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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
FINANCE

April 1, 2021 2:30 P.M.

SENATE BILL 808, SD2, HD1
RELATING TO THE SCHOOL FACILITIES AGENCY

Chair Luke, Vice Chair Cullen, and members of the committees, thank you for the opportunity to submit testimony on SB 808, SD2 HD1. The State Procurement Office (SPO) provides the following comments regarding section 2, page 4, lines 15 to 19, which states:

“Any award of a contract for construction shall be subject to the requirements of section 103D-302; provided that the agency authority shall give preference to construction bids submitted by a contractor or subcontractor domiciled within the State.”

Following this requirement may be problematic for the Department of Education (DOE) to implement. Restricting construction contracts to section 103D-302, Competitive Sealed Bidding, will eliminate the benefits of awarding contracts pursuant to Small Purchase and Competitive Sealed Proposals - specifically design build. This may cause confusion as DOE's Facilities and Operations Auxiliary Service Branch are not bound by this requirement and will continue to use the RFP method to award contracts.

In addition, Act 72, SLH 2020, does not address the methodology of applying such a local construction preference. The bill is not clear as to what local preference the agency will use, will they continue to utilize either Act 17, SLH 2009 – Apprenticeship Program, Act 68, SLH 2010 – Employment of State Residents on Construction Procurement Contracts, and HRS §103D-1002 – Hawaii Products, or will the DOE create a new preference exclusive to the school facilities agency?

The implementation of a new DOE construction preference may cause undue confusion and frustration among agencies and construction companies, because of this, the SPO recommends the following revision to page 4, lines 15-21:

~~(b) [Any award of a contract for construction shall be subject to the requirements of section 103D-302; provided that the agency give preference to construction bid submitted by a contractor or subcontractor domiciled within the state. Notwithstanding section (a), professional services contracts for licensees under chapter 464 shall be procured in accordance with section 103D-304.]~~ **The agency shall comply with chapter 103D.**

It is the SPO's position that the Hawaii Public Procurement Code is to be universally applied to all agencies statewide.

Thank you.

((CONTINUATION OF TESTIMONY))

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**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

S.B. NO. 808, S.D. 2, H.D. 1, RELATING TO THE SCHOOL FACILITIES AGENCY.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Thursday, April 1, 2021

TIME: 2:30 p.m.

LOCATION: State Capitol, Room 308, Via Videoconference

TESTIFIER(S): Clare E. Connors, Attorney General, or
Melissa J. Kolonie, Deputy Attorney General

Chair Luke and Members of the Committee:

The Department of the Attorney General (Department) opposes the provision of this bill that allows the School Facilities Agency to hire private attorneys.

The purpose of this bill is to clearly describe the powers and responsibilities of the School Facilities Agency by amending part VI, subpart C of chapter 302A, Hawaii Revised Statutes (HRS).

On page 9, lines 10 – 16 of this bill, a new paragraph (13) is added to section 302A-1703(c) to authorize the School Facilities Agency to:

“[a]ppoint or retain by contract one or more attorneys who are independent of the attorney general to provide legal services solely in cases of negotiations in which the attorney general lacks the sufficient expertise; provided that the independent attorney shall consult and work in conjunction with the designated deputy attorney general[.]”

Section 5 of the bill, at page 20, line 4, through page 22, line 17, would amend section 28-8.3(a), HRS, to authorize the school facilities agency to employ or retain attorneys.

The new section 302A-1703(c)(13), HRS, and the amended section 28-8.3(a), HRS, would allow the School Facilities Agency to hire private attorneys, who are independent of the Attorney General, to provide legal services for negotiations. While instances may arise in which the Attorney General hires and/or deputizes private

attorneys who possess specific expertise not present within the Department, the Attorney General engages this representation pursuant to section 28-8.3, HRS. As drafted, paragraph (13) interferes with the legal obligation of the Attorney General to its state agency clients, particularly in areas where representation previously has been provided by deputy attorneys general. The Department has deputies with the experience, knowledge, and training necessary to represent the School Facilities Agency, and continues to be willing and able to provide legal services in cases where negotiations are involved. If specialized expertise becomes necessary for negotiations, the Department has the legal expertise to make this determination – as opposed to the School Facilities Agency – and will exercise its authority accordingly to contract with private attorneys for assistance. Because the School Facilities Agency has yet to be established, the Department has not had the opportunity to represent the agency and thus to consider whether private attorneys are necessary for the agency to accomplish its mandate.

By locating attorneys representing state agencies within the Department, state agencies benefit from a wide range of experience and expertise. The division assigned to represent the School Facilities Agency can seek the advice of other divisions, including those with experience in particular areas. Private attorneys retained by the School Facilities Agency are unlikely to have the necessary breadth of knowledge and experience available in the Department. Additionally, because state agencies are regulated by a variety of laws not applicable in private practice – including the Code of Ethics for state employees and Collective Bargaining in Public Employment – the Department has a depth of expertise in representing state agencies that would be difficult for private attorneys to duplicate, and certainly not without additional expense. Finally, because the deputy attorneys general, and any private attorneys contracted by the Attorney General to serve as special deputy attorneys general, are separate and apart from the agencies they represent, they are insulated from political issues that may arise within an agency. This insulation permits the Department to provide objective and high-quality legal counsel. However, as discussed above, if specialized expertise is

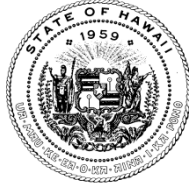
desired for a particular negotiation or litigation, the Attorney General is authorized to contract with private attorneys to serve as special deputy attorneys general.

We respectfully recommend the Committee amend the bill by removing the amendment on page 8, lines 12 – 18, and section 5, on page 18, line 20, through page 21, line 13, of this bill that would authorize the School Facilities Agency to hire by contract private attorneys who are independent of the Attorney General.

There may also be a potential single-subject issue with the amendments relating to the School Facilities Board's statutory authority, section 302A-1704, HRS, on page 10, line 11, to page 13, line 14, of the bill. Article III, section 14, of the Hawaii State Constitution provides in relevant part that "[n]o law shall be passed except by bill. Each law shall embrace but one subject, which shall be expressed in its title." While it is arguable that those amendments are within the scope of the title of this bill because the School Facilities Board's statutory authority falls under chapter 302A, part VI, subpart C, entitled "School Facilities Agency" and because the functions of the School Facilities Board are to advise the School Facilities Agency and to evaluate the performance of the Director of the School Facilities Agency, it is not clear that all of the amendments to the membership and functions of the School Facilities Board made by this bill deal with the same subject matter. To erase any doubt about the constitutionality of those provisions, the amendments that relate to the School Facilities Board on page 10, line 11, to page 13, line 14, of the bill could be deleted and placed in another vehicle with a title broad enough to encompass the subject, such as "the Department of Education" or "School Facilities."

Thank you for the opportunity to provide testimony.

DAVID Y. IGE
GOVERNOR



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
LYNN A.S. ARAKI-REGAN
DEREK J. CHOW
ROSS M. HIGASHI
EDWIN H. SNIFFEN

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

April 1, 2021
2:30 P.M.
State Capitol, Teleconference

S.B. 808, S.D. 2, H.D. 1
RELATING TO THE SCHOOL FACILITIES AGENCY

House Committee on Finance

The Department of Transportation (DOT) Highways Division, as the Administration's lead for operationalizing the provisions of Act 72, Session Laws of Hawaii (SLH) 2020, **supports** this bill and urges the Legislature to pass S.B. 808, S.D. 2, H.D. 1, with the additional amendments and resources described below.

Last year, the Legislature established the School Facilities Agency (SFA) "to improve the development, planning and construction of public school," and made the agency responsible for public school development, planning, and construction related to capital improvement projects, with oversight by its School Facilities Board. H. Stand. Comm. Rep. No. 1276-20. To enable the SFA to successfully assume the responsibilities and complete the projects transferred to it from the Department of Education (DOE), we respectfully ask the Committee to make these additional changes to the bill:

1. To fill the Executive Director and seven exempt civil service administrative staff positions Act 72 authorized, purchase furnishings, computers and other office equipment, and supplies for the SFA's office, and contract for professional services for its CIP projects, insert \$1,500,000.00 into Sections 16 and 17 of the bill to appropriate general funds for deposit into the SFA's School Facilities Special Fund for Fiscal Year (FY) 2021-2022, and appropriate the same amount from the special fund for the SFA's operations for FY 2021-2022;
2. To make clear that the School Facilities Board is to head the SFA, and direct, oversee, and be responsible for the SFA's work,

- a. Replace the first sentence of Hawaii Revised Statutes (HRS) § 302A-1702(b) at page 2 with the following:

“(b) The authority shall employ an executive director exempt from chapters 76 and 89.”

- b. Revise HRS § 302A-1704(a) at page 10 to read:

“(a) There is established [within the department for administrative purposes only] a school facilities board which shall head and oversee the authority.”

- c. Revise HRS § 302A-1704(c)(1) at page 11 to read:

“(1) [Advising the agency on preferred strategies to complete construction projects of the agency;] All matters related to the development and capital improvement projects the authority is authorized and responsible for initiating and completing under this subpart, including preferred strategies to complete those projects;”

3. Eliminate the local preference in HRS § 302A-1703(b) and revise subsection (b) to provide instead:

“(b) [Any award of a contract or construction shall be subject to the requirements of section 103D-302; provided that the agency shall give preference to construction bids submitted by a contractor or subcontractor domiciled within the State. Notwithstanding subsection (a), the professional services contracts for licensees under chapter 464 shall be procured in accordance with section 103D-304.] The authority shall comply with chapter 103D.”

4. To differentiate between the SFA and an agency other than the SFA that owns, controls, or manages land other than “public lands” that the SFA may need, revise subsections (a) and (b) of in HRS § 302A-1705 at page 13, to read as follows:

“(a) If state lands, other than public lands, under the control and management of another department or agency are required by the [agency] authority for [its] purposes of [,] of this chapter, the department or agency having [the] control and management of [those] the required lands, upon a request by the [agency] authority and with the approval of the governor, [may] shall convey title or lease those lands to the [agency] authority upon terms and conditions as may be agreed to by the parties; provided that [any lands for which] at the request of the authority, the department [currently] shall transfer any land to which it holds title [that are

agreed to be transferred shall be transferred] to the [agency no later than January 1, 2021.] authority.

(b) If public land set-aside to a department or agency pursuant to section 171-11 is required by the authority for purposes of this chapter, the authority shall submit a request to the governor to withdraw the set-aside and to re-set-aside the land to the authority pursuant to section 171-11.

Note that the two subsections' current references to "subpart" have been replaced with the highlighted "chapter;" this is proposed because Act 72 assigned responsibilities to the SFA that are codified in other subparts of HRS ch. 302A, e.g., HRS § 302A-1151.1.

5. Revise HRS § 76-16(b)(32) in Section 6 of the H.D. 1, to limit the SFA's civil service exemptions to its executive director and the seven full-time equivalent (7.0 FTE) administrative positions established and authorized in Section 5 of Act 72, SLH 2020, by rewording paragraph (32) as follows:

"(32) The executive director and seven full time administrative positions of the school facilities authority.";

6. Insert references to the "executive director of the school facilities authority" as the counterpart of the "superintendent of education" as appropriate in Sections 13 and 14 of Part IV of the H.D. 1; and "chairperson of the school facilities board" as the counterpart of the "chairperson of the board of education" as appropriate in Section 14 of Part IV of the H.D. 1; and add "board of education" as appropriate to Section 14 of Part IV of the H.D. 1; and
7. To complete the transfer of responsibilities for implementing Act 155, SLH 2013, Act 115, SLH 2015, Act 206, SLH 2017, and Act 272, SLH 2019, and HRS § 302A-1151.1, Pilot program for lease of public school land, from the DOE to the SFA, required by Section 9 of Act 72, add a new section to Part IV of S.B. 808, to substitute "school facilities authority" for every reference in HRS § 302A-1151.1, to "department." Every reference in HRS § 302A-1151.1 to the "Board of Education" and "board" should also be changed to "school facilities authority," if the Legislature intends that the decisions previously made by the Board of Education are now to be made by the School Facilities Board or the SFA.
8. To adhere more closely to the constitutional requirement that agencies of the State be allocated to the principal department of the State with common purposes and related functions, assign the SFA for administrative purposes only to the Department of Business, Economic Development and Tourism instead of the DOE, by inserting "of business, economic development and tourism" between "department" and "for administrative" into the last sentence of HRS § 302A-1702(a);

Correct the typo on page 2 at line 9 of the H.D. 1 by inserting "property" after "personal," and bracketing and striking through "but" and inserting "other" between "any" and "law" on line 7 of page 17.

Thank you for the opportunity to testify on this measure.


OFFICE OF HAWAIIAN AFFAIRS
‘Ōlelo Hō‘ike ‘Aha Kau Kānāwai
Legislative Testimony

SB808 SD2 HD1
RELATING TO THE SCHOOL FACILITIES AGENCY
Ke Kōmike Hale o ka ‘Oihana ‘Imi Kālā
House Committee on Finance

‘Apelila 1, 2021

2:30 p.m.

Lumi 308

The Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on SB808 SD2 HD1, which seeks to amend the Hawai‘i Revised Statutes (HRS) § 171-2 definition of “public lands,” thereby removing certain disposition safeguards found in HRS Chapter 171 for lands to which the School Facilities Authority (SFA) holds title. OHA notes that the potential long-term, multi-generational leases that would be enabled by this measure may foreclose Native Hawaiian claims to “ceded” lands held by the SFA, for multiple generations at a time. **OHA has significant concerns regarding any potential foreclosure of Native Hawaiian claims to “ceded” lands that were unlawfully taken under extreme duress and without consent by or compensation to the Native Hawaiian people, and urges the inclusion of language provided below that would provide some recognition of and protection for these claims.**

OHA appreciates the inclusion of parallel language in HRS § 171-64.7, requiring prior notice to OHA and supermajority legislative approval to protect our public lands, including “ceded” lands, from being sold or gifted in fee. **However, HRS 171-64.7 alone does not apply to long-term leases of public or “ceded” lands, which may otherwise be tantamount to a sale or indefinite alienation of these lands.**

By exempting SFA-held lands from the public transparency and accountability protections of HRS Chapter 171, which include lease length limitations (i.e. maximum aggregate lease terms of 65 years), lease renewal prohibitions, and auction requirements, and by not providing similar protections for leases issued by the SFA, this measure may foreclose, for a century or more, opportunities for Native Hawaiians to resolve their claims to “ceded” lands leased by the SFA to developers or other third parties.

As OHA has repeatedly asserted, extremely long-term, multi-generational leases on “ceded” lands create a sense of entitlement on the part of lessees that has led to, and may continue to lead to, the alienation of public and “ceded” lands. Notably, long-term leases, such as the 99 year leases explicitly proposed in various measures in this and recent legislative sessions, have also been considered tantamount to the sale of a fee interest in tribal lands, as **“the land base is effectively lost for generations to come,”** and **“the property expectation born of those leases, combined with the infrastructure development and capital investment made in reliance on them, may render those leases**

essentially irretractable as a political matter.”¹ OHA strongly objects to the sale or alienation of “ceded” lands except in limited circumstances, and has significant concerns over any proposal that may facilitate the effective diminution of the “ceded” lands corpus.

Accordingly, should the Committee choose to move this measure forward, **OHA respectfully but strongly urges the inclusion of additional language to ensure that any SFA lease of “ceded” lands is subject to similar lease length protections as those found in HRS Chapter 171, by amending page 7, line 6, to read as follows:**

~~“property or services in connection with a project; provided that for lands that were classed as government or crown lands prior to August 15, 1895, or exchanged for such lands, any lease, sublease, rental, exchange, transfer, assignment, or pledge of such lands or interests in such lands by the authority shall not be issued, extended, or renewed for an aggregate term longer than 65 years;”~~

Alternatively, should the Committee wish to allow the SFA to issue leases of “ceded” lands longer than the general 65-year term limit, OHA strongly urges the inclusion of additional language to minimally recognize and protect Native Hawaiian claims to such lands, by amending page 7, line 6, to read as follows:

~~“property or services in connection with a project; provided that for lands that were classed as government or crown lands prior to August 15, 1895, or exchanged for such lands, any lease, sublease, rental, exchange, transfer, assignment, or pledge of such lands or interests in such lands by the authority for an aggregate period of longer than 65 years shall be made subject to terms and conditions approved by the board of trustees of the Office of Hawaiian Affairs. Such terms and conditions shall include provisions that reflect the maintained claims of native Hawaiians in the “ceded” lands corpus, such as provisions requiring rights of first refusal, transfers or commitments of resources for programs serving native Hawaiian interests, affordability requirements based on native Hawaiian housing demand data, a reservation of the rights and interests of a native Hawaiian self-~~

¹ Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Paradigm for Federal Actions Affecting Tribal Resources*, 1995 UTAH L. REV. 109, 145-46 (1995); see also Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STANFORD L. REV. 1061, 1078 (1974) (“Through the lease instrument—often for 99 years—the fiction of Indian retention is retained, but the impact on the tribe is often inconsistent with the form. In this context, 99-year leases are tantamount of the sale of the fee” (emphasis added)).

governing entity in such lands, or any other relevant provision."

Mahalo nui loa for the opportunity to testify on this measure.

DAVID Y. IGE
GOVERNOR



DR. CHRISTINA M. KISHIMOTO
SUPERINTENDENT

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

LATE

Date: 04/01/2021

Time: 02:30 PM

Location: 308 Via Videoconference

Committee: House Finance

Department: Education

Person Testifying: Dr. Christina M. Kishimoto, Superintendent of Education

Title of Bill: SB 0808, SD2, HD1 RELATING TO THE SCHOOL FACILITIES AGENCY.

Purpose of Bill: Renames the school facilities agency as the school facilities authority. Describes the powers and responsibilities of the school facilities authority by amending chapter 302A, part VI, subpart C and Act 72, Session Laws of Hawaii 2020. Transfers the total fund balance in the state educational improvement fund to the school facilities special fund by an unspecified date. Appropriates funds. Effective 7/1/2051. (HD1)

Department's Position:

The Hawaii State Department of Education (Department) respectfully offers comments on SB 0808, SD2, HD1.

The Department appreciates the legislature's commitment to addressing the needs of Hawaii's K-12 public school students. This measure further clarifies the roles and responsibilities of the School Facilities Agency/Authority. The Department looks forward to working with the School Facilities Agency/Authority and its Executive Director in determining how to best address the facilities needs for the Department's students and schools.

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

The Hawai'i State Department of Education is committed to delivering on our promises to students, providing an equitable, excellent, and innovative learning environment in every school to engage and elevate our communities. This is achieved through targeted

work around three impact strategies: school design, student voice, and teacher collaboration. Detailed information is available at www.hawaiipublicschools.org.

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GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

LATE

Uploaded via Capitol Website

March 31, 2021

TO: HONORABLE SYLVIA LUKE, CHAIR, HONORABLE TY CULLEN,
COMMITTEE ON FINANCE

SUBJECT: **OPPOSITION TO S.B. 808 SD2 HD1, RELATING TO THE SCHOOL FACILITIES AGENCY.** Renames the school facilities agency as the school facilities authority. Describes the powers and responsibilities of the school facilities authority by amending chapter 302A, part VI, subpart C and Act 72, Session Laws of Hawaii 2020. Transfers the total fund balance in the state educational improvement fund to the school facilities special fund by an unspecified date. Appropriates funds.

HEARING

DATE: Thursday, April 1, 2021
TIME: 2:30 p.m.
PLACE: Capitol Room 308

Dear Chair Luke, Vice Chair Cullen, and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of approximately five hundred (500) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. Our mission is to elevate Hawaii's construction industry and strengthen the foundation of our community.

GCA supports the intent of S.B. 808 SD2 HD1, which further clarifies the roles and responsibilities of the School Facilities Agency and provides funding. GCA appreciates the Legislature's desire to provide our students with improved facilities.

Thank you for this opportunity to testify in support of the intent of this measure.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

LATE

The Thirty-First Legislature, State of Hawaii
House of Representatives
Committee on Finance

Testimony by
The Hawaii Government Employees Association

April 1, 2021

S.B. 808, S.D. 2, H.D. 1 — Relating To The School Facilities Agency

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO opposes S.B. 808, S.D. 2, H.D. 1, which describes the powers and responsibilities of the school facilities agency by Amending Act 72, Session Laws of Hawaii 2020. Specifically, we oppose the portion of the bill which exempts the full-time staff of the school facilities agency from the civil service requirements under chapter 76.

The Hawaii Government Employees Association represents 135 employees who currently work for the DOE's Office of Facilities and Operations. The employees we represent are already doing the jobs this agency will be responsible for, including but not limited to, public school development, planning, and construction related to capital improvement projects. Their status as civil service employees should not be adversely impacted when the positions are transferred to the agency. S.B 808 aims to circumvent the rights and protections of employees who currently hold civil service positions and their entitlements under the law.

Thank you for the opportunity to testify in opposition of S.B. 808, S.D. 2., H.D. 1.

Respectfully submitted,

Randy Perreira
Executive Director



LATE

**Statement of the Democratic Party of Hawai'i
In Support of SB808 SD2 HD1, Relating to the School Facilities Agency**

The [Democratic Party of Hawai'i](#) supports SB808 SD2 HD1, Relating to the School Facilities Agency, to the extent that it aligns with our Party's [platform](#). The bill would rename the School Facilities Agency as the School Facilities Authority; describe the powers and responsibilities of the School Facilities Authority by amending chapter 302A, part VI, subpart C and Act 72, Session Laws of Hawaii 2020; transfers the total fund balance in the state educational improvement fund to the school facilities special fund by an unspecified date; appropriate funds; and be effective 7/1/2051.

The Democratic Party of Hawai'i recognizes that the future of our State as well as our Country depends upon an educated and knowledgeable citizenry. We support the prioritization of our resources toward providing quality public education to every student, regardless of learning capacity or ability to pay, in an environment conducive to the learning process. These resources shall be made available at every level, from pre-school through higher education, including life-long learning.

We find that by improving the School Facilities Agency, which is responsible for all public school development, planning, and construction related to capital improvement projects assigned by the legislature, governor, or board of education, all Hawai'i citizens could have better access to quality public education.

We acknowledge and share the concerns raised by the Hawai'i Government Employees Association with regard to the civil service status of the 135 employees who currently work for the DOE's Office of Facilities and Operations. Their status as civil service employees should not be adversely impacted when the positions are transferred to the agency, and we hope that the legislature will work to ensure that these employees retain their status if such a transfer occurs.

Mahalo nui for the opportunity to provide these comments in support of this important bill.

*Tyler Dos Santos-Tam
Chairperson*

DEMOCRATIC PARTY OF HAWAII

PO Box 2041 • Honolulu, HI 96805 • (808) 596-2980 • www.hawaiiDemocrats.org

SB-808-HD-1

Submitted on: 3/30/2021 1:04:46 PM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
John D. Smith	Individual	Support	No

Comments:

I support this bill to be passed through legislature.