TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA ʻOIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2024

ON THE FOLLOWING MEASURE:
S.B. NO. 2176, RELATING TO TORT LIABILITY.

BEFORE THE:
SENATE COMMITTEE ON WATER AND LAND

DATE: Tuesday, February 7, 2024 **TIME:** 1:00 p.m.

LOCATION: State Capitol, Room 229 and Videoconference

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Robin M. Kishi, Deputy Attorney General

Chair Inouye and Members of the Committee:

The Department of the Attorney General provides the following comments on this bill.

The purpose of the bill is to encourage landowners, tenants, lessees, occupants, or other persons in control of the land to open the lands for recreational use by providing the landowners with immunity from liability. The bill would create landowner immunity from liability for commercial activities, by amending the definition of "recreational user" in section 520-2, Hawaii Revised Statutes (HRS), to include persons on the premises that the owner invites "with or" without charge. This bill, as currently drafted, likely creates an unintended consequence, creates legal issues likely to be litigated and addressed by the courts, as well as includes a technical issue.

First, the immunity created by this bill would likely increase the potential for unchecked and unregulated commercial activities that have the potential to increase the development of hazards and thereby increase the exposure of recreational users to those hazards. This proposed amendment is also in direct conflict with the intent and express wording of section 520-5(2), which states that the landowner's limited liability does not exist in cases in which the landowner charges a fee for access to the land. This bill creates an internal conflict, or at least ambiguity, which will invite an increase in legal challenges in lawsuits and have the unintended consequence of creating more costly and lengthy litigation for the landowners.

Second, the bill seeks to deem as a matter of law that all persons who participate in recreational activities on the land impliedly assume the risks associated with the hazards or dangers thereon. However, implied assumption of risk did not survive appellate scrutiny by the Hawaii Supreme Court.

In Larsen v. Pacesetter Systems, Inc., 74 Haw. 1, 837 P.2d 1273 (1992), the Hawaii Supreme Court stated that express assumption of risk in which a person by contract or other document expressly assumes risks of hazards or danger and waives any claim arising therefrom survived Court review, but the Court further stated that the doctrine of implied assumption of risk that focuses on a person's understanding of risks is a form of comparative negligence. Therefore, this bill will likely invite litigation on this issue and may not survive appellate court scrutiny on the issue.

Third, the bill seeks to expand the definition of "recreational user" by adding the term "or minor". Because a minor is a person who has not yet reached the age of majority, injecting the term into the statute creates the issue of whether the "minor" person or other cognitively challenged person is or is not legally competent to recognize and understand the hazards or dangers on the land and therefore assume the risks associated with those hazards or dangers.

The Hawaii Supreme Court in Sherry v. Asing, 56 Haw. 135, 531 P.2d 648 (1975), addressed the issue of a minor's contributory negligence, which is currently referred to as comparative negligence, and stated that a minor is held to a standard of care appropriate to the minor's age, experience, and mental capacity. The Court further stated that an adult person who was cognitively challenged should be held to a standard of care appropriate for that person's age, experience, and mental capacity instead of the standard for a person not similarly challenged. Therefore, by pre-determining that a "minor" person has impliedly assumed the risks, this bill invites additional litigation on this issue.

Fourth, as stated above, a minor is a person. Instead of adding the term "or minor", the term should be replaced by "including a minor". Further, once the definition is amended, the term need not be reiterated throughout the remainder of the statute.

Fifth, regarding the award of attorney's fees and costs, currently, if the landowner prevails under section 520-2 against a “recreational user” in a lawsuit, as the prevailing party, the landowner would be entitled to an award of litigation costs under section 607-9, HRS, whether or not the user had a reasonable basis for bringing the lawsuit.

In light of section 607-9, the bill is ambiguous and may weaken the ability of the prevailing landowner to recover fees and costs only if the user had no reasonable basis for bringing the lawsuit. Because the purpose of the bill is to provide greater incentive to owners to open their land, the bill need only state that “if the landowner prevails under this chapter and the court finds that the recreational user had no reasonable basis for bringing the action, in addition to the fees and costs permitted under section 607-9, the court shall award the landowner’s reasonable attorneys’ fees and costs incurred in the lawsuit”.

We therefore suggest the following changes to the bill that may help further the purpose of the bill while not increasing litigation costs for the landowner: (1) delete the “Assumption of the risk” section, page 3, line 8, to page 4, line 2; (2) delete the current wording of the “Award of attorneys’ fees and costs” section, page 3, lines 1-7, and replace it with, “If the landowner prevails under this chapter and the court finds that the recreational user had no reasonable basis for bringing the action, in addition to the fees and costs permitted under section 607-9, the court shall award the landowner’s reasonable attorneys’ fees and costs incurred in the lawsuit”; (3) delete the term “with or” from the section 520-2 definition of “recreational user”, page 4, line 17, as well as from the proposed amendment to section 520-4, page 5, line 3; (4) substitute the term “including a minor” for the term “or minor” in section 520-2, page 4, line 15, and then delete all redundant references thereafter.

SB-2176
Submitted on: 2/2/2024 3:25:03 PM
Testimony for WTL on 2/7/2024 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
LIBRADO COBIAN	Testifying for Oahu Motorsports Association	Support	In Person

Comments:

The Oahu Motorsports Association is in full **SUPPORT** of SB2176

The new section " Assumption of Risk " with the description of potential injury sources is very important to protect the liabilty of Government entities and Political Subdivisions from frivolous claims that may arise from persons using lands for recreation.

The State of Hawaii and Counties uses BRAC (Base Re-Alignment and Closure) land that was from the Military for recreation as " Park Property" . Finally after 25 Years ,the City & County of Honolulu will be receiving 400 acres in Barbers Point from the US Navy this year for Recreational use under a Federal NPS (National Parks Service) Federal Lands to Parks Program.

Military lands historically all have some form of Proposition 65 type contamination/ toxin from one form or another in their soil, And ... those same toxins and contaminants are also found in childrens toy, bicycles, wheels, balls and even the sports gear they wear

There is too much Hyper Environmental Paranoia Histeria when soils or structures on military sites are found to have some trace levels of chemical toxins, that leads to frivolous lawsuits.

The CPSC (Consumer Product Safety Commission) allows a higher limit of toxins 1,000 PPM (Parts Per Million) in a Barbie Doll and children's toys than is permitted in exterior Houshold paint (90PPM's) that you can buy at a hardware store.

Under EPA CERCLA (Comprehensive Environmental Response Compensation and Liability Act) the Military is responsible for all required remediation and any future cleanup in perpetuity, even after the lands become park property, the addition of the " Assumption of Risk " section of SB2176 , will Protect the State and County and Government entities from frivolous potential Prop 65 liability claims from the recreational use of lands.

Li Cobian 808-349-7717

President of the Oahu Motorsports Association

TESTIMONY OF EVAN OUE ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION OF SB 2176

Date: Thursday February 8, 2024

Time: 8:30 a.m.

LATE

My name is Evan Oue and thank you for allowing me to submit testimony on behalf of the Hawaii Association for Justice (HAJ) in **OPPOSITION** to SB 2176 - RELATING TO TORT LIABILITY. HAJ has serious concerns with the immunity granted under this measure for landowners.

Under the current law, Hawaii Revised Statutes (HRS) § 520-5(2), does not allow immunity for people charging those who enter land for recreational purposes. Chapter 520 was enacted to give private landowners certain protections from liability when making their lands available for recreational purposes **at no charge to the public**. HAJ has always maintained that it is not prudent to alter the basic public purpose of HRS Chapter 520.

HAJ acknowledges the intent of this measure to incentivize making private lands available to public use, however, to provide blanket immunity to landowners who charge for the recreational use of their property would be bad public policy. There is no justification for providing immunity to landowners that charge the public to be on their land.

Moreover, HAJ is concerned with the language contained with the assumption of risk section of the measure. Primarily, Hawaii has specifically ABOLISHED the assumption of risk defense and instead adopted a modified comparative fault for determining the plaintiff's level of responsibility.

Furthermore, the protection afforded to landowners that allow for recreational use of their property is for the inherent risks of the activity because they are inherent to the activity and

cannot be eliminated by the owner no matter how careful the owner may be. Specifically, HRS § 663-1.54(a) states "**Any person who owns or operates a business providing recreational activities to the public**, such as, without limitation, scuba or skin diving, sky diving, bicycle tours, and mountain climbing, **shall exercise reasonable care to ensure the safety of patrons and the public, and shall be liable for damages resulting from negligent acts or omissions of the person which cause injury."** Additionally, HRS § 663-1.54(c) states "[t]he determination of whether a risk is inherent or not is for the trier of fact. As used in this section an "inherent risk":

(1) Is a danger that a reasonable person would understand to be associated with the activity by the very nature of the activity engaged in;

(2) Is a danger that a reasonable person would understand to exist despite the owner or operator's exercise of reasonable care to eliminate or minimize the danger, and is generally beyond the control of the owner or operator; and

(3) **Does not result from the negligence, gross negligence, or wanton act or omission of the owner or operator**."

The statute does not, and was never intended to, shield landowners that operate a commercial recreational activity from their own negligence and careless operation which causes injury or death to their customers. The waiver statutes specifically cover these concerns because the statute (and related caselaw) make it clear that when a person signs a waiver for a recreational activity, the waiver protects the landowner/business owner/rec activity provider against any inherent risks associated with the activity.

The "examples" of the inherent risks or "dangers" in the proposed bill go well beyond anything inherent, such as variations in terrain, trails paths, or roads. Under this language, a recreational owner **who charges a fee** for use of land is getting blanket immunity to not maintain

their trails and roads. In other words, the landowner will be able to charge for the use of their land while having NO obligation to maintain their property regardless of how bad the conditions become due to the immunity provided under this measure.

Accordingly, providing blanket immunity to landowners who are charging a fee for the recreational use of their property is bad public policy and will reduce public safety. Thank you very much for allowing me to testify in OPPOSITION of this measure. Please feel free to contact me should you have any questions or desire additional information.

SB-2176
Submitted on: 2/6/2024 8:14:37 AM
Testimony for WTL on 2/7/2024 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Teri Leicher	Individual	Support	Written Testimony Only

Comments:

Aloha Senator Inouye and committee,

My name is Teri Wilkins Leicher. I am writing on behalf of myself and my family. We are in support of this bill.

We are a family of hikers and have increasingly been finding access to forest trails are being cut off by large landowners due to fear of lawsuits should someone inadvertently get hurt.

As an example: Mount Hualalai. We live and have hiked up there for over 40 years. Now ... we are told that no one is allowed on the Mauna because Bishop Estate owns the 4,000' and up the Mauna and if afraid of being sued by someone hiking. While we understand the fear of lawsuits ... Keeping folks from hiking the mauna just isn't Pono.

Many landowners such as ourselves have this concern.

at my place of business, we allowed a man to watch his grandson take a scuba lesson in our pool. He fell asleep and fell out of his chair and sued us even though he wasn't hurt from the fall. He felt that since we had insurance, he would try to get some money out of it. (No one made money other than lawyers and it wasted the courts time)

By passing this measure, it would allow landowners to open up there properties again, for the public to enjoy without fear of lawsuits.

It is a good bill.

LATE

SB-2176
Submitted on: 2/7/2024 6:51:13 AM
Testimony for WTL on 2/7/2024 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Rick Dell	Individual	Support	Written Testimony Only

Comments:

Tort reform is needed in Hawaii! Land owners should not be held liable for every incident on their property. This restricts access to land for recreational use due to the fear by land owners of being litigated by greedy lawyers who profit from individuals personal actions. Please pass this bill! Thank you.

LATE

SB-2176
Submitted on: 2/7/2024 9:37:40 AM
Testimony for WTL on 2/7/2024 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
David Lewis	Individual	Support	Written Testimony Only

Comments:

As someone who is an avid outdoor enthusiast (hiking, mountain biking, etc) I am strongly in support of SB2176. Already too many areas on Oahu have been closed or fenced off due to liability concerns. Please pass this much-need reform!