

TESTIMONY

SB 2840



Randy Perreira
President

HAWAII STATE AFL-CIO

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The Twenty-Fifth Legislature, State of Hawaii
Hawaii State Senate
Committee on Labor &
Committee on Judiciary and Government Operations

Testimony by
Hawaii State AFL-CIO
February 9, 2010

S.B. 2840 – RELATING TO PUBLIC PROCUREMENT

The Hawaii State AFL-CIO strongly supports S.B. 2840 which requires at least eighty percent of workers on public works and construction contracts to be Hawaii residents.

As of January 2010, Hawaii's unemployment rate has reached a staggering 6.9 percent. As of December 2010, Hawaii's hotel occupancy rate plunged below 61 percent; the lowest since the September 11, 2001 terrorist attacks and to further rub salt on the wound, Hawaii's foreclosures skyrocketed 183 percent in the year 2009 and in December 2009 alone, there were a whopping 1,534 foreclosures. In all, the news is ever so gloomy with relief seen so far away.

With the unemployment rates rising, and the 1.2 billion dollar deficit Hawaii faces, it is imperative to pass S.B. 2840. No longer should Hawaii residents sit on the bench while out-of-state workers get the jobs our workers so desperately need. It is time to put our unemployed back to work and stimulate our ever so stagnant economy. We must do all we can to keep the unemployment rate from rising and families being forced out of their homes because their parents had to sit on the bench and watch out-of-state workers do their jobs.

Thank you for the opportunity to testify.

Respectfully submitted,

Randy Perreira
President

COMMITTEE ON LABOR

Senator Dwight Y. Takamine, Chair
Senator Brian T. Taniguchi, Vice Chair

COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

Senator Brian T. Taniguchi, Chair
Senator Dwight Y. Takamine, Vice Chair

District Council 50 stands in support of Senate Bill 2840. In these times of economic hardship and high unemployment for the the men and women of the Painters, Tapers, Glaziers, and Floorlayers we believe that all state procurement contracts should go to contractors that are committed to hiring Hawaii residents. With mounting job losses in the construction industry, and the emphasis that the Governor Linda Lingle has put upon state funded Construction and Improvement Projects we feel it is necessary to protect local jobs for local people.

Nathaniel Kinney
Political Affairs Director
District Council 50
International Union of Painters and Allied Trades



HAWAII BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO

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Masons Local 630

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Vice President

Iron Workers Local 625

DAMIEN T. K. KIM

Financial Secretary

International Brotherhood of
Electrical Workers Local 1186

ARTHUR TOLENTINO

Treasurer

Sheet Metal Workers I.A. Local 293

REGINALD CASTANARES

Trustee

Plumbers & Fitters Local 675

THADDEUS TOMEI

Elevator Constructors Local 126

MALCOLM K. AHLO

Carpet, Linoleum, & Soft Tile
Local 1296

JOSEPH BAZEMORE

Drywall, Tapers, & Finishers
Local 1944

RICHARD TAGGERE

Glaziers, Architectural Metal &
Glassworkers Local Union 1889

RONAN KOZUMA

Hawaii Teamsters & Allied
Workers Local 996

GARY AYCOCK

Boilermakers, Ironship Builders
Local 627

LYNN KINNEY

District Council 50
Painters & Allied Trades
Local 1791

KALANI MAHOE

Operating Engineers Local 3

PETER GANABAN

Laborers' International Union of North
America Local 368

DOUGLAS FULP

International Association of
Heat & Frost Insulators
& Allied Workers Local 132

February 8, 2010

Honorable Senator Dwight Y. Takamine, Chair
Honorable Senator Brian T. Taniguchi, Vice Chair
Members of the Senate Committee on Labor
Hawaii State Capital
415 South Beretania Street
Honolulu, HI 96813

RE: **IN SUPPORT OF SB 2840**

Relating to Public Procurement

Hearing: Tuesday, February 9, 2010, 9:45 a.m., Room 016

Dear Chair Takamine, Vice Chair Taniguchi and the Senate Committee
on Labor:

For the Record my name is **Buzz Hong the Executive Director for
the Hawaii Building & Construction Trades Council, AFL-CIO.** Our
Council is comprised of 16-construction unions and a membership
of 26,000 statewide.

The Council **SUPPORTS** the passage of **SB 2840** that requires at
least eighty per cent of workers on public works and construction
contracts to be Hawaii residents.

Thank you for the opportunity to submit this testimony in support
of **SB 2840.**

Sincerely,

W. Hong

**William "Buzz" Hong
Executive Director**



International Brotherhood of Electrical Workers

LOCAL UNION NO. 1186 · Affiliated with AFL-CIO

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TESTIMONY FOR SB2840 , RELATING TO PUBLIC PROCUREMENT

TO: **SENATE COMMITTEE ON LABOR, AND SENATE COMMITTEE ON
JUDICIARY & GOVERNMENT OPERATIONS**

For Hearing on Tuesday, February 9, 2010, at 9:45 a.m., in Conference Room 016

RE: **STRONG SUPPORT FOR SB2840**

Honorable Chairs Takamine & Taniguchi, Vice Chairs, and Committee members,

The **International Brotherhood of Electrical Workers Local Union 1186** represents over 3,500 members working in electrical construction, telecommunications, and Oceanic Cable. Our members include civil service employees at Pearl Harbor, Kaneohe, Hickam, and at every military installation in Hawaii. IBEW Local 1186 also represents over 120 signatory electrical contractors that perform most of the electrical work in the state of Hawaii.

SB2840 enables the legislature and the state of Hawaii to constitutionally execute a policy issue to ensure local jobs are created for local residents to address a pressing local policy concern. Tax dollars and public works projects created to stimulate the local economy and reduce the plague of unemployment are more effective when the majority of those jobs go to local residents and to the support of our local community, instead of being circumvented by outside interests.

The multiplier effect and the circulation of our local dollars and resources should be encouraged by our policy makers whenever possible. SB2840 will provide the proper framework for stimulating the local economy and creating “local jobs for local people” in a responsible manner. Thank you for providing me with the opportunity to testify in strong support for SB2840.

Mahalo and aloha,

Damien Kim
Business Manager – Financial Secretary
International Brotherhood of
Electrical Workers, Local Union 1186

Testimony In Support of
SB2840 Relating to Public Procurement

By Al Lardizabal, Director of Government Relations
Hawaii Laborers' Union

To the Senate Committee on Labor and the
Senate Committee on Judiciary and Government Operations
February 9, 2010, 9:45 a.m.
State Capitol, Rm. 016

Senator Dwight Y. Takamine, Chair, Committee on Labor
Senator Brian T. Taniguchi, Chair, Committee on Judiciary and Government Operations
Members of the Joint Committee:

The Hawaii Laborers' Union strongly supports the intent and purpose of SB2840 requiring contractors to employ at least 80% of workers on government projects to be Hawaii residents.

We believe that the previous testimony and legal reasoning provided by Professor Jon M. Van Dyke on HB2736, the companion bill to SB2840, and now being provided to this joint committee, speaks directly to the problem of construction unemployment in Hawaii and the precedents established by other governmental entities with residence preferences in dealing with severe local construction unemployment, supports the intent and purpose of SB2840 now before this committee.

The construction industry and the thousands of unemployed or underemployed construction workers in Hawaii desperately need the help of the State Legislature. Please pass this bill to allow further debate and discussion. Let's make "Local Jobs for Local People" a reality.

Thank you for the opportunity to submit this testimony.

**Hawaii State Legislature
Joint Hearing
Senate Committee on Judiciary and Government Operations
Senate Committee on Labor
Tuesday, February 9, 2010
9:45 a.m.
Conference Room 016**

Re SB 2840 Relating to Public Procurement

**Testimony of Jon M. Van Dyke
On Behalf of
District Council 50**

Introduction.

Laws giving preference to local residents for work funded by state taxpayers have been found to be constitutional under the Market Participant Exception to the Dormant Commerce Clause, *White v. Massachusetts Council of Construction Employers, Inc*, 460 U.S. 204 (1983), and they can also be constitutional under the Privileges and Immunities Clause if they are substantially related to the important governmental goal of reducing unemployment. *United Building & Construction Trades Council of Camden County & Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208 (1984). The determination whether a specific local preference law is constitutional is, therefore, fact-specific and depends on whether the law is properly related to a specific unemployment problem needing attention. Because of the serious unemployment in Hawai'i's construction industry, and because of Hawai'i's unique geography, the approach taken in HB 2736 logically addresses Hawai'i's unemployment challenges and should be found to be constitutional under existing caselaw if a proper legislative record confirms the relationship between this law and the current rates of unemployment in the construction industry.

Hawai'i's Unemployment Challenges in the Construction Industry.

The unemployment rate in Hawai'i as of December 2009 was 6.9%. As Governor Lingle acknowledged in her State of the State Address, the construction industry has been hit especially hard during the current economic downturn. Between December 2008 and December 2009, 4,900 construction jobs were lost.¹ This problem appears to be exacerbated by the practice of some contractors who receive state public works contracts to hire nonresident construction workers.

¹ Hawai'i Dept. of Labor and Industrial Relations, Hawai'i's Seasonally Adjusted Unemployment Rate at 6.9 Percent in December, Jan. 22, 2010.

HB 2736 Relating to Public Procurement.

This Bill is designed to address the problem of unemployment in Hawaii's construction industry. It requires any contractor awarded a public works contract to "ensure that Hawaii residents comprise not less than eighty per cent of the workforce employed to perform the contract." This requirement also applies to subcontracts of \$50,000 or more, but it does not apply to "procurements for professional services under section 103D-304 and procurements for small purchases under chapter 103D-305." In addition, "hours worked by employees within shortage trades, as determined by the department of labor and industrial relations, shall not be included in the calculations for purposes of this section."

The Privileges and Immunities Clause.

United Building & Construction Trades Council of Camden County & Vicinity v. Mayor and Council of the City of Camden, 465 U.S. 208 (1984), involved a municipal ordinance enacted by the City Camden, New Jersey, requiring that at least 40% of the employees of contractors and subcontractors working on City construction projects be City residents. The Supreme Court ruled that the Privileges and Immunities Clause in Article IV of the U.S. Constitution protected the right of all U.S. citizens to seek employment from private employers, even those receiving governmental contracts, and that discrimination against citizens of other states can be justified only "where there is a 'substantial reason' for the difference in treatment" and if it can be shown that the nonresidents "constitute a peculiar source of the evil at which the statute is aimed." 465 U.S. at 222. In explaining this test, the Court noted that it would be proper in the usual case to defer to the judgment of local legislative bodies, especially when they are utilizing taxpayer funds to stimulate their local economy and to create jobs:

* "*The fact that Camden is expending its own funds or funds that it administers in accordance with the terms of a grant is certainly a factor – perhaps the crucial factor – to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause.*" *Id.* at 221 (emphasis added).

* "Every inquiry under the Privileges and Immunities Clause 'must...be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.' *Toomer v. Witsell*, 334 U.S. 385 (1948). *This caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls.*" *Id.* at 222-23 (emphasis added).

The U.S. Supreme Court remanded the *Camden* case back to the New Jersey Supreme Court to apply this test, because no factual record had been prepared when the case came to the U.S. Supreme Court. No further recorded proceedings took place in this particular case, however, so we do not know how the test was in fact applied. And in the following 26 years, no other cases have come before the U.S. Supreme Court to reevaluate the appropriate test or to

apply it to any other fact situations.

Some lower courts have struck down statutes mandating employment preferences,² and others have upheld them.³ A number of states do now have such statutes, as listed below.

The clearest case upholding a resident-preference hiring law is *State v. Antonich*, 694 P.2d 60, 61-64 (Wyo. 1985), upholding a requirement that available and qualified Wyoming residents be hired in preference to nonresident laborers. The Wyoming Supreme Court explained that "[w]ithout question, reduction in unemployment among Wyoming citizens constitutes a valid state goal," *id.* at 62, and ruled "that Wyoming's Preference Act...precisely fits the particular evil identified by the State." *Id.* at 63. The court went on to say:

"We hold that the Wyoming Preference Act does not violate the privileges-and-immunities clause of the federal constitution, notwithstanding the Act's infringement upon a recognized fundamental right. The Act narrowly addresses the goal of reduced unemployment among the state's taxpayers by preferring available, qualified residents for government-funded positions. Since the degree of discrimination bears a close relation to the state's valid reasons for discriminatory treatment, we affirm the Act's validity under the test established in *Toomer v. Witsell*, *supra*, and refined in subsequent cases."

Id. at 64. This decision has been cited with approval by the U.S. Court of Appeals for the Eighth Circuit, in *A-G-E Corporation v. United States*, 968 F.2d 650, 654 (8th Cir. 1992), where the court stated that "[a] direct attack on Wyoming's resident preference statutes [alleging that it violates the Privileges and Immunities Clause] would clearly face an uphill battle after *White v. Massachusetts Council of Constr. Employeers, Inc.*, 460 U.S. 204 (1983), and *United*

² See, e.g., *People ex rel Bernardi v. Leary Construction Co, Inc.*, 10 Ill.2d 295, 464 N.E. 2d 1019 (1984) (striking down a law requiring an absolute preference for Illinois residents in public works projects because nothing in the record, including the complaint itself, showed that nonresident laborers were a cause of unemployment in Illinois); *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984) (ruling that this same Illinois law violated the Privileges and Immunities Clause, in light of the complete failure of the state to make any attempt to justify the law); *Robison v. Francis*, 713 P.2d 259 (Alaska 1986) (striking down a law requiring that 95% of the workers on public works contracts be Alaska residents, as violating the Privileges and Immunities Clause); *Opinion of the Justices to the Senate*, 393 Mass. 1201, 469 N.E.2d 821 (1984) (rendering a nonbinding advisory opinion, without the benefit of any record of legislative findings, that a proposed bill requiring that 80% of workers on public works contracts by Massachusetts residents would violate the Privileges and Immunities Clause); *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624 (Alaska 1990) (striking down a law requiring that 50% of the construction workers in economically distressed areas to be hired for public works projects in that area, as violating the Equal Protection Clause of the Alaska Constitution); *A.L. Blades v. Yerusalim*, 121 F.3d 865 (3rd Cir. 1997) (striking down a Pennsylvania law requiring that all laborers on public works contracts have lived in Pennsylvania for at least three months prior to their employment, as violative of the Privileges and Immunities Clause).

³ The decision in *Walsh v. City and County of Honolulu*, 423 F.Supp.2d 1094 (D.Hawaii 2006), which struck down a residency requirement for public employees, is not directly applicable to HB No. 2376, because that decision was based on the court's conclusion that the residency requirement had the impermissible purpose of deterring immigration. HB No. 2376, by contrast, is designed to address Hawai'i's significant unemployment problem in the construction industry, and it utilizes a flexible approach, which will still permit one-fifth of all construction workers to be nonresidents.

Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208 (1984)."

Other post-*Camden* decisions that have upheld local preference statutes include:

* *Gary Concrete Products, Inc. v. Riley*, 285 S.C. 498, 331 S.E.2d 335 (1985), upholding a law requiring procurements to be made from South Carolina residents, so long as the South Carolina bidder is not more than 2% higher than that of the nonresident bidder for procurements under \$2,500,000 and not more than 1% higher for procurements over \$2,500,000.

* *APAC-Mississippi, Inc. v. Deep South Construction Co., Inc.*, 288 Ark. 277, 704 S.W.2d 620 (1986), upholding the requirement that contracts be awarded to bidders who paid local taxes, unless they are more than 3% higher than the lowest nontaxpaying bidder.

* *Bristol Steel & Iron Works, Inc. v. State Dept. of Transportation & Development*, 507 So.2d 1233, 1236 (La. 1987), upholding a law requiring that public works contracts must be awarded to Louisiana resident contractors unless it is more than 5% higher than the lowest responsible nonresident bid, explaining that the statute "serves a legitimate state interest, i.e., encouraging Louisiana's industries, and is rationally related to advancing that purpose."

* *Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist.*, 952 F.2d 1173 (9th Cir. 1992), upholding a requirement that Alaska school districts receiving state funds purchase dairy products harvested in Alaska unless the price is more than 7% higher than products of like quality harvested outside the state.

Other States with Resident Preference Statutes

Other states statutes that mandate resident-hiring preferences include:

* Idaho Code, Title 44, Chapter 10 § 44-1002, requiring that 95% of the employees in public works contracts be Idaho residents.

* Montana Code Annotated, § 18-2-409, requiring that 50% of the employees on public works contracts be "bona fide Montana residents."

* Oklahoma Statutes, Title 61, § 9, stating that all public works contracts "shall require employment of Oklahoma labor and the use of Oklahoma materials if available....and can be procured at a cost no higher than the same quality of labor or material available from outside this state."

* West Virginia Code Annotated, § 5A-3-37, giving a preference to bidders utilizing at least 75% West Virginia residents who have lived in West Virginia continuously for at least two years, as long as their bid does not exceed the lowest qualified bid by 2 1/2%.

* Wyoming Rules & Regulations, Chapter 14, § 6, giving a preference to Wyoming contractors, if their bid is not more than 5% higher than that of the lowest responsible

nonresident bidder, and requiring that resident laborers be used whenever possible.

Applying the Governing Test to HB 2736

The decisions since the 1984 *Camden* case confirm that each resident-preference statute must be examined in light of the specific situation in the affected community and the record made to support the statute. Hawai'i's geography complicates its employment situation, because many construction workers cannot easily move or relocate their families to distant sites where jobs might be available, and thus are limited to job opportunities in our islands. Because of this constraint, because the construction industry has been particularly hard hit in the current downturn, and because some contractors receiving public works contracts have brought in workers from elsewhere rather than hiring available local workers, a strong case can be made that HB No. 2736 is substantially related to the important government goal of reducing unemployment. The 80% figure in the Bill provides a contractor with sufficient flexibility to bring in workers from elsewhere who may have unique skills unavailable here, but at the same time ensures that taxpayer moneys spent for public works projects will help alleviate unemployment in Hawai'i's construction industry. The cases cited in footnote 2 can be distinguished, because they either involved situations where no legislative record was made, or they involved an absolute (or near-absolute) preference rather than the 80% utilized in HB No. 2736, or they involved local state constitutional provisions inapplicable here.

If the proper legislative record is made, therefore, HB No 2736 should be found to be constitutional.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

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The Twenty-Fifth Legislature, State of Hawaii
Hawaii State Senate

Committee on Labor
Committee on Judiciary and Government Operations

Testimony by
Hawaii Government Employees Association
February 9, 2010

S.B. 2840 – RELATING TO
PUBLIC PROCUREMENT

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO supports the purpose and intent of S.B. 2840 which requires at least 80% of workers on public works and construction contracts to be Hawaii residents. This measure seeks to positively impact our state's record-high unemployment by creating jobs for Hawaii residents and in turn stimulate our local economy.

Thank you for the opportunity to testify in support of S.B. 2840.

Respectfully submitted,

Nora A. Nomura
Deputy Executive Director

Testimony for LBR/JGO 2/9/2010 9:45:00 AM SB2840

Conference room: 016

Testifier position: support

Testifier will be present: No

Submitted by: erin rutherford

Organization: Individual

Address:

Phone:

Submitted on: 2/8/2010

Comments:

with as difficult as it already is for local residents ot find work, this bill could do a lot to benefit the local people. it will give them more opportunities for jobs which is in GREAT demand!!!!

TESTIMONY

SB 2840

LATE

The Twenty-Fifth Legislature
Regular Session of 2010

THE SENATE

Committee on Labor

Senator Dwight Y. Takamine, Chair

Senator Brian T. Taniguchi, Vice Chair

Committee on Judiciary and Government Operations

Senator Brian T. Taniguchi, Chair

Senator Dwight Y. Takamine, Vice Chair

State Capitol, Conference Room 016

Tuesday, February 9, 2010; 9:45 a.m.

**STATEMENT OF THE ILWU LOCAL 142 ON S.B. 2840
RELATING TO PUBLIC PROCUREMENT**

The ILWU Local 142 supports S.B. 2840, which requires at least 80% of workers on public works and construction contracts to be Hawaii residents.

At first glance, this bill may appear unconstitutional because it provides for preference in hiring to Hawaii residents. However, we are informed by the testimony of Professor Jon Van Dyke of the William S. Richardson School of Law at the University of Hawaii that federal case law exists to allow for such preference if it is "substantially related to the important government goal of reducing unemployment."

Clearly, this measure will help to ease the burgeoning unemployment among construction workers.. Unions report that more than half of their members are "on the bench," meaning that they are waiting to be referred for work. Many may still be receiving unemployment benefits, but some may have exhausted those benefits and are desperate for work..

At the same time, the State is issuing public works contracts to companies that bring workers into the state to complete the contracted work--as if no qualified workers are available in Hawaii! This is a travesty of justice.

If Hawaii taxpayers are paying for public works projects, Hawaii workers should be doing the work. It makes no sense to pay a company that hires offshore workers, pays for their travel and living expenses, and lets them contribute taxes elsewhere. As much as possible, our taxes should be used to support working men and women who live in Hawaii and will, in turn, support our own economy.

The ILWU urges passage of S.B. 2840. Thank you for the opportunity to testify on this matter..