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IN THE DISTRICT COURT OF THE SECOND CIRCUIT
WAILUKU DIVISION
STATE OF HAWAII

STATE OF HAWAII vs. NELSON KUUALOHA ARMITAGE, _____ RUSSELL KAHOOKELE, _____ HENRY MAILE NOA. Defendants. _____	Case No.: 2P106-02017 Case No.: 2P106-02018 Case No.: 2P106-01909 Trial date: Not set **DEFENDANTS' CLOSING ARGUMENT; CERTIFICATE OF SERVICE**

DEFENDANTS' CLOSING ARGUMENT

FACTS

On July 31, 2006, several Native Hawaiians traveled to Kaho'olawe. Two Native Hawaiians, Defendants Nelson K. Armitage and Russell Kahookele, stayed on the island of Kaho'olawe while others, including Defendant Henry Maile Noa, traveled on a boat in the waters near Kaho'olawe. All Defendants are members of the Reinstated HAWAIIAN GOVERNMENT (RHG). See Noa Decl. at ¶ 2, Declaration of Nelson K. Armitage ("Armitage Decl.") at ¶ 2, and Declaration of Russell Kahookele ("Kahookele Decl.") at ¶ 2.

The purpose of the visit was threefold: first, to allow the Reinstated Kingdom of Hawaii to exercise its property rights in Kaho'olawe; second, to allow the Reinstated Kingdom of Hawaii to proclaim its beneficial ownership of Kaho'olawe, and; third, to allow representatives of the Reinstated Kingdom of Hawaii to build a heiau and perform a prayer on the site. See Armitage Decl. at ¶ 4 and Kahookele Decl. at ¶ 3.

Defendants Nelson K. Armitage, Russell Kahookele and Henry Maile Noa were cited for a violation of the following:

> §13-261-10 Entrance into the reserve. No person or vessel shall enter or attempt to enter into or remain within the reserve unless such person or vessel: (a) Is specifically authorized to do so by the commission or its authorized representative as provided in section 13-261-11; or, (b) Is specifically authorized to do so through a written agreement approved by the commission; or (c) Is trolling in zone B, in compliance with section 13-361-13(b)(3); or (d) Must enter the reserve to prevent probable loss of vessel or human life, provided that: (1) Prior to entering the reserve and at such reasonable intervals thereafter, such person shall make every reasonable effort to notify the commission staff or the United States Coast Guard that loss of vessel or human life is probable; (2) All fishing gear shall be stowed immediately upon entering the reserve; and (3) Such person shall vacate the reserve immediately after the threat of probable loss of vessel or human life has passed.

HAR § 13-261-10 (2005).

Defendants filed a Motion to Dismiss. The evidentiary hearing on the motion took place over the course of several days, requiring just over one year of litigation.

The parties stipulated that the testimony raised in the Motion to Dismiss would be incorporated into an eventual trial, should the case merit an eventual trial. TR (7/27/07) p. 4 l. 21. The parties also stipulated that Defendant Noa's testimony would also be applied to Defendants Armitage and Kahookele as if they had testified the same way at the hearing. Id.

The Court admitted Defendant's exhibits B – TT into evidence by way of stipulation. TR (1/25/08) p. 9 l. 11. Exhibit A, the report from Defendants' expert was admitted over the State's objection.

Defendant Noa testified in his defense. Mr. Noa testified that he is the elected prime minister of the Reinstated Hawaiian Government (RHG). TR (1/25/08) p. 46 l.16. He testified that the RHG was initiated on March 13, 1999. They convened their government in January 2000, first swearing in officials elected on November 6, 1999. TR (1/25/08) p. 46 l. 18. Mr Noa is currently serving his third 4-year term as RHG Prime Minister. He testified that the RHG is a democracy. TR (1/25/08) p 48 l 18. And that "we took it (democracy) one step further. And that our laws after they're passed, they're actually ratified by a people's vote". … TR (1/25/08) p. 49 l. 1.

Mr. Noa testified that he is a Native Hawaiian as defined by Hawaii State Law. TR (1/25/08) p 49 l 13. Mr. Noa testified that the genesis of the RHG was the 1993 U.S. Public Law 103 – 105 (The Apology Bill). TR (1/25/08) p 50 l 17. After the passage of the Apology Bill, he began to research public law and international public law and he realized that nations possessed certain rights – including the right to re-exist – and that the legal term of reinstatement is actually a part of the international law. TR (1/25/08) p 52 20. Beginning in 1999 the RHG invited Native Hawaiians from all the islands to 'come to a convention and initiate the process.' TR (1/25/08) p 51 l. 19.

The RHG led by Noa, and inspired by the Apology Bill, decided to pursue reinstatement of the lost Hawaiian government through principles of international law. See TR (1/25/08) p 55 l 8.

Noa testified that the Kanaka-Maoli people, Native Hawaiians, are a distinct people and that they have traditionally occupied the Hawaiian archipelago, including the island of Kaho'olawe. This, he testified, fulfilled the first two requirements of nationhood (a people, and a territory) under international law. TR (1/25/08) p. 56 l. 16 -

p 57 l 17. The third requirement of nationhood as testified by Mr. Noa, is a common language, which RHG's people share. TR (1/25/08) p l22. Noa also understood that "[the Nation] had to have a government operating and functioning." TR (1/25/08) p 58.

He testified that the RHG went through the process of implementing their government. "What we didn't have, was a body to represent us. A government. That is the reason why we reinstated our government. We realized that as long as we did not fulfill our obligation to be represented by a government, then all we would have is another voice, like many of the other Hawaiian people that I see." TR 1/25/08)P 59 l 3.

As Prime Minister of the RHG, Noa has engaged in diplomacy with foreign governments. He met with the King of Tonga (TR at 60), the President of Tahiti (and the Minister of Foreign Affairs of Venezuela. TR at 61.

Mr. Noa explained each document in evidence to the Court.

These documents included citizenship requirements of the RHG (Ex. A), loyalty oaths (Ex. B and C), citizenship documents, a 1999 letter to Madeleine Albright (Ex. E), a Proclamation of Existence (Ex. H), various resolutions of the RHG. They included elections documents (Ex. M), citizenship tests (Ex. Y), the various Constitutions of the Kingdom of Hawaii and ultimately, the Constitution of the Reinstated Hawaiian Government.

Mr. Noa testified that he and Defendants Armitage and Kahookele went to Kaho'olawe "understanding that our intent is to be recognized, who we are as a people, as a Nation, to exercise a right as a Nation." TR (1/25/08) p 103 l 18. He testified that the Constitution of the Kingdom of Hawaii [and RHG] states that every person can practice their own religion TR (1/25/08) p 103 l 5.

Upon landing on Kaho'olawe, the Defendants undertook a traditional ceremony. "In our traditional practice, in our culture, it is well understood that when you have an event, be it a small event, or large event, you always pay respect to your ancestors, to your various Gods that our religion has or just to Akua itself. So, before we left, we already planned that we would institute a protocol, and part of that protocol was to ask our ancestors to welcome us to the island. We do that through prayer, and that is what we did when we arrived. And it is a part of our traditional protocol in our case, because we're a nation that is coming into being, we had already decided that we would build an

ahu[1] to signify our arrival, our accomplishment. TR (1/25/08) p 104 l 6. Mr. Noa testified that this type of ceremony was practiced on the island of Kaho'olawe prior to 1893. TR (1/25/08) at 106 l 11. He also testified that prior to 1893, Native Hawaiians exercised management and control of the island of Kaho'olawe. TR (1/25/08) p 107 l 10. The State did not rebut this testimony.

> Q: When you went to Kaho'olawe did you go there as an individual with the intention of breaking some State regulation? Or did you go there primarily for the purpose that you testified today?
>
> A: No, we went there primarily for the purpose that I speak about today. That once we fulfilled our obligation as a nation, I truly believe that it's now a nation's responsibility to exercise those sovereign powers." TR (1/25/08) p 108 l 2.

Mr. Noa noticed that the transfer statute "basically said that management and control shall be returned back to the sovereign Hawaiian governing entity.' "And what I saw was the word sovereign. That was the key. It wasn't just another entity. There are lots of entities on Hawaii. A lot of organizations. You take the Office of Hawaiian Affairs (OHA), I believe that's an entity. But sovereign entities? No. There weren't any. And this is what motivated us. This is what motivated myself to pursue establishing that sovereign nation." TR (1/25/08) p 58 l 4.

Mr. Noa also testified as to the constitutional issues involved in this case.

> Q. Have you studied the Administrative Regulation that you and your two colleagues are charged with violating the -- the HAR 13-261-11, the -- the -- the ask permission first statute -- rule -- regulation, I'm sorry?
> A. Have I look at it?
> Q. Yeah, have you looked at it?
> A. Yes. Yes.
> Q. Okay, and -- and do you understand that it says that permission -- permission [to enter Kaho'olawe] shall be approved or disapproved by the Commission after review and consultation with cultural practitioners? You understand that's what the regulation says?
> A. I believe so.

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[1] "An ahu is an altar. You can have personal ahus; you can have community ahus. You can have national ahus. Some national ahus are referred to as Heiaus. But [an ahu] is a sacred place where you reveal your sincerity. You invoke support from your amakuas, from your ancestors. This is where you come to give thanks giving to provide hookupo among either just you or collectively." TR (1/25/08) p 104 l 23.

> Q. Okay. Is a person who goes to Kaho'olawe after he's been approved by a cultural practitioner any less likely to be hurt by an explosion than somebody who has not been approved by a cultural practitioner?
>
> MR. SMITH: Objection, Your Honor.
>
> MR. HEMPEY: Your Honor, we have a -- we have a constitutional argument in this case. We're saying that the regulation impermissibly burdens religion, political speech and the State at the last hearing made a big point of showing -- which -- something we had already conceded, a compelling state interest because of unexploded ordinance. And of course under Constitutional law, a fundamental right can only be regulated in the least restrictive -- way -- in a way that narrowly tailored to meet the compelling state interest. And so this regulation requires approval by -- only after review and consultation with cultural practitioners and that approval has nothing to do with the compelling state interest that the State is alleging. So it's relevant. It goes right to the heart of the constitutional question. Getting [State] approval for your religion has nothing to do with protecting people from unexploded bombs.
>
> THE COURT: Okay. I'm going to overrule the objection. Proceed.
>
> Q. -- I guess my question is, … -- does having your culture approved in advance by a state agency make it somehow less likely that you're going to get exploded?
> A. I don't think so.

TR (4/4/08) p 22. The State did not rebut this testimony.

The defense also called, and the Court accepted Dr. John Gates as an expert witness as to the self-determination of indigenous peoples and international law. TR (7/27/07) p 69 l 1. The Court also qualified Dr. Gates as an expert in the principles of both Federal (US) and International Law as applicable to indigenous people. Id. at l. 10.

Dr. Gates explained that "self-determination," is a legal term of art in international law which refers to the collective right of a people to determine for themselves the right to live under the Government, live under the laws they establish to protect their land and natural resources to promote the preservation of their language and to protect the territory that they occupy. TR (7/27/07) p 19 l 18.

Dr. Gates testified that he analyzed this case based on International Law, US Federal law, Hawaii State statutes and Common law, as well as numerous organic documents[2] he received from Defendants. TR 7/27/07) p 30 l 13.

Dr. Gates also *personally* discussed the issues on which he testified in this case with Professor Jim Anaya – one of the top five Academics in the area of Indigenous Human Rights and International law in the world. TR 7/27/07) p 60 l 3.

Dr. Gates testified about the universal commonality of indigenous peoples.

> "I know if might seem funny to you, however there is a great deal that we indigenous peoples find sacred. We have sacred sites that we pray to. We understand that there are supernatural, if you want, spirits that occupy a place within our universal realm. And so, as I get more into this, again, it's striking, that the one thing we have in common, as indigenous people is that we are from this earth. And so I think that from a – from a foundation sense, when we talk about indigenous peoples, we are referring to people who occupied territories prior to the occupation and arrival of European people."

TR (7/27/07) p 5 l 5.

The Government admitted in its Opposition to the Motion to Dismiss (p. 24) that the State has recognized the rights of Native Hawaiian People to reestablish an autonomous sovereign government with control over the lands and resources.

Dr. Gates testified that prior to the illegal 1893 overthrow the Kingdom of Hawaii was a member of the International Community of Nations. TR (7/27/07) p 69 l 17. Dr. Gates testified that Native Hawaiians traditionally and customarily exercised management and control of the island of Kaho'olawe prior to 1893. TR (7/27/07) p 79 l 6. The State did not rebut this testimony.

Dr. Gates testified that several laws protect the right of Native Hawaiians to organize and create an autonomous sovereign Hawaiian government. These include Act 357, passed in 1983 and Act 200, passed in 1994 – each expressing the State's intent to

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[2] These documents in evidence include a copy of the Constitution of the Reinstated Hawaiian Government (RHG), copies of their minutes and conventions, a 1999 Proclamation of Existence that they had publicly issued, correspondence between the RHG and foreign governments, a letter from the RHG to then Secretary of State Madeleine Albright and the Citizenship roles of the Government.

recognize the right of a Native Hawaiian sovereign government to exist. TR (7/27/07) p 78 l 15. He also relied on the Hawaii State Constitution, Article 12, that "seeks to respect customary rights of Native Hawaiians to their culture and to their territories…'" TR (7/27/07) p 79 l 2.

Given that the alleged trespass in this case took place on Kaho'olawe, Dr. Gates also examined the 'transfer statute[3].' TR (7/27/07) p 81 l 16. Dr. Gates acknowledged that Hawaii State Administrative Regulations impose certain conditions upon entry onto Kaho'olawe. TR p.. 80 l..16. But Dr. Gates also noted that the State has no process for the transfer of the management and control of Kaho'olawe to a *sovereign* Nation. TR (7/2707) p 81 l 5. In this regard, he discussed the Akaka Bill. Dr. Gates explained that while the transfer statute promises management and control of Kaho'olawe to a *sovereign* nation, the Akaka Bill would create a *domestic dependent nation*[4].

He discussed the case of Cherokee Nation v. Georgia, infra, in which the Court explained the difference between domestic dependent nations (Indian tribes) and sovereign nations. TR (7/27/07) p 70 l 13. In a sovereign nation, he stated, the sovereignty emanates from within it does not – it cannot come from anywhere else. "The people are sovereign because they wish to be sovereign. And you cannot – an outside [government] does not bestow that or grant sovereignty to someone, in my opinion, it comes from within.." TR (7/27/07) p 71 l 13. Dr. Gates then distinguished a sovereign nation from the type of government that would be created by the Akaka Bill. "Again, it is seeking to bestow – a foreign power seeking to bestow and define Native Hawaiian rights as a people and to say, OK, you are going to play by our rules and you are going to take a particular form and that form is going to be within the domestic dependent nation paradigm that is represented in Federal Indian Law today. So there is a distinct difference between what might be a domestic dependent nation and what really is a sovereign nation. I mean, the Declaration of Independence of the United States says,

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[3] HRS 6 K provides that upon recognition of the sovereign Hawaiian entity…

[4] He compared the Akaka Bill (a.k.a. Native Hawaiian Government Reorganization Act) to the 1932 Indian Reorganization Act. "The Indian Reorganization Act, in essence, stripped Native People of their right to traditionally organize and govern themselves." TR p 82 l 22.

'We the People." It did not say "Britain says that you are the People now.' TR (7/27/07) p 72 l 12.

He stated that the Akaka Bill is "attempting to … turn Native Hawaiians into a quasi-Indian tribe whose powers emanate from Congress". TR (7/27/07) P 83 l 16.

Given that, management and control of Kaho'olawe is promised to a *sovereign* nation and the Akaka Bill holds no promise for such a nation, Dr. Gates then examined the long process necessary to build a truly sovereign nation. TR (7/27/07) p. 77 l. 11.

Dr. Gates ultimately concluded that the Reinstated Hawaiian Government is a sovereign nation within the context of state and International Law. TR (7/27/07) p 75 l 22. He applied a five-part test to determine that the RHG had achieved that level of nationhood status that justified its exercise of control in its national lands. First, he testified that a nation requires a *people*, explaining that there are certain elements that a *people* must possess. TR (7/27/07) p 73 l 16. Second, a nation must "have a territory and a right to exercise control over and maintain that territory." TR (7/27/07) p 74 l 8. Third, "I would look at whether or not there is a Treaty that exists… with another foreign government, with another sovereign entity, that talks about the duties and relationships between these two sovereigns." TR (7/27/07) p 74 l 11. Fourth, "I would look and see if the people has historically exercised management and control over their recognized territory." Id. And fifth, whether or not in the contemporary sense, they continue to exercise or attempt to exercise management and control over their territory. TR (7/27/07) P 74 l 20.

Dr. Gates concluded that the RHG qualifies as a nation. He noted that the Kingdom of Hawaii executed the first Treaty of Friendship of Commerce and Navigation with the United States in 1826 – clearly demonstrating a sovereign recognition, government to government relationship between those two powers. TR p. 91 l. 2. He testified that the Treaty has never been abrogated. Id. The State did not rebut this testimony. He considered that the RHG "has written, adopted a Constitution that defines, like every Constitution, rights and duties of their citizens, rights and duties of their several branches of government. "They have officially publicly and officially proclaimed their existence through publications that have been disseminated throughout the islands… they have adopted strict citizenship requirements, that are clear and easy to understand.

They have conducted regular conventions where they have adopted laws and ordinances that they have integrated within their organic documents." TR (7/27/07) p 76 l 4. Dr. Gates concluded his testimony by offering his opinion that the permission requirement for entrance onto Kaho'olawe – in these unique circumstances – was inconsistent with State and Federal law promising management and control of that island to a sovereign nation. TR (7/27/07) p 81 l 11.

Dr. Gates testified that in his expert opinion, the Native Hawaiian people in the Reinstated Hawaiian Government have expressed their desire and their determination to be a sovereign nation. TR (7/27/07) p 73 l 3. He stated that Defendant's entry onto Kaho'olawe was done as citizens of this sovereign Nation and that this action was a necessary and protected step in their quest to re-form a sovereign Hawaiian Nation. TR (7/27/07) p 75 l 6.

> "Q: In your opinion, is it necessary to attempt to control or manage a nation's landmass if a nation is to be considered to be a sovereign Nation?
> A: Yes.
> Q: So without making an attempt to exercise rights in their land, could a group be a Nation?
> A: No."
> TR (7/27/07) p75 l 11.

Dr. Gates offered five primary conclusions. First that the RHG "is a nation representing its people and citizens under national law, and therefore entitled the exercise to self-determination under international law[5]."

His second conclusion is that "as a people asserting their right to self-determination, must have as an essential component over which historically there exists an ongoing connection to that territory. TR (1/25/08) p 11 l 11.

Dr. Gates' third conclusion was that "the island of Kaho'olawe has been identified as part of the territory of the RHG and its people." p 12 l .1.

Fourth, Dr. Gates concluded that "Defendant Noa and co-Defendants traveled to Kaho'olawe as elected officials [of the RHG] whose actions were sanctioned by the

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[5] Dr. Gates acknowledged that there are very limited circumstances in which a State court properly looks to international law but given the State's promise of transfer to a sovereign nation and its refusal to adopt a process to create a sovereign nation that "this is one of the limited circumstances where the Court would have to look at international law." TR (1/25/08) p 16 l 21.

[RHG] and were purposefully contemplated to demonstrate the [RHG] rightful claim to manage and control Kaho'olawe. TR (1/25/08) p 12 l 5.

Dr. Gate's fifth and final conclusion was that the action of the Defendants is protected by law. Id.

> Q: I understand your point that it's really not up to a Federal or Sate government to determine what's a nation or not under international law, but my question is, is there a process, by which the state could recognize a "sovereign Hawaiian entity?"
> A: Well, I believe that becomes the role of the judiciary then…
>
> Q: And does it fall on the judiciary because there is no process outside the judiciary existing today?
> A: Well, that is correct…
>
> Q: Again, in your expert opinion, was entering this land of Kaho'olawe, was that action a necessary component of perfecting the existence of this … fledgling nation?
> A: Yes.
>
> Q: That was necessary?
> A: That was a necessary vital component to it, yes.
>
> Q: They had to do it before they could be considered a nation by any standard?
> A: That is correct.
>
> Q: And if, for example, a nation were to have sought or applied for recognition to the State or Federal government having not exercised any rights in their territory, would that application, in your opinion, have been deficient?
> A: I do not think it would be sufficient…particularly if the petitioning party had not taken the steps to create an organic government by themselves.
>
> Q: So, if there even was a process within the State or Federal governments and [RHG] had to prove they were a nation under international law, they would not have been able to have successfully done that without having taken the steps that they took at Kaho'olawe?
> A: I think that is correct, because as the State has pointed out perfectly correctly, by reading the language of the transfer statute, I don't see a process there within the transfer statute. I see reference to the entity, but I don't see how that can be accomplished without a nation. The RHG doing what they've done.

> Q: So it is like a 'catch 22' you can't be a Sovereign entity without exercising your rights on the land, right?
> A: Right.
>
> Q: But the State says you have to ask permission to exercise the rights in the land, and that would be completely inconsistent with being a sovereign entity?
> A: It would be.

TR (1/25/08) p 29 l 10 - p 31 l 23.

After several days of hearings, the parties made verbal closing arguments. Defendants claimed that their activities were protected by Hawaii law – and that the criminal prosecution at bar – cannot be reconciled with their protected right to form a sovereign nation.

> MR. HEMPEY: "[O]ur first defense that has to do with lenity. Our second defense has to do with constitutional issues. But as to lenity what we have is a regulation that creates a petty misdemeanor for trespass.
>
> What we have competing with that on this record is - we have Act 359 which protects the right to form a nation. We have the Public law 103 and 105, the Apology Bill which just recently, January 31st, 2008, in OHA versus HCDCH at 117 Hawaii 174, the Supreme Court confirmed that the Apology Bill is law, and it should be given the force of law.
>
> And on this record, we have expert testimony that is completely uncontradicted. And to summarize the expert's testimony he testified that the reinstated government is a nation that is entitled to exercise its rights in self determination. And he testified that it was -- it is a nation under both State law and international law. And he went further to say that when State law does not protect a nation in such circumstances the Court may look to international law for guidance. He's also said that the rights -- that this nation had in entreaties or components of nationhood, that Kaho'olawe has been accepted in treaty with indigenous Hawaiian people, and that when the Defendants went there they did so as officials of a nation. And finally, and perhaps most importantly, was his conclusion that this action was protected by law, because it is a necessary component of forming a nation, the right to do so being protected by the Constitution by Act 359, by the Apology Bill, and ,by all the laws we've stated in our brief. And what that gives us, of course, is a conflict between the administrative regulation and the fundamental, very well codified, right to create a nation. And, again, on this record the conclusion that claiming rights in Kaho'olawe was a necessary -- absolutely necessary and protected aspect of forming a nation it con -- conflicts with the

administrative regulation. And that is why lenity and due process come into play."

TR (4/4/08) p 29 l 10 - p 31.

Defendants respectfully supplement those arguments with this written closing argument – and assert that the charges against them must be dismissed.

ARGUMENT

1. DEFENDANTS' ENTRY ON KAHO'OLAWE WAS PROTECTED BY LAW AND CANNOT FORM THE BASIS FOR CRIMINAL LIABILITY.

a. Defendants' right to form a sovereign Hawaiian Nation is protected by law.

In passing Hawaii Revised Statutes §201.5 the Hawaii State legislature has already recognized the continuing and inherent sovereign authority of the native Hawaiian people:

...The United States and State of Hawaii hereby reaffirm and recognize that:

(1) The native Hawaiian people are a distinct native, indigenous people who have maintained their own language, culture, and traditions [ ].

(2) The United States has a unique trust responsibility to promote the welfare of the aboriginal, indigenous people of the State, and the federal government has delegated broad authority to the State to act for their betterment; and

(3) The aboriginal, indigenous people of the State retain their inherent sovereign authority and their right to organize for their common welfare.

H.R.S. §201.5 (emphasis added).

The Hawaii Constitution, Article XII, Section 4 and Hawaii Constitution Article XVI, Section 7 provides that Native Hawaiians, as beneficiaries of the public trust, are owed "high fiduciary duties" by the State and must be permitted to access public lands for their benefit, use and enjoyment. Office of Hawaiian Affairs v. State, 110 Haw. 338, 355 133 P.3d 767, 784 (2006) citing inter alia Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982); see also State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977).

Kaho'olawe is different from any other lands held in the public land trust because State law requires that management and control of Kaho'olawe must be transferred to the native Hawaiian entity upon recognition. HRS § 6K-9. Specifically:

> Upon its return to the State, the resources and waters of Kaho`olawe shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii.
>
> All terms, conditions, agreements, and laws affecting the island, including any ongoing obligations relating to the clean-up of the island and its waters, shall remain in effect unless expressly terminated.

HRS § 6K-9 (2005) (emphasis added). The recognized sovereign native Hawaiian entity has future rights to "management and control" of Kaho'olawe, thereby creating a future interest. See, e.g. HRS § 560:2-707 ("future interest under the terms of a trust' means a future interest that was created by a transfer…to an existing trust… ."). The future interest held by the native Hawaiian entity in Kaho'olawe, "management and control", is equivalent to fee simple ownership. See, e.g. HRS § 708-800 ("control over the property" defined to include "possessing the property, or selling, conveying, or transferring title to or an interest in the property"); see, also e.g. HRS § 516-1 ("fee simple lands" defined to include lands which are leased to a beneficiary who retains the "controlling interest and right to direct the trust with regard to management or control of the trust or its assets.").

In Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii (HCDCH), 117 Hawai'i 174, 177 P.3d 884 (2008), the Hawaii Supreme Court held that

> "Many native Hawaiians and others view the overthrow of 1893 and subsequent actions by the United States, such as supporting establishment of the provisional government and later the Republic of Hawai'i, the designation of the crown and government lands as public lands, annexation, and the ceding of the public lands to the federal government without the consent of native Hawaiians, as illegal. Because the actions taken by the United States were

> viewed as illegal and done without the consent of native Hawaiians, many native Hawaiians feel there is a valid legal claim for reparations. Many native Hawaiians believe that the lands taken without their consent should be returned and if not, monetary reparations made, and that they should have the right to sovereignty, or the right to self-determination and self-government…
>
> The legislature has also acknowledged that the actions by the United States were illegal and immoral, and pledges its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians.
>
> 1993 Haw. Sess. L. Act 354, § 1 at 999-1000 (emphases added). In Act 359, also entitled "A Bill for an Act Relating to Hawaiian Sovereignty," the legislature made findings similar to those expressed in the Apology Resolution. 1993 Haw. Sess. L. Act 359, §§ 1-2 at 1009-11. The stated purpose of Act 359 was to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." 1993 Haw. Sess. L. Act 359, § 2 at 1010.

"The Apology Resolution was adopted by both the House and the Senate, signed by then-President Clinton on November 23, 1993, and designated as Public Law No. 103-150. Generally, when a joint resolution-such as the one at issue in this case-has emerged from legislative deliberations and proceedings, it is treated as law." O.H.A. v. Housing and Community Development Corp. of Hawaii, (HCDCH), 117 Hawai'i 174, 191 177 P.3d 884, 901 (2008)…"

Defendants assert that this Court can recognize that the Reinstated Kingdom of Hawaii "exists as a state in accordance with recognized attributes of a state's sovereign nature". State v. Lorenzo, 77 Haw. 219, 221, 883 P.2d 641, 643 (App. 1994). The un-rebutted testimony, in this case, is that as a fledgling nation, the RHG has the right (if not the obligation) to enter Kaho'olawe. They ask this Court to rule that they have met the basic test for nationhood under State and International Law – and accordingly to protect them from the application of the criminal law.

Lorenzo indicated that a sovereign native Hawaiian entity would be recognized if the sovereign demonstrated that it was an entity "that has a defined territory and a

permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." Id. at 222 n.4 (citation omitted).

Moreover, Dr. Gates testified extensively as to what constitutes a sovereign nation.

Properly applied to the case at bar, the law requires a finding, at a minimum, that Defendants are citizens of a sovereign nation, entitled to exercise their rights as citizens of that nation, free from prosecution for such exercise under Hawaii State law.

b. Defendants' exercise of their government's rights in Kaho'olawe was a necessary step in forming a sovereign Hawaiian Nation.

In 1993, the legislature found that "the island of Kaho'olawe is of significant cultural and historic importance to the native people of Hawai'i," 1992 Haw. Sess. L. Act 340, § 1 at 803. Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii, (HCDCH), 117 Hawai'i 174, 194 177 P.3d 884, 904 (2008)…"

Dr. Gates uncontradicted testimony is that the Defendants had to enter Kaho'olawe – if they were to qualify as a nation.

> Q: Again, in your expert opinion, was entering this land of Kaho'olawe, was that action a necessary component of perfecting the existence of this … fledgling nation?
> A: Yes.
>
> Q: That was necessary?
> A: That was a necessary vital component to it, yes.
>
> Q: They had to do it before they could be considered a nation by any standard?
> A: That is correct.
>
> Q: And if, for example, a nation were to have sought or applied for recognition to the State or Federal government having not exercised any rights in their territory, would that application, in your opinion, have been deficient?
> A: I do not think it would be sufficient…particularly if the petitioning party had not taken the steps to create an organic government by themselves.

As this testimony was not rebutted, it stands. The State has not subordinated the right of Native Hawaiians to form a government to the criminal laws. It has protected that right. The evidence conclusively demonstrates that Defendants' conduct was a deliberate and necessary exercise of that right.

c. There is currently no process by which the State of Hawaii can recognize a sovereign Hawaiian Nation and the Court may consider International Law.

There is no debate as to the fact that the sovereign Hawaiian people never relinquished their autonomy; neither by vote, nor surrender.

> "If the subjugated State has not yet accepted its new condition of subjection, if it has not voluntarily submitted, and has merely ceased to resist from lack of power...such a State is not really subdued; it is merely conquered and oppressed,...If that nation throws off the yoke itself and sets at liberty, it reenters into the enjoyment of all its rights and regains its former position..."

Law of Nations, pg. 315, Emer de Vattel.

The Kaho'olawe transfer statute promises that "Upon ... return [of Kaho'olawe] to the State, the resources and waters of Kaho'olawe shall be held in trust as part of the public lands trust; provided that the State shall transfer management and control of the island and its waters to the **sovereign** native Hawaiian entity upon its recognition by the United States and the State of Hawaii" 1997 Haw. Sess. L. Act 329, § 1§ 2 at 806 (codified as HRS chapter 6K).

While the state of Hawaii has repeatedly acknowledged the importance of recognizing a sovereign native Hawaiian entity, it has failed to do so or to create a process to do so. See e.g., Act 359 of 1993 (1993 Haw. Sess. Laws 1009) (establishing a Hawaiian Sovereignty Advisory Commission ("HSAC") to recognize a sovereign Hawaiian entity), Act 200 of 1994 (1994 Haw. Sess. Laws) (creating the Hawaiian Sovereignty Elections Council ("HSEC"), and Act 329 of 1997 (1997 Haw. Sess. Laws) (State Legislature adopted the Apology Resolution and established a joint committee for recognition purposes yet no sovereign native Hawaiian entity has been recognized).

An entity does not cease to be a sovereign even if it has been occupied by a foreign power or has lost control of its territory temporarily. Vattel, E., The Law of Nations or the Principles of Natural Law (1758, trans. Fenwick, C. 1916), pg. 315.

Dr. Gates testified that in such a unique circumstance, where a foreign power has illegally occupied a sovereign nation – apologized – promised to return lands to the disaffected sovereign nation – but then refuses to adopt any procedure or process by which such recognition may be obtained, that it is appropriate for the State Court to look to International Law for precedent. The State did not rebut this testimony.

Accordingly, the testimony that it was "necessary" for Defendants to enter Kaho'olawe to "exercise their rights" in that territory, pursuant to international law, must be considered. Such testimony is case-dispositive. Exercise of a constitutionally protected fundamental right cannot form the basis for criminal liability.

d. The Rule of Lenity requires dismissal.

Where a criminal statute is ambiguous, it is to be interpreted according to the rule of lenity. See State v. Kaakimaka, 84 Hawai'i 280, 292, 933 P.2d 617, 629 ("Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (quoting Busic v. United States, 446 U.S. 398, 406, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980).)), reconsideration denied, 84 Hawai'i 280, 933 P.2d 617 (1997); State v. Auwae, 89 Hawai'i 59, 70, 968 P.2d 1070, 1081 (App.1998).

The 'rule of lenity' applies [ ] where there is ambiguity in or conflict between statutes." State v. Arnold (1991), 61 Ohio St.3d 175, 178. While courts are required to strictly construe statutes defining criminal penalties against the state, the rule of lenity applies only where there is ambiguity in a statute or conflict between multiple states. United States v. Johnson (2000), 529 U.S. 53, 59, 120 S.Ct. 1114, 146 L.Ed.2d 39; United States v. Lanier (1997), 520 U.S. 259, 266, 117 S.Ct. 1219 137 L.Ed.2d 432.

The rule of lenity mandates dismissal of these cases in two ways.

First, in the case at bar, Defendants have demonstrated that they have statutory rights to organize and form a sovereign Hawaiian Nation. The State did not contest this point. Defendants presented expert testimony, asserting that their entrance onto

Kaho'olawe is a necessary step in perfecting their right as a sovereign nation. The State did not rebut this point.

Accordingly, a conflict exists between the State statutes that protect the right to form a nation, and the administrative regulation that criminalizes the conduct, which is necessary to form a nation. Lenity, therefore, requires dismissal. The right conflicts with the criminal law.

Secondly, lenity also requires dismissal based on the doctrine of political question. "The political question doctrine, often considered the most amorphous aspect of justiciability, holds generally that certain matters are political in nature and thus inappropriate for judicial review." Nishitani v. Baker, 82 Hawai'i 281, 290, 921 P.2d 1182, 1191 (App.1996).

Indeed, the State has repeatedly claimed that questions as to the existence and rights of a sovereign Hawaiian Nation are solely legislative in nature and cannot be resolved by the Courts.

Courts, however, can make determinations of nationhood. See, Lorenzo, infra, and Cherokee Nation v. Georgia 30 U.S. 1 (1835). In Cherokee Nation, the U.S. Supreme Court Court first analyzed whether the Cherokee Nation had established itself as a state and concluded in the affirmative.

> They have established a constitution and form of government, the leading features of which they have borrowed from that of the United States, dividing their government into three separate departments, legislative, executive and judicial. In conformity with this constitution, these departments have all been organized. They have formed a code of laws, civil and criminal, adapted to their situation, have erected courts to expound and apply those laws, and organized an executive to carry them into effect. They have established schools for the education of their children, and churches in which the Christian religion is taught; they have abandoned the hunter state and become agriculturists, mechanics, and herdsmen; and, under provocations long continued and hard to be borne, they have observed with fidelity all their engagements by treaty with the United States.

Cherokee Nation v. Georgia 30 U.S. 1 (1835). The Supreme Court ultimately found that the Cherokee Nation was a State, within the meaning of the U.S. Constitution (before it categorized *that* nation as a domestic dependent nation, instead of a sovereign).

Nonetheless, the State claims that determinations of nationhood are inherently political in nature and cannot be resolved by the Courts. If this assertion is true, the rule of lenity must bar this prosecution and the case must be dismissed.

If, in fact, the RHG has achieved (or is near) nation-status, then clearly the action of its citizens in exercising their rights in Kaho'olawe are protected activities pursuant to State and Federal law. Defendants cannot be convicted for engaging in activities that are *protected*. The State would, however, deny Defendants their very defense – that their actions are protected because their right to form a nation is protected – and force Defendants to raise their affirmative defense in the Legislature. This approach does not make sense in this context.

The State legislature is not a forum in which affirmative defenses in criminal cases are resolved[6]. Defendants assert that the rule of lenity is violated if the political question doctrine prevents the Court from resolving a viable defense of a criminal case. In other words, the State cannot espouse a right to form a nation – charge citizens with crimes when they exercise that right – and then claim that the nature of that right, and its applicability to the Defendants, cannot be resolved in criminal court. Defendants do not believe that the doctrine of political question bars the court from considering their defense – but if it does – lenity requires dismissal.

2. THE ADMINISTRATIVE REGULATIONS APPLIED TO THIS CASE ARE UNCONSTITUTIONALLY VAGUE AND ARE A CONTENT-BASED PRIOR RESTRAINT ON PROTECTED SPEECH.

a. Vagueness

"A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it invites arbitrary and discriminatory enforcement." Schwartzmiller v. Gardner, 752 F.2d 1341, 1345 (9th Cir.

[6] By the State's reasoning, the case would have to be continued so that the matter of the affirmative defense could be removed to and decided by the legislature.

1984) (internal citations omitted) (emphasis added). "[The void for vagueness] doctrine is an aspect of due process and requires that the meaning of a penal statute[7] be determinable." Id.

In Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), the United States Supreme Court articulated the concerns underlying the void for vagueness doctrine:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.
>
> Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-499 (1982), quoting Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

In State v. Lindstedt, 101 Haw. 153, 64 P.3d 282 (Haw.App. 2003), the Hawaii Intermediate Court of Appeals addressed the framework for a void for vagueness attack:

> The Hawai'i Supreme Court has treated claims that a criminal statute is unconstitutionally vague as essentially facial attacks, subject to the following standard:
>
> > Due process of law requires that a penal statute state with reasonable clarity the act it proscribes and provide fixed standards for adjudging guilt, or the statute is void for vagueness. Statutes must give the person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may choose between lawful and unlawful conduct.
> >
> > State v. Tripp, 71 Haw. 479, 482, 795 P.2d 280, 282 (1990).

The Rules under which Defendants are being charged fail to provide "explicit standards for those who apply the statute, in order to avoid arbitrary and discriminatory enforcement and the delegation of basic policy matters." Lindstedt, supra, 101 Haw. at 167.

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[7] The Haw. Admin. Rules under which defendants are charged must logically be considered penal statutes given that violation of HAR 13-261-10 is considered a petty misdemeanor and carries a possible jail sentence.

Haw. Admin. Rule 13-261-10 provides, in relevant part:

> No person or vessel shall enter or attempt to enter into or remain within the reserve unless such person or vessel: (a) Is specifically authorized to do so by the commission or its authorized representative as provided in section 13-261-11; . . .

HAR §13-261-11 provides, in relevant part:

> Procedure for the authorization of entrance into and activity within the reserve . . . (b) Entrance into and activities within the reserve requested by applicants seeking to exercise traditional and customary rights and practices compatible with the law, shall be approved or disapproved by the commission after review and consultation with cultural practitioners.

(emphasis added).

In analyzing the Rules, their deficiency is striking. What is a "cultural practitioner"? Where is it defined? How is it determined which cultural practitioners will be consulted? How are they chosen? What are their qualifications? How many cultural practitioners must be consulted? What happens if they disagree with one another? Must the commission or the cultural practitioners provide reasons for their approval or disapproval of an application to enter the reserve for cultural or spiritual purposes? Are there any safeguards against arbitrary and/or discriminatory decisions? If the only criterion used is that a "cultural practitioner" is consulted, the answer is, "No."

Defendant Noa is a cultural practitioner. Moreover, Dr. Gates testified that his entry onto Kaho'olawe is protected. Additionally, Dr. Gates testified that the requirement for "asking permission" is wholly inconsistent with the promise of transfer of the island to a sovereign nation. Sovereign nations do not need permission to enter their own land.

In Kolender v. Lawson, 461 U.S. 352 (1983), the United States Supreme Court struck down a non-loitering law which required that citizens to provide a "credible and reliable" identification card to police officers upon request. The Court found this law to be void for vagueness because it "contain[ed] no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." Id. at 358.

Again, here, as in Kolender, the term "cultural practitioner" contains no standards to deter arbitrariness. The lack of definition of the term "cultural practitioner", the lack

of standards or measures on how cultural practitioners are chosen or consulted, and how the Commission will assess requests to enter the Reserve with the help of "cultural practitioners" all lead to one conclusion:

HAR 13-261-10 and 11 are unconstitutionally vague, as applied to this case, and should be struck down.

b. Prior Restraint

Because HAR 13-261-10 and HAR 13-261-11 affect the right of expression, they should be viewed under a more stringent standard.

> [P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.
>
> Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S.Ct. 1186, 1193 - 1194 (1982).

Any system of prior restraint on expression bears a heavy presumption against its constitutional validity. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976) citing Carroll v. Princess Anne, 393 U.S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

Symbolic expression may be forbidden or regulated only if the conduct itself may constitutionally be regulated, **only if the regulation is narrowly drawn to further a substantial governmental interest**, and if the interest is unrelated to the suppression of free speech. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) citing Spence v. Washington, 418 U.S. 405 (1974); Tinker v. Des Moines School District, 393 U.S. 503 (1969).

Here, the State points to the danger of unexploded bombs as its compelling interest in keeping unauthorized people off of Kaho'olawe, but the administrative regulations at issue do nothing to protect people from bombs. They, instead, require applicants pass some sort of cultural litmus test. This regulation is not narrowly tailored to achieve the compelling State interest of protecting people from unexploded ordinance.

The government may impose reasonable restrictions on the time, place, or manner of protected speech. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, (1984). However, these restrictions must: (1) be justified without reference to the content of the regulated speech; (2) be narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communication of the information. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

a. The Regulations Are Not Content Neutral.

HAR §§ 13-261-10 and 11 assess the validity of applications by native Hawaiians seeking to enter Kaho'lawe to practice their customary or traditional rights based on opinion of "cultural practitioners" -- an undefined, seemingly arbitrary designation.

HAR §13-261-11 provides, in relevant part:

> Procedure for the authorization of entrance into and activity within the reserve . . . (b) Entrance into and activities within the reserve requested by applicants seeking to exercise traditional and customary rights and practices compatible with the law, shall be approved or disapproved by the commission after review and consultation with cultural practitioners.

(emphasis added).

Because the statute is so vague with respect to the term "cultural practitioner" (i.e., lack of definition, lack of safeguards in the process of how they are chosen and consulted), and the criteria to be used in deciding whether to approve or disapprove an application, there is no safeguard that the statute is, in effect, content neutral.

An analogy to the current statutory scheme regarding access to Kaho'olawe would be a film commission that is allowed to approve or disapprove the screening of a film without being constricted by any articulated, accountable criteria -- other than that the commission consists of "film experts." Such a scheme cannot seriously be considered to be "content neutral."

b. The Regulations Are Not Narrowly Tailored.

> [A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so

> long as the ··· regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985); see also Community for Creative Non-Violence, supra, 468 U.S., at 297, 104 S.Ct., at 3071. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.
>
> Ward v. Rock Against Racism, 491 U.S. 781, 798-800 (1989).

Here, the government's stated interest in restricting access is the safety of those entering the Reserve. However, Mr. Noa testified that someone who is deemed as practicing a "valid" customary and traditional right is in just as much danger from unexploded ordinance as someone whose request the KIRC (in consultation with their "cultural practitioners") is deemed invalid.

The Rules, as presently enacted, give the KIRC arbitrary power in allowing access to native Hawaiians. Such a scheme cannot be considered "narrowly tailored" to achieve the compelling State interest of protecting citizens against unexploded bombs inasmuch as they have nothing to do with that subject.

Applied to this case, the regulations impose an illegal prior restraint on political speech and conduct, and must be deemed unconstitutional.

3. THIS PROSECUTION UNCONSTITUTIONALLY INTERFERES WITH FREEDOM OF RELIGION.

In 1993, Congress passed, and the President signed, the Religious Freedom Restoration Act ("the Act"). The Act basically provides that an otherwise neutral law that interferes with the free exercise of religion may only be enforced if the law is narrowly tailored to protect a compelling government interest. Specifically, the statute provides:

> The Congress finds that--
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
(3) governments should not substantially burden religious exercise without compelling justification;
(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purpose. The purpose of this Act [is] …to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

24 U.S.C.S. § 2000bb.

Defendants acknowledge that the Religious Freedom Restoration Act has been declared unconstitutional as applied to the *Federal* Government (see City of Boerne v Flores, 521 U.S. 507 (1997), but numerous later decisions clarify that the Act is constitutional when applied to the *States*. See Guam v Guerrero, 290 F.3d 1210 (9th Cir. 2002).

The rule of Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) (which is re-instated through the Religious Freedom Restoration Act) requires that a State must demonstrate that its substantial interference with the exercise of religion is the most narrowly tailored restriction necessary to further a compelling State interest.

Section 3B of the Act, 24 U.S.C.S. § 2000bb, provides:

(b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

In the case at bar, the State argues that the government's compelling interest in restricting access to Kaho'olawe is to protect citizens from dangers that may still exist on the island from military activity.

The government has not, however, demonstrated that the current statutory structure is narrowly tailored, or least restrictive to protect religious activity there. As argued above, the statutory scheme under HRS Chapter 6K is unduly burdensome on the exercise of native Hawaiian rights and practices and allows for arbitrary and discriminatory enforcement.

4. THE CONDUCT IS PRIVILEGED UNDER HANAPI.

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

In State v. Hanapi , 970 P.2d 485, 493-94, 89 Haw. 177, 186-86 (1998), the Hawai'i Supreme Court articulated a three-part test that a criminal Defendant claiming a PASH privilege must prove: (1) he or she must qualify as a "native Hawaiian" within the guidelines set out in PASH; (2) his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice; and (3) the exercise of the right occurred on undeveloped or less than fully developed property.

Defendants meet all of the requirements mandated by Hanapi.

First, Defendants are "native Hawaiians" Within The Guidelines Set Out in PASH. Second, Mr. Noa and Mr. Gates testified that the exercise of management and control of Kaho'olawe were traditional and customary native Hawaiian practices, as practiced before the illegal 1893 overthrow. The State did not rebut this testimony. There is no evidence to the contrary. Moreover, here, Defendants practiced their traditional and customary rights once they entered Kaho'olawe by building an ahu and praying. Third, it is undisputed that Kaho'olawe is undeveloped land.

Accordingly, Hanapi and its progeny mandate dismissal.

CONCLUSION

For all of the above reasons, the Motion to Dismiss should be GRANTED.

Respectfully Submitted,

_____	_____
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IN THE DISTRICT COURT OF THE SECOND CIRCUIT
WAILUKU DIVISION
STATE OF HAWAII

STATE OF HAWAII	
vs.	Case No.: 2P106-02017
NELSON KUUALOHA ARMITAGE,	Case No.: 2P106-02018
RUSSELL KAHOOKELE,	Case No.: 2P106-01909
HENRY MAILE NOA.	Trial Date: Not Set
Defendants.	**CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing closing argument and proposed fof/col were duly served upon the following counsel via U.S. Mail, postage prepaid:

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By_____
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