliberate Indifference*

To continue her analysis, Judge Otake then followed the Ninth Circuit Court of Appeals' test in *Gordon v. County of Orange* to evaluate objective deliberate indifference:

> (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.[82]

Judge Otake examined the third element of the test, which focuses on the reasonableness of the State's conduct to determine whether the State "has done or is doing enough to reasonably keep inmates healthy and safe."[83] She acknowledged the "seriousness and transmissibility of COVID-19" and noted that it has been "uniquely problematic for prisons and other detention facilities."[84] Judge Otake considered the parties' opposing declarations

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[78] *Chatman*, 2021 WL 2941990, at *7 (citing *Winter*, 555 U.S. at 20 (2008)).

[79] *Id.* at *13 (alterations in original) (quoting Farmer v. Brennan, 511 U.S. 825, 832–33 (1994)).

[80] *Id.* (quoting Castro v. County of Los Angeles, 833 F.3d 1060, 1068 (9th Cir. 2016)).

[81] *Id.* (quoting Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010)).

[82] *Id.* (quoting Gordon v. County of Orange, 888 F.3d 1118, 1124–25 (9th Cir. 2018)).

[83] *Id.* at *14.

[84] *Id.*

regarding the conditions within Hawai'i's correctional facilities.[85] The State submitted declarations from multiple DPS facility wardens, stating that state facilities had adopted the Response Plan and were "proactively and vigilantly" addressing the COVID-19 outbreak by following measures that had been implemented at the facilities, including "screening, quarantine and medical isolation, medical care, sanitation and hygiene."[86]

Judge Otake found that the Plaintiffs "paint[ed] a different picture"[87] as they were able to provide "on-the-ground descriptions of what [was] actually happening at the facilities."[88] The Plaintiffs' declarations included descriptions of their experiences regarding the lack of quarantine measures to separate inmates with known COVID-19 statuses from those whose statuses were unknown.[89] They also provided descriptions of instances where more than sixty detainees had to "eat shoulder-to-shoulder in an approximately 400 square foot room,"[90] where detainees were "regularly packed into small spaces — 40 to 60 inmates" in what was termed a "fishbowl,"[91] and where "up to seven inmates" were crammed in narrow holding areas that were separated by chain-link fences called "dog cages."[92] Additionally, the Plaintiffs reported occurrences of "ten inmates in the visitor's room," which is "ten feet by twelve feet."[93]

Furthermore, the Plaintiffs described dehumanizing living conditions, like a lack of bathrooms and running water.[94] The combination of the State's inability to enforce the Response Plan, the overcrowding, and the lack of resources restricted inmates' "access to restrooms and water," forcing inmates to "urinate on themselves, on walls, or in cups."[95] In some cases, clogged and overflowing toilets caused the facilities to reek of urine and feces.[96] There is no clearer dereliction of duty than the State's disregard for the maintenance of the Plaintiffs' living conditions.

Judge Otake found the Plaintiffs' declarations to be more compelling due to their specificity and direct perspective, compared to the State's mere restatements of the provisions in the Response Plan.[97] As Judge Otake noted,

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[85] *See id.* at *14–15.
[86] *Id.* at *14–15.
[87] *Id.*
[88] *Id.* at *14.
[89] *See id.* at *16.
[90] *Id.* at *2.
[91] *Id.* at *16 (the "fishbowl" measures at 31.5 feet by 35.3 feet).
[92] *Id.* ("dog cages" measure 5 feet by 10 feet).
[93] *Id.*
[94] *See id.*
[95] *Id.*
[96] *Id.*
[97] *See id.* at *14.

"the mere existence of policies is of little value if implementation and compliance are lacking."[98] The evidence demonstrated that the State had not taken "reasonable available measures to abate the risks caused by the foregoing conditions" and that the Plaintiffs would likely be able to "satisfy the objective prong of their Eighth Amendment Claim."[99]

### *b. Subjective Deliberate Indifference*

Next, Judge Otake determined whether the Plaintiffs were able to adequately establish that the State was "aware of, but [disregarded], an excessive risk to [the] Plaintiffs' health or safety by failing to take measures to prevent or mitigate the spread of COVID-19 in DPS facilities."[100] Judge Otake acknowledged that although outbreaks may be inevitable, the State "continue[d] to disregard the excessive risk to inmate health and safety."[101] The spread of COVID-19 continued to worsen as new inmates presented the potential threat of exposure as they were not being properly screened, tested, or quarantined.[102]

In an effort to alleviate the overcrowding at other correctional facilities, the State transferred dozens of inmates from one facility to another.[103] Some of the inmates transferred were those who were "untested or had yet to receive test results,"[104] and many of them had informed DPS staff that they felt ill.[105] Judge Otake found these actions to be "problematic on multiple levels," as the State knowingly "transported symptomatic inmates from a facility with an active COVID-19 outbreak" on an airplane, while it was on notice that those inmates were "ill" and "infected."[106] Despite this, the State continued to "house those inmates with COVID-19 negative inmates."[107] For Judge Otake, there was "almost no clearer . . . example of complete disregard for the Response Plan and abandonment of precautionary measures to prevent the spread of COVID-19 between DPS facilities and islands."[108]

Judge Otake ultimately held that the combination of the Plaintiffs' declarations of their experiences living within the State's facilities and the State's actions of transferring dozens of inmates from one correctional

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[98] *Id.*
[99] *Id.* at *18
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.* at *19 (emphasis omitted).
[107] *Id.* (emphasis omitted).
[108] *Id.*

facility to another without proper COVID-19 screening or testing "support[ed] a finding of subjective deliberate indifference" because this demonstrated the State's "knowing disregard of excessive risk to inmate health and safety."[109]

### *2. Balance of Equities and Public Interest*

Finally, Judge Otake determined whether the Plaintiffs were entitled to preliminary injunctive relief by balancing the equities and public interest.[110] She ruled in favor of the Plaintiffs, finding that the equities "tip sharply" in their favor because they "face[d] irreparable harm to their health and constitutional rights."[111] Furthermore, Judge Otake explained that the State cannot suffer harm from the injunction as it would "merely end[] an unlawful practice" to "avoid constitutional concerns"[112] and the injunction would "simply require[]" the State "to comply with [its] own policies."[113]

Judge Otake continued by finding that the State's adherence to its Response Plan would serve the public interest by protecting the health and safety of the inmates, DPS staff, and "other individuals who enter DPS facilities, along with their families and surrounding communities."[114] She declared that granting the Plaintiffs' preliminary injunctive relief would benefit the public because the State's "non-compliance causes the violation of [the Plaintiffs'] constitutional rights."[115]

### *3. State Adherence to its Policies and Decision to Not Appoint a Special Master*

Although Judge Otake acknowledged that the Plaintiffs were able to establish the requirements to obtain preliminary injunctive relief, she denied the Plaintiffs' request to appoint a special master "to oversee the development and implementation" of the State's Response Plan.[116] She did not, however, do so without caution, noting that a special master or another court appointed

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[109] *Id.* at *18.

[110] *Id.* at *21.

[111] *Id.* (citing Castillo v. Barr, 449 F. Supp. 3d 915, 923 (C.D. Cal. 2020)).

[112] *Id.* (quoting Rodriguez v. Robbins, 715 F.3d 1127, 1145 (9th Cir. 2013)).

[113] *See id.* at *22.

[114] *See id.*

[115] *Id.* (quoting Am. Beverage Ass'n v. City & County of San Francisco, 916 F.3d 749, 758 (9th Cir. 2019) ("[I]t is always in the public interest to prevent the violation of party's constitutional rights")).

[116] *Id.* at *22–23 (declaring that the appointment of a special master is not necessary because the case "is not in the remedial phase," as required by 18 U.S.C. § 3626(f)(1)(A)–(B)).

official may be necessary in the future, if appropriate.[117] One can reasonably deduce that Judge Otake likely used such language to deter the State from disregarding their Response Plan as the explicit neglect of the inmates would require a court-appointed officer to ensure their safety and protection at the correctional facilities.[118]

## IV. POTENTIAL IMPACTS OF *CHATMAN V. OTANI*

Ideally, *Chatman v. Otani* would incentivize the State to adhere more strictly to its Response Plan and proactively protect inmates from COVID-19 and other dehumanizing conditions. Additionally, Judge Otake's holding may encourage DPS and the State to address other issues, such as overcrowding. If the State fails to adequately protect inmates, however, *Chatman* may also encourage future inmate suits challenging the inhumane prison conditions and Eighth Amendment violations taking place in Hawai'i's correctional facilities.

### *A. Current Overcrowding in Hawai'i State Prisons*

Public officials agree that overcrowding in Hawai'i's correctional facilities has been a longstanding problem, and the issue has only been exacerbated by the COVID-19 pandemic.[119] For example, HCCC is currently 85% overcapacity, and the inmate population is still "steadily increasing."[120] The facility was built 43 years ago with only 22 beds.[121] Though the State has installed up to 200 more beds over the years, HCCC is still not equipped to house its roughly 425 inmates.[122] Overcrowding, however, is not only an issue on O'ahu; it also plagues the outer islands. For example, Maui's correctional facility is almost 60% over capacity with only "301 beds for approximately 470 inmates."[123] Statewide, there are about 5,500 jail and prison inmates, but there is only room for half of them.[124] Representative

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[117] *See id.* at *23.

[118] *See id.*

[119] Mileka Lincoln, *Relief for Overcrowding at Hawaii Correctional Facilities Years Away*, HAW. NEWS NOW (Apr. 30, 2018), https://www.hawaiinewsnow.com/story/38076042/hawaiis-jail-overcrowding-crisis-worsens-causing-tension-among-inmates/.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] Lei U'i Kaholokula, *Plans to Relieve Overcrowding in Hawaii's Jails are in Motion*, KITV (Apr. 3, 2019), https://www.kitv.com/townnews/social_services/plans-to-relieve-overcrowding-in-hawaiis-jails-are-in-motion/article_a47fb8a2-5178-11ec-b566-

Gregg Takayama, the Chair of the Committee on Public Safety, explained that "[i]nmates in Hilo, Maui and Kaua'i are often sleeping three or four to a cell, and this is a cell that's designed for two."[125] Many prisoners believe that the rampant overcrowding, exacerbated by the pandemic, in Hawai'i's prisons is a "death sentence."[126]

To address this issue, the Department moved twenty-eight inmates from the Big Island to O'ahu in 2021.[127] Simply moving inmates, however, failed to address the fundamental problem of overcrowding since both correctional facilities were at capacity.[128] Critics argued that it was only a temporary fix and that the real solution was to depopulate.[129] To their credit, following a Hawai'i Supreme Court order in August 2020, the State granted early release to an unspecified number of inmates with petty misdemeanor or misdemeanor convictions.[130] The Hawai'i Supreme Court order "recognize[d] the impact of COVID-19 on Hawai[']i's community correctional centers and facilities" and also acknowledged the virus' potential "to not only place the inmates at risk of death or serious illness, but also endanger the lives and well-being of staff and service providers who work at OCCC."[131] Since correction systems began vaccinating inmates and implementing COVID-19 testing, the Hawai'i Supreme Court discontinued the early release program.[132] Thus, overcrowding remains a prevalent issue.

### *B. Chatman v. Otani May Encourage Stricter Adherence to State Policies*

As discussed in Part III, Judge Otake stated the importance of the objective[133] and subjective[134] deliberate indifference tests in *Chatman*.[135]

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f35c6d82fb45.html.

[125] *Id.*

[126] Annalisa Burgos, *Big Island Inmates Moved to Oahu to Address Overcrowding in Hilo Prison Outbreak*, KITV (Nov. 29, 2021), https://www.kitv.com/story/44132950/big-island-inmates-moved-to-oahu-to-address-overcrowding-in-hilo-prison-outbreak.

[127] *Id.*

[128] *See id.*

[129] *Id.*

[130] Diane Ako, *Supreme Court Orders OCCC Jail Inmate Release Due to COVID-19,* KITV (Aug. 16, 2020, 10:40 PM), https://www.kitv.com/townnews/law/supreme-court-orders-occc-jail-inmate-release-due-to-covid-19/article_b6226406-5222-11ec-96b0-2b02baebccae.html.

[131] *Id.*

[132] Blaze Lovell, *Hawaii Supreme Court Ends Early Release of Inmates,* HONOLULU CIV. BEAT, (Apr. 16, 2021), https://www.civilbeat.org/2021/04/hawaii-supreme-court-ends-early-release-of-inmates/.

[133] Chatman v. Otani, No. 21-00268, 2021 WL 2941990, at *13 (D. Haw. July 13, 2021).

[134] *Id.* at *18.

[135] *See id.* at *13; *see also infra* Part III.

Thus, *Chatman* provides an important framework for inmates seeking to bring future suits for Eighth Amendment violations.

Future suits are almost certain to occur. State Representative Karl Rhoads, Chair of the House Committee on Judiciary noted that he did not "see any other rational way to address [overcrowding] at this point. Eventually, we're going to get sued."[136] Similarly, DPS Public Information Officer, Toni Schwartz, admitted that "[i]t's no secret that all of our jails are grossly overcrowded and have been overcrowded for several years."[137]

Government officials recognize that conditions at DPS facilities are "objectively, sufficiently serious," demonstrating prison officials' "knowledge of and deliberate indifference to" inmates' safety and basic needs.[138] Likewise, numerous high-ranking officials and DPS managers admit to the "excessive risk[s] to inmate health and safety,"[139] and members of the legislature cite that "overcrowding is likely the root cause."[140] Despite this, legislative efforts to improve conditions have "overwhelmingly failed" and prison conditions "continue to worsen."[141] Thus, the Hawai'i prison system "finds itself in an intractable dilemma," that as the inmate population continues to increase, facility conditions "continue to worsen."[142]

*Chatman* demonstrates the State and DPS officials' deliberate indifference to the inhumane prison conditions.[143] The favorable outcome of this case and the court's resolve to address Hawai'i state prisons' egregious conditions will likely encourage inmates, suffering from the consequences of overcrowding, to sue the state for violations of their Eighth Amendment rights.[144]

## CONCLUSION

The appalling conditions seen in *Chatman v. Otani* have only been exacerbated by the COVID-19 pandemic. The precedent set by *Chatman* establishes that inmates can prevail in suits against state prison systems that

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[136] ACLU 2017 Complaint, *supra* note 34, at 23 (citing Allyson Blair, *Lawmakers Consider Early Releases to Ease Prison Overcrowding*, HAW. NEWS NOW (Mar. 7, 2016, 10:13 PM), https://www.hawaiinewsnow.com/story/31409846/proposed-law-would-release-some-inmates-to-ease-jail-overcrowding/).

[137] *Id.* at 24 (citing Eileen Chao, *Maui's Only Jail Severely Overcrowded*, HAW. PUB. RADIO (Aug. 10, 2015), https://www.hawaiipublicradio.org/maui-news/2015-08-10/mauis-only-jail-severely-overcrowded).

[138] *Id.* at 26 (quoting Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006)).

[139] *Id.* 26–27 (quoting Anderson v. County of Kern, 45 F.3d 1310, 1313 (9th Cir. 1995)).

[140] *Id.* at 27.

[141] *Id.*

[142] *Id.* at 27.

[143] *See* No. 21-00268, 2021 WL 2941990, at *13 (D. Haw. July 13, 2021).

[144] *See id.*

violate their Eighth Amendment rights if they are able to prove that the facilities demonstrated objective and subjective deliberate indifference to their health, safety, and well-being while incarcerated.[145] In the opinion, Judge Otake states that the injunctive relief requested "simply requires DPS to comply with its own policies."[146] The State "will not be burdened or harmed if DPS must do what [it] insists it is already doing."[147] Future suits brought by inmates are likely to utilize the *Chatman* framework.

*Chatman* illuminates a seemingly never-ending cycle of Eighth Amendment violations by the State as was previously seen nearly forty years ago in *Spear*.[148] Though the COVID-19 pandemic likely exacerbated the conditions in Hawai'i state prisons, the root of the problem—overcrowding—is an unresolved and recurring issue for the State. *Chatman v. Otani* presents the State with an opportunity to properly address overcrowding. Failure to do so will cause the State, and more importantly, the inmates to suffer the consequences of the State's noncompliance.

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[145] *See id.* at *13–14, *18.
[146] *Id.* at *22.
[147] *Id.*
[148] *See* Complaint, Spear v. Waihee, No. 84-1104 (D. Haw. Sept. 14, 1984).

# Water and Justice for Maui's Communities: Lessons and Lasting Impacts from a Decade of Litigating *Maui County v. Hawai'i Wildlife Fund*

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Micah M. Miyasato,[***] Siena I. Schaar[****]

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'Inā e lepo ke kumu wai, e hō'ea ana ka lepo i kai
*If the source of water is dirty, the muddy water will travel on.*
Where there is evil at the source, the evil travels on.[1]

## INTRODUCTION

The 'ōlelo no'eau "ola i ka wai,"[2] or "water is life," attests to the immense historical and cultural significance of freshwater throughout Hawai'i and for Native Hawaiians.

> According to mo'olelo (stories) passed down from generation to generation, fresh water streams and springs were created throughout Hawai'i by the gods Kāne and Kanaloa. This established a spiritual connection between indigenous inhabitants of the islands and the resource that is so vital to life. The importance of water in Hawai'i is also evidenced in the many place names that include "wai[,]" as well as important words, such as those describing wealth (waiwai) and law (kānāwai).[3]

Water was, and continues to be, a critical resource to the health and well-being of all people across Hawai'i.[4]

Maui is the second-largest of the islands.[5] The city of Lāhaina is located on the northwest coast of the island of Maui and was historically the capital

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[1] MARY KAWENA PUKU'I, 'ŌLELO NO'EAU HAWAIIAN PROVERBS & POETICAL SAYINGS, 134 (1983).

[2] MARY KAWENA PUKU'I & SAMUEL I. ELBERT, HAWAIIAN DICTIONARY 271 (1986).

[3] STATE OF HAW. COMM'N ON WATER RES. MGMT., WATER RES. PROT. PLAN, at 8 [hereinafter PLAN] https://files.hawaii.gov/dlnr/cwrm/planning/wrpp2019update/WRPP_201907.pdf (2019 Update). 'Ōiwi place names encode 'ike kūpuna accumulated over centuries of kilo (observation) and biocultural data collection of 'āina; *see, e.g.,* Wai'oli Valley Taro Hui, Inc., *Draft Environmental Assessment: Wai'oli Taro Hui Long-Term Water Lease for Traditional Lo'i Kalo Cultivation,* Appendix C, 23-24 (2021) http://oeqc2.doh.hawaii.gov/Doc_Library/2021-06-08-KA-DEA-Waioli-Valley-Taro-Hui-Long-Term-Water-Lease.pdf (last visited Feb. 18, 2022).

[4] *See* PLAN, *supra* note 3, at 8 ("In accordance with their reverence and respect for water, land management units were organized around freshwater supplies in a traditional system known as the ahupua'a resource-management system."). An ahupua'a is "a land division usually extending from the mountains to the sea along *rational* lines, such as ridges or other natural characteristics." Public Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n, 79 Hawai'i 425, 430 n.1, 903 P.2d 1246, 1250 n.1 (1995) (emphasis in original). Prior to the Great Māhele in 1848, ahupua'a contained no private landowners, but rather functioned as self-sufficient economic units, with the residents managing the lands and water together. *See* State ex rel. Kobayashi v. Zimring, 58 Haw. 106, 112, 116-17, 566 P.2d 725, 730, 732-33.

[5] CNTY. OF MAUI, FISCAL YEAR 2015 COUNCIL ADOPTED BUDGET: COUNTY PROFILE 33, https://www.mauicounty.gov/DocumentCenter/View/92753/010_05_County_Profile (last visited Dec. 20, 2021).Hawai'i is composed of 137 islands, but the majority of these islands are uninhabited.*See Northwest Hawaiian Islands*, PAC. ISLANDS BENTHIC HABITAT MAPPING

of the Hawaiian Kingdom from 1820 to 1845.[6] The area also hosted one of the main ports for the North Pacific whaling fleet.[7] Modern-day Lāhaina—now a popular resort area among tourists for on-reef recreation—is home to a population of roughly 12,702 people,[8] eight percent of whom identify exclusively as Native Hawaiian or other Pacific Islander.[9] Lāhaina's population also fluctuates significantly with year-round arrivals of tourists: as the second-most visited Hawaiian island after O'ahu, Maui hosted 232,208 visitors in August 2021 alone.[10]

The Lāhaina Wastewater Reclamation Facility ("LWRF") is a group of four on-site injection wells operated by the County of Maui ("the County").[11] LWRF collects close to four million gallons of sewage every day, which it then filters and disinfects.[12] LWRF is located approximately half of a mile away from the shoreline[13] and "comprises two separate recycled water distribution systems: the Mauka System and the South System."[14] The Mauka System, which consists of two pumps and a recycled waterline, connects to two reservoirs, the Honokowai Reservoir and a county reservoir.[15] The South

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CTR., http://www.soest.hawaii.edu/pibhmc/cms/data-by-location/ northwest-hawaiian-islands/ (last visited Dec. 20, 2021). The eight major islands of Ni'ihau, Kaua'i, O'ahu, Moloka'i, Lāna'i, Kaho'olawe, Maui, and Hawai'i comprise the majority of the population. *See* STATE OF HAW. DEP'T OF BUS., ECON. DEV. & TOURISM, HAWAI'I FACTS & FIGURES 2–3 (2021), https://files.hawaii.gov/dbedt/economic/library/facts/Facts_Figures_printable.pdf.

[6] *Lahaina Historic District*, NAT'L PARK SERV., https://www.nps.gov/places/lahaina-historic-district.htm (last visited Oct. 3, 2021).

[7] *Id.*

[8] The source for this figure is the 2020 Census of Population and Housing.QUICKFACTS: LAHAINA CDP, HAWAII, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/ lahainacdphawaii (last visited Oct. 3, 2021).

[9] Sources for this figure are the U.S. Census Bureau's Population Estimates Program and American Community Survey, both of which are updated annually. *Id.*

[10] *See* RSCH. & ECON. ANALYSIS DIV., STATE OF HAW. DEP'T OF BUS., ECON. DEV. & TOURISM, VISITOR SPENDING FOR AUGUST 2021 DECLINED 8.9% FROM PRE-PANDEMIC AUGUST 2019, at 6 (Sept. 30, 2021), https://www.hawaiitourismauthority.org/media/7971/august-2021-visitor-statistics-press-release.pdf.

[11] *See* Haw. Wildlife Fund v. Cnty. of Maui, 24 F. Supp. 3d 980, 983 (D. Haw. 2014), *aff'd*, 881 F.3d 754 (9th Cir. 2018), *amended by* 886 F.3d 737 (9th Cir. 2018), *vacated sub nom.*, Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2020).

[12] *Id.*

[13] Haw. Wildlife Fund v. Cnty. of Maui, No. 12-00198, 2021 WL 3160428 (D. Haw. July 26, 2021) (amended order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment).

[14] Kehaulani Cerizo, *$26M Project Would Reduce Lahaina Injection Well Use*, THE MAUI NEWS (Mar. 2, 2021), https://www.mauinews.com/news/local-news/2021/03/26m-project-would-reduce-lahaina-injection-well-use/.

[15] *Id.*"With the cessation of Maui Land and Pineapple Co. operations, there is no longer demand for irrigation water from the Mauka System, and the county reservoir is no longer in regular operation."*Id.*

System also consists of two pumps and a recycled waterline "that ends at a [Ka'anapali] Golf Course reservoir and delivers up to about 1.8 million gallons per day to Honua Kai Resort, [Ka'anapali] Golf Course, Hyatt Regency and Hyatt Residence Club."[16]

The County operates eighteen such injection wells on Maui.[17] The injections wells direct the effluent through long pipes to "a shallow groundwater aquifer beneath the facility."[18] However, the effluent pumped into injection wells 3 and 4 does not stay in the groundwater; it flows into the Pacific Ocean from Kahekili Beach.[19] This errant, ocean-polluting discharge is not a new problem for the County: "A 1991 environmental assessment, conducted by the County's Department of Public Works, noted that treated effluent—including suspended solids, dissolved oxygen, nitrogen, and phosphorus—flows from the injection wells into the ocean."[20]

The impact of the effluent on the coral at Kahekili Beach led a group of plaintiffs[21] to sue the County of Maui, arguing that "the County's continued discharge of wastewater without [a National Pollutant Elimination System (NPDES)[22]] permit violates the Clean Water Act."[23] According to studies done by Plaintiffs' experts on the nearshore waters at Kahekili Beach, decades of effluent discharged into the ocean resulted in "elevated levels of inorganic nitrogen and phosphorus, low salinity, low pH, and high temperature."[24] Plaintiffs' experts also contended that the effects of the effluent have caused coral to suffocate due to lack of oxygen, dissolve due to the water's low pH, and die due to lower salinity and higher temperatures of the water.[25] To the contrary, the County believed that the effluent had not impacted the coral; the County's expert argued that the coral at the nearshore were healthy based on a visual inspection.[26]

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[16] *Id.*

[17] *Wastewater Injection Wells*, CNTY. OF MAUI, https://www.mauicounty.gov/faq.aspx?TID=83 (last visited Nov. 28, 2021).

[18] *Haw. Wildlife Fund*, 24 F. Supp. 3d at 983–84.

[19] *See id.* at 984.

[20] *Id.*

[21] The Hawai'i Wildlife Fund, the Sierra Club-Maui Group, the Surfrider Foundation, and the West Maui Preservation Association are the plaintiffs listed on the complaint.

[22] "The NPDES permit program, created in 1972 by the Clean Water Act (CWA), helps address water pollution by regulating point sources that discharge pollutants to waters of the United States."*About NPDES*, EPA, https://www.epa.gov/npdes/about-npdes (last visited Jan. 4, 2022).

[23] *See Haw. Wildlife Fund*, 24 F. Supp. 3d. at 986.

[24] *See id.* at 984–85.

[25] *See id.* at 985.

[26] *See id.*

In this Note, we examine Judge Susan Oki Mollway's 2021 order in *Hawai'i Wildlife Fund v. County of Maui*, culminating nearly a decade of litigation.[27] This Note endeavors to untangle the quandary of social, political, and cultural dynamics surrounding the four unsuspecting injection wells on the island of Maui. In Part II, we summarize Judge Mollway's 2014 order and track its evolution through the Ninth Circuit Court of Appeals to the U.S. Supreme Court. Part III offers a cursory summary of Judge Mollway's order on remand applying the Supreme Court's new factor test. Building first on this explanatory foundation, we propose that a traditional legal analysis inadequately captures the significance of Judge Mollway's order. In Part IV, we deploy a contextual analysis to expound on the environmental, social, political, and cultural ramifications of *Hawai'i Wildlife Fund v. County of Maui.*

## I. THE HISTORY OF *HAWAI'I WILDLIFE FUND V. COUNTY OF MAUI*

Nearly a decade ago, Hawai'i Wildlife Fund, Surfrider Foundation, Sierra Club-Maui Group, and West Maui Preservation Association ("Plaintiffs")—four Hawai'i-based environmental organizations represented by Earthjustice[28]—filed suit against the County as the owner and operator of LWRF.[29] Plaintiffs claimed that the County was egregiously violating the Clean Water Act ("CWA")[30] by releasing polluted effluent into groundwater injection wells at the LWRF without an NPDES permit.[31] Before Judge Susan Oki Mollway[32] in the U.S. District Court for the District of Hawai'i,

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[27] Haw. Wildlife Fund v. Cnty. of Maui, No. 12-00198, 2021 WL 3160428 (D. Haw. July 26, 2021) (amended order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment).

[28] "Earthjustice is the premier nonprofit public interest environmental law organization" that "wield[s] the power of law and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change."*About Earthjustice*, EARTHJUSTICE, https://earthjustice.org/about (last visited Jan. 5, 2022).

[29] Complaint for Declaratory and Injunctive Relief ¶¶ 13–21, Haw. Wildlife Fund v. Cnty. of Maui, 24 F. Supp. 3d 980 (D. Haw. 2014) (No. 12-0198) 2012 WL 1329000 [hereinafter Plaintiffs' Complaint].The Plaintiffs' initial complaint was filed on April 16, 2012.*Id.*

[30] *Id.* ¶ 64, at 23 (alleging, specifically, that the County "ha[d] violated and [was continuing to] violat[e] section 301(a) of the CWA, 33 U.S.C. § 1311(a), and H.R.S. § 342D-50(a), which prohibit discharges of pollutants without an NPDES permit . . . .").

[31] *See id.* ¶ 22, at 8 (alleging further that the "resulting discharges of pollutants into [the] ocean [were] adversely affect[ing] and [were] continu[ing] to adversely affect the environmental, aesthetic, recreational, scientific, and educational interests of" the plaintiff environmental activist groups).

[32] President Bill Clinton nominated Judge Mollway in 1995 and the Senate confirmed her appointment in 1998 making her the first Asian-American woman appointed to the federal

Plaintiffs sought declaratory and injunctive relief by requiring the County to immediately "apply for and comply with the terms of an NPDES permit for the injection wells at the LWRF to prevent further illegal discharges of pollutants . . . ."[33]

In 1972, Congress amended the Federal Water Pollution Control Act of 1948 in response to increasing public concern about the effects of water pollution.[34] Since the 1972 amendments, the law is known as the CWA.[35] The stated purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[36] The statute also contains the ambitious goal of eliminating the "discharge of pollutants into the navigable waters" by providing federal assistance to construct publicly-owned waste treatment centers.[37]

A party, however, may dump pollutants in water if they obtain a NPDES permit.[38] The NPDES permit requirement extends to both private and public facility discharges, including publicly-owned treatment plants.[39] The permits are issued by an approved state agency only upon the condition that such discharge will meet the effluent and other standards[40] set by the administrator of the EPA.[41] For the EPA administrator to approve a state permitting program, the state agency must have the power to "control the discharges" entering its waters.[42]

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bench.*See* Pete Pichaske, *Island Lawyer's Judicial Appointment Blocked*, STAR BULL. (1997), http://archives.starbulletin.com/97/11/11/news/story3.html; *About*, *Historial Timeline*, ASIAN AM. BAR ASS'N OF THE GREATER BAY AREA, https://www.aaba-bay.com/about/history (last visited Jan. 5, 2022).

[33] Plaintiffs' Complaint, *supra* note 29, ¶ 1–3, at 25.

[34] *History of the Clean Water Act*, EPA, https://www.epa.gov/laws-regulations/history-clean-water-act (last visited Oct. 3, 2021).

[35] *Id.*

[36] Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251(a).

[37] *Id.* § 1251(a)(1), (a)(3), (a)(4).The statute defined "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water;""discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source;" and a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . from which pollutants are or may be discharged."*Id.* § 1362(6), (12), (14).

[38] *See* EPA The National Pollutant Discharge Elimination System, 40 C.F.R. § 122.1(b)(1) (2021).

[39] *See id.* § 122.1(b)(2).

[40] *See Industrial Effluent Guidelines,* ENV'T PROT. AGENCY https://www.epa.gov/eg/industrial-effluent-guidelines (last visited Feb. 18, 2022) (listing all existing effluent guidelines promulgated by the EPA).

[41] *See id.* § 123.1.

[42] *Id.* § 123.1(c).

According to Judge Mollway, the CWA did not preempt the Plaintiffs' contention that discharge into groundwater may require an NPDES permit.[43] Indeed, she noted that the Plaintiffs could prevail on summary judgment if they were able to show the discharge was "functionally equivalent to a discharge into the ocean itself."[44]

Judge Mollway, relying in part upon a detailed groundwater tracer study,[45] found that a considerable amount of polluted effluent from the injection wells ended up in the ocean (a navigable water) as a result of the County's LWRF injection wells.[46] In her 2014 order denying the County's motion for stay and granting Plaintiffs' motion for summary judgment, Judge Mollway concluded that it was "undisputed that the County ha[d] discharged pollutants into the ocean through the conduit of the groundwater below the LWRF."[47] Consequently, Judge Mollway concluded that the County's failure to obtain an NPDES permit violated the CWA.[48]

The Ninth Circuit Court of Appeals agreed.[49] In affirming Judge Mollway's ruling, however, Senior Judge Dorothy Nelson's interpretation of the statutory standard deviated slightly from the standard articulated by Judge Mollway in her 2014 District Court ruling.[50] Judge Nelson, instead, wrote that an NPDES permit is required when "the pollutants are *fairly traceable* from the point source to a navigable water such that the discharge is the *functional equivalent* of a discharge into navigable water."[51] In so ruling, the

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[43] *See* Haw. Wildlife Fund v. Cnty. of Maui, 24 F. Supp. 3d 980, 994 (D. Haw. 2014).

[44] *Id.*

[45] Judge Mollway relied on the findings of the 2013 Tracer Dye Study in both her 2014 Order and her subsequent 2021 Order on Remand from the U.S. Supreme Court.*See id.* at 984–85; Haw. Wildlife Fund v. Cnty. of Maui, No. 12-00198, 2021 WL 3160428 (D. Haw. July 26, 2021) (amended order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment).Researchers placed Fluorescein tracer dye into Wells 3 and 4 to determine where the wastewater flowed into the Ocean.*See Haw. Wildlife Fund*, 2021 WL 3160428, at *3–4.Researchers located two general areas where the dye was detected: 1) a northern seep group about nine to twenty feet off shore and 2) a southern seep group about eighty feet off shore.*Id.*

[46] *See Haw. Wildlife Fund*, 24 F. Supp. 3d at 998 ("The central finding of the Tracer Dye Study–and the center piece of Plaintiffs' case – is that '64% of the treated wastewater injected into wells [3 and 4] currently discharges from the submarine spring areas' and into the ocean.Because wells 3 and 4 'receive more than 80 percent of the treated wastewater,' it appears that over 50% of the wastewater discharged at the LWRF emerges into the ocean." (citations omitted and alternation in original)).

[47] *See id.* at Haw. Wildlife Fund v. Cnty of Maui, 24 F.Supp.3d 980, 998, 1005 (D. Haw. 2014) (emphasis added).

[48] *Id.* at 1005.

[49] Haw. Wildlife Fund v. Cnty. of Maui, 886 F.3d 737, 752 (9th Cir. 2018).

[50] *See id.* at 749.

[51] *See id.* (emphasis added). The Court also ruled that the County had fair notice because the County's undisputed action of adding treated effluent to the Pacific Ocean via four

"fairly traceable" test proffered by Judge Nelson effectively broadened the CWA's coverage.[52] Following Judge Nelson's decision, the U.S. Supreme Court granted the County's petition for certiorari "[i]n light of the differences in the standards adopted by the different Courts of Appeals . . . ."[53]

In a 6-3 decision,[54] the U.S. Supreme Court held that the CWA "requires a permit when there is a direct discharge [of pollutants] from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*."[55] To determine what constitutes a functional equivalent of a direct discharge, Justice Breyer, writing for the majority, set forth seven "potentially relevant factors":[56]

> (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, [and] (7) the degree to which the pollution (at that point) has maintained its specific identity.[57]

Justice Breyer noted that these seven exemplary factors are not the only guideposts that should be considered.[58] Foreshadowing Judge Mollway's 2021 decision on remand, Justice Breyer stated that "courts can provide guidance through decisions in individual cases" and that "the traditional common-law method, making decisions that provide examples that in turn lead to ever more refined principles, is sometimes useful, even in an era of statutes."[59]

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injection wells, fell plainly within the language of the statute. Haw. Wildlife Fund v. Cnty. of Maui, 886 F.3d 737, 751–52 (9th Cir. 2018).

[52] *Compare id.*, *with Haw. Wildlife Fund*, 24 F. Supp. 3d at 998, 1005.

[53] Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1469 (2020).

[54] Justice Kavanaugh filed a concurring opinion. Justice Thomas filed a dissenting opinion in which Justice Gorsuch joined. Justice Alito filed a dissenting opinion. *Id.* at 1462.

[55] *Id.* at 1476 (emphasis in original).

[56] *Id.* (noting that "there are too many potentially relevant factors applicable to factually different case for this Court now to use more specific language" and that determining relevant factors for consideration "depend[s] upon the circumstances of a particular case").

[57] *Id.* at 1476–77 (noting that "[t]ime and distance will be the most important factors in most cases, but not necessarily every case.").

[58] *See id.* at 1477 (explaining the numerous forms of guidance that future courts can pull from, including how other courts decide individual cases, underlying statutory objectives, and administrative guidance from the EPA).

[59] *See id.*

## II. JUDGE MOLLWAY'S APPLICATION OF THE U.S. SUPREME COURT'S TEST IN COUNTY OF MAUI

The U.S. Supreme Court's new factor test to determine whether a functional equivalent of a discharge requires a permit under the CWA gave a considerable amount of discretion to lower court judges.[60] The permissive language of Justice Breyer's order recognized the unique circumstances of potential cases and gave Judge Mollway the flexibility of making a determination to use the seven factors as she wished.[61] According to Justice Breyer, a judge could conceivably use each factor, disregard one, or even include another not enumerated by the Court.[62] This flexibility anticipated an evolving guidance from the judiciary.[63] Each subsequent decision should produce examples that "in turn lead to ever more refined principles" in interpreting the CWA.[64]

With the Court's new guiding language, Judge Mollway now considered the parties' respective motions for summary judgment.[65] Her 2021 order analyzed the parties' arguments and expert testimony to determine whether the County needed an NPDES permit to inject treated wastewater into groundwater that flowed into the ocean.[66] Of the Court's seven factors, Judge Mollway found four in favor of the plaintiff environmental organizations and two in favor of the County.[67] She also found that one of the Court's factors—the manner by or area in which the pollutant enters the navigable waters—did not apply to the present case.[68] Curiously, Judge Mollway included an *eighth factor*—the raw volume of the pollutant—and weighed it in favor of the plaintiff environmental organizations despite their apparent victory without the added factor.[69] After nearly twelve years of litigation, Judge Mollway granted the organizations' motion for summary judgment and ordered the County to apply for NPDES permits for its injection facilities.[70]

The following section parses through Judge Mollway's order and her application of the Court's seven articulated factors. It provides a mechanical

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[60] *See id.* at 1476–77.

[61] *See id.*

[62] *See id.*

[63] *See id.*

[64] *See id.* at 1477.

[65] Haw. Wildlife Fund v. Cnty. of Maui, No. 12-00198, 2021 WL 3160428 (D. Haw. July 26, 2021) (amended order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment).

[66] *See id.* at *2.

[67] *Id.* at *18.

[68] *See id.* at *15.

[69] *See id.* at *16–18.

[70] *See id.* at *1, 18.

recitation that favors a descriptive retelling of Judge Mollway's order and reserves a deeper contextual analysis for a later section. It ends with Judge Mollway's added factor. The apparent triviality of weighing a new factor for the Plaintiffs after their victory of summary judgment is dispelled—and its reaching impact teased out—in the later sections.

### *A. Factors in Favor of an NPDES Permit*

Of the U.S. Supreme Court's seven recommended factors, Judge Mollway found that four weighed in favor of the Plaintiffs and held that the County needed to obtain an NPDES permit.[71]

#### *1. Transit Time*

The court found that the transit time factor weighed in favor of the Plaintiffs.[72] Judge Mollway reiterated the U.S. Supreme Court's general guidance and considered the parties' arguments.[73] The U.S. Supreme Court recommended that the first and second factors be given special consideration by the courts.[74] Because the nature of groundwater does not expedite pollutants to the ocean in any measure of haste, the Court fashioned this first factor to accommodate for an uncertain amount of travel time.[75] When pollutants are mere seconds or minutes removed from reaching a navigable water, this factor weighs in favor of permitting, whereas pollutants that travel for "many years" from the source point before reaching a navigable water may escape the NPDES permitting process.[76]

Citing a 2013 Tracer Dye Study, Judge Mollway found that, on average, pollutants laced with dye injected into groundwater travelled fourteen to sixteen months before its detection in the ocean.[77] The earliest detection started eighty-four days after injection.[78] "Half of the dye measured at the

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[71] *See id.* at *18.

[72] *Haw. Wildlife Fund*, 2021 WL 3160428, at *12–13.

[73] *See id.* at *11–13.

[74] *Id.* at *11 (citing Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1476–77 (2020)).

[75] *See id.* at *12 ("The very nature of groundwater means that the pollutants will not reach the ocean in a matter of minutes. Had the Court intended to say that anything taking more than 90 minutes or a day or a week or a month was exempt from the NPDES permitting requirement, it could easily have said that. Instead, the Court recognized examples at the extremes of a few seconds or minutes to many years.").

[76] *See id* (quoting Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1476 (2020)).

[77] *See id.*

[78] *See id.*

seeps entered the ocean within 300 days."[79] For Judge Mollway, the Tracer Dye Study demonstrated the "relatively rapid flow of significant quantities of pollutant from the LWRF to the ocean."[80] Even if the County received a favorable inference by doubling the average transit time, it would still fall below the U.S. Supreme Court's "many years" threshold.[81]

Judge Mollway also rejected the County's attempt to shift the measuring perspective.[82] The County proposed that the "90 to 108 minutes that wastewater would take to travel the half-mile in a hypothetical pipe running in a straight line from the LWRF to the ocean" should serve as a baseline when determining transit time.[83] This argument would downplay the "relatively rapid flow" found by the 2013 Tracer Dye Study by unfairly comparing it to the even faster flow of the County's hypothetical pipeline.[84] Judge Mollway refused.[85] She disassembled the County's argument by focusing her analysis on the actual events of the case and not the County's superfluous example:

> [T]his court does not view that hypothetical pipe as any kind of lodestar. It is instead just one of an immense number of examples one could imagine for transporting wastewater half a mile.
>
> . . . It makes no sense to this court to use the single example selected by the County as some kind of absolute measuring point, especially when changing the dimensions of the hypothetical pipe could easily alter travel times.[86]

### *2. Distance Traveled*

Next, the court considered whether the distance the pollutant travelled from the injection point to the ocean weighed in favor of an NPDES permit.[87] Like with transit time, the U.S. Supreme Court emphasized the importance of the distance a pollutant travels to reach a navigable water.[88] A pollutant that travels a few feet through groundwater will likely require an NPDES

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[79] *Id.*

[80] *Id.* (quoting Haw. Wildlife Fund v. Cnty. of Maui, 24 F. Supp. 3d 980, 1003 (D. Haw. 2014)).

[81] *Id.* at *13 ("Even if this court doubles the longest time measured at the seeps and assumes that some of the wastewater took that doubled time to reach the ocean, this court is still far from the extreme of 'many years.'").

[82] *See id.* at *12.

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] *Id.*

[87] *See id.* at *13–14.

[88] *See id.* at *11 (citing Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1476–77 (2020)).

permit.[89] On the other hand, "[i]f [a] pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply."[90] The further a pollutant travels through groundwater and thus mixes with other material before reaching the ocean, the less likely an NPDES permit is required.[91]

Judge Mollway found that the distance factor weighed in favor of the Plaintiffs.[92] The court conceded the near impossibility of measuring the exact distance groundwater travels before entering the ocean.[93] Indeed, a trial would not produce a precise maximum distance.[94] Yet, based on both parties' expert witnesses, Judge Mollway determined that the pollutant travelled "a minimum distance of between 0.3 and 1.5 miles to the sea."[95] This placed the defendant well outside the U.S. Supreme Court's example of fifty miles.[96] Even a reasonable inference that tripled the high end of the estimation fell short of the fifty mile extreme.[97]

### *3. The Amount of the Pollutant Entering the Navigable Waters Relative to the Amount of the Pollutant That Leaves the Point Source*

Next, the court considered the amount of the pollutant that entered the ocean relative to the amount of the pollutant that left the point source. The parties did not dispute that 100 percent of the wastewater eventually reaches the ocean.[98] Though the Tracer Dye Test accounted for two percent of the pollutant injected, Judge Mollway determined the certainty that

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[89] *See* Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1476 (2020) ("Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies.").

[90] *Id.*

[91] *See id.*

[92] *Haw. Wildlife Fund*, 2021 WL 3160428, at *14.

[93] *See id.*

[94] *Id.* ("It is hard to see how trial would lead to a more precise figure. Certainly the parties have not suggested how a trial might yield better data.").

[95] *See id.* at *13–14. Each parties' expert witness provided independent estimations of the distance the pollutant travelled to reach the ocean. *See id.* at *13. Plaintiffs' expert witness stated that the pollutant travelled a maximum of 1.5 miles. *Id.* The County's expert stated that "the wastewater travels from the LWRF to the ocean a minimum distance ranging from 0.3 to 1.3 miles." *Id.* Judge Mollway set the minimum distance between 0.3 and 1.5 miles. *Id.* at *14.

[96] *See id.*

[97] *Id.* at *14.

[98] *Id.* at *2. Both parties' expert witnesses agreed with the statement that "100% of wastewater injected into any of the LWRF wells will discharge in the adjacent Pacific Ocean." *Id.* at *7.

groundwater—and with it the wastewater—flows into the ocean weighed in favor of the Plaintiffs.[99]

*4. The Degree to Which the Pollution Maintains its Specific Identity*

Judge Mollway found that the wastewater detected in the ocean was the same effluent injected at the LWRF.[100] Though the Tracer Dye Study found remnants of chemicals and substances not likely from the LWRF, no party contended that the wastewater entering the ocean was completely "devoid of pollutants" identifiable from the LWRF.[101] Judge Mollway emphasized that the identity of the wastewater relied less on the chemical composition of the pollutant and more on "its specific identity as polluted water emanating from the wells."[102] She determined the wastewater's origin—and that the same flow was tracked from the injection point into the ocean—established its identity and did not change as it flowed underground.[103]

*B. Factors Not in Favor of an NPDES Permit*

Judge Mollway found that three factors did not weigh in favor of requiring an NPDES permit. The County prevailed on two factors. Judge Mollway also determined that a third factor offered little relevance to the case.

*1. The Nature of The Material Through Which the Pollutant Travels*

The nature of the underground environment through which the wastewater travelled weighed in favor of the County. The County presented expert testimony describing the wastewater's interaction with saline and brackish water in the "diverse assemblage of volcanic rock."[104] Judge Mollway determined that this mixing weighed against requiring an NPDES permit.[105] She developed her reasoning further while discussing the next factor.

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99 *Id.* at *15.
100 *Id.* at *15.
101 *Id.* at *15–16.
102 *Id.* at *16.
103 *See id.*
104 *Id.* at *14.
105 *Id.*

#### *2. The Extent to Which the Pollutant is Diluted or Chemically Changed as It Travels*

The chemical change of the pollutant as it travelled from the point source to the ocean weighed against requiring an NPDES permit. The parties did not dispute that the pollutant interacted with saline, brackish, and fresh water while travelling through the groundwater. Further, neither party disputed that volcanic rock, through which the pollutant travelled, filtered the wastewater. The County's expert witness presented evidence that this filtration system substantially lowered the nitrogen levels of the wastewater to approximately thirty-one pounds of nitrogen per day. Judge Mollway found that the nature of the material through which the pollutant travelled altered the chemical composition and thus weighed against requiring an NPDES permit.

#### *3. The Manner By or Area in Which the Pollutant Enters the Navigable Waters*

Judge Mollway determined that the manner by or area in which the pollutant enters the navigable waters did not contribute to the analysis. The parties agreed that all the wastewater injected into groundwater eventually will find its way into the ocean. Further, the parties agreed that some wastewater enters the ocean through seeps and some enters through diffuse. Judge Mollway agreed with the County that neither party can precisely describe the manner in which it enters beyond those two options. Though the wastewater likely enters the ocean in a general area based on the short distance it travels, Judge Mollway did not preclude the chance that some wastewater may enter the ocean from an unidentified source. Nevertheless, Judge Mollway concluded that "[t]his factor may not add much to the other factors in the circumstances of this case" and gave it "no additional weight."

### *C. The Eighth Factor: The Raw Volume of the Pollutant*

After completing her discussion of the U.S. Supreme Court's seven factors—finding four factors in favor of the plaintiffs—Judge Mollway exercised her discretion and included an eighth consideration that considers the raw volume of wastewater reaching navigable waters. The four wells at LWRF each injected more than a million gallons of wastewater into the groundwater each day, and 100 percent of that injected water would find its way into the ocean. According to Judge Mollway, this quantity was "mind-boggling." Even a conservative estimate based on the two percent of wastewater identified by the Tracer Dye Study comes out to a million gallons of pollutant per year flowing into the ocean.

Judge Mollway's consideration of raw volume refuted any framing by the County that the two percent of pollutant accounted for in the Tracer Dye Study was a comparatively small, insignificant number. Moreover, as both parties agreed that 100 percent of groundwater eventually flows into the ocean, 100 percent of the millions of gallons injected into the groundwater per day will accordingly find its way into the ocean. The absolute volume of the discharge "is so high that it is difficult to imagine why it should be allowed to continue without an NPDES permit."

## III. A CONTEXTUAL ANALYSIS OF JUDGE MOLLWAY'S ADDITIONAL VOLUME OF WASTEWATER FACTOR REVEALS IMPORTANT JUSTICE IMPLICATIONS FOR MAUI COMMUNITIES

Legal formalism, the dominant view of law and legal process, "attempt[s] to deem the law a neutral tool that produce[s] justice by mechanistically applying legal rules to cases." This path to "justice," however, fails to consider any meaningful inquiry into outside factors including impacts to the parties involved nor to society. The assumption of the legal process as objective and inherently neutral is undercut by the theory of legal realism. Legal realism, which emerged in the 1920s, challenged the formalist view of law as "necessarily objective" by recognizing that "social context, the facts of the case, judges' ideologies, and professional consensus critically influence individual judgments and patterns of decisions over time."

Contextual inquiry stems from legal realism and explicitly assesses "what's at stake, how power and status are implicated in the underlying event and the legal process itself, and what the actual results of legal decision-making will be." Most importantly for this case, it asks whether a decision was appropriate or inappropriate (especially when measured against other available choices) given the relevant history, current cultural and economic conditions, and larger policy concerns. Deploying these tools of critical inquiry here allow for a more robust analysis by providing deeper insights into why the additional volume of discharge factor is significant in light of Maui's history and local communities, and what this means for parties looking to bring similar CWA-based lawsuits in the future.

While helpful in understanding the case at face value, Judge Mollway's evaluation of the seven-factor test does not reflect the lasting impacts that her additional factor has on Maui's communities and environment. In order to fully grasp the robust importance behind this decision, the analysis must move beyond formalism to engage in critical contextual inquiry, a sophisticated, multilevel analysis that asks, in simple terms, "what's really going on?"

### *A. Judge Mollway's Justification for Considering the Volume of Wastewater Reaching Navigable Waters*

In her July 2021 order, Judge Mollway expounded that the U.S. Supreme Court's factors "are not necessarily the only factors relevant to a determination of whether the wastewater from the wells is the functional equivalent of a direct discharge into navigable waters."[106] In effect, Judge Mollway added an additional consideration to the Court's list of guiding factors, namely the "volume of wastewater reaching navigable waters."[107] As justification, she highlighted that the Court's focus on the relative percentage of pollutant entering navigable waters versus the amount of pollutant that leaves the point source does not adequately address the scope of the problem by ignoring the significance of the immense quantity of wastewater making its way to the ocean.[108] In illuminating her point, Judge Mollway stated that "[e]ven if this court restricted its consideration to the wastewater that emerges at the monitored seeps, the amount of wastewater is enormous. If those seeps account for less than 2 percent of the wastewater discharged from the LWRF's wells, that percentage on its own is mind-boggling."[109] In this case, the County was putting three to five million gallons of treated and disinfected wastewater per day into four injection wells at the LWRF, which then ended up in the Pacific Ocean.[110] The County's injection of wastewater into the wells since 2006 resulted in substantial discharge into the ocean.[111]

### *B. The Critical Role of Community Advocacy*

The ostensible gravity of Judge Mollway's decision can be perceived through its localized effects on communities who live near the injection wells. As the waters generally look clean and inviting, families in West Maui

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[106] Haw. Wildlife Fund v. Cnty. Of Maui, No. 12-00198 2021 WL 3160428, at *46 (D. Haw. July 26, 2021) (amended order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment).

[107] *Id.* ("Something not captured in those seven favors is the immensity of the wastewater volume.")

[108] *See id.* at *46. Judge Mollway specifically states that:

If the wastewater as a whole is considered the pollutant, rather than each toxin or chemical contributing to that polluted status, then 100 percent of the pollutant reaches the sea. But just referring to 100 percent does not fully capture how much wastewater is traveling from the wells to the Pacific Ocean. As noted at the start of this order, more than a million gallons of wastewater is discharged from a single well every day, all of it going to the sea.

[Insert Citation for block quote – "*Id.*"].

[109] *Id.* at *47.

[110] *Id.* at *4.

[111] *See id.* at *3.

often visit Kahekili Park to swim and spend the weekend.[112] With LWRF nearby, however, communities are often exposed to drugs like carbamazepine, sulfamethoxazole, and diphenhydramine, as well as household cleaners, food additives, and cosmetic products.[113] As a result of this pollution, many environmental and community groups began to take action to voice their concerns about LWRF and the social impacts of injection wells.

The DIRE Coalition[114]—a group of Maui organizations, residents, and visitors committed to protecting the island's coral reefs, ocean, and scarce water resources—was the first to lead the effort to challenge the County's request for a new ten-year permit to continue injection of wastewater.[115] As a result of the coalition's concerted efforts to provide testimony, community outreach, and education to community stakeholders, community members turned out in record numbers to public hearings to voice their concerns.[116]

In November 2008, for example, over seventy people attended an EPA public hearing on the County's ten-year application to renew the Lahaina wastewater injection well permit.[117] According to DIRE, "[a]ll of those who testified favored phasing out the injection wells and re-directing these waters for beneficial use on land."[118] Less than a year after the hearing, the EPA held a second public hearing regarding the same issue, after 200 community members supported the DIRE coalition's request for a second hearing.[119] The second public hearing, held on August 20, 2009, drew over fifty community members, all of whom "testified in favor of a five-year requirement for ending injection wells on Maui and increased treatment of pathogens and removal of nutrients in the interim."[120] Charmaine Tavares, the Mayor of Maui at the time, also testified indicating that she supported ending all injection well use on the island and moving to 100 percent wastewater reuse; however, Mayor Tavares did qualify her statements by indicating that the

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[112] *See* Patricia Tummons, *Reports Show Maui County Sewage Plants Are Polluting Waters at Popular Beaches*, ENV'T HAW., May 2010, at 1, 4–8, https://www.environment-hawaii.org/?p=1063.

[113] *Id.*

[114] *About: DIRE Coalition,* DIRE, https://dontinject.wordpress.com/about-2/ (last visited Oct. 2, 2021). DIRE stands for "Don't Inject, Redirect." The DIRE Coalition advocates for reclaiming and using Maui's "treated wastewater for irrigation, stream restoration, green belts and fire prevention, rather than injecting it into wells where it migrates to the ocean, promotes algae growth, and suffocates [Maui] reefs." *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

County would likely be slower at making those changes than DIRE and community members may like.[121]

As a result of concerns over declining reef health and mismanagement of nearshore resources in the area, a Makai Watch program[122] in Ka'anapali was established in 2010 to support the Kahekili Herbivore Fisheries Management Area (KHFMA). This community volunteer program is jointly coordinated by Project S.E.A.-Link[123] and the Hawai'i Division of Aquatic Resources (DAR).[124] "Efforts focus on outreach and education in support of KHFMA in order to promote voluntary compliance with its rules and regulations."[125] Additionally, the Makai Watch program acts to support the Division of Conservation and Resource Enforcement (DOCARE) through observation and incident reporting, citizen science within the KHFMA, and "general outreach and education efforts which promote fisheries and watershed stewardship by all stakeholders."[126]

Judge Mollway's decision to consider an eighth factor speaks directly to the community's concerns for protecting Maui's coral reefs, ocean, and scarce water resources because of their deep care for the 'āina. U'ilani Tanigawa Lum, a Maui resident, attorney, and Native Hawaiian cultural practitioner, encapsulated this sentiment when she said, "We did not get in this fight to win lawsuits; we got in it to save reefs, to protect this precious resource, and to advocate for wastewater reuse solutions that will ultimately save taxpayers money in the long run."[127] Echoing Tanigawa Lum and other community members' concerns, Earthjustice attorney David Henkin also highlighted the critically important social implications of this case, stating:

> Communities across this country are fighting to protect their rivers, lakes, and oceans from pollution via groundwater, from Hawai'i to New York, and from Alabama to Montana. . . . As the first court to apply the Supreme Court's test, the Hawai'i federal court's ruling is a victory for clean water, for justice, and for common sense.[128]

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[121] *Id.*

[122] *See Makai Watch*, DEP'T OF LAND AND NAT. RES., https://dlnr.hawaii.gov/makaiwatch/ (last visited Oct. 2, 2021).

[123] Project S.E.A.-Link is a 501I(3) non-profit organization based on Maui, Hawai'i. *Who We Are*, PROJECT S.E.A–LINK, https://projectsealink.org/who-we-are.html (last visited Oct. 2, 2021).

[124] *Makai Watch: MW Sites*, DEP'T OF LAND AND NAT. RES., https://dlnr.hawaii.gov/makaiwatch/mw-sites/ (last visited Jan. 11, 2022).

[125] *Id.*

[126] *Id.*

[127] U'ilani Tanigawa Lum, *County Needs to Stop Denying the Injection Wells Problem and Fix It,* THE MAUI NEWS (June 19, 2020) https://www.mauinews.com/opinion/columns/2020/06/county-needs-to-stop-denying-the-injection-wells-problem-and-fix-it/.

[128] Nick Grube, *Maui County Loses Again In Federal Court Over Pollution Discharges*,

Even though this case has been litigated up to the highest court, and back down, Maui politicians and their constituents still fear future legal battles. While urging Maui Mayor Michael P. Victorino not to appeal Judge Mollway's decision, Maui Councilmember Kelly Takaya King warned that Judge Mollway's ruling serves as a "final wake up call."[129] Councilmember Takaya King iterated that "[t]he main message from this case is that we hope we can learn from this experience for the future" and that "we shouldn't waste precious time and resources fighting with our own residents who have legitimate concerns about the environment."[130]

### *C. Kahekili Beach and the Environmental Impacts of Wastewater Dumping*

Another outcome of Judge Mollway's decision can be seen by its influences on Maui's reef ecosystems. Although a fringing reef surrounds much of the island, most of the "live coral growth can only be found on the leeward west coast where the reef is protected from waves by the surrounding islands."[131] West Maui's nearshore areas and those below the high water mark are "a natural resource owned by the state subject to, but in some sense in trust for, the enjoyment of certain public rights."[132] "Over the past two decades, there has been a notable change in seafloor-bottom type [corals along west-central Maui.] Once dominated by abundant coral coverage, the area is now characterized by an increased abundance of turf algae and macroalgae."[133]

The degradation of coastal habitats, particularly coral reefs, raises risks by increasing the exposure of coastal communities, like those in west Maui, to flooding hazards.[134] The decline in the health of these coral reefs over the

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HONOLULU CIVIL BEAT (July 16, 2021), https://www.civilbeat.org/2021/07/maui-county-loses-again-in-federal-court-over-pollution-discharges/.

[129] *Hawai'i Federal Court Decides Maui's Lahaina Facility Requires Clean Water Act Permit*, MAUINOW (July 16, 2021), https://mauinow.com/2021/07/16/hawaii-federal-court-decides-mauis-lahaina-facility-requires-clean-water-act-permit/.

[130] *Id.*

[131] *Coast Reef Project: Maui*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/centers/pcmsc/science/coral-reef-project-maui?qt-science_center_objects=0#qt-science_center_objects (last visited Oct. 2, 2021).

[132] Lance D. Collins, *Segmentation and Seawalls: Environmental Review of Hawaii's Coastal Highways in the Era of the Anthropocene*, 20 HAW. BAR J. 89, 126 (2016) (citing In re Water Use Permit Applications (*Waiahole I*), 94 Hawai'i 97, 128, 9 P.3d 409, 440 (2000)).

[133] *Coast Reef Project: Maui*, *supra* note 131.

[134] CURT D. STORLAZZI ET AL., RIGOROUSLY VALUING THE ROLE OF U.S. CORAL REEFS IN COASTAL HAZARD RISK REDUCTION (2017), https://pubs.er.usgs.gov/publication/70188998

past several decades has been "slow but persistent."[135] "The shallow coral reefs off [of Kahekili Beach] are exposed to nutrient-enriched, low-pH submarine groundwater discharge (SGD) and are particularly vulnerable to the compounding stressors from land-based sources of pollution and lower seawater pH."[136] "Areas of discrete coral cover loss up to 100 % along [Kahekili] have been observed for decades."[137] "The shift in benthic cover from abundant corals to [turf or seaweed] and increased rates of coral bioerosion has been linked to the input of nutrient-rich water via wastewater injection wells."[138]

There is immense "scientific evidence of the negative impacts that the wastewater injected into the ground at the [LWRF] has had and is having on the adjacent coral reef."[139] Research conducted by dozens of scientists with over fifty years of combined in-person work on the coral reefs of Kahekili Beach Park has shown that the wastewater effluent is entering the ocean where people swim and the reef is degrading because of it.[140] More specifically, data from the Division of Aquatic Resources and the University of Hawai'i have shown significant declines in overall coral abundance and health over the past twenty years.[141]

"The water coming out of the seeps at Kahekili is warm, acidic, high in nutrients, and lacking oxygen."[142] Any one of these elements alone is dangerous to the health of corals, so the combined impact of them together

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[135] MICHAEL E. FIELD ET AL., THE MAJOR CORAL REEFS ON MAUI NUI, HAWAII–DISTRIBUTION, PHYSICAL CHARACTERISTICS, OCEANOGRAPHIC CONTROLS, AND ENVIRONMENTAL THREATS 1 (2019), https://doi.org/10.3133/ofr20191019.

[136] Nancy G. Prouty et al., *Carbonate System Parameters of an Algal-Dominated Reef Along West Maui*, 15 BIOGEOSCIENCES 2467 (Apr. 23, 2018), https://bg.copernicus.org/articles/15/2467/2018/.

[137] *Id.*

[138] *Id.* at 3.

[139] Emily Kelly et al., Letters to the Editor, *Wastewater Detrimental to Coral Reefs off Kahekili*, THE MAUI NEWS (Aug. 31, 2019), https://www.mauinews.com/opinion/letters-to-the-editor/2019/08/wastewater-detrimental-to-coral-reefs-off-kahekili. The authors of this article are scientists involved in studies of the effects of injection wells on coral reef health. *Id.* The letter summarizes research performed individually by the Division of Aquatic Resources, University of Hawaii, the U.S. Geological Survey, and the University of California, Santa Cruz. *See id.*

[140] *See* Joseph Murray et al., *Coral Skeleton δ15N as a Tracer of Historic Nutrient Loading to a Coral Reef in Maui, Hawaii*, 9 NATURE 2 (2019); Univ. of Cal., Santa Cruz, *Coral Study Traces Excess Nitrogen to Maui Wastewater Treatment Facility*, SCI. DAILY (Apr. 3, 2019), https://www.sciencedaily.com/releases/2019/04/190403095516.htm; DIV. OF AQUATIC RES., DEP'T OF LAND & NAT. RES., STATE OF HAWAI'I, STATUS AND TRENDS OF MAUI'S CORAL REEFS Div. of Aquatic Res. (2014), https://dlnr.hawaii.gov/coralreefs/files/2014/12/Status_and_Trends_of_Mauis_Coral_Reefs.pdf [hereinafter DAR Status Report].

[141] DAR Status Report, *supra* note 141, at 1.

[142] Kelly et al., *supra* note 139.

is especially alarming.[143] "At Kahekili, dead coral occurs in distinct patches that are nicknamed 'dead zones.'"[144] Dead zones are found across the reef in depths ranging from five to forty feet, and ranging in size from fifteen to forty-five feet in diameter.[145] The "dead zones contain heavily eroded dead coral skeletons overgrown by turf algae."[146] "Erosion and algal growth like this are consistent with the effects of excessive nutrient input."[147]

Further research by the U.S. Geological Survey found that corals in the area affected by seep water, which contains 50 times as much nitrate (a nutrient found in sewage) as surrounding ocean water, suffered increased erosion from sponges, worms and urchins. A follow-up study also demonstrated that high nutrient levels caused the corals' skeletons to dissolve and lose strength. New research led by the University of California, Santa Cruz discovered the sewage nutrient fingerprint in coral skeletons, dating back to 1995 when the county began biological nutrient removal.[148]

In summary, "decades of rigorous scientific research has improved [necessary] understanding of the impacts of wastewater upon the coral reef ecosystem."[149] There are many factors affecting coral reef health, all of which must be dealt with to halt the reef's further decline.[150] Judge Mollway's consideration of raw volume of wastewater discharge[151] allows for a more robust analysis that can contemplate the effects of wastewater effluent in the ways described above, a critical opportunity for protecting coral reefs in the future.

### *D. Political Alliances Undergirding the Case*

Lastly, the magnitude of Judge Mollway's opinion can be especially felt in light of contemporaneous political enterprises. In an unexpected alliance, Maui County found an ally in President Donald Trump whose administration has seemingly made reversing decades of environmental regulation one of its top priorities.[152] The administration joined the case and latched on to Maui

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143 *Id.*

144 *Id.* (emphasis omitted).

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *See* Haw. Wildlife Fund v. Cnty. of Maui, No. 12-00198, 2021 WL 3160428, at *46–47 (D. Haw. July 26, 2021) (amended order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment).

152 *See* Nadja Popovic et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, THE NEW YORK TIMES (Jan. 20, 2021),

County's argument that it did not need an NPDES permit because it was not discharging waste *directly* into the ocean, but instead mixing it with groundwater that then percolated out to sea.[153] This "who touched it last" theory also rallied fossil fuel companies and other major industry polluters, several of which wrote legal briefs in support of Maui County and the administration.[154] "Among those backing Maui County were the American Petroleum Institute, the National Mining Association and Energy Transfer Partners, the company behind the Dakota Access Pipeline project that spurred months-long protests at the Standing Rock Sioux reservation in North Dakota."[155] Stephen Wermiel, a U.S. Supreme Court expert and professor of constitutional law at American University commented that "the fact that so many special interests are jumping into the case with friend-of-the-court legal briefs highlights just how significant the argument is before the justices."[156]

Thus, the U.S. Supreme Court decision was a strong rebuke of Maui County, the Trump administration, and major industry polluters.[157] Despite the Trump administration's efforts to remove any type of permit requirements for groundwater injection sites, the U.S. Supreme Court allowed trial judges to tailor the factor test to suit the unique circumstances of each case.[158] Specifically, the Court's permissive language gave Judge Mollway the authority to consider the volume of discharge in her decision,

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https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html; Cayli Baker, *The Trump Administration's Major Environmental Deregulations*, BROOKINGS (Dec. 15, 2020), https://www.brookings.edu/blog/up-front/2020/12/15/the-trump-administrations-major-environmental-deregulations/.

153 *See* Nick Grube, *US Supreme Court Rules Against Maui in Major Clean Water Case*, HONOLULU CIVIL BEAT (Apr. 23, 2020), https://www.civilbeat.org/2020/04/us-supreme-court-rules-against-maui-in-major-clean-water-case/.

154 *See* Brief for Electric Edison Institute et al. as Amici Curiae Supporting Petitioners, Cnty. of Maui v. Haw. Wildlife Fund, 140 S.Ct. 1462 (2020) (No. 18-260); Brief for Kinder Morgan Energy Partners, L.P. and Plantation Pipe Line Company, Inc. as Amici Curiae Supporting Petitioners, Cnty. of Maui v. Haw. Wildlife Fund, 140 S.Ct. 1462 (2020) (No. 18-260); Brief for Agric. Bus. Orgs. as Amici Curiae Supporting Petitioners, Cnty. of Maui v. Haw. Wildlife Fund, 140 S.Ct. 1462 (2020) (No. 18-260).

155 Grube, *supra* note 153.

156 Nick Grube, *The Stakes are High as Maui Wastewater Case Heads to US Supreme Court*, HONOLULU CIVIL BEAT (Nov. 5, 2019), https://www.civilbeat.org/2019/11/the-stakes-are-high-as-maui-wastewater-case-heads-to-us-supreme-court/.

157 *See* Adam Liptak, *Clean Water Act Covers Groundwater Discharges, Supreme Court Rules*, THE NEW YORK TIMES (Apr. 23, 2020), https://www.nytimes.com/2020/04/23/us/supreme-court-clean-water-act-hawaii.html; *SCOTUS Clean Water Act Test 'Devasting' for Industry*, BLOOMBERG LAW (Apr. 23, 2020), https://news.bloomberglaw.com/environment-and-energy/supreme-courts-clean-water-act-test-devastating-for-industry.

158 *See* Cnty. of Maui v. Haw. Wildlife Fund, 140 S.Ct. 1462, 1476–77 (2020).

which, while not binding, can serve as strong support and motivation for other courts to review and consider additional factors relevant to their analyses. Even more surprisingly, Judge Mollway included the factor *after* she already found that four of the seven factors weighed in favor of requiring an NPDES permit.[159] This may suggest that judges can contemplate relevant factors even after they determine that the summary judgement standard has been met. Moving forward, future cases filed by other environmentalist groups against wastewater plants and oil processing companies related to their water discharge will need to be re-evaluated in light of the latitude afforded to district courts by the U.S. Supreme Court.

## CONCLUSION

Justice Breyer noted that the seven exemplary factors articulated by the U.S. Supreme Court were not the only guideposts that should be considered. Foreshadowing Judge Mollway's 2021 U.S. District Court decision on remand from the U.S. Supreme Court, Justice Breyer stated that "courts can provide guidance through decisions in individual cases" and "the traditional common-law method . . . provide[s] examples that [then] lead to more refined principles."[160] This permissive language from Justice Breyer's majority opinion effectively afforded lower courts leeway to consider additional factors that may be relevant on a case-by-case basis. Judge Mollway, wielding this permissive language, considered an eighth factor—the raw volume of wastewater discharged. A cursory review of Judge Mollway's Order diminishes its wide impact. Deploying contextual analysis allows for a deeper reading into her decision's real impacts on Maui's communities, environment, and strategies for future plaintiffs. *Maui County* serves as a compelling example of how courts not only adjudicate legal disputes, but also possess the power to transform specific legal challenges into larger public messages about the necessity of clean water for all.[161]

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[159] *See* Haw. Wildlife Fund v. Cnty. of Maui, No. 12-00198, 2021 WL 3160428, at 46–48 (D. Haw. July 26, 2021) (amended order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment).

[160] *Hawai'i Wildlife Fund*, 140 S.Ct. at 1477.

[161] *Cf.* Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 19–21 (1994) (discussing the "dispute transformation theory" and noting that "courts in important instances not only decide disputes, they also transform particular legal controversies and rights claims into larger public messages.").