



Hawai'i

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

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

Re: *ACLU of Hawai'i Comments on Informal Draft of Proposed Rules*

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

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

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

#### Traditional and Customary Practices

The University of Hawai'i ("UH") received critical testimony during its September 2018 hearing on Section 20-26-21 of its previous draft, which addressed access to Mauna Kea for traditional and customary practices. In the current draft, this section has been removed entirely. Article XII Section 7 of the Hawai'i State Constitution provides:

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The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

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

#### Group Registration Requirements

ACLU of Hawai‘i has serious concerns regarding the requirement that groups of ten members or more register with the president of UH at least fifteen calendar days in advance of accessing the UH management area of Mauna Kea, pursuant to §20-26-62. If applied to groups seeking to access Mauna Kea to engage in activity protected by the First Amendment of the U.S. Constitution and Article I Section 4 of the Hawai‘i State Constitution, this provision could be subject to constitutional challenge.

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

This provision also requires groups of ten members or more to obtain insurance and to indemnify UH against liability before registering with UH, in violation of the First Amendment of the U.S. Constitution when applied to those engaged in political speech or other expressive activity. While §20-26-62(b)(6) requires insurance “[d]epending on the potential impact to natural, cultural, archeological, historic, or scientific resources,” in practice, this would apply to all

groups because there is no guidance on when insurance would or would not be required. First amendment activity, therefore, would seemingly be included in this requirement. The blanket requirement that groups obtain insurance may be constitutionally invalid.<sup>1</sup> Further, “indemnification of the university” is overly broad. This indemnification provision is likely impermissible under both the state and federal constitutions.<sup>2</sup>

#### Imposition of fines for violation

Section 20-26-22 (3) prohibits “[e]ntering and remaining within any portion of the UH management areas developed or used by the university for educational or research purposes, after being asked to leave the area by an authorized agent or law enforcement officer.” The fine for a first violation of this provision is \$2,500. This fine is overly punitive, especially if the underlying citation that gave a law enforcement officer cause to remove an individual is invalid.

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<sup>1</sup> See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1207-09 (7th Cir. 1978); *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1029-30 (C.D. Cal. 2002); *Courtemanche v. General Services Admin.*, 172 F. Supp. 2d 251, 268 (D. Mass. 2001); *Invisible Empire v. Mayor*, 700 F. Supp. 281, 285 (D. Md. 1988).

<sup>2</sup> The ACLU of Hawai‘i filed a lawsuit challenging a similar insurance and indemnification requirements for demonstrators at the Hawai‘i State Capitol, which resulted in a settlement providing that demonstrators would no longer be required to indemnify the State or obtain insurance if they could not afford it. See Stipulation for Dismissal and Proposed Order, *American Civil Liberties Union of Hawaii v. Seki*, Civil No. 14-00150 JMS/RLP, (D. Haw. Sept. 5, 2014), ECF No. 17, available at <https://acluhawaii.files.wordpress.com/2014/09/17-stipulation-to-dismiss-with-prejudice-and-order.pdf>; see also *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011 (9th Cir. 2008).