



REPRESENTATIVE MARK M. NAKASHIMA, CHAIR
REPRESENTATIVE SCOT Z. MATAYOSHI, VICE CHAIR
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

TESTIMONY ON SENATE BILL NO. 3041, SD2: **SUPPORT, WITH AMENDMENTS**

Tuesday, March 15, 2022, 2:00 p.m.
Conference Room 325 & Via Videoconference
State Capitol
415 South Beretania Street

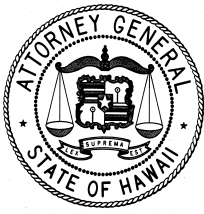
Aloha Chair Nakashima, Vice Chair Matayoshi, and Honorable Committee Members,

Earthjustice is counsel of record on behalf of community plaintiffs in the lawsuits referenced in Sections 2 and 3 of SB 3041, SD2, *i.e.*, Nā Kia'i Kai v. Nakatani, et al., Civil No. 18-00005, and Kaupiko, et al. v. Department of Land and Natural Resources, State of Hawai'i, Civil No. CAAP-21-0000374, respectively. Earthjustice **supports SB 3041, SD2, with amendments**, to accurately reflect the agreed-upon settlement amounts, as follows:

- For the Nā Kia'i Kai lawsuit, the settlement amount in Section 2 should read **\$132,611.78**; and
- For the Kaupiko lawsuit, the settlement amount in Section 3 should read **\$145,736.28**.

Mahalo for this opportunity to testify. Please do not hesitate to reach out to us if you have any questions or need any further information.

Kylie W. Wager Cruz, Esq.
Senior Attorney
Earthjustice, Mid-Pacific Office



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022**

ON THE FOLLOWING MEASURE:

S.B. NO. 3041, S.D. 2, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, March 15, 2022 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
Caron Inagaki, Deputy Attorney General

Chair Nakashima and Members of the Committee:

The Department of the Attorney General (Department) supports this bill with amendments.

The purpose of this bill is to seek appropriations to satisfy claims against the State, its officers, or its employees, including claims for legislative relief, judgments against the State, settlements, and miscellaneous claims.

The prior version of the bill (Senate Draft 1), contained eight claims that totaled \$938,613.47. Attachment A provides a brief description of those claims. At the time the bill was before the Senate Committee on Ways and Means, a new claim, *HELG Administrative Services, LLC v. Department of Public Safety*, had been resolved in the amount of \$550,000.00, and the amount of one of the claims, *Kaupiko v. Department of Land and Natural Resources*, needed to be corrected from \$145,000.00 to \$145,736.28. With the new claim and the correction, there were nine claims that totaled \$1,489,349.75. In our testimony to the Senate Committee on Ways and Means, we requested an appropriation from the general fund be made to satisfy the new claim, and the bill be amended to reflect the corrected amount for the *Kaupiko* claim.

Since the bill was last amended, two new claims were resolved for an additional \$290,540.00. The claims are an appropriation request from the general fund. Attachment B provides a brief description of the new claims, including the *HELG* claim.

Including the two new claims, the appropriation request totals \$1,779,889.75 allocated among eleven claims.

The Department has had a longstanding policy of advising agencies how to avoid claims such as those in this bill. The Department also has complied with section 37-77.5, Hawaii Revised Statutes, which requires the Attorney General to develop and implement a procedure for advising our client agencies on how to avoid future claims.

Senate Draft No. 2 of the bill (S.D. 2) changed the appropriated amounts of all judgments, settlements, and miscellaneous claims to unspecified amounts and did not add the *HELG* claim.

Section 6 of S.D. 2 at page 6, lines 5 through 11, states that

The sums hereinabove may be paid to the respective persons, or for the satisfaction or settlement of the respectively identified cases, and in several amounts hereinabove set forth or in lesser amounts deemed appropriate, upon checks issued by the comptroller; provided that departments shall obtain the approval of the attorney general before payment of any claim can be made.

The Department respectfully requests that this section be deleted. The intent of this section is not entirely clear but appears to suggest that the amounts of the claims may be reduced or otherwise altered. The Legislature may either appropriate or decline to appropriate moneys to pay the settlement or judgment amounts, but the terms of the settlements negotiated and agreed to by the parties may not be independently changed. Similarly, a judgment entered by a court may not thereafter be altered or amended without court approval.

We respectfully request passage of this bill with the original amounts reinstated, additional appropriations for the new claims added, and the removal of section 6.

ATTACHMENT "A"

AGRIBUSINESS DEVELOPMENT CORPORATION:

Na Kia'i Kai v. Nakatani, et al.
Civil No. 18-00005, USDC

\$ 132,611.78 (*General Fund*)
Settlement

The plaintiff filed a lawsuit against the Agribusiness Development Corporation (ADC) regarding the management of irrigation ditches in Kekaha, Kauai, that discharge into the ocean. The ADC inherited the network of ditches built by a sugar plantation that discharges into the ocean. Those discharges were regulated by the Clean Water Act under a National Pollutant Discharge Elimination System (NPDES) permit. The ADC applied to renew the permit and was informed by the Department of Health that one was not required. The ADC then withdrew its application and entered into an MOU with the Department of Health regarding the proper land management and water quality monitoring. The court found that an NPDES permit was required and discharging without a permit was a violation of the Clean Water Act. The plaintiff prevailed on summary judgment and the damages were ultimately resolved via settlement agreement. This claim is a separate settlement regarding attorney's fees and costs. The total amount of attorneys' fees and costs was \$263,698.30. Half of this amount, \$131,849.15, was appropriated in the 2021 Legislative Session via Act 15. The remaining balance is \$132,611.78 which represents \$131,849.15 plus interest.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

**Kaupiko, et al. v. Dept. of Land
and Natural Resources, State of Hawaii**
Civil No. 20-0000125; First Circuit
Civil No. CAAP-21-0000374,
Intermediate Court of Appeals

\$ 145,736.28 (*General Fund*)
Settlement

In a prior case, Umberger v. Dep't of Land & Nat. Res., 140 Hawai'i 500, 403 P.3d 277 (2017), the Hawaii Supreme Court barred commercial aquarium collection using fine mesh nets under section 188-31, Hawaii Revised Statutes (HRS), holding that such collection was an "action" requiring chapter 343 review. In this lawsuit, the plaintiffs claimed that all commercial aquarium collection occurring without fine mesh nets under the general commercial marine license statute (section 189-2, HRS), which is required for all kinds of commercial fishing activities, was also an "action" that required chapter 343 review. They also argued that commercial aquarium collection was barred on several other theories: (1) a statutory interpretation of section 188-31, HRS; (2) public trust; and (3) native Hawaiian rights.

On November 27, 2020, the environmental court granted the plaintiffs' motion for summary judgment on the chapter 343 argument and denied as to all other claims and

theories, ruling that all commercial aquarium collection is barred pending chapter 343 compliance. All commercial marine licenses obtained under section 189-2, HRS, are now subject to additional special terms and conditions, regardless of the gear-type used, at least until chapter 343 review is complete. The parties agreed that plaintiffs' remaining claims would be dismissed, and judgment was entered in conformity with the orders. The plaintiffs were awarded \$165,020 in attorneys' fees. The Department of Land and Natural Resources appealed the award. The parties reached a settlement through appellate mediation for \$145,000 and \$736.28 in costs for a total of \$145,736.28.

DEPARTMENT OF PUBLIC SAFETY:

**Curt K.K. Tokunaga, et al. v. Dept.
of Public Safety, State of Hawaii
Civil No. 18-1-0982-06, First Circuit**

**\$ 150,000.00 (General Fund)
Settlement**

A wrongful death lawsuit was filed after the plaintiffs' son, a former inmate, died after his release from prison. The decedent had epilepsy, substance abuse disorder, and mild cognitive impairment. He was released from prison at night wearing only disposable clothing and without any money, identification, or necessary medication. He was found dead eight days later in an abandoned vehicle. The decedent's official cause of death was heart failure due to cardiomyopathy. The plaintiffs argued that the decedent died of a seizure due to lack of medication and that the State should have released the decedent directly to the custody of a halfway house or treatment program and provided him with a supply of medication for his transition. The State disputed causation because, if the decedent died of heart failure, the failure to provide him with his seizure medication would not have caused his death. The plaintiffs sought \$1,000,000 in damages. The case settled in mediation for \$150,000.

STATE PUBLIC CHARTER SCHOOL COMMISSION:

**UPW on behalf of James Ah Sing v.
Christina Kishimoto, et al.
Case No. CE-01-539
Hawaii Labor Relations Board**

**\$ 125,275.38 (General Fund)
Judgment**

The complainant's position as a janitor at Connections, a New Century Charter School was not renewed in 2003. The United Public Workers, on behalf of the complainant, filed a prohibited practice complaint with the Hawaii Labor Relations Board. There were several appeals to the Hawaii Supreme Court but on the final remand to the Hawaii Labor Relations Board, the complainant ultimately prevailed and was awarded back pay, vacation pay, and all substantiated attorneys' fees and costs.

MISCELLANEOUS CLAIMS:

Sang Chol Bang **\$ 40.65** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Rodney Baculpo **\$ 1,283.01** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Darlene Vicente fka Darlene Baculpo **\$ 1,283.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Princeville Hotel, LP **\$ 383,119.65** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

ATTACHMENT "B"

DEPARTMENT OF PUBLIC SAFETY:

Faatalale Auelua v. State of Hawaii **\$ 40,000.00** *(General Fund)*
Civil No. 17-1-0802-05 GWBC; First Circuit **Settlement**

Plaintiff was assaulted by a group of inmates while he was asleep on the top bunk in his cell on the second floor of Annex II at the Oahu Community Correctional Facility (OCCC). The assailants were alleged gang members who were housed on the first floor but gained access to the second floor through unlocked and open gates. The gates should have been locked as required by OCCC policies and procedures. Plaintiff sustained lacerations on his head, hands, and body. He also alleges that he sustained a traumatic brain injury and has post traumatic stress disorder.

Anthony Chatman, et al. v. Max N. Otani **\$ 250,540.00** *(General Fund)*
Civil No. 21-00268 JAO KJM; USDC **Settlement**

Plaintiffs in this class action lawsuit claim that the conditions of confinement at the State of Hawaii's correctional facilities placed current and future inmates at risk of being exposed to and contracting COVID-19. On July 13, 2021, the Court entered an Order (1) Granting Plaintiffs' Motion for Provisional Class Certification and (2) Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order. On September 2, 2021, the parties executed a Settlement Agreement and General Release. On October 1, 2021, the parties entered into a Fee Settlement Agreement. On November 10, 2021, the Court entered an Order and Judgment finding that the Settlement Agreement and Fee Settlement Agreement are fair and reasonable, approving the amount of \$250,540.00 in attorneys' fees, and dismissing the case with prejudice.

HELG Administrative Services, LLC, **\$ 550,000.00** *(General Fund)*
as Special Administrator of the Estate of **Settlement**
Daisy L. Kasitati, deceased, et al. v.
Dept. of Public Safety, State of Hawaii
Civil No. 19-1-0348(2), Second Circuit

A female inmate committed suicide while incarcerated at Maui Community Correctional Center in 2017. At the time of her death, she was 26-years old and the mother of four children under the age of five. She had a six-year history of repeat incarcerations along with a history of drug and alcohol abuse. She also had a history of depression and had attempted suicide at least once. She was due to be released in 2022.

In the twelve to fourteen hours before her death on October 12, 2017, her cell mates asked an adult corrections officer on duty to get medical help for the decedent because she was depressed, and they felt she needed help. A few hours before her death, the

decedent told the adult corrections officer that she was feeling "low" because of a family member's recent death and suggested, in what was perceived to be a joking manner, that she be put on suicide watch. No action was taken to get her medical help or to put her on suicide watch. Her cellmates left to attend a class. Sometime between the 2:00 p.m. roll call and 2:30 p.m., she blocked the window of her cell with paper and hanged herself with a bed sheet. She was last seen alive during the routine 2:00 p.m. head count for her unit. She was discovered unconscious and cold at approximately 2:30 p.m. by her cellmates and an adult corrections officer. Resuscitation efforts were unsuccessful.

SB-3041-SD-2

Submitted on: 3/13/2022 4:07:07 PM

Testimony for JHA on 3/15/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Gerard Silva	Individual	Oppose	Written Testimony Only

Comments:

This should go nto effect NOW!!!!

DAVID Y. IGE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the House Committee on
JUDICIARY & HAWAIIAN AFFAIRS**

**Tuesday, March 15, 2022
2:00 PM**

State Capitol, Conference Room 325, Via Videoconference

**In consideration of
SENATE BILL 3041, SENATE DRAFT 2
MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE
STATE, ITS OFFICERS, OR ITS EMPLOYEES**

Senate Bill 3041, Senate Draft 2 proposes to make appropriations and approve payments for claims against the State, its officers, and its employees. **The Department of Land and Natural Resources (Department) appreciates the intent of this measure and offers the following comments and amendments limited to PART III, SECTION 3 as follows:**

PART III, SECTION 3 of the measure proposes to approve payment for judgments against the State and settlement of claims in Kaupiko, et al. v. Department of Land and Natural Resources, State of Hawaii (Civil No. 20-0000125, First Circuit; Civil No. CAAP-21-0000374, Intermediate Court of Appeals) in the amount of \$_____,¹ *provided that the amount is expended by the Department from its FY21-22 budget (LNR , general funds).*

The Department respectfully requests that the Legislature appropriates \$145,736.28 out of the general revenues of the State to satisfy this claim. This amount represents the Court-approved settlement amount for Plaintiffs' attorneys' fees and costs incurred in a lawsuit filed against the Department. In defending this lawsuit, the Department relied on existing legal precedent. In a prior case, Umberger v. Dep't of Land & Nat. Res., 140 Hawai'i 500, 403 P.3d 277 (2017), the Hawaii Supreme Court barred commercial aquarium collection using fine mesh nets under Section 188-31, Hawaii Revised Statutes (HRS), holding that such collection was an "action" requiring Chapter 343, HRS, review. In reaching this conclusion, the Supreme Court pointed to the statutory language of Section 188-31, HRS, which gives the Department discretionary

¹ The bill leaves this amount unspecified, but the proper amount is \$145,736.28.

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

consent to issue permits to use fine mesh nets for aquarium collection. In this lawsuit (between nearly identical parties), the plaintiffs claimed that all commercial aquarium collection occurring without fine mesh nets under the general commercial marine license statute (Section 189-2, HRS), which is required for all kinds of commercial fishing activities, was also an “action” that required Chapter 343, HRS, review. The statutory language of Section 189-2, HRS, does not give the Department discretionary consent to issue commercial marine licenses. The First Circuit Court, however, went beyond the legal precedent set in Umberger, ruling that Chapter 343, HRS, requires environmental review for the commercial taking of aquarium fish pursuant to Section 189-2, HRS. Requiring the Department to pay these attorneys’ fees and costs from its Fiscal Year 21-22 budget has no practical policy benefit and would create a chilling effect on defense of lawsuits against the State. It would also adversely impact the Department’s ability to fulfill its mission.

The Department’s Administration Division has 92% of its general fund budget earmarked for personnel costs, leaving 8% for other operating expenses. Using these funds to pay for the aforementioned settlement will adversely impact the Department’s ability in meeting its operational needs.

Thank you for the opportunity to comment on this measure.

SB-3041-SD-2

Submitted on: 3/13/2022 10:41:18 PM

Testimony for JHA on 3/15/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
David Sakoda	DLNR	Comments	Remotely Via Zoom

Comments:

I am available for questions to DLNR. Please allow me Zoom access.

DAVID Y. IGE
GOVERNOR



CRAIG K. HIRAI
DIRECTOR

GLORIA CHANG
DEPUTY DIRECTOR

EMPLOYEES' RETIREMENT SYSTEM
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
OFFICE OF THE PUBLIC DEFENDER

STATE OF HAWAII
DEPARTMENT OF BUDGET AND FINANCE
P.O. BOX 150
HONOLULU, HAWAII 96810-0150

ADMINISTRATIVE AND RESEARCH OFFICE
BUDGET, PROGRAM PLANNING AND
MANAGEMENT DIVISION
FINANCIAL ADMINISTRATION DIVISION
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

WRITTEN ONLY

TESTIMONY BY CRAIG K. HIRAI
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
TO THE HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
ON
SENATE BILL NO. 3041, S.D. 2

March 15, 2022
2:00 p.m.
Room 325 and Videoconference

**MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS,
OR ITS EMPLOYEES**

The Department of Budget and Finance (B&F) offers comments on this bill.

Senate Bill No. 3041, S.D. 2, appropriates an unspecified amount of general funds for FY 22 for the Department of the Attorney General for claims against the State or its officers or employees for the overpayment of taxes, or for refunds, reimbursements, payments of judgments or settlements, or other liabilities.

Regarding Section 5 of this bill (page 5, lines 6-27, and page 6, lines 1-4), B&F notes that this section specifies that the Department of Education (DOE) is to pay for a claim against the State Public Charter School Commission (SPCSC). B&F would like to point out that DOE and SPCSC have separate budgets and it would not be normal budgeting practice to have DOE pay for an expense of SPCSC.

Additionally, B&F notes that, with respect to the general fund appropriation in this bill, the federal Coronavirus Response and Relief Supplemental Appropriations Act requires that states receiving Elementary and Secondary School Emergency Relief

(ESSER) II funds and Governor's Emergency Education Relief II funds must maintain state support for:

- Elementary and secondary education in FY 22 at least at the proportional level of the state's support for elementary and secondary education relative to the state's overall spending, averaged over FYs 17, 18 and 19; and
- Higher education in FY 22 at least at the proportional level of the state's support for higher education relative to the state's overall spending, averaged over FYs 17, 18 and 19.

Further, the federal American Rescue Plan (ARP) Act requires that states receiving ARP ESSER funds must maintain state support for:

- Elementary and secondary education in FY 22 and FY 23 at least at the proportional level of the state's support for elementary and secondary education relative to the state's overall spending, averaged over FYs 17, 18 and 19; and
- Higher education in FY 22 and FY 23 at least at the proportional level of the state's support for higher education relative to the state's overall spending, averaged over FYs 17, 18 and 19.

The U.S. Department of Education has issued rules governing how these maintenance of effort (MOE) requirements are to be administered. B&F will be working with the money committees of the Legislature to ensure that the State of Hawai'i complies with these ESSER MOE requirements.

Thank you for your consideration of our comments.



STATE OF HAWAII
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAII 96804

Date: 03/15/2022

Time: 02:00 PM

Location: 325 Via Videoconference

Committee: House Judiciary & Hawaiian
Affairs

Department: Education

Person Testifying: Keith T. Hayashi, Interim Superintendent of Education

Title of Bill: SB 3041, SD2 MAKING APPROPRIATIONS FOR CLAIMS
AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

Purpose of Bill: Makes appropriations and approves payments for claims against
the State, its officers, and its employees. Effective 7/1/2050.
(SD2)

Department's Position:

The Hawaii State Department of Education (Department) supports passage of SB 3041, SD 2 but offers comments regarding the funding source for the State Public Charter School Commission claim.

The language in SB 3041, SD 2 in part V, section V currently provides that for "legislative appropriation item for the department of education for fiscal year 2021-2022 in section 3 of Act 88, Session Laws of Hawaii 2021, the general fund sum of \$ shall be expended from the fiscal year 2021-2022 budget (EDN , general funds) by the department of education for the purposes of this Act." The Department prefers the language in the original bill which provided an appropriation out of "the general revenues of the State of Hawaii to the department of the attorney general for the purpose of satisfying claims for legislative relief."

The practical implication of the language in SB 3041, SD 2 appears to be that the Department would need to fund a specific claim that arises from a case that was initiated in 2003 and involves a former charter school employee.

It is important to consider that charter schools are operated and managed by independent governing boards and charter school operations are funded directly by the

Legislature via EDN 600, as defined in Section 302D-28, Hawaii Revised Statutes. Essentially, charter school funding is determined by a funding formula that is used by the Legislature to establish the general fund support level for charter schools. As charter schools have their own general fund appropriation, if the Legislature determines it is appropriate to impose the cost of settlements on the state agency involved, then it does not appear the Department is the appropriate agency for this item.

Thank you for the opportunity to provide testimony on this measure.