

The Judiciary, State of Hawai'i

Testimony to the Thirty-Second State Legislature, 2023 Regular Session

House Committee on Judiciary & Hawaiian Affairs

Representative David A. Tarnas, Chair

Representative Gregg Takayama, Vice Chair

Friday, February 24, 2023 at 2:00 p.m.

Conference Room 325 & Via Videoconference

by:

R. Mark Browning

Chief Judge of the First Circuit

State of Hawai'i

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 1440, Relating to the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.

Purpose: Adopts the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act. Repeals the superseded Uniform Guardianship and Protective Proceedings Act.

Judiciary's Position:

The Judiciary respectfully requests that House Bill No. 1440 be deferred for the reasons stated below.

1. This bill seeks to repeal the Uniform Guardianship and Protective Proceedings Act, which is codified in Article V of the Uniform Probate Code, and replace it with the Uniform Guardianship, Conservatorship, and other Protective Arrangements (UGCOPA) Act. The Judiciary appreciates the stated goals of the UGCOPA Act. However, adoption of the UGCOPA Act in place of our existing statutes will have tremendous impacts on current and future guardianships and conservatorships. We respectfully suggest that a detailed and comprehensive review and assessment by a range of stakeholders should be undertaken prior to the implementation of such a fundamental change to the existing statutory framework. This review and assessment will take time.

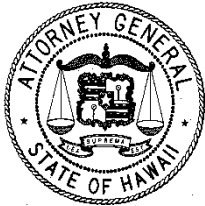


House Bill No. 1440, Relating to the Uniform Guardianship,
Conservatorship, and Other Protective Arrangements Act
House Committee on Judiciary & Hawaiian Affairs
Friday, February 24, 2023 at 2:00 p.m.
Page 2

2. In addition, a number of provisions in the UGCOPA Act – for example, the appointment of attorneys, examiners and evaluators in guardianship proceedings – will require the Judiciary to develop and implement significant new operational processes and will require substantial additional resources and funding.

3. Given the breadth of the changes to current law in this bill, the Judiciary respectfully requests that this bill be deferred to allow: (1) stakeholders sufficient time to fully analyze the UGCOPA Act and study the effects it will have on guardianships and conservatorships in Hawai‘i; and (2) the Judiciary sufficient time to plan for and implement necessary operational procedures and request necessary additional resources and funding.

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



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023**

ON THE FOLLOWING MEASURE:

H.B. NO. 1440, RELATING TO THE UNIFORM GUARDIANSHIP,
CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Friday, February 24, 2023 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Margaret A. Leong, Deputy Attorney General

Chair Tarnas and Members of the Committee:

The Department of the Attorney General offers the following comments:

The purpose of this bill is to adopt as a new chapter of the Hawaii Revised Statutes (HRS) the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, which would significantly change the existing law in this area to, among other things: (1) require additional notice and hearing requirements for hearings on petitions for guardianship, conservatorship, or other protective arrangements; (2) require an evaluation of the individual who is the subject of a guardianship or conservatorship proceeding, upon the filing of the petition; (3) allow conservators additional powers; (4) permit an individual who is the subject of a guardianship or conservatorship proceeding to retain the right to vote or marry upon findings entered by the court; and (5) allow less restrictive alternatives to a guardianship or a conservatorship. We note several changes that may be inadvertent and should be reviewed in light of current Hawaii law.

First, the bill does not retain the exclusive jurisdiction of the family court in guardianship proceedings for minors. See, new section -104 on page 8, lines 16-20. The family court has historically been vested with exclusive subject matter jurisdiction over guardianships and related proceedings concerning minors, and concurrent jurisdiction with the circuit court over guardianship and related proceedings for adults,

pursuant to section 560:5-106, HRS. If the Legislature does not intend to change the jurisdiction of the courts over guardianship of a minor, the bill should be amended accordingly.

Second, new section -107(c), on page 14, lines 1-3, provides for a jury trial for guardian and conservatorship proceedings. Since the definition of "respondent" in new section -102, on page 7, lines 11-13, does not distinguish between an adult and a minor, the provision for a jury trial would be applicable to proceedings for a minor. Jury trials historically have not been held in family court proceedings that are the subject of confidential and sensitive family matters, particularly for those proceedings involving a minor. Moreover, providing a jury trial would result in further delay and risk for vulnerable individuals and increase the need for additional resources for the Judiciary and the Department of the Attorney General. We recommend deleting section -107(c). Page 14, lines 1-3. In the alternative, we recommend amending section -107(c) to recognize the right to jury trials that is allowed under court rules as follows:

(c) ~~[A respondent may demand a jury trial in a proceeding under this chapter on this issue whether a basis exists for appointment of a guardian or conservator.]~~ Except as otherwise provided in this article:

- (1) Guardianship proceedings under this article pending in the family court are governed by the Hawai'i family court rules, including the rules concerning appellate review; and
- (2) Guardianship and protective proceedings under this article pending in the court are governed by the Hawai'i probate rules, including rules concerning appellate review.

Third, new section -201, on page 34, lines 15-17, requires a finding by a court that a parent is either not willing or not able to provide appropriate care for a minor, before a guardianship or conservatorship is granted. That means that a parent could be willing but not able to care for the minor, or able but not willing, and a court would not be authorized to grant the guardianship or conservatorship. Such a result would be counterproductive and could result in minor's interests not being adequately protected. To remedy that, we suggest that a finding be made to reflect that a parent would have to be both willing and able to provide adequately for a minor such that a guardianship or

conservatorship is not necessary. New section -201(b)(3), on page 34, lines 15-17, should be amended as follows to reflect that there are no parents that are willing and able to exercise powers as guardian for a minor:

"(3) There is clear and convincing evidence that no parent of the minor is willing [~~or~~] and able to exercise the powers the court is granting the guardian."

Similarly, new section -207(c)(2), on page 44, line 20, to page 45, line 2, should be amended as follows to reflect that there are no parents that are willing and able to care for or make decisions for the minor no later than two years after the appointment of a standby guardian:

"(2) Finding that no parent of the minor likely will be able [~~or~~] and willing to care for or make decisions with respect to the minor no later than two years after the appointment."

Fourth, the bill uses the term "domestic partner" throughout; that term is not defined and use of the term is not consistent with current statutes. See, page 58, lines 20-21; page 74, line 19; page 75, line 17; page 79, line 12; page 112, line 4; page 133, line 17; page 189, line 17; and page 191, line 16. The term "domestic partner" should be defined or, alternatively, it may be deleted in all instances and the bill should be revised consistent with the terms defined and used in chapter 572B, HRS, Civil Unions.

Fifth, the provisions for the contents of the petition are unclear as they require identification of an adult with whom the respondent has "shared household responsibilities" for more than six months in the twelve-month period immediately before the filing of the petition, and the term "shared household responsibilities" is not defined. See, page 58, line 20, to page 59, line 3; page 112, lines 4-8; and page 189, lines 17-21. We recommend this provision be amended to reflect identification of an adult with whom the respondent has resided for more than six months before the filing of the petition, as currently provided in section 560:5-403 (b)(4)(A), HRS.

Sixth, the bill does not include a provision to send an order that appoints a conservator or guardian to the Hawaii Criminal Justice Data Center as currently required by section 560:5-311(d), HRS, for inclusion in the National Instant Criminal Background Check System database. We recommend the bill be amended to include a

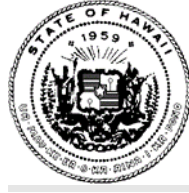
similar provision for the safety of the individual, to be inserted as a subsection in new section -117, at page 20, lines 19-21:

(d) The court shall forward to the Hawaii criminal justice data center all orders of appointment or information from all orders of appointment as requested by the Hawaii criminal justice data center, which in turn shall forward the information to the Federal Bureau of Investigation, or its successor agency, for inclusion in the National Instant Criminal Background Check System database. The orders of appointment or information shall also be maintained by the Hawaii criminal justice data center for disclosure to and use by law enforcement officials for the purpose of firearms permitting or registration pursuant to chapter 134. This subsection shall apply to all orders appointing a guardian or conservator without regard to the date of the appointment.

Seventh, the provisions in the bill regarding the respondent's attendance and rights at hearings, at page 70, lines 11-16; page 125, lines 4-9; and page 201, line 19, to page 202, line 3, provide that the court shall make reasonable efforts to hold hearings at an alternative location convenient to the respondent, if it is not reasonably feasible for the respondent to attend the hearing at the location court proceedings are typically held. This provision would be burdensome on the court and staff and could be used to delay proceedings. We recommend this provision be stricken and the allowance for the respondent to attend the hearing using real-time audio-visual technology be retained.

Thank you for this opportunity to present our comments.

JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA



CATHY BETTS
DIRECTOR
KA LUNA HO'OKELE

JOSEPH CAMPOS II
DEPUTY DIRECTOR
KA HOPE LUNA HO'OKELE

STATE OF HAWAII
KA MOKU'ĀINA O HAWAI'I
DEPARTMENT OF HUMAN SERVICES
KA 'OIHANA MĀLAMA LAWELAWE KANAKA
Office of the Director
P. O. Box 339
Honolulu, Hawaii 96809-0339

February 23, 2023

TO: The Honorable Representative David A. Tarnas, Chair
House Committee on Judiciary & Hawaiian Affairs

FROM: Cathy Betts, Director

SUBJECT: **HB 1440 – RELATING TO THE UNIFORM GUARDIANSHIP, CONSERVATORSHIP,
AND OTHER PROTECTIVE ARRANGEMENTS ACT**

Hearing: Friday, February 24, 2023, 2:00 p.m.
Conference Room 325 & Videoconferencing, State Capitol

DEPARTMENT'S POSITION: The Department of Human Services (DHS) appreciates the intent of this bill, offers comments, requests clarification and an extended effective date.

PURPOSE: The purpose of the bill is to adopt the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPA). Repeals the superseded Uniform Guardianship and Protective Proceedings Act.

DHS supports the bill's intent to provide greater options for securing a child's safety when safe parents are not able to be physically present to care for the child. DHS also appreciates modernizing guardianship provisions that provide additional options for individuals and families. DHS will need more time to meet, further discuss, and clarify the issues and significant changes raised by the proposal, which will impact the Adult Protective Community Services Branch (APCS) and the Child Welfare Services Branch (CWS). We will need time to cross walk proposed changes with other laws that influence protective services work. We will also need time to prepare, retrain our staff, and realign resources and processes to implement

the measure. There is also a potential for cost implications generated by this proposal which APCS will need further time to evaluate. DHS respectfully requests an extended effective date to give it time to address the breadth of changes.

For example, APCS provides protective services for vulnerable adults, which includes petitioning the court for emergency guardianship, guardianship, and conservatorship per Article V of Chapter 560, Hawaii Revised Statutes (HRS), which is repealed by this measure. APCS may also petition for an order for immediate protection (OIP) per Section 346-231, HRS, which may be consolidated with a proceeding for the appointment of a guardian or conservator per Section 346-253, HRS.

Training is essential for APCS workers to pursue the necessary protection of vulnerable adults per the requirements of this measure. For example, assessing the respondent's abilities and inabilities which will be determined based upon a "clear and convincing evidence" standard of proof and understanding the concept of "supported decision making." Training and resources are also needed to support how to properly petition per § -302 Petition for appointment of guardian for adult (page 58) and § -402 Petition for appointment of conservator (page 111).

Clear guidance and training are also needed to provide better clarity on which level of protection is most appropriate to seek under what circumstance, whether it be limited guardianship or conservatorship, full guardianship or conservatorship, protective arrangement versus an Order for Immediate Protection, or other less restrictive alternatives.

Currently, to petition for guardianship, APCS is required to include as an exhibit a written report from a physician to establish incapacity. APCS often pays for these physician assessments and is challenged with a limited pool of physicians who are able and willing to complete these assessments. Although "incapacitated person" is removed from the measure, a thorough assessment of the respondent is still indicated. If APCS continues to need a physician or other clinical assessment to support the petition, APCS must first establish an adequate resource of funds and professionals who are able to complete such assessments.

DHS requests clarification of the reference to article 5 of Chapter 583A, Hawaii Revised Statutes, on page 9, lines 3-5. Currently, Chapter 583A, HRS, does not have an article 5.

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

HB-1440

Submitted on: 2/23/2023 12:15:15 PM

Testimony for JHA on 2/24/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Elizabeth Kent	Commission to Promote Uniform Laws	Support	In Person

Comments:

Thank you for scheduling a hearing for this important bill and for the opportunity to present testimony in support of HB 1440. As a member of the Commission to Promote Uniform Legislation, I am happy to speak in favor of the passage of HB 1440. Here are some of the reasons why:

- ***Encourages person-centered planning.*** Under HB 1440l, a guardian or conservator must develop an individualized plan for each person’s protection. Family and friends will receive copies of the plan and courts monitor the guardian or conservator for compliance.
- ***Promotes independence.*** The bill does not allow a court to impose a guardianship or conservatorship if less restrictive alternative, such as supported decision-making, would provide adequate protection. It also creates a mechanism for a court to order a protective arrangement instead of guardianship or conservatorship where a person’s needs could be met with this less restrictive option.
- ***Helps leverage court resources.*** Courts can require notice of certain suspect actions to be sent to family members or friends of a person subject to guardianship, who act as the court’s eyes and ears to prevent abuse.
- ***Protects legal rights.*** Persons subject to a guardianship or conservatorship order must be given notice of certain key rights, including the right to receive independent legal counsel and the right to have the order modified or terminated when appropriate.
- ***Provides guidance to guardians and conservators.*** The bill includes a list of applicable fiduciary duties and provides clear standards for making decisions.
- ***Helps prevent isolation.*** A guardian may not restrict family members and friends from visiting or communicating with the person subject to guardianship for more than one week without a court order. Unless the court orders otherwise, the guardian is required to notify interested persons of any change in residence or significant change in health status.

Thank you for the opportunity to testify on this bill. I think that these changes will help people who are subject to guardianships and conservatorships have more fulfilling lives and that it will also help the people who care about and care for them.



STATE OF HAWAII
STATE COUNCIL
ON DEVELOPMENTAL DISABILITIES
1010 RICHARDS STREET, Room 122
HONOLULU, HAWAII 96813
TELEPHONE: (808) 586-8100 FAX: (808) 586-7543
February 24, 2023

The Honorable Representative David A. Tarnas, Chair
House Committee on Judiciary & Hawaiian Affairs
The Thirty-Second Legislature
State Capitol
State of Hawai'i
Honolulu, Hawai'i 96813

Dear Representative Tarnas and Committee Members:

SUBJECT: HB1440 HD1 RELATING TO THE UNIFORM GUARDIANSHIP,
CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT.

The Hawaii State Council on Developmental Disabilities **STRONGLY SUPPORTS HB1440 WITH RECOMMENDED CHANGES**, which adopts the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act. Repeals the superseded Uniform Guardianship and Protective Proceedings Act.

We would like to address some concerns the committee may have regarding the language of the bill, and offer possible amendments.

The amendments below clarify language to better fit Hawai'i's systems:

Section -104 p. 9, l. 5 should be amended to change the chapter reference to "551G"

Section -123 (p. 25, l. 17 - p. 26, l. 11) can be amended to clarify that reporting is mandatory for conduct that falls under subsection 123(a).

Section -209, p. 85, l. 10, the list of decisions a guardian may make regarding an adult subject to guardianship, does not include "safety". "Safety" is also omitted from other similar lists throughout the bill (see p. 86, l. 21; p. 109, l. 13; p. 110, l. 12-13; p. 158, l. 12-13 and 19-20; p. 171, l. 12-13; p. 181, l. 3 and 6-7; p. 185, l. 9; p. 186; l. 13-14; p. 210, l. 8 and 16-17).

"Welfare" is intended to mean safety and well-being, but making an amendment inserting the word "safety" can increase clarity to these lists.

Section -503, p. 186, l. 5 can be amended to change the word "money" to "funds".

Section -503, p. 186, l. 15-18 should be deleted, as they are duplicative of lines 11-14.

Section -603 p. 214, l. 31 can be amended to include language stating that the person has a right to object to the conservator's plan or report.

Section -603 p. 215, l. 9 can be amended to include language stating that the person has a right to object to the conservator's plan, inventory, or report.

Additionally, there are several cross references to article V of Chapter 560 that are not addressed by this measure and would need to be updated (see sections 333F-11; 334-1; 551-21; 551A-2; 556A-2; 556A-14; 560:1-201; 560:1-311; 560:3-915; 586-3; 560-10.5; 658J-3; 708-812.55):

- Section 551-21: Reference to section 560:5-403 should be changed to -402.
- Section 551A-2: Reference to section 560:5-304 should be changed to -202 and -302.
- Section 556A-2: Reference to section 560:5-106 should be changed to -104.
- Section 556A-14: Reference to sections 560:5-410 and 560:5-414 should be changed to -415?
- Section 560:1-311: Reference to section 560:5-307 and 560:5-407 should be changed to -308, -409, and -511.
- Section 560:3-915: Reference to section 560:5-104 should be changed to -432.
- Section 658J-3: Reference to sections 560:5-202, 560:5-204, 560:5-301, and 560:5-304 should be changed to -206 for a minor and -310 for an adult

Thank you for the opportunity to submit testimony in **STRONG SUPPORT OF HB1440 WITH RECOMMENDED CHANGES.**

Sincerely,



Daintry Bartoldus
Executive Administrator



Statement of Ben Orzeske, Chief Counsel of the Uniform Law Commission to the Hawaii House Committee on Judiciary and Hawaiian Affairs in support of HB 1440 to adopt the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, February 24, 2023

Chair Tarnas, Vice Chair Takayama, and Members of the Committee:

Thank you for considering HB 1440, which is based on a uniform law produced by the Uniform Law Commission (ULC). The ULC is a nonprofit, nonpartisan law reform organization comprised of volunteer attorneys, appointed by all 50 states to draft model state legislation on topics where uniformity of the law is beneficial. Hawaii has a long history of adopting uniform acts including the Uniform Commercial Code, the Uniform Transfers to Minors Act, the Uniform Anatomical Gift Act, and many others.

This bill would repeal and replace Hawaii's current statute on guardianship. That statute is itself based on an older uniform law, which was updated by a drafting committee of the Uniform Law Commission in 2017, working closely with guardianship experts from organizations like AARP and the National Disability Rights Network. The newer version has several significant improvements compared to the previous version on which Hawaii's law is based.

For example, under the revised uniform law, courts are required to conduct an individual analysis of the needs and abilities of each respondent in a guardianship hearing, and to use the resulting information to order the least restrictive alternative that will meet the respondent's needs. Under the old law, most guardianship orders were for full guardianships, which take away all of an individual's rights – even when the individual is capable of making some decisions for himself or herself.

The new law will also provide enhanced procedural protections, like requiring the respondent to be present at a hearing where their rights could be removed – even if appearing remotely by video. A court cannot craft an appropriate guardianship order unless the judge can interview the respondent. The law also clarifies the role of an attorney in a guardianship hearing to avoid potential conflicts of interest and ensure effective representation of the respondent.

HB 1440 includes more guidance for guardians and conservators, many of whom are family caregivers without any formal training for the role. It provides greater protections for those subject to guardianship, ensuring they have access to friends and family and are not isolated from their support community.

The new law also contains a brand-new provision on less restrictive protective arrangements. This allows courts to address a respondent's problems without taking away their rights, and diverts cases from the guardianship system. The law also implements an innovative community

monitoring system to provide courts with additional oversight of guardianships without imposing any additional costs.

In summary, HB 1440 provides important updates to Hawaii's guardianship law. It will provide greater protection and independence for those subject to guardianship, clearer duties and guidelines for their caretakers, and greater flexibility for courts who deal with these difficult cases.

Thank you for considering HB 1440 to enact the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act in Hawaii. I welcome any questions from the committee.



1001 Bishop Street | Suite 625 | Honolulu, HI 96813-2830
1-866-295-7282 | Fax: 808-536-2882
aarp.org/hi | aarphi@aarp.org | twitter.com/AARPHawaii
facebook.com/AARPHawaii

**The State Legislature
House Committee on Judiciary and Hawaiian Affairs
Friday, February 24, 2023
Conference Room 325
2:00 p.m.**

TO: The Honorable David Tarnas, Chair
FROM: Keali'i S. López, State Director
RE: Support for H.B. 1440 Relating to Uniformed Guardianship, Conservatorship and other Protective Arrangement Act

Aloha Chair Tarnas and Members of the Committee:

My name is Keali'i Lopez and I am the State Director for AARP Hawai'i. AARP is a nonpartisan, social impact organization that advocates for individuals age 50 and older. We have a membership of nearly 38 million nationwide and nearly 140,000 in Hawai'i. We advocate at the state and federal level for the issues that matter most to older adults and their families.

AARP **strongly supports H.B. 1440** which adopts the Uniform Guardianship, Conservatorship and other Protective Arrangements Act. This bill would repeal and replace Hawaii's current statute on guardianship.

The proposed measure updates Hawaii's current guardianship law and will provide greater protection and independence for those subject to guardianship. The following are several significant improvements included in the newer law:

- More guidance for guardians and conservators, many of whom are family caregivers without any training for the role.
- Provides greater protections for those subject to guardianship, ensuring they have access to friends and family and are not isolated from their support community.
- Contains a brand-new provision on less restrictive protective arrangements. This allows courts to address a respondent's problems without taking away their rights.

Thank you very much for the opportunity to testify in strong support for **H.B. 1440**.



February 24, 2023

RE: Testimony in Support of HB 1440, Relating To The Uniform Guardianship, Conservatorship, And Other Protective Arrangements Act.

To Chair Tarnas, Vice Chair Takayama, and members of the Committee on Judiciary & Hawaiian Affairs:

The National Coalition for a Civil Right to Counsel (NCCRC) supports HB 1440's enactment of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements (UGCOPA) Act with respect to the right counsel provisions contained therein. Founded in 2003, the NCCRC is a coalition of over 600 participants and partners from 45 states, including Montana. We seek to advance the recognition of a right to counsel in civil cases involving fundamental interests and basic human needs. Much of our work has been around right to counsel in matters involving child custody, and we have supported UGCOPA enactment in a number of other states as well as assisted litigation on the right to counsel in child guardianship cases in Massachusetts and California.

Child guardianship proceedings are a significant deprivation of custody, one that is extremely difficult to undo once put in place. In these proceedings, the stakes for children and parents are high. In recognizing a right to counsel for parents in such cases, the Supreme Judicial Court of Massachusetts in *Guardianship of V.V.*, 24 N.E.3d 1022 (Mass. 2015), observed that parental rights at stake in a guardianship proceeding are "no less compelling" than in a termination case because the guardian's rights completely displaces those of the parent, and no less compelling when the state is absent. It added, "Even if the guardianship lasts for only a brief period of time, the displacement impacts the parent's liberty interests ... While it is true that the parent's underlying parental rights are not forever terminated as a result of the guardianship, they are severely circumscribed, becoming subsidiary to those of the guardian, for as long as the guardianship remains in effect." Such is true for children as well, whose liberty interest in the existing parental relationship is jeopardized. And these proceedings are highly complex, requiring counsel for both parents and children to ensure accurate outcomes.

For these reasons, the NCCRC strongly supports the passage of HB 1440. Thank you and please let us know if there is any additional information we could provide.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Pollock".

John Pollock
Coordinator, NCCRC

HB-1440

Submitted on: 2/24/2023 3:52:30 PM

Testimony for JHA on 2/24/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Dana Keawe	Individual	Support	Written Testimony Only

Comments:

support