



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SIXTH LEGISLATURE, 2011**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 1378, PROPOSED H.D. 1, RELATING TO THE STATE OF HAWAII ENDOWMENT.

**BEFORE THE:**

HOUSE COMMITTEE ON FINANCE

**DATE:** Friday, February 25, 2011 **TIME:** 6:00 p.m.

**LOCATION:** State Capitol, Room 308

**TESTIFIER(S):** David M. Louie, Attorney General, or  
Randall S. Nishiyama, Deputy Attorney General

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Chair Oshiro and Members of the Committee:

The Department of the Attorney General provides the following comments regarding H.B. No. 1378, H.D. 1 (Proposed), Relating to the State of Hawaii Endowment Fund ("SOH Endowment Fund" or "Fund").

This bill amends section 40-88, Hawaii Revised Statutes, to establish the SOH Endowment Fund directly by statute and add to the permissible use of the moneys in the fund. The SOH Endowment Fund consists of \$2,000,000 contributed by the State (see Conf. Comm. Rep. No. 104, Haw. H.J. 1000-1001 (1995)), and a \$4,000,000 appropriation authorized by Act 97, Session Laws of Hawaii (SLH) 2006, as amended by Act 156, SLH 2007.

The purpose of the SOH Endowment Fund is to support the production of music by an Oahu-based symphony orchestra as determined by the State Foundation on Culture and the Arts ("SFCA"). This bill broadens the purpose of the SOH Endowment Fund to permit moneys from the Fund to be used for the education of children in school in preparation for the production of music with instruction by a performer from an Oahu-based symphony orchestra, including any Oahu-based youth symphony orchestra.

Also, this bill amends Act 97, SLH 2006, to add corresponding wording regarding the purpose the \$4,000,000 appropriation made to the SOH Endowment Fund.

Implementation of this bill may face administrative and constitutional challenges.

The \$2,000,000 Amount

The deletion of the reference to the fund created by the trust agreement, dated December 5, 1986, indicates the intent is to create a new statutorily established fund. If, however, such a fund is established, separate from the trust agreement, it is unclear how the money from the trust agreement fund is being transferred to the statutorily established fund.

If the intent, however, is to work with the existing trust fund, then the bill should be clarified to continue the trust agreement fund. Then the proposed amendments to section 40-88 will be applicable to the \$2,000,000 amount in the Fund on the effective date of this bill, as long as the underlying trust agreement is consistent with the proposed amendments because that amount is not encumbered by statutory or contractual restrictions.

The \$4,000,000 Amount

However, as for the \$4,000,000 amount in the SOH Endowment Fund, we believe that the proposed amendments to section 40-88 cannot be effective until after the Symphony Foundation has raised the full \$4,000,000, which, at the latest, must be February 28, 2013, which is the expiration of the contract ("Agreement") between the State (acting through the Department of Accounting and General Services and the SFCA) and the

Honolulu Symphony Foundation, Inc. ("Symphony Foundation") (attached). The \$4,000,000 appropriation to the SOH Endowment Fund was authorized by Act 97, SLH 2006, as amended by Act 156, SLH 2007, and was deposited into the SOH Endowment Fund pursuant to the Agreement.

Under the Agreement, the Symphony Foundation pledged that it will pay or cause to be paid by February 28, 2013, at the latest, \$4,000,000 to the SOH Endowment Fund, and to be in compliance with section 40-88. The Agreement represents an approved match needed for the \$4,000,000 appropriation from the State to be deposited into the SOH Endowment Fund. Any portion of the \$4,000,000 in the SOH Endowment Fund which is not matched by February 28, 2013, at the latest, will revert to the general fund at that time pursuant to section 40-88(a)(3). However, we note that on February 28, 2013, if the Symphony Foundation were to simply obtain pledges amounting to \$4,000,000, then the \$4,000,000 appropriation would be retained by the SOH Endowment Fund.

We note that the Symphony Foundation, which manages the SOH Endowment Fund, is a separate organization from the Honolulu Symphony Society, which filed for liquidation under a chapter 7 bankruptcy.

We believe that the amendments to section 40-88 in section 2 of the bill, as applied and implemented to the \$4,000,000 amount in the SOH Endowment Fund, if enacted, could be challenged as violating violate Section 10 of Article I of the Constitution of the United States which provides in part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

In 2008 when the Agreement was executed, section 40-88 provided that moneys in the SOH Endowment Fund could only be

used for the production of music by an Oahu-based symphony orchestra as determined by the SFCA. The additional uses of the SOH Endowment Fund were not a part of section 40-88 when the Symphony Foundation contracted with the State to raise \$4,000,000 in matching funds as provided in the Agreement. The proposed amendments to section 40-88, which add additional uses for the expenditure of moneys from the SOH Endowment Fund, could represent an impairment of the existing Agreement.

While the Honolulu Symphony Society has filed for liquidation under a chapter 7 bankruptcy, we understand that because there are proposals to start a symphony orchestra, which would fulfill the purpose of the SOH Endowment Fund, the SFCA has considered the Symphony Foundation to be in compliance with section 40-88 and not in breach of the Agreement.

#### Conclusion

As for the \$2,000,000 amount in the SOH Endowment Fund, we believe that the proposed amendments to section 40-88 in section 2 of the bill will be effective on the date stated in the bill. Also, we believe that the amendment to Act 97, SLH 2006, in section 3 of the bill, is ineffective because the appropriation has already been disbursed.

With respect to the \$4,000,000 amount in the SOH Endowment Fund, we believe that the amendments to section 40-88 proposed in section 2 of the bill cannot be effective until after the Symphony Foundation has raised the full \$4,000,000, which, at the latest, must be February 28, 2013, the expiration date of the Agreement with the Symphony Foundation. Please note, however, that any portion of the \$4,000,000 that is not matched by that time will revert to the general fund. However, only a pledge is needed to meet this requirement.

## PLEDGE AGREEMENT

### KNOW ALL BY THESE PRESENTS:

That HONOLULU SYMPHONY FOUNDATION, INC., a Hawaii nonprofit corporation (the "Foundation"), hereby pledges and promises to pay or cause to be paid to the State of Hawaii endowment fund established under a trust agreement dated December 5, 1986 (the "SOH Endowment Fund"), the sum of Four Million Dollars (\$4,000,000). Said sum shall be payable no later than the date which is the fifth (5th) anniversary from the date that funds in the amount of Four Million Dollars (\$4,000,000) are deposited into the SOH Endowment Fund from the general revenues of the State of Hawaii pursuant to Act 97 of the 2006 Session Laws of Hawaii, as amended by Act 156 of the 2007 Session Laws of Hawaii (collectively, the "Acts").

The Foundation acknowledges that it must make or cause to be made the payment of said Four Million Dollars (\$4,000,000) in order to satisfy its pledge and that said payment must be made in full on or before the fifth (5th) anniversary specified above, and the Foundation understands that the amounts paid by it to the SOH Endowment Fund shall be invested in accordance with the requirements of Section 40-88 of the Hawaii Revised Statutes.

The Foundation also understands and acknowledges that, in reliance on this pledge, the State of Hawaii will deposit by February 29, 2008, Four Million Dollars (\$4,000,000) into the SOH Endowment Fund, which the State of Hawaii would not do so but for the Foundation's pledge as provided herein.

This Agreement is made pursuant to and in compliance with the provisions of the Acts and Section 40-88 of the Hawaii Revised Statutes, and this Agreement is a legal, valid, and binding obligation of the Foundation. A Certificate of Corporate Resolution authorizing the execution of this Agreement by the Foundation is attached hereto as Exhibit "A".

This instrument may be executed in several counterparts. In addition, this instrument may contain more than one counterpart of the signature page and this instrument may be executed by the affixing of the signatures of each of the parties to one of such counterpart signature pages and the assembly of such signature pages with this instrument as one document; and all of such counterpart signature pages shall be read as though one, and they shall have the same force and effect as though all of the signers had signed a single signature page.

The remainder of this page is intentionally left blank; the next page is the signature page.

Signature Page of Honolulu Symphony Foundation, Inc.  
to Act 97/Act 156 Pledge Agreement

IN WITNESS WHEREOF, the Foundation has executed this Pledge Agreement  
on this 7 day of February, 2008.

HONOLULU SYMPHONY FOUNDATION, INC.,  
a Hawaii nonprofit corporation

By Mark D. Wong  
Name: Mark D. Wong  
Title: Chair


By Carolyn A. Berry  
Name: Carolyn A. Berry  
Title: Vice Chair

Acceptance Page for Honolulu Symphony Foundation, Inc. Pledge Agreement

The foregoing Pledge Agreement of the Honolulu Symphony Foundation, Inc. is hereby acknowledged and accepted.

STATE FOUNDATION ON CULTURE  
AND THE ARTS

Date: 2-8-08



Name: RONALD K. YAMAKAWA  
Title: EXECUTIVE DIRECTOR

DEPARTMENT OF ACCOUNTING AND  
GENERAL SERVICES

Date: 2/8/08

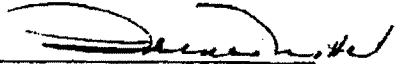


Name: BARBARA A. ANNIS  
Title: DEPUTY COMPTROLLER

STATE OF HAWAII )  
 ) ss.:  
CITY AND COUNTY OF HONOLULU )

On this 7 day of Feb., 2008 before me personally appeared  
Mark D Wong, to me personally known, who, being by me duly sworn  
or affirmed, did say that such person executed the foregoing instrument as the free act  
and deed of such person, and if applicable, in the capacity shown, having been duly  
authorized to execute such instrument in such capacity.

Irene Nitta  
(Print or Type Name of Notary)

 ls  
(Signature of Notary)

Notary Public, State of Hawaii

My Commission Expires: 9/1/2010

IRENE NITTA  
NOTARY PUBLIC, FIRST JUDICIAL CIRCUIT  
State of Hawaii  
Commission Expires 9/1/2010  
Comm. Number 32 333




STATE OF HAWAII )  
 ) ss.:  
CITY AND COUNTY OF HONOLULU )

On this 7 day of February, 2009 before me personally appeared  
Carolyn A Berry, to me personally known, who, being by me duly sworn  
or affirmed, did say that such person executed the foregoing instrument as the free act  
and deed of such person, and if applicable, in the capacity shown, having been duly  
authorized to execute such instrument in such capacity.

Irene Nitta

(Print or Type Name of Notary)

  
(Signature of Notary)

Notary Public, State of Hawaii

My Commission Expires: **9/1/2010**

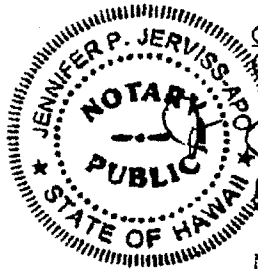
IRENE NITTA  
NOTARY PUBLIC, FIRST JUDICIAL CIRCUIT  
State of Hawaii  
Commission Expires 9/1/2010  
Comm. Number 82-633

STATE OF HAWAII )

) ss.:

CITY AND COUNTY OF HONOLULU )

On this 3<sup>rd</sup> day of February, 2008, before me personally appeared Barbara A. Annis, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.



Jennifer P. Jerviss-Apo  
(Print or Type Name of Notary)

Jennifer P. Jerviss-Apo  
(Signature of Notary)

Notary Public, State of Hawaii

My Commission Expires:

STATE OF HAWAII )  
 ) ss.:  
CITY AND COUNTY OF HONOLULU )

On this 0<sup>th</sup> day of February, 2008, before me personally appeared Ronald K. Yamakura, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Sharon Y Gibu  
(Print or Type Name of Notary)

Sharon Y Gibu  
(Signature of Notary)

Notary Public, State of Hawaii

My Commission Expires: April 7, 2011

**EXHIBIT "A"**

THIS CERTIFIES that the undersigned is the Vice Chair of the HONOLULU SYMPHONY FOUNDATION, INC., a Hawaii nonprofit corporation (the "Foundation"), and that the following Resolutions were adopted by unanimous written consent of the Board of Directors thereof pursuant to the Bylaws of the Foundation:

**"HONOLULU SYMPHONY FOUNDATION  
RESOLUTION APPROVING PLEDGE  
TO THE HAWAII STATE ENDOWMENT FUND**

WHEREAS, the State of Hawaii has appropriated \$4 million to the Hawaii State Endowment Fund with Act 97 of SLH-2006, amended by Act 156 of SLH 2007;

WHEREAS, funds will be deposited into the endowment fund when matched on a dollar-for-dollar basis by private funds;

WHEREAS, a pledge pursuant to and in compliance with the provisions of the Acts and Section 40-88 of the Hawaii Revised Statutes constitutes a match by private funds;

NOW, THEREFORE, BE IT RESOLVED, the Board of Directors authorizes any two officers of the Honolulu Symphony Foundation to execute an agreement to pledge and promise to pay or cause to be paid to the State of Hawaii endowment fund established under a trust agreement dated December 5, 1986 (the "SOH Endowment Fund"), the sum of Four Million Dollars (\$4,000,000). Said sum shall be payable no later than the date which is the fifth (5th) anniversary from the date that funds in the amount of Four Million Dollars (\$4,000,000) are deposited into the SOH Endowment Fund from the general revenues of the State of Hawaii pursuant to Act 97 of the 2006 Session Laws of Hawaii, as amended by Act 156 of the 2007 Session Laws of Hawaii (collectively, the "Acts").

The Foundation acknowledges that it must make or cause to be made the payment of said Four Million Dollars (\$4,000,000) in order to satisfy its pledge and that said payment must be made in full on or before the fifth (5th) anniversary specified above, and the Foundation understands that the amounts paid by it to the SOH Endowment Fund shall be invested in accordance with the requirements of Section 40-88 of the Hawaii Revised Statutes.

This pledge is made pursuant to and in compliance with the provisions of the Acts and Section 40-88 of the Hawaii Revised Statutes."

IN WITNESS WHEREOF, I have hereunto set my hand this 8<sup>TH</sup> day of FEBRUARY, 2008.

  
Vice Chair of Honolulu Symphony Foundation, Inc.

NEIL ABERCROMBIE  
GOVERNOR



BRUCE A. COPPA  
Comptroller

RYAN OKAHARA  
Deputy Comptroller

STATE OF HAWAII  
DEPARTMENT OF ACCOUNTING  
AND GENERAL SERVICES  
P.O. BOX 119  
HONOLULU, HAWAII 96810-0119

TESTIMONY  
OF  
BRUCE A. COPPA, COMPTROLLER  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
TO THE  
HOUSE COMMITTEE  
ON  
FINANCE  
ON  
February 25, 2011  
H.B. 1378, H.D. 1

RELATING TO THE STATE OF HAWAII ENDOWMENT FUND

Chair Oshiro and members of the Committee, thank you for the opportunity to testify on H.B. 1378, H.D. 1.

The Department of Accounting and General Services (DAGS) opposes H.B. 1378, H.D. 1.

We oppose this bill because it is not in the core mission of DAGS to cultivate music production, performances, and music education or to manage endowment funds. The main role of DAGS is to provide support functions to the Executive Branch departments in the form of building design, construction, and maintenance, accounting, land survey, records management, computer and communication services, and audit services. DAGS has no technical expertise in administering an endowment fund with the objectives previously stated. The administrative responsibilities of this fund would be better placed in a department or agency which has the

expertise (in culture and the arts) to manage the endowment fund to meet its legislative purpose. If a qualified agency cannot be found, an alternative maybe to be liquidate the endowment fund and deposit the proceeds into the general fund to help reduce the State's deficit .

It is our understanding that the State Foundation on Culture and the Arts has an agreement with the Honolulu Symphony Foundation to manage the \$4 million endowment which terminates in February 2013. We would defer to the Attorney General on the legality of this bill in light of this agreement.

Thank you for the opportunity to testify on this bill.



**HAWAII**  
STATE FOUNDATION on  
CULTURE and the ARTS

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Honolulu, HI 96813

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Comptroller  
Bruce A. Copp

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**TESTIMONY OF  
STATE FOUNDATION ON CULTURE AND THE ARTS  
TO THE  
HOUSE COMMITTEE ON FINANCE  
February 25, 2011**

**H.B. 1378 H. D. 1**

**RELATING TO THE STATE OF HAWAII ENDOWMENT FUND**

Chair Oshiro and members of the committee, I am Ronald Yamakawa, executive director of the State Foundation on Culture and the Arts. The SFCA defers to the Department of the Attorney General to determine the status of the current agreement between the Honolulu Symphony Foundation and the State of Hawaii.

State attorneys have reviewed the status of the fund and are of the opinion that the current pledge agreement between the State and the Honolulu Symphony Foundation is valid until February 28, 2013. As the SFCA is currently in charge of the fund, our recommendation is to take no action to change the conditions of the contract until the contract is officially expired.

Earlier this month the SFCA met with representatives from the Symphony Foundation and the State Legislature, the Symphony Foundation's investment counselor, and attorneys and fiscal administrators for the State. We discussed the intent of Section 40-88, HRS and subsequent amendments.

The original legislation was conceived to provide support for the Honolulu Symphony, and later changed to support the "production of

music by an Oahu-based symphony orchestra.” The SFCA would accept an “Oahu-based youth symphony orchestra” referred to in H.D. 1 as included in this reference.

Symphony musicians were compensated with wages set by the musicians’ union and virtually all of the revenues from the fund’s investment were used to pay musicians’ fees during the concert seasons.

Therefore, broadening the language of the statute to include more diverse uses of the fund does not address the main intent of the legislation, which is to support the existence of a symphony orchestra on Oahu.

During the meeting, we also clarified that Merrill Lynch is responsible for managing the investment portfolio that includes exercising fiduciary control over the principle and all revenues generated in the form of interest. The SFCA monitors investment reports from Merrill Lynch on a monthly basis and represents the State in interpreting statutory requirements in relation to best serving the interests of culture and the arts in Hawai‘i.

Thank you for the opportunity to testify on this matter.





## HONOLULU SYMPHONY FOUNDATION

50 South Beretania Street, Suite 208-B • Honolulu, HI 96813 • Tel (808) 527-2000 • Fax (808) 527-2034

Rep. Marcus Oshiro, Chair  
Committee on Finance  
Hawaii State Capitol, Room 308  
415 South Beretania Street  
Honolulu, HI 96813

Chairman Oshiro and members of the committee, I am testifying in opposition to House Bill 1378, relating to the State of Hawaii Endowment Fund.

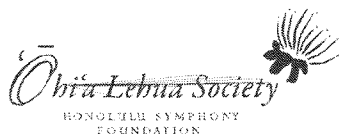
In November 1998, the Honolulu Symphony Society's board of directors realized that it could not give sufficient attention to the long-term investments of the endowment. The Honolulu Symphony Foundation, Inc. was formed with its own separate board of directors that oversees and develops the endowment's assets. Some of the primary reasons for creating a separate organization were to protect the endowment from the cyclical financial crises of the symphony, and to ensure a symphony orchestra could be restarted in the event the symphony shut down.

For the past twelve years, the Honolulu Symphony Foundation has managed endowments from Orvis, Hearst, Bretzlaff, Castle, Cades, Mellon and other foundations. It is the sole organization in the State of Hawaii created to specialize in the financial support of symphonic music. Its board is comprised of musicians, financial professionals, lawyers, and philanthropists. As such, it is the logical choice for managing the State of Hawaii Endowment Fund.

In light of the recent bankruptcy of the Honolulu Symphony Society, it makes sense to broaden the purpose of the State of Hawaii Endowment Fund, as proposed in this bill. This would allow support for musicians, performances, and education – all of which must be kept alive to ensure the eventual return of a symphony.

The management and administration of the fund, however, should stay with the Honolulu Symphony Foundation. Neither the department of accounting and general services nor any other state department has the combination of musical, financial, philanthropic, and investment expertise to administer this fund.

As evidence of the financial stewardship by the Foundation, it has realized a cumulative return of nearly 17% on the \$4 million received in February 2008. This strong performance was during a time of a severe global financial crisis. It serves as an



argument for leaving management of the endowment funds with the Foundation. In addition to providing expert management of the portfolio, the Foundation avoids any expenditures for supplies, salaries, travel, or fundraising. These are all donated by its volunteer trustees.

The purpose of this fund is to endow the costs of producing symphonic music in Hawaii. The State of Hawaii signed an agreement with the Honolulu Symphony Foundation to manage this fund. Given the State's fiscal challenges, it is questionable whether it would safeguard the endowment for support of a symphony. We support broadening the purpose of the fund, but are strongly opposed to move the funds from the one organization most qualified, and legally authorized to administer them.

Thank you for the opportunity to testify on this bill.

Mark Wong  
Chairman  
Honolulu Symphony Foundation