CARLSMITH BALL LLP

JOHN P. MANAUT 3989
STEVEN M. EGESDAL 4511
ARSIMA A. MULLER 8631
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842
jmanaut@carlsmith.com
segesdal@carlsmith.com
amuller@carlsmith.com

Special Appearance Attorneys for Defendant
UNIVERSITY OF HAWAI'I, Manoa and Hilo

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

C. KAUI JOCHANAN AMSTERDAM, 1415 PENSACOLA ST., #12, HONOLULU, HAWAII 96822, NATIVE HAWAIIAN BENEFICIARY,

Plaintiff,

vs.

STATE OF HAWAII, OFFICE OF THE GOVERNOR, GOVERNOR DAVID IGE, BOARD CHAIRMAN OF TMT OBSERVATORY CORP., CHAIRMAN HENRY YANG, ASSOCIATED STATE AGENCIES, BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, DEPARTMENT OF LAND AND

CIVIL NO. 15-00338 LEK BMK

DEFENDANT UNIVERSITY OF HAWAII'S **OPPOSITION** TO (1) PLAINTIFF'S MOTION FOR AN IMMEDIATE TEMPORARY INJUNCTION REGARDING THE THIRTY METER TELESCOPE OR TMT PROJECT ATOP THE SACRED VOLCANIC MOUNTAIN OF MAUNA KEA, FILED ON AUGUST 24, 2015 [DOC 2]; AND (2) PLAINTIFF'S MOTION REGARDING THE THIRTY METER TELESCOPE OR TMT PROJECT ATOP THE SACRED VOLCANIC MOUNTAIN OF MAUNA KEA, FILED ON

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| NATURAL RESOURCES, STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, SUZANNE CASE, IN HER OFFICIAL CAPACITY) AS CHAIR OF THE BOARD OF LAND AND NATURAL RESOURCES AND DIRECTOR OF THE DEPARTMENT OF LAND AND NATURAL RESOURCES, THE UNIVERSITY OF HAWAII AT HILO AND MANOA, REPRESENTATIVES OF THE NATIONS OF CHINA, INDIA, JAPAN, CANADA, AND THE UNITED STATES INVOLVED IN THE TMT PROJECT, ALL REPRESENTATIVES AS INDIVIDUALS AND IN THEIR OFFICIAL CAPACITY, RESPONDENTS/DEFENDANTS,<br><br>Defendants. | AUGUST 24, 2015 [DOC 3]; CERTIFICATE OF SERVICE<br><br>Hearing Date: October 14, 2015<br>Time: 9:30 a.m. |

**DEFENDANT UNIVERSITY OF HAWAII'S OPPOSITION**

## I. INTRODUCTION.

Defendant University of Hawaii ("**UH**"), by special appearance,[1] opposes the two motions stated above. The two motions, however captioned, are for injunctive relief: the plaintiff wants the court to stop the state and its agencies, including UH, from building a telescope on Mauna Kea. *See* Pl. Mot. [Doc. 2] at 2 (seeking "orders that the Defendants be temporarily restrained…in the

[1] The plaintiff has not yet served UH with the Complaint.

advancement of…the TMT Project and Injunctive Relief thereby be provided….”); Pl. Mot. [Doc. 3] at 3 (“Accordingly, the Plaintiff presents his Motion herein to currently stop the advancement of the TMT Project to prevent further injury, suffering, and damage.”). The motions, including their supporting unsworn declaration and exhibits, present ***no probative, admissible evidence*** of any “injury, suffering, and damage.” *See* Pl. Mot. [Doc. 2] 2-3; Pl. Mot. [Doc. 3] 1-5; *id*. Exs. A, B [Docs. 3-3, 3-4]; Amsterdam Dec. 1-2 [Doc. 4]. The plaintiff’s unverified complaint likewise is ***no evidence*** of any “injury, suffering, and damage.” Compl. [Doc. 1].

The plaintiff is entitled to deference by the court, because he proceeds pro se. But there is no evidence upon which this court can enter the drastic remedy of a preliminary injunction against the defendants, including UH. Even if injunctive relief were available to him, he has failed to submit evidence showing that he likely will prevail on his claims. UH has filed a motion to dismiss, which explains that all his claims cannot be maintained as a matter of law. *See* Def. UH Mot. to Dismiss [Doc. 18]. Under Federal Rule of Civil Procedure 1[2], UH incorporates and restates those reasons here for purposes of these motions.

The plaintiff therefore fails to “establish that he is likely to succeed on the merits[.]” *Winter v. Natural Res. Def. Council Inc*., 555 U.S. 7, 20 (2008). The

[2] Under Rule 1, all rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every motion and proceeding.”

plaintiff also has failed to submit evidence showing that it is he who will suffer irreparable harm, absent the injunctive relief he seeks. Therefore, the court should dismiss the motions.

## II. FACTS.

The controlling facts concern the profound lack of any admissible evidence presented in the plaintiff's motions needed to support the injunctive relief he seeks. The motions nowhere provide evidence that UH's involvement in the building of a telescope on Mauna Kea actually has interfered with his own exercise of any sincerely-held religious belief. They do not substantiate that he personally believes that Mauna Kea is "sacred." They nowhere substantiate one event where he was prevented by UH from exercising his religious beliefs on Mauna Kea.

Instead, there is only one passing suggestion of any possible (though unlikely) personal injury or harm: "Besides being subjected to arrest for accessing Mauna Kea, the Plaintiff and other Native Hawaiians are subject to humiliation and possible physical injury …." Pl. Mot. [Doc. 3] at 4. Neither the motions nor the unsworn declaration substantiate that the plaintiff ever was "arrested." (Being "subjected to arrest" and "arrested" are two different things.) The motions also do not substantiate that the plaintiff may be arrested (again or otherwise), for trying to exercise his religious beliefs on Mauna Kea.

## III. THE MOTIONS AND SUPPORTING DECLARATION VIOLATE LR7.6.

District courts have the authority to promulgate local rules to conduct their business, so long as these rules are consistent with the Federal Rules of Civil Procedure or acts of Congress. 28 U.S.C. § 2071; *United States v. Warren*, 601 F.2d 471, 473 (9th Cir. 1979). LR7.6 requires (1) factual assertions to be supported by sworn testimony, and (2) declarations and affidavits to contain only facts, not conclusions and argument.

> Factual contentions made in support of or in opposition to any motion ***shall be supported by affidavits or declarations***, when appropriate under the applicable rules. Affidavits and declarations shall ***contain only facts***, shall conform to the requirements of Fed. R. Civ. P. 56(e) and 28 U.S.C. § 1746, and shall ***avoid conclusions and argument***. Any statement made upon information or belief shall specify the basis therefor. ***Affidavits and declarations not in compliance with this rule may be disregarded by the court.***

LR7.6 (emphasis added).

Although the plaintiff is a pro se litigant, he still must comply with applicable federal and local rules concerning motions. Though federal courts are solicitous of pro se litigants, they may nonetheless require strict compliance with local rules. *Cf. McNeil v. United States*, 508 U.S. 106, 113 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel."

(citation omitted)); *Cady v. Sheahan*, 467 F.3d 1057,1061 (7th Cir. 2006) (affirming district court's strict adherence to local rules).

The motions and the supporting declaration violate LR7.6. The motions' factual assertions are not supported by sworn testimony. The declaration does not contain only facts; it contains mostly unsupported conclusions and argument. The court should disregard the declaration and dismiss the unsupported motions.

## IV. NO JUSTICIABILITY: PLAINTIFF FAILS TO ESTABLISH ARTICLE III STANDING.

Federal courts exercise limited jurisdiction, possessing only that power authorized by Article III of the United States Constitution and statutes enacted by Congress under it. *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994) (citations omitted)Courts presumptively are without jurisdiction, until it is established by the party asserting it. *Id.* The court always must look first to questions of jurisdiction before proceeding to the merits of a dispute. Federal court jurisdiction is limited by the Constitution to "cases" and "controversies."[3] Standing, "the core component … of the case-or-controversy requirement of Article III[,]"[4] is "the threshold question in every federal case[.]"[5]

In *Lujan*, the Supreme Court held that members of wildlife conservation and other environmental organizations lacked standing to complain of a new regulation

[3] U.S. Const. art. III, § 2; *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).
[4] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).
[5] *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

interpreting the Endangered Species Act only applying to actions within the United States or on the high seas. 504 U.S. at 557-58. In so doing, the Court explained the three-element test for standing. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 560-61 (internal citations omitted). Clarifying that injury-in-fact test, the Court explained that it "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.* at 563 (citation omitted). As such, the Court held that there must be sufficient evidence of a ***concrete interest***, as well as a ***concrete harm***. *Id.* at 572.

In addition to the constitutional requirements, a plaintiff also must satisfy prudential standing restrictions. A plaintiff must "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third

parties."[6] Second, a plaintiff's claim must be more than a "generalized grievance[]" that is pervasively shared by a large class of citizens.[7]

The motions nowhere provide evidence that the state's building of a telescope on Mauna Kea has interfered with ***plaintiff's own rights***, including with any personal exercise of his sincerely-held religious beliefs. *See* Pl. Mot. [Doc. 2]; Pl. Mot. [Doc. 3]; *id.* Exs. A, B; Amsterdam Decl. Indeed, neither motion even substantiates that the plaintiff personally believes that Mauna Kea is "sacred." *Id.* Neither motion alleges one event where he was prevented from exercising his religious beliefs on Mauna Kea. *Id.* A generalized grievance is not harm for purposes of establishing Article III standing.

In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Supreme Court declared that, in most cases, a plaintiff seeking injunctive relief under 42 U.S.C. § 1983 must allege that he or she will be subject again to the challenged conduct. Absent those allegations, a plaintiff does not have standing to seek an injunction, and that aspect of the case therefore is not justiciable. *Id.* at 105.

Here, the plaintiff does not substantiate that he ***personally*** has been subjected to any challenged government conduct, including by UH, much less that he will be subjected to it ***again***. The plaintiff only alleges "being subjected to

[6] *Warth*, 422 U.S. at 499 (citations omitted).
[7] *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982) (citation omitted).

arrest[.]" Pl. Mot. [Doc. 3] at 4. He does not allege that he ***personally*** has been punished by UH for exercising a sincerely-held religious belief, or he ***personally*** has had any religious activity disrupted by UH. He does not even allege that UH has done anything to him ***personally***, or UH threatens to do anything to him ***personally***. He does not allege why, for him ***personally***, the risk of recurrence of any activity ***by UH*** is more than speculative. As such, he has no viable claim for any form of injunctive relief against UH.

## V. ANALYSIS ON PRELIMINARY INJUNCTION.

If the plaintiff establishes that the court has jurisdiction, then he bears the burden of establishing four separate factors in seeking a preliminary injunction: (1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) showing the balance of the equities tips in his favor; and (4) the injunction is in the public interest. *Winter*, 555 U.S. at 20 (citations omitted). The Ninth Circuit considers all those elements except for irreparable injury using a sliding scale approach, where "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131 (9th Cir. 2011). The element of irreparable injury is not subject to balance; the moving party must "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (citations omitted). The

Supreme Court repeatedly has emphasized that "injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22 (citation omitted).

"'[S]erious questions going to the merits' [combined with] a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Cottrell*, 632 F.3d at 1135. A "serious question" is one on which the plaintiff "has a fair chance of success on the merits." *Sierra On-Line, Inc. v. Phoenix Software. Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984). As a result, an injunction serves as "a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32 (citation omitted). A preliminary injunction is an "extraordinary and drastic remedy," and never awarded as of right. *Munaf v. Geren*, 553 U.S. 674, 689-690 (2008) (internal citations omitted).

Although the same general principles apply, where "a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction." *Martin v. International Olympic Comm.*, 740 F.2d 670, 675 (9th Cir.1984). Therefore, "[m]andatory preliminary relief ... should not be issued unless the facts

and law clearly favor the moving party. *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979) (citations omitted).

**A. No Evidence of Likelihood of Success on the Merits.**

The plaintiff seeks an "immediate temporary" (*i.e.*, preliminary) injunction to stop the building of the telescope on Mauna Kea. Pl. Mot. [Doc. 2] at 2; Pl. Mot. [Doc. 3] at 3. He is unlikely to succeed because he has failed to state a claim upon which relief can be granted. While the plaintiff's claims are unclear, they vaguely imply two legal bases: the Hawaii state constitution and the Admission Act (presumably Section 5(f)). Both motions fail, as a matter of law, as explained in UH's motion to dismiss the Complaint. *See* Def. UH Mot. to Dismiss [Doc. 18].

The court has no power to enjoin the state or its officials for a violation of state law, including the state constitution. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). The court also should not determine whether the state and its officials have violated the state constitution. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).[8] The plaintiff submits no evidence of any violation of Section 5(f) of the Admission Act, including no evidence that the state's and its agencies' building of the telescope on Mauna Kea falls outside the

[8] The decision in *Pullman*, did not involve a state constitutional issue, but the Court's argument for abstention applies at least as forcefully to claims resting on a state constitution. In later cases, the Supreme Court invoked *Pullman* abstention to allow a state court to consider state constitutional questions. *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975); *Reetz v. Bozanich*, 397 U.S. 82, 86-87 (1970).

enumerated purposes of Section 5(f).

The plaintiff's motions are based, at best, on the plaintiff's two-page unsworn declaration, and two exhibits. Exhibits A and B [Doc. 3-2 and 3-3] contain two photographs of the plaintiff's kin; Exhibit B [Doc. 3-3] apparently is a list of persons who are part of the "Interim Government" for the Kingdom of Hawaii. It is unclear what relevance those exhibits have to claims made or the relief sought. The unverified complaint is no evidence of any claim against UH. The plaintiff has failed to submit evidence demonstrating that it is likely he will prevail on his claims. The plaintiff has failed to "establish that he is likely to succeed on the merits[.]" *Winter*, 555 U.S. at 20.

**B. Irreparable Harm.**

To prevail on a motion for a preliminary injunction, plaintiffs must establish that the denial of such an injunction will result in irreparable harm. *Winter*, 555 U.S. at 20. "[A]lthough some injuries may usually be irreparable and thus a likelihood of irreparable injury easily shown, ***the plaintiff must still make that showing on the facts of his case*** and cannot rely on a presumption to do it for him." *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011) (citing *Winter and eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006)) (emphasis added). Here, plaintiff makes no showing with any evidence.

Courts generally look at the "immediacy of the threatened injury in determining whether to grant preliminary injunctions." *Privitera v. California Bd. of Med. Quality Assurance*, 926 F.2d 890, 897 (9th Cir. 1991), *citing Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) ("a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief"). The plaintiff's motions provide no evidence of any immediate threatened injury to him personally and directly, if the building of the telescope proceeds. The plaintiff's motion fails to carry his burden to establish irreparable injury warranting immediate injunctive relief.

## VI. CONCLUSION.

The court should dismiss the motions.

DATED: Honolulu, Hawai'i, September 23, 2015.

/s/ John P. Manaut
JOHN P. MANAUT
STEVEN M. EGESDAL
ARSIMA A. MULLER

Special Appearance Attorneys for Defendant
UNIVERSITY OF HAWAI'I, Manoa and Hilo