



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019**

LATE TESTIMONY

ON THE FOLLOWING MEASURE:

H.B. NO. 942, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Wednesday, February 6, 2019 **TIME:** 2:20 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Caron M. Inagaki, Deputy Attorney General

Chair Lee and Members of the Committee:

The Department of the Attorney General supports this bill.

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 bill contains ten (10) claims that total \$888,010.95. Nine (9) claims are general fund appropriation requests that total \$875,844.50, and one (1) claim is an appropriation request from a departmental fund that totals \$12,166.45. Attachment A provides a brief description of each claim in the bill.

Since the bill was introduced, three (3) new claims have been resolved for an additional \$241,245.29. The claims are appropriation requests from the general fund. Attachment B provides a brief description of the new claims.

Including the new claims, the appropriation requests total \$1,129,256.24 allocated among thirteen (13) claims. Of this total \$1,117,089.79 are general fund appropriation requests, and \$12,166.45 are appropriation requests from departmental funds.

The Department has had a longstanding policy of advising agencies as to 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.

We respectfully request passage of this bill with the additional appropriations and amendments.

ATTACHMENT "A"

DEPARTMENT OF ATTORNEY GENERAL:

**Aloha Pregnancy Care and Counseling
Center, Inc. v. Suzuki, et al.
Civil No. 17-00343, USDC**

**\$ 20,344.50 (General Fund)
Settlement**

This is one of two lawsuits brought in the U.S. District Court for the District of Hawaii against the Attorney General by religiously affiliated pregnancy centers, and an organization composed of religiously affiliated pregnancy centers, challenging the constitutionality of Act 200, Session Laws of Hawaii 2017 ("Act 200"). Act 200 requires "limited service pregnancy services," as that term is defined in the act, to disseminate a written notice to clients or patients informing them that Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services, including all FDA-approved methods of contraception and pregnancy-related services for eligible women. Act 200 was modeled after California's Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act"), which required certain licensed pregnancy centers in California to post a notice similar to the notice required under Act 200. California's FACT Act was the subject of a similar constitutional challenge in Nat'l Inst. of Family & Life Advocates v. Becerra, brought in the Southern District of California, which was appealed to the United States Supreme Court. On June 26, 2018, the Supreme Court issued its opinion in Nat'l Inst. of Family & Life Advocates v. Becerra, 2018 WL 3116336 (U.S. June 26, 2018), holding, in a 5-4 majority opinion, that the licensed notice likely violates the First Amendment. After the Supreme Court issued its decision, there was little choice but to resolve the matter without further litigation.

DEPARTMENT OF EDUCATION:

**Miller-Potter v. State of Hawaii, et al.
Civil No. 16-1-0385K, Third Circuit**

**\$ 75,000.00 (General Fund)
Settlement**

Plaintiff was at a meeting on the premises of Waimea Middle School, a Charter School maintained and operated by the State Public Charter School Commission. During the meeting, and after it had become dark outside, Plaintiff excused herself to go to the restroom. Unknown to school administrators, the hallway lights had burned out. As a result, the hallway leading to the restroom was dark. While walking to the restroom, Plaintiff tripped over a low bench that was painted brown in color, fell, and injured her face, teeth and allegedly her left knee. As result of the accident, Plaintiff sustained facial and dental injuries and scarring, right shoulder pain, and aggravation of a pre-existing left knee condition that necessitated a total knee replacement. Plaintiff did not claim lost wages, or lost future earnings. Plaintiff's settlement demand listed related medical expenses of \$212,846.86. The case proceeded to mediation resulting in the settlement of \$75,000.

DEPARTMENT OF HEALTH:

**Kawamoto, et al. v. Ige, et al.
Civil No. 16-00362, USDC**

**\$ 27,500.00 (General Fund)
Settlement**

This case involved claims against the Department of Health and the Department of Human Services. On or about August 30, 2018 a global settlement of \$55,000.00 was achieved in this litigation. The Department of Health's share of this settlement amount is \$27,500.00.

Plaintiffs are an elderly couple that requires a 24-hour level of nursing care, and wanted to live together in a small, community-like, care home operated for profit to service the elderly population of Hawaii. There are two types of these care homes in Hawaii: community care foster family homes ("CCFFHs"), and expanded adult residential care homes ("E-ARCHs"). They both provide 24-hour nursing level of care to elderly persons who require that level of care in a home-like, community setting, but CCFFHs are designed for Medicaid recipients whereas E-ARCHs are for anyone and thus primarily service "private-pay" clients, who are people that do not receive Medicaid.

This lawsuit was about a provision in section 321-481, Hawaii Revised Statutes, which no longer exists, that made a critical distinction between CCFFHs and E-ARCHs as applied to persons such as Plaintiffs who are not Medicaid recipients. Previously, CCFFHs were statutorily defined as accommodations "for not more than two adults at any one time, at least one of whom shall be a Medicaid recipient." A CCFFH could be certified for a "third adult" but that third adult also had to be "a Medicaid recipient." As a result, a CCFFH could not admit a married couple together if neither was a Medicaid recipient, such as the Plaintiffs.

Plaintiffs filed this lawsuit to challenge the provision in section 321-481 that prevented them from living together in the CCFFH of their choice. In the course of this lawsuit, through an act of the 2007 Hawaii Legislature, the statutory wording of section 321-481 at issue in this lawsuit has changed. Under the new statutory wording of section 321-481, the Department of Health was provided with the discretion to allow two private pay individuals to reside together in a CCFFH after considering several factors. So the Plaintiffs are now allowed to live together in a CCFFH.

The Court refused to dismiss the entire case based on mootness, and suggested that the State could have made a "case-by-case exception for Plaintiffs' situation" to the statute even though the statute itself was found to be facially constitutional. To avoid the risk of exposure to a substantial attorneys' fee award at the conclusion of trial, the State negotiated the present settlement amount to resolve the case in full.

DEPARTMENT OF HUMAN SERVICES:

**Doe 1, John, et al. v. Department of
Human Services, et al.,
Civil No. 14-1-0554(2), Second Circuit**

**\$ 585,000.00 (General Fund)
Settlement**

The plaintiffs, John Doe 1 and John Doe 2, alleged that they were sexually molested by their foster care provider, Florentino Rios. Mr. Rios had changed his name to “Zack Morris” and a background check into “Zack Morris” did not uncover any information. John Doe 1 was placed with Mr. Morris and his wife. There was a physical altercation between John Doe 1 and Mr. Morris and, at that time, John Doe 1 claimed that Mr. Morris had sexually abused him. Mr. Morris claimed that John Doe 1 had assaulted him. The police and the court sided with Mr. Morris. The Department of Human Services’ (DHS) investigation classified the sexual abuse allegation as “unconfirmed.” John Doe 1 was then removed from the Morris home. Mr. Morris sued DHS for discrimination for not placing any foster children with him and won. Despite lingering suspicions, DHS placed a second child, John Doe 2, with the Morrises at the request of John Doe 2’s mother. It was not until a third child (John Doe 2’s younger brother) was placed with the Morrises and reported sexual abuse to his therapist, were John Doe 2 and his brother removed from the home. Plaintiffs’ expert opined that both boys suffer from multiple issues, including PTSD, delayed education, and alcoholism, as a result of the sexual abuse.

**Kawamoto, et al. v. Ige, et al.
Civil No. 16-00362, USDC**

**\$ 27,500.00 (General Fund)
Settlement**

This case involved claims against the Department of Health and the Department of Human Services. On or about August 30, 2018 a global settlement of \$55,000.00 was achieved in this litigation. The Department of Human Services’ share of this settlement amount is \$27,500.00.

Plaintiffs are an elderly couple that requires a 24-hour level of nursing care, and wanted to live together in a small, community-like, care home operated for profit to service the elderly population of Hawaii. There are two types of these care homes in Hawaii: community care foster family homes (“CCFFHs”), and expanded adult residential care homes (“E-ARCHs”). They both provide 24-hour nursing level of care to elderly persons who require that level of care in a home-like, community setting, but CCFFHs are designed for Medicaid recipients whereas E-ARCHs are for anyone and thus primarily service “private-pay” clients, who are people that do not receive Medicaid.

This lawsuit was about a provision in section 321-481, Hawaii Revised Statutes, which no longer exists, that made a critical distinction between CCFFHs and E-

ARCHs as applied to persons such as Plaintiffs who are not Medicaid recipients. Previously, CCFFHs were statutorily defined as accommodations “for not more than two adults at any one time, at least one of whom shall be a Medicaid recipient.” A CCFFH could be certified for a “third adult” but that third adult also had to be “a Medicaid recipient.” As a result, a CCFFH could not admit a married couple together if neither was a Medicaid recipient, such as the Plaintiffs.

Plaintiffs filed this lawsuit to challenge the provision in section 321-481 that prevented them from living together in the CCFFH of their choice. In the course of this lawsuit, through an act of the 2007 Hawaii Legislature, the statutory wording of section 321-481 at issue in this lawsuit has changed. Under the new statutory wording of section 321-481, the Department of Health was provided with the discretion to allow two private pay individuals to reside together in a CCFFH after considering several factors. So the Plaintiffs are now allowed to live together in a CCFFH.

The Court refused to dismiss the entire case based on mootness, and suggested that the State could have made a “case-by-case exception for Plaintiffs’ situation” to the statute even though the statute itself was found to be facially constitutional. To avoid the risk of exposure to a substantial attorneys’ fee award at the conclusion of trial, the State negotiated the present settlement amount to resolve the case in full.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Boucher v. Vitousek, et al.
Civil No. 16-1-155K, Third Circuit

\$ 70,000.00 (General Fund)
Settlement

Plaintiff was driving through the intersection of Nani Kailua and Queen Kaahumanu Highway on the island of Hawaii and was struck by a vehicle driven by an employee of the Department of Land and Natural Resources. It is undisputed that the State employee was solely at fault and, therefore, the State was fully liable. Plaintiff’s vehicle was a total loss and she alleged that she suffered from post concussive syndrome, sustained injuries to her left knee that required surgery, right knee and ankle pain, and had hernia surgery. Plaintiff sought total damages in the amount of \$450,000.

DEPARTMENT OF PUBLIC SAFETY:

Fraser v. Lingle, et al.
Civil No. 08-1-0709(1), Second Circuit

\$ 25,000.00 (General Fund)
Settlement

Plaintiff, a former inmate at the Maui Community Correctional Center, was overdetailed in jail by 76 days in 2006-2007 because the jail staff applied an incorrect amount of presentence credit leading to a miscalculation of his sentence expiration date.

Luong v. Sequeira, et al.
Civil No. 16-00613, USDC

\$ 27,500.00 (General Fund)
Settlement

This case arises from an altercation that occurred at the Oahu Community Correctional Center (OCCC) where Plaintiff was incarcerated. Plaintiff claims that during "open module," he and three other inmates were in his cell "talking story." One of the inmates was smoking in the cell. According to the Plaintiff, when an Adult Correction Officer (ACO) came in to investigate the smoke, Plaintiff uttered an obscenity and the ACO struck Plaintiff and knocked him down, causing him to hit his head. Smoking in the cells is against the rules and matches or other sources of ignition are contraband. According to the ACO, he smelled the smoke and went to investigate. He found the occupants of the cell to be high and in a stupor. One of the inmates suddenly awoke and attacked the ACO. In the ensuing melee, Plaintiff, still in a stupor fell off his chair and struck his head on the concrete floor. After a bench trial in the United States District Court for the District of Hawaii, the judge made a preliminary finding in favor of the Plaintiff and made a provisional damages award of \$35,000. The case subsequently settled for \$27,500.

Johnson v. Department of Public Safety, et al.
Civil No. 15-1-0609-04, First Circuit

\$ 18,000.00 (General Fund)
Settlement

Plaintiff, a former inmate at the Oahu Community Correctional Center (OCCC), was overdetailed in jail by 127 days because the court's April 2, 2013, order entitling him to release was not received by OCCC until August 7, 2013.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Bowles v. Hawaiian Electric Company, et al.
Civil No. 17-1-0259-02 VLC, First Circuit

\$ 12,166.45 (Department)
Settlement Appropriation)

Plaintiff stepped into a deep, grass-covered hole on the grassy median at the intersection of Kailua Road and Kalaniana'ole Highway, which is owned and maintained by the Department of Transportation. The hole was described as about 8 feet deep and 20 inches wide. Plaintiff sustained a tibial plateau fracture, which is a fracture located at the top of the tibia (shin bone) in the knee joint. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the Plaintiff \$60,917.89. After a reduction for Plaintiff's comparative negligence and a credit for the amount paid by a settling co-defendant, the State's share of the damages and costs totaled \$12,166.45.

ATTACHMENT "B"

DEPARTMENT OF ATTORNEY GENERAL:

Calvary Chapel Pearl Harbor, d/b/a A Place for Women in Waipio, et al. v. Suzuki, et al.
Civil No. 17-00326, USDC

\$ 40,000.00 (General Fund)
Settlement

This is one of two lawsuits brought in the U.S. District Court for the District of Hawaii against the Attorney General and the Governor of Hawaii by religiously affiliated pregnancy centers, and an organization composed of religiously affiliated pregnancy centers, challenging the constitutionality of Act 200, Session Laws of Hawaii 2017 (Act 200). Act 200 requires "limited service pregnancy services," as that term is defined in the act, to disseminate a written notice to clients or patients informing them that Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services, including all FDA-approved methods of contraception and pregnancy-related services for eligible women. Act 200 was modeled after California's Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act"), which required certain licensed pregnancy centers in California to post a notice similar to the notice required under Act 200. California's FACT Act was the subject of a similar constitutional challenge in Nat'l Inst. of Family & Life Advocates v. Becerra, brought in the Southern District of California, which was appealed to the United States Supreme Court. On June 26, 2018, the Supreme Court issued its opinion in Nat'l Inst. of Family & Life Advocates v. Becerra, 2018 WL 3116336 (U.S. June 26, 2018) holding, in a 5-4 majority opinion, that the licensed notice likely violates the First Amendment. After the Supreme Court issued its decision, there was little choice but to resolve the matter without further litigation.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Umberger, et al. v. Department of Land and Natural Resources, State of Hawaii, Civil No. 12-1-2625-10, First Circuit

\$ 160,645.29 (General Fund)
Settlement

Plaintiffs claim the Department of Land and Natural Resources should not issue permits allowing use of fine mesh nets to take aquatic life for commercial and recreation aquarium purposes without a chapter 343, Hawaii Revised Statutes, study. The circuit court granted summary judgment to the department. The Intermediate Court of Appeals unanimously affirmed. The Supreme Court reversed and granted summary judgment to plaintiffs. The Supreme Court held that in a chapter 343 case, a party prevailing on a claim against the State is entitled to attorneys' fees based on the Court's "private attorney general" theory. The Supreme Court previously awarded \$74,491.81 for fees and costs on appeal. That was paid last year. The circuit court has now awarded an additional \$160,645.29. No further appeals are available.

MISCELLANEOUS CLAIM:

Shim Ching

\$ 40,600.00 (General Fund)

Claimant requests reissuance of an outdated check that was 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, Hawaii Revised Statutes.

JAMES HOCHBERG

ATTORNEY AT LAW, LLLC

February 4, 2019

TESTIMONY RE: HB 942 HOUSE COMMITTEE ON JUDICIARY

Rep. Chris Lee, Chair
Rep. Joy A. San Buenaventura, Vice Chair
Committee Members:

Rep. Tom Brower
Rep. Calvin K.Y. Say
Rep. Richard P. Creagan

Rep. Ryan I. Yamane
Rep. Angus L.K. McKelvey
Rep. Nicole E. Lowen

Rep. Cynthia Thielen
Rep. Gregg Takayama
Rep. Dee Morikawa

HEARING: Wednesday, February 6, 2019; 2:20pm; Conference Room 325

Dear Chairmen, Vice Chairmen and Committee Members,

My name is Jim Hochberg and together with Alliance Defending Freedom, I successfully represented the Plaintiffs challenge to the constitutionality of Act 2 of the 2017 legislative session. That case was filed in the United States District Court in the District of Hawaii as Civil Action No. 17-00326-DKW-KSC, on behalf of Calvary Chapel Pearl Harbor, d/b/a, a Place for Women in Waipio and the National Institute of Family and Life Advocates d/b/a NIFLA against Attorney General Russell A. Suzuki and Governor David Ige, in their official capacities. I understand the Department of the Attorney General is submitting testimony on HB942 that includes a request to add an item in the amount of \$40,000 for legal fees in the above-referenced litigation as the agreed to attorneys fees to be paid to Plaintiffs' counsel. I strongly support the Attorney General's request that you add this \$40,000 payment to the bill in compliance with the settlement agreement. For the foregoing reasons I ask that you amend HB 942. If you have any questions please feel free to call me.

Sincerely,



JAMES HOCHBERG

JH