



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020**

ON THE FOLLOWING MEASURE:

S.B. NO. 2810, RELATING TO DECLARATORY JUDGMENTS.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Thursday, February 20, 2020 **TIME:** 9:15 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Clare E. Connors, Attorney General, or
Robert T. Nakatsuji, First Deputy Solicitor General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General appreciates the intent behind S.B. No. 2810 and supports certain parts of it. The Department offers amendments to focus and strengthen the parts of the bill that raise concerns.

The purpose of this bill is to restrain the use of declaratory judgments because the use has become too broad in recent years. The bill limits declaratory actions to instances where only declaratory relief, and no other forms of relief, are available, and it requires a plaintiff to show a “personal stake” in a controversy, which comports with the traditional three-part test for legal standing.

The Department supports the addition of a new subsection (b) to Hawai‘i Revised Statutes (HRS) section 632-1, page 9, lines 6 to 20, and page 10, lines 1 and 2, of the bill, which requires a “personal stake.” This amendment addresses a recent decision of a three-justice majority of the Hawai‘i Supreme Court in *Tax Foundation of Hawai‘i v. State*, 144 Hawai‘i 175, 439 P.3d 127 (2019), that radically altered the standard for legal standing in Hawai‘i cases. The majority eliminated the previously existing and longstanding requirement of a “personal stake” or an “injury-in-fact” for declaratory actions, thereby allowing third parties with an insufficient connection to controversies to sue. Because the court’s decision was based on the statutory language in section 632-1, the Legislature can correct the court’s error by amending the statute. The Department believes that the “personal stake” requirement should be restored.

With respect to the amendments to subsection (a) of section 632-1, page 7, line 1 to page 9, line 5, and to section 632-6, page 10, lines 5 to 14, the Department recommends caution. These amendments change the way declaratory judgments are used by limiting them to cases where no other relief could be claimed. These amendments do not directly address the *Tax Foundation* standing issue and they may cause unanticipated procedural problems in future declaratory action cases. While the wording in the statute that was relied upon by the *Tax Foundation* majority should be removed and the statute clarified, the way declaratory judgments are used does not have to be fundamentally changed.

The Department recommends that this bill focus only on addressing the problematic standing issue created by the *Tax Foundation* case. To illustrate the recommended approach, attached hereto is a revised draft of this bill; it also includes an extensively revised legislative findings section. (See Attachment "A".)

The bill also contains an amendment to subsection (a)(3), on page 7, lines 13 and 14, that excludes constitutional cases from declaratory actions. The Department suggests deleting this exception because the Legislature's concerns are addressed adequately by the amendments to subsection (b). If constitutional challenges continue to be based on the declaratory judgments act, they will be subject to the standing requirements that this bill will restore.

The Department respectfully requests that the Committee pass this bill, but with the recommended amendments.

S.B. NO. 2810,
S.D. 1 PROPOSED

A BILL FOR AN ACT

RELATING TO DECLARATORY JUDGMENTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAI'I:

1 SECTION 1. The legislature finds that a recent decision by
2 a three-justice majority of the Hawai'i Supreme Court in *Tax*
3 *Foundation of Hawai'i v. State*, 144 Hawai'i 175, 439 P.3d 127
4 (2019), has radically altered the standard for legal standing in
5 Hawai'i cases. The majority interpreted section 632-1 of the
6 Hawai'i Revised Statutes so as to eliminate the previously
7 existing and longstanding requirement of a "personal stake" or an
8 "injury-in-fact" for declaratory actions. Chief Justice
9 Recktenwald and Justice Nakayama dissented.

10 With all due respect, the legislature finds that the *Tax*
11 *Foundation* majority misinterpreted the intent behind section 632-
12 1. As described by the Chief Justice in his dissent, section
13 632-1 was intended only to address **when** a party could sue, not
14 **who** could sue. *Tax Foundation*, 144 Hawai'i at 212, 439 P.3d at
15 164 (Recktenwald, C.J., dissenting) ("The legislature thus sought
16 to expand when in time a controversy may be heard; it did not
17 seek to eliminate the need for plaintiffs to have 'a personal
18 stake' in its outcome."). Declaratory actions were intended

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1 merely to allow parties to file actions for declaratory relief
2 slightly earlier in time, before rights were actually violated,
3 when a controversy was threatened but still imminent, inevitable,
4 and concrete. Thus, section 632-1 was intended only to authorize
5 declaratory actions when controversies were threatened but had
6 not yet fully ripened into actual harm. Section 632-1 was never
7 intended to eliminate the requirement that plaintiffs have a
8 "personal stake" in a controversy.

9 The majority's interpretation will allow third parties with
10 only a tenuous connection to controversies to sue. It
11 effectively allows parties suffering no actual or threatened
12 injury, with only an abstract, conjectural, or hypothetical
13 interest in a case, to initiate a lawsuit. The majority's
14 interpretation will likely lead to an increase in frivolous
15 litigation and legal expenses. Furthermore, this vast expansion
16 of the reach of the judiciary implicates the separation of powers
17 at the heart of our system of government and threatens the
18 delicate balance reflected in our State Constitution.

19 Because the *Tax Foundation* majority's weakening of legal
20 standing was based on the statutory language in section 632-1,
21 the legislature is able to correct the majority's error by
22 amending section 632-1. Consequently, the legislature amends
23 section 632-1 to remove the language relied upon by the *Tax*
24 *Foundation* majority. The legislature further simplifies the
25 provisions establishing that declaratory actions may be used in
26 actual or threatened controversies. Finally, the legislature

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1 expressly provides that standing for declaratory actions shall be
2 established by the traditional three-part test and restores the
3 requirement of a "personal stake" in a controversy.

4 The legislature also amends section 632-6 so as to make
5 clear that the wording in that section was not intended to weaken
6 standing requirements.

7 SECTION 2. Section 632-1, Hawai'i Revised Statutes, is
8 amended to read as follows:

9 **"§632-1 Jurisdiction; controversies subject to. [†] (a) [†]**

10 In cases of actual or threatened controversy, courts of record,
11 within the scope of their respective jurisdictions, shall have
12 power to make binding adjudications of legal relation, status,
13 right, or privilege, whether or not consequential relief is, or
14 at the time could be, claimed, and no action or proceeding shall
15 be open to objection on the ground that a judgment or order
16 merely declaratory of right is prayed for; provided that
17 declaratory relief may not be obtained in [~~any~~]:

18 (1) Any district court [~~, or in any~~];

19 (2) Any controversy with respect to taxes [~~, or in any~~];

20 (3) Any case where a divorce or annulment of marriage is
21 sought [~~-~~]; and

22 (4) Any case where a statute provides a special form of
23 remedy for a specific type of case.

24 Controversies involving the interpretation of deeds, wills, other
25 instruments of writing, statutes, municipal ordinances, and other
26 governmental regulations may be so determined, and this

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1 enumeration does not exclude other instances of an actual or
2 threatened antagonistic [~~assertion and denial of right.~~]
3 relationship. However, the mere fact that an actual or
4 threatened controversy is also susceptible of relief through a
5 general common law remedy, a remedy equitable in nature, or an
6 extraordinary legal remedy shall not debar a party from the
7 privilege of obtaining a declaratory judgment.

8 ~~[(b)] Relief by declaratory judgment may be granted in~~
9 ~~civil cases where an actual controversy exists between contending~~
10 ~~parties, or where the court is satisfied that antagonistic claims~~
11 ~~are present between the parties involved which indicate imminent~~
12 ~~and inevitable litigation, or where in any such case the court is~~
13 ~~satisfied that a party asserts a legal relation, status, right,~~
14 ~~or privilege in which the party has a concrete interest and that~~
15 ~~there is a challenge or denial of the asserted relation, status,~~
16 ~~right, or privilege by an adversary party who also has or asserts~~
17 ~~a concrete interest therein, and the court is satisfied also that~~
18 ~~a declaratory judgment will serve to terminate the uncertainty or~~
19 ~~controversy giving rise to the proceeding. Where, however, a~~
20 ~~statute provides a special form of remedy for a specific type of~~
21 ~~case, that statutory remedy shall be followed; but the mere fact~~
22 ~~that an actual or threatened controversy is susceptible of relief~~
23 ~~through a general common law remedy, a remedy equitable in~~
24 ~~nature, or an extraordinary legal remedy, whether such remedy is~~
25 ~~recognized or regulated by statute or not, shall not debar a~~
26 ~~party from the privilege of obtaining a declaratory judgment in~~

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1 ~~any case where the other essentials to such relief are present.]~~

2 (b) Notwithstanding any other law that may be construed to
3 the contrary, plaintiffs seeking declaratory relief shall have
4 legal standing only if the plaintiff has alleged a personal stake
5 in the outcome of the controversy by establishing the following:

6 (1) The plaintiff suffered an actual or threatened injury;

7 (2) The injury is fairly traceable to the defendant's
8 actions; and

9 (3) A favorable decision will likely provide relief for the
10 plaintiff's injury.

11 The injury in paragraph (1) must be actual or threatened harm to
12 a legally protected interest. The plaintiff must show a distinct
13 and palpable injury to the plaintiff rather than a generally
14 available grievance that no more directly affects plaintiff than
15 it does the public at large. The injury must be distinct and
16 palpable, as opposed to abstract, conjectural, or merely
17 hypothetical."

18 SECTION 3. Section 632-6, Hawai'i Revised Statutes, is
19 amended to read as follows:

20 **"§632-6 Provisions, remedial.** This chapter is declared to
21 be remedial. Its purpose is to afford relief from the
22 uncertainty and insecurity attendant upon controversies over
23 legal rights, without requiring one of the parties interested so
24 to invade the rights asserted by the other as to entitle the
25 party to maintain an ordinary action therefor. ~~[It is to be~~
26 ~~liberally interpreted and administered, with a view to making the~~

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1 ~~courts more serviceable to the people.]~~ However, this chapter is
2 not intended to allow parties without a personal stake in an
3 actual or threatened controversy to sue. Nothing in this section
4 shall be construed as affecting the legal standing requirements
5 set forth in section 632-1(b)."

6 SECTION 4. Statutory material to be repealed is bracketed
7 and stricken. New statutory material is underscored.

8 SECTION 5. This Act shall take effect upon its approval.

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Report Title:

Declaratory Judgments; Standing; Courts; Personal Stake; Injury-In-Fact

Description:

Reverses *Tax Foundation* decision on legal standing. Restores requirement of a personal stake in an actual or threatened controversy for declaratory actions.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

Statement Before The
SENATE COMMITTEE ON JUDICIARY
Thursday, February 20, 2020
9:15 AM
State Capitol, Conference Room 016

in consideration of
SB 2810
RELATING TO DECLARATORY JUDGMENTS.

Chair RHOADS, Vice Chair KEOHOKALOLE, and Members of the Senate Judiciary Committee

Common Cause Hawaii provides comments on SB 2810, which prohibits declaratory judgments when there is a cause of action and in other certain instances and requires a plaintiff to show a personal stake in the actual controversy beyond a general disagreement or complaint by requiring a showing of an injury-in-fact.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to strengthening our democracy. A strong democracy requires protecting everyone's constitutional rights and ensuring equal access to our courts and judicial system. The ability to access our courts and judicial system is one of the foundations of democracy.

SB 2810 appears to require plaintiffs seeking declaratory relief to have a personal stake in the outcome of the controversy through having suffered an actual or threatened injury, which injury is fairly traceable to the defendant's actions, and to show a favorable decision will likely provide relief for the plaintiff's injury. Page 9; lines 6-15. Such requirements found in SB 2810 may be difficult for nonprofits to seek declaratory relief. Further, The U.S. Supreme Court has held that "we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat — for example, the constitutionality of a law threatened to be enforced." MedImmune, Inc. v. Genentech, Inc., 549 US 118, 127 S.Ct. 764, 772 (2007).

Thank you for the opportunity to comment on HB 2810. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii

LATE

SB-2810

Submitted on: 2/19/2020 5:15:53 PM

Testimony for JDC on 2/20/2020 9:15:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Mandy Fernandes	Testifying for ACLU of Hawaii	Oppose	Yes

Comments:



LATE

SENATOR KARL RHOADS, CHAIR
SENATOR JARRETT KEOHOKALOLE, VICE CHAIR
SENATE COMMITTEE ON JUDICIARY

TESTIMONY IN **STRONG OPPOSITION** TO SENATE BILL NO. 2810

Thursday, February 20, 2020, 9:15 a.m.
Conference Room 016
State Capitol
415 South Beretania Street

Dear Chair Rhoads and Vice-Chair Keohokalole,

Earthjustice strongly opposes Senate Bill No. 2810 because it drastically and unjustifiably restricts people’s access to the courts and justice, by gutting the state Declaratory Judgments statute, Haw. Rev. Stat. (HRS) chapter 632. The bill’s preamble asserts that “the remedy of declaratory judgments has now become too broad, where the remedy has been authorized in instances of a general disagreement of a government action without a showing of an actual controversy,” citing a recent case, *Tax Foundation of Hawai’i v. State*, 144 Hawai’i 175 (2019). SB 2810, however, goes far beyond any rational, specific response to that case and alleged issue and, instead, proposes sweeping regressive changes to the Declaratory Judgments statute that would roll back decades of established precedent on the statute. Rather than address any real problem, these ill-considered changes will spawn confusion and litigation, invite unforeseen negative consequences, and severely curtail the availability of judicial relief and access to justice for the people. Accordingly, we respectfully request that SB 2810 be held.

SB 2810 states one of its purposes is to codify the standard for legal standing, requiring a plaintiff establish “injury in fact” standing. Related to this point, the bill cites the *Tax Foundation* case, in which the Hawai’i Supreme Court enunciated a standard for standing based on the language of HRS § 632-1. Contrary to SB 2810’s suggestion that the case allows lawsuits over “general disagreement of a government action without a showing of an actual controversy,” the Court’s ruling recognized the standing requirement in the statute that “the party seeking declaratory relief has a *concrete interest in a legal relation, status, right, or privilege* that is challenged or denied by the other party, who has or asserts a concrete interest in the same legal relation, status, right, or privilege.” *Tax Found.*, 144 Hawai’i at 202 (emphasis added). SB 2810

does not explain how this standard is inadequate or unwarranted in allowing parties to obtain declaratory relief as to their concrete legal rights and interests.¹

Moreover, on the specific issue of standing, SB 2810 goes a step further to require a plaintiff to “show a distinct and palpable injury to the plaintiff rather than a generally available grievance that *no more directly affects plaintiff than it does the public at large.*” (Emphasis added.) The Hawai’i Supreme Court has long abandoned the archaic standing requirement that a member of the public must show interests or injuries distinct from those of the general public.² SB 2810 threatens to turn the clock back decades on this long-standing legal principle.

SB 2810 goes still further to propose additional extensive amendments to the Declaratory Judgments statute that would roll back decades (indeed, a better part of a *century*) of established precedent under the statute. Yet, the bill is entirely silent on any purported reason and need for such changes. Many of the proposed amendments are less than clear in their wording and effect and, thus, at a minimum, would create confusion and litigation and invite unforeseen negative consequences. Overall, these changes would clearly work in the direction of hindering and suppressing people’s access to the courts and justice.

The following highlights the worst concerns regarding SB 2810’s proposed overhaul of the Declaratory Judgments statute:

- ▶ SB 2810 states that its purpose includes “[r]einstat[ing] the restriction of the *Kaleikau* Court limiting the use of declaratory judgments” and “[r]estricting declaratory judgments to instances where a legally cognizable injury has not yet occurred and consequential relief could not be presently claimed.” Yet, as the bill’s preamble recounts, the *Kaleikau* case is almost *100 years old* and was legislatively abrogated in 1945. SB 2010 would nullify decades of practice and precedent under the Declaratory Judgments statute and would needlessly complicate, rather than simplify and streamline, the accessibility and responsiveness of the legal process.
- ▶ SB 2810 also refers to a cryptic purpose of “further amending the instances in which declaratory judgments would not be available.” One of these amendments would bar

¹ Notably, even the dissent by the Chief Justice recognized standing for the plaintiff in that case based on the taxpayer standing doctrine, while the other dissenting justice declined to address standing based on the rationale that the plaintiff did not allege taxpayer standing. *See Tax Found.*, 144 Hawai’i at 206-24 (dissenting opinions by Recktenwald, C.J., and Nakayama, J.). In other words, *none* of the justices in the *Tax Foundation* case affirmatively ruled that the plaintiff in that case did *not* have standing.

² *See, e.g., Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai’i 64, 70 (1994) (holding that “a member of the public has standing to enforce the rights of the public even though the individual’s injury is not different in kind from the public’s generally”).

any declaratory relief in “[a]ny controversy with respect to the determination of a future effect of a constitutional provision.” This language could be broadly read to bar any request for prospective relief against constitutional violations. This would shut the courthouse doors on any number of requests for relief to protect constitutional rights and the public interest.³ Environmental and Native Hawaiian rights, for example, are based on constitutional provisions, as are the broad range of civil rights and liberties in our democratic system.

► SB 2810 deletes the long-standing mandate in the HRS § 632-6 that the Declaratory Judgments statute “is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people.” Again, this mandate has been a hallmark of this statute and the state judicial process for decades.⁴ The modern trend over many years has been to simplify the legal process to facilitate access to the courts and justice. SB 2810 would dramatically reverse this progress and make the courts less serviceable to the people.

In sum, for the foregoing reasons, Earthjustice strongly opposes SB 2810 and respectfully requests that it be held. Mahalo nui for this opportunity to testify. Please do not hesitate to contact us with any further questions or for further information.

Isaac H. Moriwake



Managing Attorney
Earthjustice, Mid-Pacific Office

³ In this regard, this proposed amendment may run afoul of the constitutional separation of powers doctrine.

⁴ See *Kilakila 'O Haleakala v. Bd. Of Land & Nat. Res.*, 131 Hawai'i 193, 204 (2013) (reiterating the “fundamental policy that Hawai'i's state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the ‘needs of justice’ would best be served by allowing a plaintiff to bring claims before the court”).

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: MISCELLANEOUS, Require Injury in Fact Before Bringing Suit

BILL NUMBER: SB 2810; HB 1821

INTRODUCED BY: SB by K. RHOADS; HB by SAIKI, BELATTI, C. LEE, MORIKAWA, NAKASHIMA

LATE

EXECUTIVE SUMMARY: Prohibits declaratory judgments when there is a cause of action and in other certain instances. Requires a plaintiff to show a personal stake in the actual controversy beyond a general disagreement or complaint by requiring a showing of an injury-in-fact. We caution that this bill may be an over-reaction to a nonexistent problem.

SYNOPSIS: Makes extensive amendments to section 632-1, HRS, to provide that any plaintiff seeking declaratory relief shall have legal standing only if the plaintiff has alleged a personal stake in the outcome of the controversy by establishing the following: (1) the plaintiff suffered an actual or threatened injury; (2) the injury is fairly traceable to the defendant's actions; and (3) a favorable decision will likely provide relief for the plaintiff's injury. The injury in paragraph (1) must be an actual or threatened harm to a legally protected interest. The plaintiff must show a distinct and palpable injury to the plaintiff rather than a generally available grievance that no more directly affects plaintiff than it does the public at large. The injury must be distinct and palpable, as opposed to abstract, conjectural, or merely hypothetical.

Makes conforming amendments to section 632-6, HRS.

EFFECTIVE DATE: Upon approval.

STAFF COMMENTS: The preamble in this bill recites disagreement with the decision of the Hawaii Supreme Court in *Tax Foundation of Hawaii v. State*, 144 Haw. 175, 439 P.3d 127 (2019):

The legislature understands that part of the inquiry of determining whether parties have adverse legal interests is determining whether a plaintiff has sufficient standing to bring the suit. For the purposes of determining whether parties have adverse legal interests, the legislature believes that declaratory judgments should be reserved for instances where a plaintiff alleges more than a disagreement. In *Tax Foundation of Hawaii v. State*, the plaintiff, as a taxpayer, was found to have a concrete interest in a right to have moneys transferred from one governmental agency to another. 144 Haw. 175, 202-03 (2019). While the legislature believes that the expenditures of public moneys and the proper management of such expenditures are of public importance, the legislature does not believe that general disagreement challenges to government actions are the proper use of declaratory judgments. A plaintiff should show a personal stake in the proceedings beyond a mere disagreement with the government action and shall implicate an actual or threatened injury or penalty.

The Foundation initiated this case because state law at the time allowed the State to skim off 10% of the gross amount of what then was the Honolulu county surcharge on the General Excise Tax and use the money in its general fund for purposes unrelated to rail. The amount skimmed, on average, was about \$25 million a year, which was an amount comparable to the entire budget of the Department of Taxation and thus was obviously more than the amount needed to compensate the State for its effort in collecting the surcharge amount and distributing it to the county or counties adopting the surcharge.

In the Hawaii Supreme Court, the State vigorously contested the Foundation's standing, arguing that if any controversy was present, it would be between the State and the City & County of Honolulu, which of course had not sued.

But governments don't pay taxes. People and companies pay taxes. The Foundation paid taxes, and on that basis urged that the Court get involved. The ultimate result in the case was that the amount of the skim was slashed to 1% from the 10% by Act 1, SLH, Special Session 2017, and that the Court ultimately held against the Foundation on the merits.

The Chief Justice's dissenting opinion pointed out that there is a separate theory of "taxpayer standing" that has been applied in this State:

Hawai'i has a long history of recognizing individual taxpayers' standing to seek relief in such cases. *See, e.g., Castle v. Atkinson*, 16 Haw. 769, 774 (Haw. Terr. 1905) (recognizing "the right of resident taxpayers to ... prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay"); *Wilder v. Pinkham*, 23 Haw. 571, 573 (Haw. Terr. 1917) ("The theory upon which a suit by a taxpayer to restrain the illegal expenditure of public money may be maintained is that of protection to the property rights of the complainant."); *Wilson v. Stainback*, 39 Haw. 67, 72 (Haw. Terr. 1951) (providing that a taxpayer's "right to sue and prevent the violation of law" requires "that some interests or property of the taxpayer would be injuriously affected by illegal acts of public officials, about to be committed in expending public money or creating a public debt").

The "basic theory" behind taxpayer standing is:

that the illegal action is in some way injurious to municipal and public interests, and that if permitted to continue, it will in some manner result in increased burdens upon, and dangers and disadvantages to, the municipality and to the interests represented by it and so to those who are taxpayers.

Munoz v. Ashford, 40 Haw. 675, 683 (Haw. Terr. 1955) (citation and quotation marks omitted).

144 Haw. at 208, 439 P.3d at 160 (Recktenwald, C.J., dissenting).

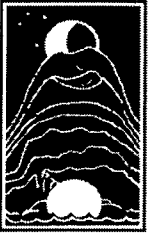
Akau v. Olohana Corp., 65 Haw. 383, 390, 652 P.2d 1130, 1135 (1982), held "that a member of the public has standing to sue to enforce the rights of the public ... if he can show that he has

suffered an injury in fact” by “demonstrat[ing] some injury to a recognized interest such as economic or aesthetic, and is himself among the injured and not merely airing a political or intellectual grievance.” The bill, by requiring that the plaintiff “show a distinct and palpable injury to the plaintiff rather than a generally available grievance that no more directly affects plaintiff than it does the public at large,” appears to abrogate the core principle stated in *Akau* and may create an insurmountable barrier to suits brought in the public interest such as the one the Foundation brought.

"Complexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of justice." *Life of the Land v. Land Use Commission*, 63 Haw. 166, 174 n.8, 623 P.2d 431, 439 n.8 (quoting *East Diamond Head Association v. Zoning Board of Appeals*, 52 Haw. 518, 479 P.2d 796 (1971)).

Therefore, this bill, if enacted, could be interpreted not only as creating an additional hurdle to declaratory judgments as described in section 632-1, HRS, but as an abrogation of the taxpayer standing rule as well. It appears to be a gross overreaction to a perceived problem, if there is a problem at all. The Foundation, having brought the suit it did, does not and will not agree that its litigation was inappropriate, and cannot support a bill providing otherwise.

Digested 2/19/2020



Native Hawaiian LEGAL CORPORATION

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SENATOR KARL RHOADS, CHAIR
SENATOR JARRETT KEOHOKALOPE, VICE CHAIR
SENATE COMMITTEE ON JUDICIARY

Thursday, February 20, 2020, 9:15 a.m.
Conference Room 016
State Capitol
415 South Beretania Street

TESTIMONY IN STRONG OPPOSITION TO SENATE BILL NO. 2810

Dear Chair Rhoads and Vice-Chair Keohokalole,

Native Hawaiian Legal Corporation strongly opposes Senate Bill No. 2810 because it effectively forecloses a number of people's access to the courts and justice by gutting the state Declaratory Judgments statute, Haw. Rev. Stat. (HRS) chapter 632. If passed, it will accomplish the exact opposite of what access to justice reforms statewide and across the country for that matter have attempted to address: to substantially increase access to justice in civil legal matters, especially for poor and marginalized communities and interests. The bill's preamble asserts that "the remedy of declaratory judgments has now become too broad, where the remedy has been authorized in instances of a general disagreement of a government action without a showing of an actual controversy," citing a recent case, *Tax Foundation of Hawai'i v. State*, 144 Hawai'i 175 (2019). SB 2810, however, does more harm than good by proposes sweeping changes to the Declaratory Judgments statute that would roll back decades of established precedent on the statute; decades of meaningful progress in ensuring that equal justice for all is truly available for all. Rather than address any real problem, these ill-considered changes will severely curtail the availability of judicial relief and access to justice for people who need it most. Accordingly, we respectfully request that the SB 2810 be held.

As our ally, Earthjustice, ably points out, SB 2810 states one of its purposes is to codify the standard for legal standing, requiring a plaintiff establish "injury-in-fact" standing. Related to this point, the bill cites the *Tax Foundation* case, in which the Hawai'i Supreme Court enunciated a standard for standing based on the language of HRS § 632-1. Contrary to SB 2810's suggestion that the case allows lawsuits over "general disagreement of a government action without a showing of an actual controversy," the Court's ruling recognized the standing requirement in the statute that "the party seeking declaratory relief has a *concrete interest in a legal relation, status, right, or privilege* that is challenged or denied by the other party, who has or

asserts a concrete interest in the same legal relation, status, right, or privilege.” *Tax Found.*, 144 Hawai’i at 202 (emphasis added). SB 2810 does not explain how this standard is inadequate or unwarranted in allowing parties to obtain declaratory relief as to their concrete legal rights and interests.¹

That SB 2810 goes a step further to require a plaintiff to “show a distinct and palpable injury to the plaintiff rather than a generally available grievance that *no more directly affects plaintiff than it does the public at large*” (emphasis added) with respect to standing takes jurisprudence on this back to the dark ages. Literally. The Hawai’i Supreme Court has long abandoned the archaic standing requirement that a member of the public must show interests or injuries distinct from those of the general public.² SB 2810 threatens to turn the clock back decades on this long-standing legal principle.

SB 2810’s additional extensive amendments to the Declaratory Judgments statute that would roll back decades of established precedent under the statute for no good reason; at least none articulated in the bill itself. Many of the proposed amendments are less than clear in their wording and effect and, thus, at a minimum, would create confusion and litigation and invite unforeseen negative consequences. All of these amendments would work in the direction of hindering and suppressing people’s access to the courts and justice, **not** ensuring them as is our shared kuleana.

We reiterate the worst aspects of SB 2810’s proposed overhaul of the Declaratory Judgments statute, as previously pointed out by Earthjustice:

- ▶ SB 2810 states that its purpose includes “[r]einstat[ing] the restriction of the *Kaleikau* Court limiting the use of declaratory judgments” and “[r]estricting declaratory judgments to instances where a legally cognizable injury has not yet occurred and consequential relief could not be presently claimed.” Yet, as the bill’s preamble recounts, the *Kaleikau* case is almost *100 years old* and was legislatively abrogated in 1945. SB 2810 would nullify decades of practice and precedent under the Declaratory Judgments statute and would needlessly complicate, rather than simplify and streamline, the accessibility and responsiveness of the legal process.

¹ Notably, even the dissent by the Chief Justice recognized standing for the plaintiff in that case based on the taxpayer standing doctrine, while the other dissenting justice declined to address standing based on the rationale that the plaintiff did not allege taxpayer standing. *See Tax Found.*, 144 Hawai’i at 206-24 (dissenting opinions by Recktenwald, C.J., and Nakayama, J.). In other words, *none* of the justices in the *Tax Foundation* case affirmatively ruled that the plaintiff in that case did *not* have standing.


² *See Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai’i 64, 70, 881 P.2d 1210, 1216 (1994) (holding that “a member of the public has standing to enforce the rights of the public even though the individual’s injury is not different in kind from the public’s generally”).

► SB 2810 also refers to a cryptic purpose of “further amending the instances in which declaratory judgments would not be available.” One of these amendments include barring any declaratory relief in “[a]ny controversy with respect to the determination of a future effect of a constitutional provision.” This language could be broadly read to bar any request for prospective relief against constitutional violations. This would shut the courthouse doors on any number of requests for relief to protect constitutional rights and the public interest.³ Environmental and Native Hawaiian rights, for example, are based on constitutional provisions, as are the broad range of civil rights and liberties in our democratic system.

► SB 2810 deletes the long-standing mandate in the HRS § 632-6 that the Declaratory Judgments statute “is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people.” Again, this mandate has been one of the hallmarks of this statute for decades.⁴ The modern trend over many years has been to simplify the legal process to facilitate access to the courts and justice. SB 2810 would dramatically reverse this progress and make the courts less serviceable to the people.

In sum, and for the foregoing reasons endorsed by other legal professionals committed to ensuring equal justice and equal access to justice for all, Native Hawaiian Legal Corporation strongly opposes SB 2810 and respectfully requests that it be held. Mahalo nui for this opportunity to testify.

Summer Sylva



Executive Director

Native Hawaiian Legal Corporation

³ In this regard, this proposed amendment may run afoul of the constitutional separation of powers doctrine.

⁴ See *Kilakila 'O Haleakala v. Bd. Of Land & Nat. Res.*, 131 Hawai'i 193, 204, 317 P.3d 27, 38 (2013) (reiterating the “fundamental policy that Hawai’i’s state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the ‘needs of justice’ would best be served by allowing a plaintiff to bring claims before the court.”).

David Kimo Frankel's Testimony in Opposition to SB 2810
February 20, 2020 Hearing

Chair Rhoads and members of the committee,

Access to our courts is of fundamental importance in our democratic society. It allows citizens to keep government accountable. SB 2810 would close the courthouse doors to those who have legitimate grievances.

If SB2810 became law, how would a citizen sue over violations of state statutes, including, but not limited to environmental ones?

There is no compelling need for this radical legislation. HRS chapter 632 has **not** been abused.

LATE

SENATE COMMITTEE ON JUDICIARY

ATTN: CHAIR KARL RHOADS & VICE-CHAIR JARRETT KEOHOKALOLE

Testimony in Opposition to SB 2810: Relating to Declaratory Judgements

**February 20, 2020, 9:15 a.m.
Conference Room 016**

Aloha Chair Rhoads, Vice-Chair Keohokalole, and Members of the Committee:

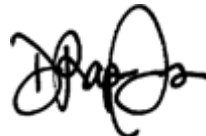
I am testifying in strong opposition to SB 2810, and urge you to kill this bill. SB 2810 would bar the courtroom doors and significantly limit access to justice, especially for historically underrepresented groups such as Native Hawaiians and those seeking to protect and restore our natural and cultural resources and the traditional and customary Native Hawaiian practices that are dependent upon them. This bill is unnecessary and will distort several complex areas of law that have developed over the better part of a century.

Although I am testifying in my personal capacity because of the significant concerns that I and my family share about SB 2810, I have some experience in this area. I am a Professor of Law at the University of Hawai'i at Mānoa's William S. Richardson School of Law, the Director of Ka Huli Ao Center for Excellence in Native Hawaiian Law, and the Director of the Environmental Law Clinic. I teach and write in these highly specialized areas. I am also a practicing attorney with over twenty years of litigation experience in various areas that are implicated by this bill.

The 1978 constitutional convention crafted important amendments to Hawai'i's legal framework that were later ratified by an overwhelming majority of the electorate. These provisions declared a public trust over Hawai'i's natural and cultural resources, protected traditional and customary Native Hawaiian rights and practices, established the Office of Hawaiian Affairs, provided a right to a clean environment, and recognized the fiduciary duties related to stewardship of our Public Land Trust, among many, many other things. SB 2810's amendment to the declaratory judgment statute barring "any controversy with respect to the determination of a future effect of a constitutional provision" would significantly limit the redress available for anyone seeking to enforce these and other constitutional provisions for no apparent reason other than to deny these groups access to justice. Please note that although my specific concern is with respect to Native Hawaiian and environmental interests, SB 2810 would significantly limit protections for a range of civil rights and liberties that have been the hallmark of democracy and so much of what we here in Hawai'i stand for.

Please kill this awful bill. Mahalo for your time and consideration.

Me ka ha'aha'a,



D. Kapua'ala Sproat
1515 Nu'uaniu Avenue #148
Honolulu, Hawai'i 96817
E: kapua.sproat@gmail.com



SIERRA CLUB OF HAWAI'I

LATE

SENATE COMMITTEE ON JUDICIARY

February 20, 2020 9:15AM Room 016

In **OPPOSITION** of **SB2810**: Relating to Declaratory Judgements

Aloha Chair Rhoads, Vice Chair Keohokalole, and members of the committee,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawai'i **strongly opposes SB2810** to severely restrict the public's access to declaratory court decisions. This bill proposes to rewind decades of jurisprudence far beyond justification and impose regressive changes to existing state law.

Haw. Rev. Stat. §632 was first adopted in 1921. As spelled out in HRS §632-6, "[i]ts purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights". HRS §632-6. SB2810 proposes to up-end this long settled law about the terms under which the public may seek the court's assistance in understanding the law. Why? *Is it truly the goal of this Senate to not make "the courts more serviceable to the people"?* HRS §632-6. That would be shocking, if true.

Declaratory judgements should be used to determine constitutional rights

While this bill is premised on addressing the Tax Foundation's case on the handling of the General Excise Tax surcharge for the rail project, the amendments proposed go way beyond that by overly limiting the scope of declaratory judgements.

The most egregious example of this may be the amendment that says:

declaratory relief may not be obtained in [~~any~~]:

(1) Any district court~~[, or in any]~~;

(2) Any controversy with respect to taxes~~[, or in any]~~;

(3) Any controversy with respect to the determination of a future effect of a constitutional provision;

(4) Any case where a divorce or annulment of marriage is sought [-];

(5) Any case where a statute provides a special form of remedy for a specific type of case; and

(6) Any case where another cause of action exists pursuant to section 632-6.

(emphasis added.)

What is the rationale for limiting the public's access to the courts to determine the extent of existing constitutional provisions? Adopting this amendment will limit the public's ability to get an objective assessment of their constitutional rights. How is that a good thing in any context? This serves only to undermine public faith in its rights and creates more litigation as people's rights are challenged. In this time of waning public support for government actions in the Hawaiian Islands, the Senate should be working to restore the public's faith in government actions.

Tax Foundation lost its case

The Hawai'i Supreme Court considered the Tax Foundation's claims on appeal (439 P.3d 127 (2019)).

. It concluded that:

- 1) The Tax Foundation has the right to seek a declaratory judgement about whether the state had properly administered the GET surcharge adopted by the City and County of Honolulu. Just as Hawai'i Insurer's Council had a right to ask the court to review the transfer of funds between state agency in 2008, and
- 2) The state had not erred its administration of the GET surcharge, and so the Tax Foundation was not entitled to any relief.

So to be clear, the state won the case brought by the Tax Foundation in 2015 over the taxes collected for the Rail Project. The system worked. The court, as an objective third party, reviewed the decision of the legislature, found it to be completely legal, and by that decision created certainty and mutual understanding around the legislature's action where it had previously been lacking. This is a good thing. The Tax Foundation's case does not provide sufficient justification for amending this bedrock statute, especially not amending it in such a regressive way, as is currently proposed.

What do these words mean?

HRS §632 has been litigated for literally 100 years. As a result, the statute has been refined and improved over the years as courts test the statute against real-life situations. This means the legal community feels pretty comfortable about when a declaratory judgement is an option and when it is not. This century of jurisprudence should not be disregarded lightly.

This statute has also been amended over this time to clarify intent and application, such as in the case of "tax appeals." Past amendments to this bill have been very targeted and well justified. Unfortunately, we are not seeing that approach in this bill. SB2810 proposes vague language that is not fully justified or explained. Specifically:

- 1) the bill proposes to revert the standard for declaratory judgements to a 1923 case that was later deemed far too restrictive by the legislature in 1945. Yet, the bill offers little explanation or justification for this change. How are courts to interpret this proposed change if it is enacted?
- 2) The bill directs that "A plaintiff should show a personal stake in the proceedings beyond a mere disagreement with the government action and shall implicate an actual or threatened injury or penalty." (emphasis added). What is the definition of "personal stake"?
- 3) The bill says for a declaratory judgement, a plaintiff's "injury must be distinct and palpable, as opposed to abstract, conjectural, or merely hypothetical." What does "distinct and palpable" mean? Is that like an injury-in-fact, but different? It is unclear.

Our concern is that passage of this bill without a major overhaul will create unnecessary confusion in the courts and the public.

As an advocate for constitutionally protected public trust resources, a government watchdog, and a supportive of many of the good laws passed by this legislature, the Sierra Club strongly urges this Committee to hold this bill.

Sincerely,



Marti Townsend
Chapter Director