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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

THE OFFICE OF HAWAIIAN AFFAIRS,

Plaintiff,

vs.

STATE OF HAWAI'I; DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES; DAWN N.S. CHANG, CHAIRPERSON, DEPARTMENT OF LAND AND NATURAL RESOURCES; THE UNIVERSITY OF HAWAI'I; DAVID K. LASSNER, PRESIDENT, UNIVERSITY OF HAWAI'I; MAUNA KEA STEWARDSHIP AND OVERSIGHT AUTHORITY; JOHN KOMEIJI, CHAIRPERSON, MAUNA KEA STEWARDSHIP AND OVERSIGHT AUTHORITY; DOE ENTITIES 1-20,

Defendants.

CIVIL NO. 1CCV-24-0000082
(Declaratory Judgment)

MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF ROBERT G. KLEIN; EXHIBITS "1" – "19"; CERTIFICATE OF SERVICE

Hearing Motion:
Judge: Honorable Shirley M. Kawamura
Date: May 21, 2024
Time: 10:00 a.m.

Trial Date: None

PLAINTIFF THE OFFICE OF HAWAIIAN AFFAIRS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff THE OFFICE OF HAWAIIAN AFFAIRS ("**OHA**"), by and through its attorneys, Klein Law Group LLLC, hereby moves this court ("**Court**") for partial summary judgment on their Complaint for Declaratory Judgment and Injunctive Relief, filed on January 17, 2024 ("**Complaint**") against Defendants the STATE OF HAWAI'I ("**State**"), the DEPARTMENT OF LAND AND NATURAL RESOURCES ("**DLNR**"), the BOARD OF LAND AND NATURAL RESOURCES ("**BLNR**"), DAWN N.S. CHANG ("**Ms. Chang**"), in her official capacity as Chairperson of the BLNR, the UNIVERSITY OF HAWAI'I ("**UH**"), DAVID K. LASSNER ("**Mr. Lassner**"), in his official capacity as President of UH, the MAUNA KEA STEWARDSHIP AND OVERSIGHT AUTHORITY ("**Authority**"), JOHN KOMEIJI ("**Mr. Komeiji**"), in his official capacity as Chairperson of the Authority, and DOE ENTITIES 1-20 ("**Motion**").

Specifically, OHA respectfully requests that this Court declare that Act 255, the legislation that created the Authority, is unconstitutional on its face because it violates the Contract Clause of the Federal Constitution. OHA further requests that this Court, after so declaring, thereafter enjoin the Authority from engaging in any further activity purportedly authorized under Act 255.

This Motion is brought pursuant to Rules 7 and 56 of the Hawai'i Rules of Civil Procedure and Rules 7.1 and 7.2 of the Rules of the Circuit Courts of the State of Hawai'i. This Motion is supported by the legal memorandum, declaration of counsel, and exhibits attached hereto, along with the records and files herein, and any additional argument by counsel at the hearing on this Motion.

DATED: Honolulu, Hawai'i, March 25, 2024.

/s/ *Robert G. Klein*

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THE OFFICE OF HAWAIIAN AFFAIRS

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Act 255 is unconstitutional on its face because it violates the Contract Clause of the United States Constitution. The issues for determination are: (1) whether Act 255 operates as a substantial impairment of the State Lease between the State, through its BLNR and DLNR, and UH; (2) whether Act 255 is an exercise of the State's police power in furtherance of a broad public purpose or legislation designed to benefit a special interest; and (3) whether Act 255 is a reasonable and narrowly drawn means of promoting a significant and broad public purpose.

As demonstrated below, Act 255 does not just substantially impair the State Lease between BLNR and UH, it literally destroys it.[1] Pursuant to both Hawaiʻi and United States Supreme Court ("**USSC**") caselaw interpreting the Contract Clause, Act 255 legally cannot be seen as an exercise of the State's police power that is designed to promote a broad public purpose. Rather, Act 255 is legislation that substantially impairs an existing contract in order to promote the special interests of UH, as lessee and sublessor, and UH's sublessee observatories. Nor can it be said that Act 255 is by any measure a reasonable and narrowly drawn means of achieving the State's purposes. Act 255 does not and cannot withstand constitutional scrutiny.

II. BACKGROUND: the Contract Clause, ACT 255, and the State Lease

The Contract Clause reads as follows: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." *U.S. Const. art. 1 § 10*.[2]

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[1] In so doing, Act 255 also violates the State's constitutional duties regarding the ceded lands trust.

[2] As to the meaning of "the obligation of contracts", the USSC has held as follows:

> The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement. This Court has said that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a prt [sic] of it, as if they were expressly referred to or incorporated in its terms. This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached.

United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17 (1977) (internal quotation marks and citations omitted). Here, there is no doubt that since attaining statehood in 1959, the fundamental law of the State of Hawaiʻi is that the State and its agencies are strictly bound by their fiduciary duties as trustees of the ceded lands trust, including those lands atop Mauna Kea that are the subject

Act 255, Part II, Section 7 reads in its entirety as follows:

> (a) On July 1, 2028, all rights, powers, functions, and duties of the University of Hawaii relating to the powers and responsibilities granted to the Mauna Kea stewardship and oversight authority under part I of this Act are transferred to the Mauna Kea stewardship and oversight authority.
>
> (b) Notwithstanding the transfer of all rights, powers, functions, and duties pursuant to subsection (a), **the state lease by and between the board of land and natural resources and the University of Hawaii** entered into on June 21, 1968, as General Lease S-4191, as amended on September 21, 1999, as General Lease S-5529, **shall remain in full force and effect until its expiration unless otherwise specifically amended pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii**.
>
> (c) Upon the assignment of all rights, powers, and duties of the University of Hawaii to the Mauna Kea stewardship and oversight authority pursuant to subsection (a), **the University of Hawaii shall be released from any and all obligations under the state lease by and between the board of land and natural resources and the University of Hawaii** entered into on June 21, 1968, as General Lease S-4191, as amended on September 21, 1999, as General Lease S-5529, and any conservation district use application permits appertaining thereto, **unless otherwise specifically agreed upon pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii**; provided that the transfer and release authorized under this subsection shall not apply to any litigation pending on June 30, 2028, relating to General Lease S-4191, as amended on September 21, 1999, as General Lease S-5529, or any conservation district use application permit appertaining thereto, to which the University of Hawaii is a party.
>
> (d) Notwithstanding subsection (b) or any action that is a consequence of this Act, including a merger of interests, effective July 1, 2028, **every reference to the department of land and natural resources, board of land and natural resources, or the chairperson of the board of land and natural resources in those deeds, leases, subleases, contracts, loans, agreements, permits, or other documents relating to Mauna Kea lands shall be construed as a reference to the Mauna Kea stewardship and oversight authority or the chairperson of the authority**, as appropriate; **provided that all** deeds, **leases, subleases**, contracts, loans, agreements, permits, or other documents executed or **entered into prior to the effective date of this Act, by or on behalf of the department of land and natural**

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of the State Lease. *Cf. Anthony v. Kualoa Ranch*, 69 Haw. 112, 119, 736 P.2d 55, 60 (1987) ("***Kualoa Ranch***") (Wherein the Hawaiʻi Supreme Court, in its Contract Clause analysis of a new statute's effect on an existing lease, found it necessary to ascertain the law at the time the lease was executed: "The law of Hawaii in 1953, when the lease was executed, was that a house built upon premises owned by another became a fixture and part of the realty.").

> **resources or the board of land and natural resources** pursuant to the Hawaii Revised Statutes that are reenacted or made applicable to the Mauna Kea stewardship and oversight authority by this Act, **shall remain in full force and effect until its expiration unless otherwise specifically amended pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii**.

(emphasis added).

The leases referred to in Act 255 by and between the State, through BLNR, and UH, are General Lease S-4191, entered into on June 21, 1968, and expiring on December 31, 2033, and General Lease S-5529, entered into on September 21, 1999, and expiring on February 27, 2041. *See* Exhibits ("**Exhs.**") "1" and "2"; Declaration of Robert G. Klein ("**Klein Decl.**") ¶ 4. General Leases S-4191 and S-5529 are referred to herein collectively, as they are in Act 255, as the "**State Lease**". Act 255 also references "subleases". *See supra*. UH, as sublessor, has entered into numerous subleases with various astronomical observatories as sublessees. The various subleases all expire on December 31, 2033. *See* Exhs. "3"-"10", "12", "14", "16" and "18"; Klein Decl. ¶ 4.

As is clear from even a cursory reading, Act 255 violates the Contract Clause because, at the very least: (1) it literally destroys the State Lease between BLNR and UH; (2) it literally grants UH *carte blanche* in that UH can violate the State Lease at will, and the State Lease "shall remain in full force and effect until its expiration unless otherwise specifically amended pursuant to an agreement by [the Authority] *and the University of Hawaii*"; (3) it literally eviscerates any and all authority that BLNR has to enforce any breaches of the State Lease by UH because "the state lease by and between the board of land and natural resources and the University of Hawaii . . . shall remain in full force and effect until its expiration unless otherwise specifically amended pursuant to an agreement by [the Authority] and the University of Hawaii"; (4) it gives the Authority, who is not a party to the State Lease, the power to amend the State Lease; (5) although the State Lease between BLNR and UH expires on December 31, 2033, as do the subleases, it *literally* releases UH from any and all obligations under the State Lease: "**the University of Hawaii shall be released from any and all obligations under the state lease** by and between the board of land and natural resources and the University of Hawaii . . . unless otherwise specifically agreed upon pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii"; (6) it therefore also releases UH from any and all obligations it has *as sublessor* of the various observatories, which includes releasing UH from its obligations to monitor its sublessees' use of the land and enforce any violations by its sublessees; (7) it literally deprives

BLNR of any rights it has under the State Lease by releasing UH from all obligations; (8) it immunizes any and all of UH's sublessees from liability for violating their subleases with UH; and (9) it literally mandates the re-writing of the State Lease and every sublease by requiring that "effective July 1, 2028, every reference to the department of land and natural resources, board of land and natural resources, or the chairperson of the board of land and natural resources in those . . . leases [and] subleases . . . relating to Mauna Kea lands shall be construed as a reference to the Mauna Kea stewardship and oversight authority or the chairperson of the authority".

Moreover, by granting UH *carte blanche* and by destroying BLNR's ability to enforce any breaches of the State Lease and, therefore, of UH's subleases as well, Act 255 is also in clear derogation of all constitutional and common law principles relating to the State's fiduciary duties as trustee of the ceded lands trust. See *Ching v. Case*, 145 Hawai'i 148, 152, 449 P.3d 1146, 1150 (2019): "We hold that an essential component of the State's duty to protect and preserve trust land is an obligation to reasonably monitor a third party's use of the property, and that this duty exists independent of whether the third party has in fact violated the terms of any agreement governing its use of the land."

When analyzed in depth and according to the applicable case law, the unconstitutionality of Act 255 becomes even more obvious.

III. LEGAL STANDARD

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Stallard v. Consol. Maui, Inc.*, 103 Hawai'i 468, 472-73, 83 P.3d 731, 735-36 (2004).

IV. ARGUMENT

"It has long been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977) (citing *Fletcher v. Peck*, 6 Cranch 87, 137-39 (1810); *Darthmouth College v. Woodward*, 4 Wheat 518 (1819)). See also *Exxon Corp v. Eagerton*, 462 U.S. 176, 192 n.13 (1983) ("The statutes under review in *United States Trust Co.* also implicated the special concerns associated with a State's impairment of its own contractual obligations.") (underscore added).

Here, the State Lease is between the State, through BLNR, and UH. Although the subleases are between UH and the various observatories, every sublease required the approval of BLNR. *See* Exh. "1" at 4 ¶ 5 ("The Lessee [UH] shall not sublease, sub-rent, assign or transfer this lease or any rights thereunder without the prior written approval of the Board of Land and Natural Resources") and Exh. "2" at 4 ¶ 12 ("The Lessee [UH] shall not sublease, subrent, transfer, assign, or permit any other person to occupy or use the premises or any portion or transfer or assign this lease or any interest therein, either voluntarily or by operation of law, without the prior written approval of the [BLNR]"); *see also* Exhs. "11", "13", "15", "17", "19"; Klein Decl. ¶ 4. That the State through BLNR is a party to the State Lease, and that the State through BLNR was required to approve each of UH's subleases is, as indicated *supra*, extremely significant in the following Contract Clause three-step analysis.

A. <u>The Contract Clause Three-Step</u>

"Whether a regulation violates the Contract Clause is governed by a three-step inquiry." *HRPT Properties Trust v. Lingle*, 715 F. Supp. 2d 1115, 1135 (D. Hawai'i 2010) ("***HRPT Properties***"):

> [**1**] The first inquiry concerns whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. This threshold inquiry itself has three components, the first being whether there is a contractual relationship. This component goes not just to whether there is any contractual relationship between the parties, but to whether there is a contractual agreement regarding the specific terms allegedly at issue. [**2**] The second component looks at whether a change in the law impairs that contractual relationship. [**3**] The third component concerns whether the impairment is substantial.
>
> If this three-component threshold inquiry results in a finding that a law has substantially impaired a contractual relationship, a court must address the second inquiry, which concerns whether the State, in justification, has a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. The final inquiry concerns whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. If a state is not a party to the contract, a court employs less scrutiny in addressing the third inquiry.

Id. at 1135-36 (internal quotation marks and citations omitted, numbering added) (citing *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1152 (9th Cir. 2004)). However, "**<u>[c]ourts defer to a</u>**

lesser degree when the State is a party to the contract because the State's self-interest is at stake." *RUI One Corp. v. City of Berkeley*, 371 F.3d at 1147 (internal quotation marks and citation omitted, emphasis added). "Courts [] apply a decreased deference for self-interested government acts only upon reaching the third component of the Contract Clause analysis – the inquiry into the government's legislative judgment that the ordinance is reasonable and of appropriate character." *Id.* at 1152 (citation omitted). Each inquiry and component are addressed *seriatim*.[3]

B. Inquiry 1: substantial impairment of a contractual relationship

***i.* Component 1: contractual relationship**

The State Lease is between the State, through BLNR, and UH. *See* Exh. "1" at 1 ("THIS INDENTURE OF LEASE, made this 21st day of June 1968 by and between the STATE OF HAWAII, by its Board of Land and Natural Resources . . . and the UNIVERSITY OF HAWAII . . . ") (caps in original). There is obviously a contractual relationship between the State and UH. The State Lease's "specified use" is as follows: "The land hereby leased shall be used by the Lessee as a scientific complex, including without limitation thereof an observatory . . .[.]" *See id.* at 3 ¶ 4. *Act 255, Part II, Section 7(b)* specifically refers to the State Lease: "**the state lease by and between the board of land and natural resources and the University of Hawaii** entered into on June 21, 1968, as General Lease S-4191, as amended on September 21, 1999, as General Lease S-5529, **shall remain in full force and effect until its expiration unless otherwise specifically amended pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii**." (emphasis added). The first component of Inquiry 1 is clearly satisfied.

[3] There does not appear to be a very large amount of case law in Hawaiʻi on the Contract Clause. The leading Hawaiʻi cases are: *Anthony v. Kualoa Ranch*, 69 Haw. 112, 736 P.2d 55 (1987); *In re Herrick*, 82 Hawaiʻi 329, 922 P.2d 942 (1996); and from the United States District Court of Hawaiʻi, *HRPT Properties Trust v. Lingle*, 715 F. Supp. 2d 1115 (D. Hawaiʻi 2010). It is of note that in *Kualoa Ranch*, the Hawaiʻi Supreme Court looked for Contract Clause guidance from four USSC cases. "The parties have cited to us four cases of relatively recent vintage, decided by the Supreme Court of the United States, dealing with the contracts clause." *Kualoa Ranch* at 118, 60. Those cases are: *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (***United States Trust***"); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) ("***Allied Structural Steel***"); *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) ("***Energy Reserves Group***"); and *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) ("***Exxon***"). Though their vintage has aged, these four cases remain good law and are central to Hawaiʻi's Contract Clause jurisprudence.

***ii.* <u>Component 2: impaired contractual relationship</u>**

"The second component looks at whether a change in the law impairs that contractual relationship." *HRPT Properties* at 1135. <u>*Act 255, Part II, Section 7(c)*</u> completely releases UH from its obligations under the State Lease: "**<u>the University of Hawaii shall be released from any and all obligations under the state lease</u>** by and between the board of land and natural resources and the University of Hawaii entered into on June 21, 1968, as General Lease S-4191, as amended on September 21, 1999, as General Lease S-5529, and any conservation district use application permits appertaining thereto, **<u>unless otherwise specifically agreed upon pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii</u>**[.]" (emphasis added). Those obligations from which UH is released are specifically provided for in the State Lease. *See* Exh. "1" at 3-5 ¶¶ 1-13. As previously noted, *one* of those obligations is that "[t]he Lessee shall not sublease, sub-rent, assign or transfer this lease or any rights thereunder without the prior written approval of the Board of Land and Natural Resources." <u>*See*</u> *id.* at 4 ¶ 5. That Act 255 impairs the State Lease is obvious, and the second component of Inquiry 1 is clearly satisfied.

***iii.* <u>Component 3: substantial impairment</u>**

"The third component concerns whether the impairment is substantial." *HRPT Properties* at 1135. "[I]if a law completely destroys contractual expectations, a severe impairment exists". *Id.* at 1136 (citing *Energy Reserves Group* at 411 for the rule that "a severe impairment exists when state regulation defeats the expectations of the parties under their contracts").

Here, Act 255 does not just impair the State Lease. Act 255 utterly destroys the State Lease. Act 255 renders UH omnipotent. Act 255 renders BLNR a non-player in its own contract. Act 255 requires that the State Lease will remain in place *no matter what*. Act 255 makes it impossible for UH to breach the State Lease. Act 255 therefore also renders it impossible for the various sublessees to breach the subleases. Act 255 absolves DLNR and UH of their duties as trustees of the ceded lands. Act 255 absolves UH of its duty to monitor its sublessees. Act 255 confers upon the newly created Authority, which is not a party to the State Lease, the power to amend the State Lease. To say that Act 255 does not substantially impair the contract is absurd. <u>*See*</u> *Kualoa Ranch* at 119, 60 ("To say that this is not a substantial impairment of appellants' contractual rights is absurd").

Arguably, the analysis can stop here, as the *Kualoa Ranch* Court made it clear that "[a] State could not adopt as its policy the repudiation of debts or the destruction of contracts or the denial of the means to enforce them." *Kualoa Ranch* at 123, 62-63 (quoting *United States Trust* at 22; underscore added). Here, "the destruction of contracts" and "the denial of the means to enforce them" *is precisely what Act 255 does*.

In any event, "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear[]", *Allied Structural Steel* at 245, "[t]he severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected[]", *Energy Reserves Group* at 411, and the analysis continues. The State's hurdle, however, is insurmountable.

C. **Inquiry 2: an exercise of "police power for a broad public purpose" or "legislation to benefit special interests"?**

"Under the four cases cited [*United States Trust*, *Allied Structural Steel*, *Energy Reserves Group*, and *Exxon*], we must then next consider what public policy under the police power was sought to be furthered by [Act 255]." *Kualoa Ranch* at 120, 60.[4]

Here, in this second step, it becomes even more clear that Act 255 cannot survive. As the *HRPT Properties* Court observed: "Because [the legislation] substantially impairs preexisting contractual rights, [the legislation] cannot survive absent a significant and legitimate public purpose. **It must protect a "broad societal interest rather than a narrow class" to ensure that the state is exercising its police power rather than benefiting a special interest**." 715 F. Supp

[4] The specific question posed by the *Kualoa Ranch* Court with regard to Inquiry 2 is as follows: "Thus, the question posed is whether, in the exercise of police power, the State can, simply in order to do what it regards as equity, enact a statute which specifically changes an agreed upon, and material provision, in existing leases to the detriment of one party and the advantage of the other." Citing to *Allied Structural Steel*, the *Kualoa Ranch* Court continued as follows: "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of the State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Kualoa Ranch* at 123, 62.

Here, the State Lease has been legislated out of existence by, *inter alia*, granting UH *carte blanche* and by depriving BLNR of any means to enforce any violations. That UH has no obligations under the State Lease also necessarily means that its obligations as sublessor of the various subleases are also destroyed, as each of UH's subleases are obviously tied to the State Lease—*i.e.*, the State Lease and all UH's subleases expire on December 31, 2033. Much more than that, however, is the fact that the beneficiaries of the ceded lands trust are also denied the duty that the State owes to them as trustee of the ceded lands. Again, the destruction of the State Lease cannot only be seen as affecting the contracting parties because the subject of the State Lease is an integral part of the ceded lands trust.

2d at 1137 (citing *Allied Structural Steel* at 249, emphasis added, internal quotation marks in original). "The requirement of a legitimate public purpose guarantees that the State is exercising its police power rather than providing a benefit to special interests." *Energy Reserves Group* at 412 (footnote omitted).

Under Inquiry 1, *supra*, Act 255 either substantially impairs the State Lease or, more accurately, destroys the State Lease completely. Act 255 therefore cannot survive scrutiny under Inquiry 2 unless it serves a "significant and legitimate public purpose", *as defined in Contract Clause law*, "rather than providing a benefit to special interests." Yet "providing a benefit to special interests" is precisely what Act 255 does. Act 255 is not an exercise of the State's police power. According to *HRPT Properties*, to exercise the police power is to protect "a broad societal interest rather than a narrow class". *HRPT Properties* at 1137. Indeed, an act passed to exercise the State's police power over "broad societal interests" is, in the Contract Clause context, the exact opposite of an act passed to "benefit a special interest" or a "narrow class". The case law on this critical difference between "broad societal interests" and "special interests" is very clear. *Allied Structural Steel* is particularly instructive: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public", 438 U.S. at 241; "This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people", *id.*; "[T]he Clause must leave room for the essential attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens.", *id.* at 244; "Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem", *id.* at 247; "Thus, this law can hardly be characterized, like the law at issue in the *Blaisdell* case, as one enacted to protect a broad societal interest rather than a narrow class", *id.* at 248-49; "The law was not even purportedly enacted to deal with a broad, generalized economic or social problem", *id.* at 250. (all underscoring added).[5]

[5] The "Blaisdell" case referenced *supra* is also instructive here. Although it predates the current, well-defined three-step analysis now employed in Contract Clause analysis, the points it hits are essentially the same. As noted by the *Allied Structural Steel* Court, "[i]n *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 [1934], the Court . . . [i]n upholding the state mortgage

Regardless of what may be the good intentions of the legislature, Act 255 is nevertheless clearly designed to promote the special interests of UH and its sublessees. This is not subject to debate, as Act 255 itself declares as much. *Act 255, Part I, Section 2, sub-§ 8(a)(b)*, codified as *HRS Chapter 195H-8(a)(b)* reads in part as follows:

> Astronomy development; declaration of policy; **reserved viewing or observing time and other requirements**.
>
> It is declared that the support of astronomy consistent with section 195H-1 is a policy of the State.
>
> Beginning after the transition period has expired, **any lease executed by the authority for an astronomical observatory shall include reserved viewing or observing time of not less than seven per cent of the total amount of viewing or observing time provided by the astronomical observatory for the University of Hawaii, as negotiated by the authority**.

(emphasis added).

To the point, however, Act 255 is clearly not an exercise of the State's police power *as defined by Contract Clause law*. Act 255 is, at bottom, special interest legislation that is intended to benefit UH and its sublessees by guaranteeing that the State Lease and the subleases cannot be terminated and will all be renewed, thereby guaranteeing that UH will receive at least seven per cent of the viewing time in each renewed sublease. Indeed, *Act 255, Part I, Section 2, sub-§ 8(a)(b)*, *supra*, simply presumes that the subleases *will be renewed*. This also flies in the face of the State's fiduciary duties as to the ceded lands trust because if the sublessees were to breach their subleases, everyone—the State through BLNR, UH, and the Authority—is now essentially legislatively mandated to ignore any such breach *and to never terminate any lease*. See *Ching v. Case*, 145 Hawai'i 148, 152, 449 P.3d 1146, 1150 (2019) ("We hold that an essential component of the State's duty to protect and preserve trust land is an obligation to reasonably monitor a third party's use of the property, and that this duty exists independent of whether the third party has in fact violated the terms of any agreement governing its use of the land"). Indeed, it could also be

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moratorium law . . . found five factors significant. First, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. Second, the state law was enacted to protect a basic societal interest, not a favored group. Third, the relief was appropriately tailored to the emergency that it was designed to meet. Fourth, the imposed conditions were reasonable. And finally, the legislation was limited to the duration of the emergency." *Allied Structural Steel* at 242 (citations omitted). Here, it is obvious that Act 255 caters to a very narrow special interest, *i.e.*, the UH and its sublessees.

argued that Act 255 negates the holding in *Ching v. Case* dealing with the State's *constitutionally mandated* responsibilities as trustee.

Moreover, and as previously discussed, Act 255 also mandates that the State Lease "**shall remain in full force and effect until its expiration unless otherwise specifically amended pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii**." *Act 255, Part II, Section 7(b)*. This necessarily means that UH is immunized from breaching the State Lease and that the State, through BLNR, is precluded from enforcing any breach *and exercising its contractual prerogative to terminate the State Lease for breach*. *See* State Lease, Exh. "1" at 4 ¶ 8 ("In the event that (1) the Lessee fails to comply with any of the terms and conditions of this lease . . . the Lessor may terminate this lease by giving six months' notice in writing to the Lessee"). Furthermore, although the Mauna Kea stewardship and oversight authority ("**Authority**") was not a contracting party to the State Lease, Act 255 gives it the power to amend the State Lease. This means that the Authority is empowered to renew the State Lease, which is consistent with the Authority's mandate to then renew the subleases, *as long as those renewed subleases grant UH at least seven per cent of the viewing time*. Such legislative mandates simply cannot be viewed as an exercise of the State's police power "for the promotion of the common weal," "for the general good of the public," "to protect the lives, health, morals, comfort and general welfare of the people," "to safeguard the welfare of their citizens," or as "necessary to meet an important general social problem," or as "enacted to protect a broad societal interest rather than a narrow class," or as "enacted to deal with a broad, generalized economic or social problem." *Allied Structural Steel* at 241, 244, 247-50.

In addition, the Authority does not simply step into the shoes of BLNR. The Authority is separate and distinct: "There is established the Mauna Kea stewardship and oversight authority, which shall be a body corporate and a public instrumentality of the State for purposes of implementing this chapter." *HRS § 195H-3(a)*. That the Authority is now empowered—*along with UH and excluding the State through BLNR*—to amend the State Lease and renegotiate the subleases stemming therefrom only serves to strengthen the argument that Act 255 is legislation intended to benefit the special interests of UH and its sublessees. Act 255 therefore does not meet the Contract Clause's standard of a valid exercise of the State's police power, and it therefore also cannot be said that Act 255 furthers a broad public purpose that justifies the substantial impairment, or downright destruction, of the State Lease. Act 255 does not survive Inquiry 2.

Assuming *arguendo* that Act 255 does survive Inquiry 2, it cannot survive Inquiry 3. The release of UH from all its obligations and the corresponding evisceration of the State's rights and responsibilities in the State Lease (to say nothing of the State's ability to carry out its fiduciary duties as trustee of the ceded lands) are not necessary for the State to achieve *any* purpose.

D. Inquiry 3: reasonably and narrowly drawn, or not

"The final inquiry concerns whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *HRPT Properties* at 1136. As previously stated, "[c]ourts [] apply a **decreased deference for self-interested government acts only upon reaching the third component of the Contract Clause analysis – the inquiry into the government's legislative judgment that the ordinance is reasonable and of appropriate character**." *RUI One Corp. v. City of Berkeley*, 371 F.3d at 1152 (emphasis added); *see also Energy Reserves Group* at 412 n.14 ("When the State is a party to the contract, 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake'") (quoting *United States Trust* at 26, internal quotation marks in original).

Even if it could be said that the support of astronomy constitutes a broad societal interest, the extremity of destroying the State Lease is patently unreasonable, and Act 255 simply cannot be said to be narrowly drawn in order to achieve the State's purpose. Again, *Act 255, Part II, Section 7(c)* mandates that "**the University of Hawaii shall be released from any and all obligations under the state lease by and between the board of land and natural resources and the University of Hawaii** . . . **unless otherwise specifically agreed upon pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii**[.]" (emphasis added).

It is indeed difficult to conceive of legislation that could do more than Act 255 actually does in terms of altering the rights and responsibilities of the contracting parties. Although the State Lease expires on December 31, 2033, UH is released from its obligations under that very lease from July 1, 2028, unless UH and the Authority, the latter a non-party to the State Lease, decide otherwise. *See Act 255, Part II, Section 7(a)(b)(c)*. **This is a legal absurdity**. *Cf. United States Trust* at 25 n.23, quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1877) ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity"). As to BLNR, Act 255 literally shoo-shoos it out of the contract. And, as already noted and as is perfectly

obvious, Act 255 confers upon the Authority, a non-party to the State Lease, the power to amend it. If this does not constitute destroying a contract, then nothing does. The Contract Clause, *even without decreased deference to legislative judgment*, does not allow what Act 255 does. "**A State could not adopt as its policy the repudiation of debts or the destruction of contracts or the denial of the means to enforce them**." *Kualoa Ranch* at 123, 62-63 (quoting *United States Trust* at 22; emphasis added).

The basic question here is "whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *HRPT Properties* at 1136 (underscore added). In other words, if the promotion of astronomy can be considered a "broad public purpose" and in the "exercise of the State's police power," and if the State is intent on the State Lease and the subleases continuing in effect and being renewed before they all expire on December 31, 2033, so that UH can then receive legislatively mandated viewing time in observatories that up to this point have each literally paid less than $50.00 in rent for years of occupying space on what is considered *the premier* site on planet Earth for astronomical observation, can it then be said, *inter alia*, that Act 255's (1) release of UH from all obligations under the State Lease, (2) eviction of BLNR as a party to the State Lease, and (3) insertion of the non-party Authority *as the authority* in the State Lease are reasonable conditions that are narrowly drawn to achieve the State's purpose? The short answer is "no".

The better question to ask is: "Is what Act 255 mandates *even necessary at all* to achieve the State's purpose?" Here too, the answer is "no." In promoting the State's purpose, *why is it even necessary* to totally destroy the *status quo* in this contract to which the State is a party? In promoting the State's purpose, *why is it even necessary* to release UH from all its obligations on July 1, 2028, when UH's contract with the State and UH's subleases with the observatories all expire on December 31, 2033? In promoting the State's purpose, *why is it even necessary* to evict BLNR from its own contract? In promoting the State's purpose, *why is it even necessary* to legislatively confer the power to amend the State Lease to the Authority *and UH*, when the former is not even a contracting party, and the latter is paradoxically also released from all its obligations?

That none of this is necessary, and is certainly not narrowly drawn, is obvious when one considers that at present the State Lease remains intact and unaltered, and there is no indication that at present the State is incapable of promoting its purpose. It is only on July 1, 2028, that

BLNR is out, the Authority is in, and UH is completely released from its obligations. "On July 1, 2028, all rights, powers, functions, and duties of the University of Hawaii relating to the powers and responsibilities granted to the Mauna Kea stewardship and oversight authority under part I of this Act are transferred to the Mauna Kea stewardship and oversight authority." *Act 255, Part II, Section 7(a)*. Act 255, Part II, Section 7(b)(c)(d), then all refer to this particular date as the specific day on which the State Lease is destroyed. July 1, 2028, is, of course, simply an arbitrary date that marks the end of the "transition period". *See Act 255, Part I, Section II, sub-§ 6(a)*; *HRS § 195H-6(a)* ("The authority shall have a transition period of five years beginning July 1, 2023"). In other words, the substantial impairment of the State Lease is based on nothing more than an arbitrary date on which the Authority assumes *full* control. *See Act 255, Part I, Section II, sub-§ 7(a)*; *HRS § 195H-7(a)* ("Following the end of the transition period pursuant to section -6, the department of land and natural resources, University of Hawaii, and all other departments and agencies of the State shall be subject to the oversight of the authority with regard to the control and management of Mauna Kea lands"). At present, the Authority already has *joint* control with UH, *and yet the State is still able to promote its purpose*. "The authority shall serve jointly with the University of Hawaii in fulfilling the obligations and duties under the state lease for a period of five years as established in section -6." *Act 255, Part I, Section II, sub-§ 3(a)*; *HRS § 195H-3(a)*. At present, then, UH still has "obligations and duties under the state lease", and it makes absolutely no sense that UH's "obligations and duties under the state lease" must terminate on July 1, 2028, in order for the State to pursue its purpose, *just as it is doing at present*. "Upon the assignment of all rights, powers, and duties of the University of Hawaii to the Mauna Kea stewardship and oversight authority pursuant to subsection (a), **the University of Hawaii shall be released from any and all obligations under the state lease by and between the board of land and natural resources and the University of Hawaii** . . . **unless otherwise specifically agreed upon pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii**[.]" *Act 255, Part II, Section 7(c)* (emphasis added). In short, Act 255 itself demonstrates that the State can pursue its purpose with the current *status quo* in place *and without destroying the State Lease*. Given the standard of decreased deference to the legislature's judgment as to Inquiry 3, it is clear that Act 255 cannot withstand constitutional scrutiny.

"**[A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a**

drastic impairment when an evident and more moderate course would serve its purposes equally well." *United States Trust* at 30-31 (emphasis added). Although the onus will inevitably fall on the State to justify why Act 255's substantial impairment of the State Lease is a narrowly tailored means of achieving the State's purpose, it is already obvious that Act 255 need not destroy the State Lease in order for the State to promote astronomy. It therefore simply cannot be said that Act 255 embraces any sort of "reasonable conditions" and that it is narrowly tailored to achieve the State's purpose. "But limiting rents by **changing the obligations of specific parties clearly violates the Contract Clause**." *HRPT Properties* at 1140 (emphasis added). Here, Act 255 does not just "change the obligations of specific parties". Here, Act 255 **completely relieves UH of all of its obligations under the State Lease**.

What Act 255 requires—the only material fact at issue here—violates the Contract Clause and is thus unconstitutional on its face.

V. CONCLUSION

Based on the aforementioned arguments and authorities, OHA respectfully moves this Court to declare that Act 255 is unconstitutional and to thereafter enjoin the Authority from engaging in any further actions purportedly authorized by Act 255.

DATED: Honolulu, Hawaiʻi, March 25, 2024.

/s/ *Robert G. Klein*
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

THE OFFICE OF HAWAIIAN AFFAIRS, Plaintiff, vs. STATE OF HAWAIʻI; DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES; DAWN N.S. CHANG, CHAIRPERSON, DEPARTMENT OF LAND AND NATURAL RESOURCES; THE UNIVERSITY OF HAWAIʻI; DAVID K. LASSNER, PRESIDENT, UNIVERSITY OF HAWAIʻI; MAUNA KEA STEWARDSHIP AND OVERSIGHT AUTHORITY; JOHN KOMEIJI, CHAIRPERSON, MAUNA KEA STEWARDSHIP AND OVERSIGHT AUTHORITY; DOE ENTITIES 1-20, Defendants.	CIVIL NO. 1CCV-24-0000082 (Declaratory Judgment) **DECLARATION OF ROBERT G. KLEIN**

DECLARATION OF ROBERT G. KLEIN

I, ROBERT G. KLEIN, hereby declare that:

1. I am licensed to practice law in all courts of the State of Hawaiʻi.

2. I am a partner with Klein Law Group, LLLC, attorneys for Plaintiff THE OFFICE OF HAWAIIAN AFFAIRS ("**OHA**") in the above-referenced action.

3. I have personal knowledge of the matters set forth herein except and unless stated to be upon information and belief.

4. Attached hereto as Exhibits "1" to "19" are true and correct copies of leases, subleases, and consents to sublease Mauna Kea lands produced to OHA in *The Office of*

Hawaiian Affairs v. State of Hawai'i, et al., Civil No. 1CC171001823, by Defendant STATE OF HAWAI'I or entities thereof.

I, ROBERT G. KLEIN, declare under penalty of law that the foregoing is true and correct.

Executed this 25th day of March 2024, at Honolulu, Hawai'i.

/s/ *Robert G. Klein*
ROBERT G. KLEIN

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

THE OFFICE OF HAWAIIAN AFFAIRS, Plaintiff, vs. STATE OF HAWAIʻI; DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES; DAWN N.S. CHANG, CHAIRPERSON, DEPARTMENT OF LAND AND NATURAL RESOURCES; THE UNIVERSITY OF HAWAIʻI; DAVID K. LASSNER, PRESIDENT, UNIVERSITY OF HAWAIʻI; MAUNA KEA STEWARDSHIP AND OVERSIGHT AUTHORITY; JOHN KOMEIJI, CHAIRPERSON, MAUNA KEA STEWARDSHIP AND OVERSIGHT AUTHORITY; DOE ENTITIES 1-20, Defendants.	CIVIL NO. 1CCV-24-0000082 (Declaratory Judgment) **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a true and correct copy of the foregoing document was duly served upon the following parties through the Judiciary Electronic Filing System ("**JEFS**"), or via U.S. Mail, postage prepaid, as set forth below:

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