



*The Judiciary, State of Hawai‘i*

**Testimony to the House Committee on Judiciary**

Representative Chris Lee, Chair

Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 5, 2019, 2:05 p.m.  
State Capitol, Conference Room 325

By

Rodney A. Maile

Administrative Director of the Courts

**WRITTEN TESTIMONY ONLY**

---

**Bill No. and Title:** House Bill No. 369, Relating to Court Proceedings.

**Purpose:** Provides that the Legislature shall have standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision.

**Judiciary's Position:**

The Judiciary respectfully opposes this bill.

House Bill No. 369 would provide the Legislature with standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision. Because so many claims implicate statutes or constitutional provisions, this bill would effectively provide the Legislature with unprecedented authority to become a party in most cases being considered by the courts, without regard to the Legislature’s interest in the case, the specific nature of the constitutional or statutory claims, or the potential prejudice to the original parties.

It is not clear why this bill is necessary, since the current system provides ample opportunities for the Legislature to present its views in litigation when appropriate. First, the Legislature can seek to become a party to civil cases by filing a motion to intervene. For example, in the circuit courts, Hawai‘i Rules of Civil Procedure (HRCP) Rule 24 sets forth standards under which anyone may seek to intervene, including circumstances in which intervention must be



House Bill No. 369, Relating to Court Proceedings  
House Committee on Judiciary  
Tuesday, February 5, 2019  
Page 2

allowed by the court,<sup>1</sup> and other circumstances in which intervention may be allowed in the discretion of the court.<sup>2</sup> Significantly, in exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Second, interested parties, including the Legislature, can seek permission of the court to file written amicus curiae or “friend of the court” briefs to assist the court in resolving particular issues of concern to them.<sup>3</sup> Indeed, the Legislature has intervened or filed amicus briefs in both circuit and appellate court cases in the recent past, and the process appears to be working to ensure that the Legislature is able to participate appropriately in cases of interest.<sup>4</sup>

---

1 HRCP Rule 24(a) provides, in relevant part:

**(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

2 HRCP Rule 24(b) provides, in relevant part:

**(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute, ordinance or executive order administered by an officer, agency or governmental organization of the State or a county, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute, ordinance or executive order, the officer, agency or governmental organization upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

3 In the circuit courts, the filing of such briefs is within the discretion of the court, while the process for filing amicus briefs on appeal is set forth in the Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(g).

4 The Circuit Court of the First Circuit granted the Legislature’s request to intervene on a permissive basis in Hussey v. Say. See Hussey v. Say, 139 Hawai‘i 181, 184-85 (2016). The Hawai‘i Supreme Court also granted the Legislature’s request to file an amicus curiae brief in Nelson v. Hawaiian Homes Comm’n, 141 Hawai‘i 411 (2018). In addition, the Circuit Court of the First Circuit recently granted the Legislature’s request to file an amicus curiae brief in the League of Women Voters v. State. See Nathan Eagle, Colleen Hanabusa is Now the Legislature’s Attorney in Case Against the State, CIVIL BEAT (Nov. 29, 2018), <https://www.civilbeat.org/2018/11/colleen-hanabusa-is-now-the-legislatures-attorney-in-case-against-the-state/>.



House Bill No. 369, Relating to Court Proceedings  
House Committee on Judiciary  
Tuesday, February 5, 2019  
Page 3

Finally, it is important to note whenever a party draws the constitutionality of a statute into question, the party is required to provide immediate written notice of the issue to the attorney general.<sup>5</sup>

In contrast, this measure would effectively give the Legislature broad standing to intervene in most cases as a matter of right, which no other citizen, agency, or branch of government currently appears to enjoy.<sup>6</sup>

In addition, passage of this measure could result in unintended negative consequences for some of the most vulnerable populations in our community. For example, the Legislature would have standing to intervene in proceedings in family court, which would be particularly problematic for cases involving minors. To protect the best interest of children who find themselves involved in family court proceedings, court records for every case involving a minor, except divorce proceedings, are confidential by law. This includes allegations of child abuse or neglect in Child Welfare Services cases, adoption cases, and juvenile law violation cases to name a few. Confidentiality protects the identity and other personal details about a child's life from being open to public scrutiny. Although the current Legislature may not intend to utilize this measure to participate in family court proceedings, this measure nevertheless opens the door to future intrusion and does not provide necessary discretion to the presiding judge to weigh the Legislature's interest in intervening against the best interest of the child given the facts of each case.

This measure, if passed, would also give the Legislature the right to intervene as a party in criminal prosecutions, which are all based on statutes, and which often involve application of provisions of the Constitution. There could be many unintended, negative consequences of such participation. For example, the Sixth Amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution guarantee a defendant in a criminal case the right to a speedy trial in all prosecutions. Given defendants' rights, the proposal in this measure becomes increasingly concerning as the Legislature would have the authority to intervene without consideration of whether the Legislature's participation will unduly delay court proceedings or otherwise disrupt the scheduling of case events.

---

5 See HRCF Rule 24(d); HRAP Rule 44.

6 HRCF Rule 24(b) provides a mechanism for an officer, agency or governmental organization of the State or a county to permissively intervene in a case, but with limitations. In addition, for all cases on appeal, HRAP Rule 28(g) provides that the attorney general may file an *amicus curiae* brief without order of the court where the constitutionality of any statute of the State of Hawai'i is drawn into question.



House Bill No. 369, Relating to Court Proceedings  
House Committee on Judiciary  
Tuesday, February 5, 2019  
Page 4

In sum, the current system strikes a careful balance between giving non-parties an avenue to participate in cases in which they have an interest, while also ensuring that the court has the discretion necessary to manage the litigation process and prevent unintended negative consequences. This measure would not only impede the administration of justice in Hawai‘i and undermine judges’ abilities to effectively manage their cases at various stages of litigation, but it will also add an additional layer of uncertainty to the legal process for attorneys and the parties that they represent.

For these reasons, the Judiciary respectfully opposes House Bill No. 369. Thank you for the opportunity to testify on this matter.

**Testimony of the Office of the Public Defender,  
State of Hawaii to the House Committee on  
Judiciary**

February 5, 2019

H.B. No. 369: RELATING TO COURT PROCEEDINGS

Chair Lee and Members of the Committee:

We respectfully oppose passage of H.B. No. 369 which would allow the legislature to intervene in any court proceeding involving a constitutional or statutory claim. We are concerned that this provision would extend to every criminal proceeding in the District, Circuit and appeals courts in the state. Every criminal proceeding alleges a violation of statutes. Many involve the litigation of constitutional provisions such as the right against illegal search and seizure, the right to due process, and the right to equal protection. H.B. No. 369 is far too vague in how intervention by the legislature in every case would operate. The bill is also vague on the reason for such intervention.

The Hawaii Rules of Appellate Procedure, Rule 44 currently provides that when the constitutionality of a Hawaii statute is challenged in cases in which the state is not a party, the Attorney General must be served with notice of such a challenge. Thus the current rules provide for the state to take appropriate action, such as the filing of an amicus brief, when a law is challenged on constitutional grounds.

If the legislature is allowed to routinely intervene in cases, H.B. No. 369 would be subject to a constitutional challenge. For instance, if the legislature were to intervene in a criminal case to argue for a certain interpretation of a sentencing statute, it could be argued that the legislature has violated the separation of powers doctrine by taking on an executive branch function, namely the enforcement of a law through prosecution.

If H.B. No. 369 were to be enacted, an immediate question would be raised as to whether the legislature would have to be served with notice in any case involving a constitutional or statutory claim in order to give it the opportunity to intervene in the case. This would result in the legislature be served thousands of times per year. Such a situation would likely become unwieldy.

Due to the many unanswered questions surrounding this bill, we oppose its passage. Thank you for the opportunity to provide testimony in this matter.



P.O. Box 37158, Honolulu, Hawai`i 96837-0158  
Phone: 927-0709 [henry.lifeoftheland@gmail.com](mailto:henry.lifeoftheland@gmail.com)

COMMITTEE ON JUDICIARY

Rep. Chris Lee, Chair

Rep. Joy A. San Buenaventura, Vice Chair

DATE: Tuesday, February 5, 2019

TIME: 2:05pm

PLACE: Conference Room 325

HB 369 RELATING TO COURT PROCEEDINGS.

STRONGLY OPPOSE

Aloha Chair Lee, Vice Chair San Buenaventura, and Members of the Committee

Life of the Land is Hawai`i's own energy, environmental and community action group advocating for the people and `aina for 49 years. Our mission is to preserve and protect the life of the land through sound energy and land use policies and to promote open government through research, education, advocacy and, when necessary, litigation.

Life of the Land has intervened in over 100 regulatory, state and federal proceedings since 1971. Decades of jurisprudence have developed standing, ripeness, and mootness doctrines.

There are elements in the State Legislature that give the appearance to members of the audience, that the Legislature does not want to be one of three equal branches of government, but rather to dominate.

Over the past few years the Legislature has introduced and heard bills that play with judicial terms, salaries, benefits. The annual State of the Judiciary address to the Legislature has not always be permitted. Legislative press conferences have highlighted the need to control the Judiciary.

This bill appears to be further encroachment of the Legislature into the Judicial kuleana.

# HAWAII FILIPINO LAWYERS ASSOCIATION

## Officers

Jessica Domingo, President  
Merlinda Garma, 1<sup>st</sup> Vice-President  
Daniel Padilla, Secretary

## Directors

Sergio Alcubilla  
Kainani Alvarez  
Earl Edward Aquino  
Joanne Badua  
Cassie Bagay  
Sean Baz  
Catherine Betts  
Ron Federizo

Shelby Ferrer  
Voltaire Gansit  
Rebecca Gardner  
Ashley Labasan  
Alana Peacott-Ricardos  
Pearl Tamayo  
Radji Tolentino  
Rozelle Agag, Immediate Past-President

Date: February 4, 2019

To: Sen. Karl Rhoads, Chair  
Sen. Glen Wakai, Vice Chair  
Senate Committee on Judiciary

Rep. Chris Lee, Chair  
Rep. Joy A. San Buenaventura, Vice Chair  
House Committee on Judiciary

Re: Testimony on **S.B. 860/H.B. 369** – Relating to Court Proceedings

SB 860: 2/5/19 at 9:00 a.m.-Conference Room 16  
HB 369: 2/5/19 at 2:05 p.m.-Conference Room 325

---

The Hawaii Filipino Lawyers Association (HFLA) appreciates the opportunity to submit this testimony in **OPPOSITION** to **S.B. 860** and **H.B. 369**, which provide that the legislature shall have standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision.

First, HFLA believes **this proposal is overbroad**. The right to intervene is a procedure wherein the court allows a third party, who is not an original party in a legal action, to join the plaintiff or defendant as a party in the litigation. As currently drafted, this proposal will enable the legislature to intervene in virtually *any* case – as most lawsuits will involve a claim based upon a constitutional or statutory provision. If the legislature is so enabled, its influence in the courts will be disproportionately expanded in unprecedented and dangerous ways.

Moreover, Rule 24(a) of the Hawaii Rules of Civil Procedure makes clear the legislature has the power to give itself the right to intervene on specific matters, regarding specific statutes, if it so chooses to enact a provision conferring that right:

*“Upon timely application anyone shall be permitted to intervene in an action . . . when a statute confers an unconditional right to intervene[.]”*

Thus, if there is any specific statute that has prompted this proposal, the legislature can pass a law giving it the ability to intervene in that statute or constitutional provision. Doing so will avoid the unnecessary and unintended risk that a future legislature will adversely influence the interpretation of *any* law – in matters which this measure is not meant to address.

Second, **it is within the province of the executive branch - not the legislature - to litigate statutory and constitutional questions through the attorney general's (AG) office.** It is the executive branch's duty, not the legislature's, to implement and administer the laws and public policies enacted and funded by the legislative branch. The AG's office – an essential arm of the state's executive branch - has the requisite resources, skills, and subject matter expertise to intervene in a lawsuit on behalf of the state. Should a decision by our courts offend notions of fairness, justice, and/or specific laws and policies our legislators wish to advance, our lawmakers can then engage in the structured and deliberative legislative process it is constitutionally charged to conduct. This process enables the legislature to clarify, amend, repeal, and/or reinforce a statutory or constitutional provision. The legislature is also empowered to engage in various investigative processes, and does so, through public hearings or measures calling on entities like the auditor's office, the legislative reference bureau, the ethics commission, and others to do so. The legislative process necessarily involves important and relevant public and stakeholder input – which could be circumvented if the legislature is given the ability to intervene in most litigation. We are concerned that giving the legislature this additional power - especially in the broad and unchecked terms that are outlined in this measure - will invite dire results.

Third, **this measure is duplicative on questions of constitutionality** as the relevant rules of civil procedure already allow the state to seek intervention through the attorney general's office. This process is triggered under Rule 24 (d) of the Hawaii Rules of Civil Procedure:

*"A party who draws into question the constitutionality of a Hawai'i statute, in any proceeding to which the State of Hawai'i, or any agency thereof, or any officer or employee thereof in an official capacity is not a party, shall provide immediate written notice of the constitutional issue to the Attorney General of the State of Hawai'i."*

Similarly, Rule 44 of the Hawaii Rules of Appellate Procedure provides that questions on the constitutionality of a statute shall be brought to the attention of the attorney general on appeal:

*"It shall be the duty of a party who draws in question the constitutionality of any statute of the State of Hawai'i in any proceeding in any Hawai'i appellate court to which the State of Hawai'i, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the appellate court, to give immediate notice in writing to the Attorney General of the State of Hawai'i of the existence of said questio."*

Fourth, the intervention of the legislature in a lawsuit, especially if it does not have the resources and subject matter expertise to proceed with speed and competence, **will present unnecessary delay and distraction to the parties and the courts. This may delay the timely adjudication and administration of justice to the original parties.** In essence, this negatively impinges upon citizens' and businesses' access to justice.

Fifth, **the bicameral nature of our legislature will make it difficult for its representation in the courts to fairly and equally represent the interests of both the house and senate.** This measure does



not make clear which chamber is authorized to speak on behalf of both. Similarly, such representation cannot adequately defend the work product of either chamber if their respective interests and positions are at odds.

Sixth, **the legislature may elect to represent its interests in litigation through it's own relationships and administrative processes of engaging the attorney general's office**, by seeking its legal opinion or requesting it to draft and file relevant *amici curiae* briefs or other relevant statements and pleadings. This power is conferred under various provisions in Hawaii Revised Statutes (HRS) chapter 28. For example, HRS sec. 28-1 provides:

*"The attorney general shall appear for the State personally or by deputy, in all the courts of record, in all cases criminal or civil in which the State may be a party, or be interested, and may in like manner appear in the district courts in such case[;]"*

HRS section 28-3, which states:

*"The attorney general shall, when requested, give opinions upon questions of law submitted by the governor, the legislature, or its members, or the head of any department[;]"*

HRS section 28-4, providing:

*"The attorney general shall, without charge, at all times when called upon, give advice and counsel to the heads of departments, district judges, and other public officers, in all matters connected with their public duties, and otherwise aid and assist them in every way requisite to enable them to perform their duties faithfully[;]"*

and HRS section 28-8.3, stating:

*"No department of the State other than the attorney general may employ or retain any attorney, by contract or otherwise, for the purpose of representing the State or the department in any litigation, rendering legal counsel to the department, or drafting legal documents for the department[.]"*

Finally, **HFLA believes this bill threatens to disrupt a quintessential tenet of our democracy – the separation of powers between the executive, judicial, and legislative branches of our state government.** Our nation's founders enshrined these principles in our federal Constitution – which are duly mirrored in our state constitution - to divide the responsibilities of government between these three distinct branches so that one branch may not exercise the core function of another. The checks and balances inherent in our system ensure that the respective powers of each branch is exercised in a separate, independent, and equitable way so as to effectively promote liberty and prevent the concentration and abuse of power in any one of these three branches.

We are concerned this measure will invite improper influence on the decision-making of our third branch – the Judiciary. Disgruntled legislators and/or the special interest groups or large donors that back them may engage in unfair and politically motivated sway or retribution in the courts. This measure threatens to undermine the Rule of Law and our Judiciary's informed, reasoned analyses and learned interpretations of it. Passing it would be a step backward, unnecessarily subjecting the judicial process to the whims of political influence.

In the tumultuous political climate since the 2016 presidential election, our nation's system of checks and balances have endured a persistent and troubling test as one branch seeks to overstep its bounds, assume and wield the powers of other branches, and challenge and erode the authority of the other branches to keep it in check. Our nation has been braced with great concern as it watches this branch abuse its power, while the others weather political and partisan efforts to infiltrate its ranks and eviscerate the powers and abilities conferred upon them by the Constitution. HFLA believes that it is critical – now, more than ever – to support and celebrate the independence of our Judiciary.

Thank you for this opportunity to testify on these measures in opposition.

*The purposes of the HFLA are: to promote participation in the legal community by Filipino lawyers; to represent and to advocate the interests of Filipino lawyers and their communities; to foster the exchange of ideas and information among and between HFLA members and other members of the legal profession, the Judiciary and the legal community; to encourage and promote the professional growth of the HFLA membership; to facilitate client referrals and to broaden professional opportunities for Filipino lawyers and law students.*

# **HAWAII STATE TRIAL JUDGES ASSOCIATION**

## **Testimony of Kenneth S. Robbins, on behalf of the Hawaii Chapter of the American Board of Trial Advocates (ABOTA)**

Regarding House Bill 369  
COMMITTEE ON JUDICIARY  
Representative Chris Lee, Chair  
Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 5, 2018, 2:05 p.m.  
Conference Room 325, State Capitol  
415 South Beretania Street

Dear Representatives Lee and San Buenaventura:

The members of the Hawaii Chapter of the American Board of Trial Attorneys (ABOTA), a national honorary organization of trial attorneys, whose members represent both plaintiffs and defendants and have participated in more jury trials per member than any other legal organization, opposes H.B. No. 369 for a number of reasons, each one of which is compelling.

1. H.B. 369 violates the separation of powers mandate of the Constitution of the State of Hawaii.

The State of Hawaii constitutional mandate of separation of powers has been sacrosanct since 1864 when the Constitution of the Hawaiian Kingdom included the imperative of checks and balances within the three branches of government:

The Supreme Power of the Kingdom in its exercise, is divided into the Executive, Legislative and Judicial; these shall always be preserved distinct ...

The separation of powers/checks and balances mandate has been the fundamental construct of governance in Hawaii ever since. The same separation of powers underlies the very foundation of the U.S. Constitution. Challenges have been asserted and attempts to weaken this pillar of our democracy have been made, but never successfully. The framers of the 1864 Constitution were prophetic when the document they drafted said: "... these (3 branches of government) shall always be preserved distinct ...".

Therefore, if enacted, this bill would certainly be stricken as unconstitutional. The legal challenge would be mounted by the Executive Branch, led by the Office of the Attorney General, and decided summarily by

Testimony of Kenneth S. Robbins,  
on behalf of the Hawaii Chapter of the  
American Board of Trial Advocates (ABOTA)  
Senate Bill 860  
February 4, 2018  
Page 2

the Judicial Branch. Thus, the very process of challenging and killing this potential legislation would, itself, constitute the fundamental dynamic of separation of powers and checks and balances among the three branches of government.

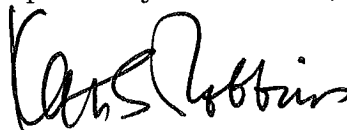
2. The Attorney General is the legal representative of the people of the State of Hawaii. In the event H.B. No. 369 is enacted there could be a conflict between the State A.G., acting on behalf of the Executive Branch and the attorney representing the Legislative Branch. If enacted and not stricken, H.B. 369 would create a monumental constitutional crisis.

3. Intervention is statutorily guaranteed to anyone or any entity with standing to file a motion to intervene. The State AG has standing to assert the right in appropriate cases, on behalf of the people of the State of Hawaii, and is not precluded from consultations with any stripe of person or entity in exercising that right, including members of the legislature.

4. Expanding standing to the legislature as proposed, would clutter lawsuits with additional unnecessary parties, thereby adding to an already costly system and creating further delay to a process which is already criticized for its delays.

For the foregoing reasons, ABOTA's **OPPOSES** H.B. 369.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kenneth S. Robbins". The signature is written in a cursive, flowing style.

Kenneth S. Robbins  
for the Hawaii Chapter of the  
American Board of Trial Attorneys

**LATE**

**HB-369**

Submitted on: 2/4/2019 6:56:03 PM

Testimony for JUD on 2/5/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Marilyn Yamamoto	Hawaii Family Advocacy Team	Support	No

Comments:

As an advocate for families in the child welfare system, I have serious concern for the lack of due process and checks and balances that are supposed to exist in family courts. I strongly support this bill.

TESTIMONY OF THOMAS D. FARRELL  
Regarding HB 369, Relating to Court Proceedings  
Committee on Judiciary  
Representative Chris Lee, Chair/Representative Joy San Buenaventura, Vice Chair  
Monday, February 5, 2019 2:05 p.m.  
Conference Room 325, State Capitol

Good afternoon Representative Lee and Members of the Committee:

I oppose HB 369, which would allow the legislature to intervene as a party in any state court proceeding.

The drafter of this measure might complain that I am overstating the breadth of the bill, but I am not. Virtually any civil or criminal action is “based upon a constitutional or statutory provision.” So, HB 369 gives the legislature the power to stick its nose into any case, in any court, for any reason and without having to meet the legal tests that any other intervenor would have to meet under existing law.

Frankly, I think you all have enough to do, and we don’t need you in one of my divorce cases, weighing in on the side of one spouse or the other, perhaps advocating your considered legislative view of what custodial arrangements would be in the best interest of the parties’ children or how the marital estate should be divided. Of course, my cases probably aren’t important enough to warrant your attention, but how about legislative intervention in the case of the thug who ran over and killed three people last week? Now, I don’t have much sympathy for Alins Sumang, but every defendant is entitled to a fair trial. How do you think it would look if the legislature decided to participate in his trial? What impact do you think that would have on the jury? You can scream for his head in the press---and I’ll join you---but I don’t think you get to do that in a courtroom. That’s the prosecutor’s job.

The problem here is that there are some members of this body who just doesn’t like the concepts of judicial independence and separation of powers. This bill is one of many that keep coming back and are designed to punish the judicial branch for an unpopular decision some years ago that resulted in an unfunded liability for the state. Those who support these initiatives, want the judicial process to be a lot more political, and they think that you’re the folks who ought to control it.

---

Divorce ♦ Paternity ♦ Custody ♦ Child Support ♦ TROs ♦ Arbitration  
*also handling national security cases involving revocation or denial of security clearances*

---

700 Bishop Street, Suite 2000, Honolulu, Hawaii 96813  
Telephone 808.535.8468 ♦ Fax 808.585.9568 ♦ on the web at: [www.farrell-hawaii.com](http://www.farrell-hawaii.com)

---

\*Certified by the National Board of Trial Advocacy. The Supreme Court of Hawaii grants Hawaii certification only to lawyers in good standing who have successfully completed a specialty program accredited by the American Bar Association.

Testimony of Thomas D. Farrell

HB 369

February 5, 2019

page 2

Now, I understand that there are times that the legislature feels a need to weigh in on one subject or another. However, you have the ability to do that in ways that do not require intervention as a party in an ongoing case. You can pass resolutions. I'm not sure that you necessarily should, but you can. You can participate in the appellate process---where most important public issues are eventually decided---by filing amicus briefs, with leave of court. Of course, I don't know how you figure out what position to advocate in situations where different legislators have different views, but I leave you to figure that one out. And I remind you that in cases where the constitutionality of a state statute is drawn into question, the law requires that the Attorney General be provided notice and an opportunity to be heard on that issue.

In short, HB 369 is a very bad bill, and this committee would be performing a real public service by killing it in its cradle.

Thank you for the opportunity to testify this morning.

# Coates Frey Tanimoto & Gibson

P. Gregory Frey  
Senior Attorney  
Noah H. Gibson  
Managing Attorney  
Tom S. Tanimoto 谷本定男  
Litigation Supervisor

ATTORNEYS AT LAW • LLLC

Shannon Kim Hackett 샤논 김해켓  
Asian Languages Practice  
John D. Hughes  
Military Affairs Practice  
Ann S. Isobe 磯部アン  
Asian Languages Practice  
Scott M. Y. LaFontaine  
Domestic Abuse Practice  
Micky Yamatani 山谷美季  
Asian Languages Practice  
Robert S. N. Young 羅伯特新年楊  
Paternity Practice

Bradley A. Coates\*  
Of Counsel  
A Law Corporation  
Paul W. Soenksen  
Senior Counsel

February 4, 2019

Representative Chris Lee, Chair  
Representative Joy A. San Buenaventura, Vice Chair  
Committee on Judiciary

RE: Testimony of Tom S. Tanimoto in Strong Opposition to HB 369

Dear Representative Lee, Representative San Buenaventura, and Members of the Committee,

I have been an attorney licensed to practice law here in the State of Hawaii for 14 years, have served as chair of the HSBA Family Law Section and am currently practicing family law as a partner and litigation supervisor at Coates Frey Tanimoto & Gibson, AAL, LLLC. **Please accept this letter as testimony in respectful and strong opposition of HB 369.**

House Bill 369 is patently vague and overbroad, can lead to legislative overreaching and portends a host of implications, some perhaps unintended (and undesirable) including, the clogging up the already overburdened court system and increasing costs of litigation. The bill also begs the question as to *why* the legislature should have standing to intervene as a matter of right, and this unknown facet of the bill alone, warrants that it not move out of committee.

## Overreaching

The Legislature does just that, it legislates. It should not intervene in order to argue a position with respect to statutes or constitutional provisions, nor should it, since statutory interpretation is historically within the exclusive purview of the judiciary. Furthermore, there are sufficient materials available to the court to aid in any interpretative analysis, such as the House and Senate's record, testimony, floor speeches and committee reports.

## Effects on Litigation

Most lawsuits involve two (2) parties, a plaintiff and a defendant. Intervention is already accorded by Court Rule to those parties who have some right that is affected by a lawsuit – it is clearly not intended for any person or entity to simply join in a lawsuit for the purpose of “armchair quarterbacking.” Should the legislature indeed have some rights that are affected in a given scenario, it is not precluded from initiating its own case, which right off the top of my head, could only be in very rare and narrow circumstances, as limited by the political question doctrine. Allowing broad scoping intervention for cases based on statutory or constitutional provisions could encompass so many types of cases in this state, thereby leading to an

Divorce • Paternity • Custody • Abuse/TRO • Mediation • All Family Law

\*Mr. Coates, the firm's founder, remains an active and vital part of the office in an “Of Counsel” capacity, but no longer maintains an ownership interest in the firm.



February 4, 2019

Representatives Chris Lee and Joy A. San Buenaventura

exponentially costly scenario where we assume that tax-payers would pay for the legislature's counsel.

### **Unintended Consequences**

By seeking to become a party to a given case by way of this bill, is the legislature willing to be cross-examined, subject to discovery or deposed like any other party, and if so, would every legislator be a potential witness? Nothing more need be said about how unwieldy all of this can end up being. If something needs to be said, participation in a case as an amicus is always a possibility. HB 369 is not workable on its face. Thank you for your consideration.

David Kimo Frankel  
1638-A Mikahala Way  
Honolulu, HI 96816

February 5, 2019

TESTIMONY IN OPPOSITION TO HB 369

Chair Lee and members of the Committee on Judiciary,

I assume that others will discuss the separation of powers implications raised by HB 369. Suffice it to say, HB 369, like many other bills that have been introduced this session and recent sessions, threatens to undermine the independence of the judiciary. It also raises budgetary issues and could jeopardize the legislature's relationship with the Attorney General. Ironically, HB 369 actually disempowers you.

First, it is unclear how the legislature will decide in which cases (and on which side) the legislature will intervene. A few years ago, the House Speaker decided unilaterally that the House should join the Senate in filing an amicus brief in the *Nelson* case. There was no debate on the House floor. There was no committee hearing. There was no opportunity for the public to comment. There was no vote by any of you. The House Speaker made his decision unilaterally. Do you want to give the House Speaker more power – and give up your right to vote on issues? You may be in leadership today, but not tomorrow. Are legislative decisions better when they are made behind closed doors without any opportunity for public comment?

Second, currently you have the power to clearly identify the legislature's intent in your committee report. Do you want to give up that influence to a future Speaker to intervene in a proceeding to tell the judiciary how to interpret a statute?

Aloha,

/s/

David Kimo Frankel

# HARRISON & MATSUOKA

*Attorneys at Law*

William A. Harrison

E-mail: [wharrison@hamlaw.net](mailto:wharrison@hamlaw.net)

Keith A. Matsuoka

E-mail: [kmatsuoka@hamlaw.net](mailto:kmatsuoka@hamlaw.net)

1001 Bishop Street, Suite 1180

Honolulu, Hawaii 96813

Telephone: (808) 523-7041

Facsimile: (808) 538-7579

Web: [www.harrisonmatsuoka.net](http://www.harrisonmatsuoka.net)

[www.hamlaw.net](http://www.hamlaw.net)

*Of Counsel:*

Gene K. Lau

E-mail: [glau@hamlaw.net](mailto:glau@hamlaw.net)

1001 Bishop Street, Suite 2828

Honolulu, Hawaii 96813

Telephone: (808) 376-4864

Facsimile: (808) 533-1248

E-mail: [glau@hamlaw.net](mailto:glau@hamlaw.net)

February 3, 2019

*Via Web: [www.capitol.hawaii.gov/submittestimony.aspx](http://www.capitol.hawaii.gov/submittestimony.aspx)*

## COMMITTEE ON THE JUDICIARY

**Chair: Rep. Chris Lee**

**Vice Chair: Rep. Joy A. San Buenaventura**

DATE: Tuesday, February 5, 2019

TIME: 2:05 pm

PLACE: Conference Room 325

State Capitol

415 Beretania Street

Honolulu, Hawai'i 96813

**BILL NO.: OPPOSE HB 369**

Honorable Representatives: Chris Lee, Joy A. San Buenaventura and members of the Committee on Judiciary.

Thank you for providing me this opportunity to offer written testimony **in strident opposition to House Bill 369.**

The Hawai'i Constitution sets forth the rudimentary concept that the powers of government are divided into three co-equal branches of government. This concept of "separation of powers" is very important to insure fairness in our three branches of government, which through our system of checks and balances, helps to ensure no one branch wields excessive influence. The passage of HB 396 will clearly erode the foundation of that model.



COMMITTEE: **COMMITTEE ON THE JUDICIARY**

**Chair: Rep. Chris Lee**

**Vice Chair: Rep. Joy A. San Buenaventura**

Date: Tuesday, February 5, 2019

Page 2

The authority to litigate is clearly not a legislative function. That function belongs to the Executive Branch. The Attorney General is Hawai'i's chief legal officer and is given the authority to represent the legislature in legal matters, which includes the power to intervene in court proceedings. The AG is therefore notified when the constitutionality of a law is challenged. Moreover, pursuant to existing law, the legislature already has the power to request intervention and the right to file an amicus on cases of interest. Giving the legislature the individual power to intervene on its own behalf in litigation may create an untenable situation where the House and Senate could seek to intervene on opposite ends of an issue.

Furthermore, the bill would also create a situation where the government could intrude or impose on a citizen's private interest. It could open up confidential family court cases and theoretically impact speedy trial and other criminal rights. In doing so this bill undermines the rule of law and puts the legislature in a position to impose undue governmental burdens on private parties.

HB 369 is an extraordinary expansion of the power of the legislative branch of government and its passage would surely invite litigation as to its purported constitutionality. In short, this is bad law that is not beneficial for Hawai'i and the people you represent. I therefore stridently oppose the passage of this bill!

Sincerely,

A handwritten signature in black ink, appearing to read "William A. Harrison". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

William A. Harrison

**LAW OFFICE OF HOWARD K. K. LUKE**

ATTORNEY AT LAW  
DAVIES PACIFIC CENTER  
SUITE 410  
841 BISHOP STREET  
HONOLULU, HAWAII 96813

HOWARD K. K. LUKE  
howard@hkkluke.com

TEL: (808) 545-5000  
FAX: (808) 523-9137

February 4, 2019

Representative Christopher K. C. Lee, Chair  
Representative Joy A. San Buenaventura, Vice Chair  
House Committee on Judiciary

Hearing: February 5, 2019

**Re: Opposition to H.B. No. 369, Relating to Court Proceedings**

Dear Chair Lee, Vice Chair San Buenaventura, and fellow Members of the House Committee on Judiciary,

I herewith respectfully submit my opposition to H.B. No. 369, (“Relating to Court Proceedings”), set for Hearing on February 5, 2019.

I have been licensed to practice law in the State of Hawai’i for over 41 years. At various times, I have been an attorney employed by the State (as a Fair Hearing Officer), the United States District Court (for the Commonwealth of the Northern Mariana Islands), the City and County of Honolulu (as a deputy prosecuting attorney), and with a private law firm (Schutter and Glickstein). For the past thirty years I have had my own private law practice, with an emphasis on state and federal criminal defense and pro bono involvement in the legal community. In 2018, I was the President of the Hawai’i State Bar Association, but I am now writing in my own capacity and not as a member or representative of any other legal organization or entity.

My strong objection to H.B. No. 369 is based on the language of the bill, which, according its description, “[p]rovides that the legislature shall have standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision.” While the summary description is “for informational purposes only and is not legislation or evidence of legislative intent,” it nonetheless raises numerous issues that serve to abrogate the separation of powers doctrine. Moreover, the bill purports to provide automatic standing without a showing of any basis upon which a predicate of standing might be based.

Admittedly, my research of this issue has been limited due to the time constraints for a response to your committee. Having said this, I have found no legal support for the broad scope of the intended bill, and I know of no other authority that would grant such authority.

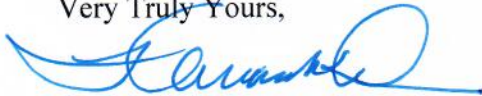
It should be noted that in virtually every criminal case filed on behalf of the government, at least one, and more often several, legal statutes are implicated. Additionally, virtually all pleadings and/or other proceedings in criminal cases involve “constitutional provisions.” To allow the legislative branch of our government to have automatic standing in such cases would encroach upon the time-honored principle that criminal cases involve the sovereign (the executive branch

of the government through delegation to the prosecuting authority [the Department of the Prosecuting Attorney or the Attorney General]) as plaintiff, versus the defendant or defendants identified in the charging instrument. Neither persons nor entities aggrieved as alleged victims, nor persons directly or indirectly affected by the prosecution of the defendant(s), are identified as parties to the criminal proceedings. To allow the legislature to automatically intervene, without requiring any showing of the legal basis upon which standing to intervene may be reviewed, would violate the separation of powers doctrine that is firmly rooted in the United States Constitution and the Constitution of the State of Hawai'i.

For these reasons, I oppose H.B. No. 369 and advise against its enactment.

Thank you for taking the time to review this testimony. If it is proper, please do not hesitate to contact me if you have any questions.

Very Truly Yours,

A handwritten signature in blue ink, appearing to read "Howard K. K. Luke", with a long horizontal flourish extending to the right.

Howard K. K. Luke

**HB-369**

Submitted on: 2/2/2019 3:01:14 PM

Testimony for JUD on 2/5/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
daniel foley	Individual	Oppose	No

Comments:

Dear Mr. Chairman,

It seems to me this bill is unnecessary and overly broad.

Legislators can intervene in appropriate cases pursuant to Hawaii Rules of Civil Procedure Rule 24. My experience as an attorney and former judge is that this rule works fairly well. Any time a party intervenes in a case the cost and complexity of that case increases for the judge and the parties. Rule 24 weighs and balances these interests. If this rule has not proven adequate for legislators, it can certainly be amended.

Legislators may also move to file amicus curiae briefs in appropriate cases.

The bill as written would apply to hundreds, if not thousands of cases. Claims are routinely based on statutes and constitutional provisions, if not made on common law.

Respectfully submitted,

Daniel Foley

**HB-369**

Submitted on: 2/2/2019 8:24:30 PM

Testimony for JUD on 2/5/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Bianca Isaki	Individual	Oppose	No

Comments:

Aloha Committee Members,

I'm a practicing attorney in Hawai'i and **oppose SB No. 860**. The proposal to mandate the legislature's ability to intervene in substantially any matter before the courts ("any court proceeding involving a claim that is based upon a constitutional or statutory provision") would introduce an un-reasoned element into Hawaii's jurisprudential development of case law governing standing. This is a clear over-step of the legislature's authority as dictated by the constitutional separation of powers.

Thank you for considering my testimony.

Yours,

Bianca Kai Isaki, Ph.D., Esq.



**HB-369**

Submitted on: 2/4/2019 12:50:10 PM

Testimony for JUD on 2/5/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Dara Carlin, M.A.	Individual	Support	No

Comments:

Please PLEASE SUPPORT and pass HB369!

**HB-369**

Submitted on: 2/4/2019 4:09:12 PM

Testimony for JUD on 2/5/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Dr. Guy Yatsushiro	Individual	Support	No

Comments: