



*The Judiciary, State of Hawai‘i*

**Testimony to the Senate Committee on Judiciary**

Senator Karl Rhoads, Chair  
Senator Glenn Wakai, Vice Chair

Tuesday, February 5, 2019, 9:00 a.m.  
State Capitol, Conference Room 016

By

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**WRITTEN TESTIMONY ONLY**

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**Bill No. and Title:** Senate Bill No. 860, Relating to Court Proceedings.

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

**Judiciary's Position:**

The Judiciary respectfully opposes this bill.

Senate Bill No. 860 would provide the Legislature with standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision. Because so many claims implicate statutes or constitutional provisions, this bill would effectively provide the Legislature with unprecedented authority to become a party in most cases being considered by the courts, without regard to the Legislature’s interest in the case, the specific nature of the constitutional or statutory claims, or the potential prejudice to the original parties.

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



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

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

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

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

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

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

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

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



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

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

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

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

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

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



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

For these reasons, the Judiciary respectfully opposes Senate Bill No. 860. Thank you for the opportunity to testify on this matter.