



**DEPARTMENT OF BUSINESS,  
ECONOMIC DEVELOPMENT & TOURISM**

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Statement of  
**MIKE MCCARTNEY**  
Director

Department of Business, Economic Development, and Tourism  
before the

**SENATE COMMITTEE ON WAYS AND MEANS**

Wednesday, February 24, 2021  
10:00 AM  
State Capitol, Conference Room 211

In consideration of  
**SB 928 SD1**  
**RELATING TO THE STATE FOUNDATION ON CULTURE AND THE ARTS.**

Chair Dela Cruz, Vice Chair Keith-Agaran and members of the Committee.

The Department of Business, Economic Development and Tourism (DBEDT) provides comments on SB 928, SD1, which allows The State Foundation on Culture and the Arts (SFCA) works of art special fund to be expanded to include performing arts, under certain conditions. The measure also seeks to retain rights to any digital material created and funded by a grant pursuant to Section 103-8.5 Hawaii Revised Statutes.

DBEDT and its Creative Industries Division (CID) has concerns with effectuating Section 3 and requests amending the language as written in items 1 through 4 as proposed. Of primary concern is the state retaining rights to performances captured and displayed through digital audio or video recordings for an undetermined timeframe.

We defer to the State Foundation on Culture and the Arts (SFCA) on recommendations to be made to language further clarifying our mutual concerns regarding copyright and licensing in this measure.

We understand the intent is to support our performing artists and organizations, who remain severely impacted by the economic downturn due to COVID-19. DBEDT has continued its industry meetings with this important sector of Hawaii's creative economy, proposing opportunities to expand markets globally via digital export. We caution this measure as it stands, does not reflect the industry standards that are in place to assure fair compensation for artists' intellectual property rights.

Through CID's involvement in advocating for Hawaii's artists and ensuring their awareness of federal initiatives such as The Mechanical Licensing Collective (the organization designated by the U.S. Copyright Office to administer the landmark Music Modernization Act of 2018) DBEDT continues to engage with industry leaders to ensure protection of our artists' rights.

As such, CID/DBEDT pledges to work with the Legislature and stakeholders to provide guidance on best practices from licensing organizations such as Mechanical Licensing Collective, ASCAP, BMI, SESAC, The Recording Academy and the Hawaii Academy of Recording Arts.

Through our creative workforce's ability to monetize their IP, we build a stronger foundation for the global export of Hawaii's wealth of creative content while supporting our road to economic recovery.

Thank you for the opportunity to testify.

DAVID Y. IGE  
GOVERNOR



CRAIG K. HIRAI  
DIRECTOR

ROBERT YU  
DEPUTY DIRECTOR

EMPLOYEES' RETIREMENT SYSTEM  
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND  
OFFICE OF THE PUBLIC DEFENDER

**STATE OF HAWAII**  
**DEPARTMENT OF BUDGET AND FINANCE**  
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ADMINISTRATIVE AND RESEARCH OFFICE  
BUDGET, PROGRAM PLANNING AND  
MANAGEMENT DIVISION  
FINANCIAL ADMINISTRATION DIVISION  
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

**WRITTEN ONLY**  
TESTIMONY BY CRAIG K. HIRAI  
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE  
TO THE SENATE COMMITTEE ON WAYS AND MEANS  
ON  
SENATE BILL NO. 928, S.D. 1

**February 24, 2021**  
**10:00 a.m.**  
**Room 211 and Videoconference**

RELATING TO THE STATE FOUNDATION ON CULTURE AND THE ARTS

The Department of Budget and Finance (B&F) offers comments on Senate Bill (S.B.) No. 928, S.D. 1.

S.B. No. 928, S.D. 1, allows the Works of Art Special Fund (WOASF) to be used for performing arts, under certain conditions. It includes posting a recording of a performing art as a form of public display and defines “performance of art” and “performing arts.”

B&F has serious concerns regarding S.B. No. 928, S.D. 1. This measure allows for the recording of works of performing arts in a video or audio file. Such a recording is a capital expenditure under Internal Revenue Code Section 263(A) and Treasury Regulation Section 1.263A-2(a)2(ii), which provides that the production of “. . . films, sound recordings, video tapes and other similar property embodying words, ideas, concepts images, or sounds by the creator thereof” must be capitalized. This would be a permissible use of the WOASF. However, the showing or playback of such files would be an operating expense and would not be a permissible use of the WOASF.

Additionally, the WOASF is primarily funded by tax-exempt general obligation bonds. Using such bond proceeds for operating purposes puts the tax-exempt status of the bonds at risk (see Treasury Regulation Sections 1.148-(c)(4)(ii) and 1.148-10(a)(4)). Consequently, tax-exempt bond proceeds should not be used to fund operating expenses.

Thank you for your consideration of our comments.



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

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 928, S.D. 1, RELATING TO THE STATE FOUNDATION ON CULTURE AND THE ARTS.

**BEFORE THE:**

SENATE COMMITTEE ON WAYS AND MEANS

**DATE:** Wednesday, February 24, 2021      **TIME:** 10:00 a.m.

**LOCATION:** State Capitol, Via Videoconference & Room 211

**TESTIFIER(S):**      **WRITTEN TESTIMONY ONLY.**  
(For more information, contact Randall S. Nishiyama,  
Deputy Attorney General, at 586-1267)

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Chair Dela Cruz and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments regarding this bill, which would allow the Works of Art Special Fund ("WASF"), section 103-8.5, Hawaii Revised Statutes, to be used for works of performing arts provided that those works are recorded. The works of performing arts are forms of creative activity intended to be performed for an audience such as drama, music, and dance. This bill also includes the posting of recordings of the works of performing art as a form of public display.

The WASF requires that one percent of all state fund appropriations for capital improvements designated for the construction cost element of capital improvement projects for the construction and renovation of state buildings, with certain exceptions, be transferred to the WASF for the acquisition and maintenance of works of art. Works of art includes items such as paintings, sculptures, photographs, and pottery pieces.

Currently, the WASF is funded by tax-exempt general obligation bonds. Consequently, the WASF moneys must be used consistent with the Internal Revenue Code in order to maintain the tax-exempt status of the general obligation bonds. Under the Internal Revenue Code, tax-exempt general obligation bonds, with certain exceptions, are used for capital projects. Using tax-exempt general obligation bond

proceeds for operating purposes jeopardizes the tax-exempt status of the bonds. See Treasury Regulation sections 1.148-1(c)(4)(ii) and 1.148-10(a)(4).

This bill allows for the recording of works of performing arts in a video or audio file. Such a recording is a capital expenditure under the Internal Revenue Code section 263(A) and Treasury Regulation section 1.263A-2(a)(2)(ii), which provides that the production of "films, sound recordings, video tapes, books, and other similar property embodying words, ideas, concepts, images, or sounds by the creator thereof" must be capitalized. Consequently, the recording of works of performing arts is a permissible use of the WASF under the Internal Revenue Code.

However, we believe that the showing or playback of such video or audio files appears to be an operating expense and not a permissible use of the WASF because it is incurred after the production of the work of performing art and is an expense that the State Foundation of Culture and the Arts incurs through its normal operations.

The Department notes that there may be a missing comma on page 2, line 14, of the bill. It should be corrected as follows: ". . . not limited to dance, choreography, singing, lyrics, motion . . ."

Thank you for the opportunity to present this testimony.



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**TESTIMONY OF THE STATE FOUNDATION ON CULTURE AND THE ARTS  
TO THE SENATE COMMITTEE ON WAYS AND MEANS  
Wednesday, February 24, 2021 at 10:00 a.m. CR 211 via Videoconference  
S.B. 928 S.D. 1  
RELATING TO THE STATE FOUNDATION ON CULTURE AND THE ARTS**

Chair Donovan M. Dela Cruz and members of the Committee, I am Jonathan Johnson, Executive Director of the State Foundation on Culture and the Arts (SFCA), and I am grateful for the opportunity to testify with **COMMENTS** on S.B. 928 S.D. 1.

**Purpose of Works of Art Special Fund:** Expenditures for the Works of Art Special Fund are restricted to the acquisition, interpretation, conservation and transportation of works of art. The SFCA [2020 Annual Report](#) offers a transparent look at how the SFCA fund efficiently and effectively administers the fund for public benefit. On a three-year average, the Works of Art Special Fund averages \$4.7M revenue and \$4.4M expenditures, however, **in 2020, Act 40 disrupted funding** with an unintended consequence that prevents the 1% from being allotted to the Special Fund resulting in only \$15,520 revenue to the fund, to date. With the revenue stream blocked, the \$9M current unencumbered cash balance will be completely depleted by the SFCA in two years. Maintaining a fund balance equal or greater than the legislative appropriation is necessary to ensure solvency as legislative appropriations are from the fund balance.

<b>Works of Art Special Fund S-319</b>	<b>FY 17-18</b>	<b>FY 18-19</b>	<b>FY 19-20</b>	<b>FY 20-21 (as of 1-31-21)</b>
<b>1% Revenue (actual)</b>	<b>7,584,288.25</b>	<b>3,680,929.93</b>	<b>3,084,544.00</b>	<b>15,520.00</b>
<b>Total Expenses</b>	<b>4,003,645.42</b>	<b>4,329,333.25</b>	<b>4,575,636.76</b>	<b>5,000,000 e.</b>
<b>Appropriation</b>	<b>4,508,223.00</b>	<b>4,508,223.00</b>	<b>5,573,625.00</b>	<b>5,573,625.00</b>

**SFCA funds Performing Arts** annually through the Biennium Grants and Artists in the School programs supported by the Legislature through a General Fund appropriation. Performing Arts represents 45% of total Biennium Grants and 75% of total Artists in the Schools projects. This year, Honolulu Theatre for Youth (HTY), a recipient of Biennium Grants, leveraged their grant with private funding and produced content that was aired on television and online, completely accessible to the community. HTY managed the copyrights, production, storage and fees associated with their presentation, while SFCA provided administration of the grant. This symbiotic relationship between SFCA and grantees allows for an efficiency in government while also allowing for organizational autonomy to produce creative, high-quality art and rich cultural experiences, with the support of government funding. SFCA grants go through rigorous monitoring to ensure compliance.

Based on discussions with the Attorney General’s Office on what is allowable and not permissible, the Department of Business Economic Development and Tourism’s Creative Industries Division regarding copyright, and industry professionals regarding best practices, we have the following comments on S.B. 928 S.D. 1 and the restrictions of the Works of Art Special Fund per 103-8.5.

Overall, the requirements in S.B. 928 S.D. 1 complicate and limit funding and support for Performing Arts.

Performing Arts as referenced in S.B. 928 S.D. 1 are already defined in Chapter 9 HRS;

§9-1 Definitions. The following terms, whenever used and referred to in this chapter, shall have the following respective meanings unless a different meaning clearly appears in context.

"Arts" includes music, dance, painting, drawing, sculpture, architecture, drama, poetry, prose, crafts, industrial design, interior design, fashion design, photography, television, motion picture art, unique or decorative plants, landscaping, and all other creative activity of imagination and beauty.

1)The performance shall be recorded as an audio file, video file, audiovisual file, or other medium intended to be shown by or through the use of machines or devices such as projectors, viewers, or electronic equipment or device, together with accompanying sounds, if any;

**Allowable:** Recording is an allowable expense in the Works of Art Special Fund and as is a tangible asset as a digital file.

**Not Permissible:** Playback of the digital file in any format, on any device, would be considered an operational expense and would not be a permissible use of the Works of Art Special Fund. S.B. 928 S.D. 1 opens the State up to liability if the funds are used outside of the tax code requirements.

2)The recording of the performance shall be archived and maintained by the foundation or the state art museum as property of the State;

**Allowable:** Although possible, may require technical expertise, expense of storage capacity and maintenance, as well as training of staff.

3)The State shall have whole and exclusive copyrights in the performance and its recordings pursuant to the works made for hire doctrine under Title 17, United States Code; and

**Allowable:** The State could negotiate with each contract, but Copyright law is multi-faceted and copyright infringement is a liability risk the State should not be taking. Performers working on union contracts that cover their live performances would need to be contracted again by the State for the use of a video recording of their performances.

**Not Permissible:** The State would not have whole and exclusive copyrights as copyright is owned by the author, composer, lyricist, etc., not the performer.

4)The recording of the performance shall be displayed for viewing and listening at presentation sites, in a format determined by the comptroller and the foundation to be most easily accessible to the public.

**Allowable:** Playback would involve royalties to the author, composer, etc. that the State would be responsible for.

**Not Permissible:** Playback of the digital file in any format, on any device, would be considered an operational expense and would not be a permissible use of the Works of Art Special Fund. Also, not every performance is suitable or desirable for digital viewing.

**The State through the SFCA has an established and successful funding pathway for Performing Arts that is encompassing and not as limiting as the specifications of the Works of Art Special Fund.**

Thank you for the opportunity to submit written testimony on this matter.





**LATE**

*Preserving and Perpetuating Native Hawaiian Cultural Traditions for Future Generations*

Chair Dela Cruz, Vice Chair Keith-Agaran,  
Members of the Senate Committee on Ways and Means

RE: Support for SB 928 SD1 Relating to the State Foundation on Culture and the Arts

Aloha!

I am Vicky Holt Takamine, the Executive Director of PA'I Foundation and Kumu Hula of Pua Ali'i 'Ilima. I am pleased to submit this letter of support for SB 928 to further the State Foundation on Culture and the Arts' endeavors by allowing the works of art special fund to be used for the support and promotion of performing arts in the state.

The economic viability of Hawaii's tourism is heavily dependent on the Hawaiian culture, through media such as music, dance, and art. The culture of the indigenous people is unique and of critical importance in differentiating Hawai'i from all other sand and sea visitor destinations. Tourism promotions have relied upon Hawaiian culture and arts as the number one marketing tool and the basis for perpetuating the aloha spirit, which is so vital to the economic success of the industry, but there has been very little support for the cultural practitioners and artists who perpetuate Native Hawaiian culture and art.

The State Department of Business Economic Development and Tourism (DBEDT) acknowledges that COVID-19 has severely impacted Hawaii's vibrant ecosystem of artists, cultural artisans, musicians, media makers and designers representing 53,464 jobs or 6.1% of the state total civilian jobs and \$4.2 billion (GDP) as noted in the most recent DBEDT Creative Industries Report. In this metric, the performing arts and music sectors comprise the second largest industry group in the creative sector with a total of 17,632 employees, including self-employed entrepreneurs and gig workers.

The June 2020 report by Brookings Institute, *The Lost Art: Measuring COVID-19's Devasting Impact On Americas Creative Economt* states that creative economy is one of the sectors most at risk from the COVID-19 crisis, and that the State of Hawaii is one of the top five States that have job losses in this sector greater that the national average of 30.3%.

I would encourage the SFCA to also review language developed by respected Hawaiian leaders in 2002 encouraging the foundation to adopt a formal policy supporting Native Hawaiian culture and arts.



*Preserving and Perpetuating Native Hawaiian Cultural Traditions for Future Generations*

However, we oppose language that gives to the State the exclusive copyrights and intellectual property rights of the performance and works. Artists must be allowed to retain their intellectual property rights to their original materials and/or creative works. Commissioned works, i.e. oli (chants), mele (songs), hula (dances) and other performing arts traditions that are created for a special occasion should be allowed to be shared not only at the opening of events and buildings etc. but at other occasions such as festivals, community events etc. to tell these stories in order for them to live on for future generations. These traditions, should not be exclusive to the State, but allowed to be shared with the people of Hawai'i and abroad. I have attached a link to the [Paoakalani Declaration](#), a document that outlines the Intellectual Property Rights of Kanaka Maoli.

Furthermore, PA'I is concerned for our creative sector and recommends support for SB 928 SD1. Should you have any questions, do not hesitate to contact me at [Vicky@paifoundation.org](mailto:Vicky@paifoundation.org) or on my cell at 808-754-2301. Mahalo Nui Loa for your consideration,

Vicky Holt Takamine  
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**SB928 SD1**  
**STATE FOUNDATION ON CULTURE AND ARTS**  
House Committee on Finance

February 24, 2021

10:00 AM

Videoconference

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The Council for Native Hawaiian Advancement (CNHA), a member-based 501(c)(3) non-profit organization with a mission to enhance the cultural, economic, political, and community development of Native Hawaiians, *supports* the effort of this measure and offers the following **COMMENTS** concerning SB928 SD1, which would allow the Works of Art Special Fund to be used for the support and promotion of performing arts in the State of Hawai'i.

**CNHA supports increased State funding and opportunities for cultural practitioners and artists in the State of Hawai'i. CNHA wishes to emphasize the need for significantly increased funding, support, and opportunities exclusively for Native Hawaiian cultural practitioners and artists.**

The State of Hawai'i has benefitted significantly from Native Hawaiian cultures and arts. The commodification of Native Hawaiian cultures and arts has been woven into the State's economic branding. With limited funding opportunities and a very crowded field in need, especially considering the needs of the Native Hawaiian community alone, a State agency like the State Foundation on Culture and Arts (SFCA), then serves as the gatekeeper for Native Hawaiian cultural and artistic advancement by way of its discretionary selection.

CNHA acknowledges the State's attempt to endeavor equity through continued oversight by the SFCA. In review of the SFCA's 2019-2023 Strategic Priorities report, one of twelve objectives are devoted to Native Hawaiians. The three strategies included within this objective are to strengthen the relationship with Native Hawaiians; to regularly liaise with the Native Hawaiian community; and to encourage, support, and acknowledge Native Hawaiian culture. In nearly five decades of its existence, the SFCA's strategic priorities, with respect to Native Hawaiians, appears introductory, and does not give any indication of a thorough understanding of the needs of the Native Hawaiian community – some of these needs have

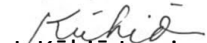


included, increased opportunities for Native Hawaiian cultural and artistic expression, better protections against misappropriation and exploitation, reinforcement for Native Hawaiian intellectual property rights.

**In recognition of the above statements, CNHA strongly encourages language in this bill to include a funding priority of Native Hawaiian arts and culture within the section 103-8.5 Works of art special fund.**

Mahalo nui loa for this opportunity to provide testimony on this measure.

Respectfully,



J. Kūhiō Lewis

President & CEO

Council for Native Hawaiian Advancement