

NO. 29035

IN THE SUPREME COURT OF THE STATE OF HAWAII

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawaii; et al.,

Plaintiffs/Appellants/
Cross-Appellees,

vs.

THE DEPARTMENT OF
TRANSPORTATION OF THE STATE OF
HAWAII; HAWAII SUPERFERRY, INC., et
al.,

Defendants/Appellees/
Cross-Appellants.

Hawaii Second Cir. Ct.
Civil No. 05-1-0114(3)

(Declaratory Judgment)

Judge Joseph E. Cardoza

FILED
STATE OF HAWAII
APPELLATE COURTS
E.M. RIMANDO

2009 MAR 30 AM 10:07

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**HAWAII STATE LEGISLATURE'S
MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

MEMORANDUM IN SUPPORT OF MOTION

CERTIFICATE OF SERVICE

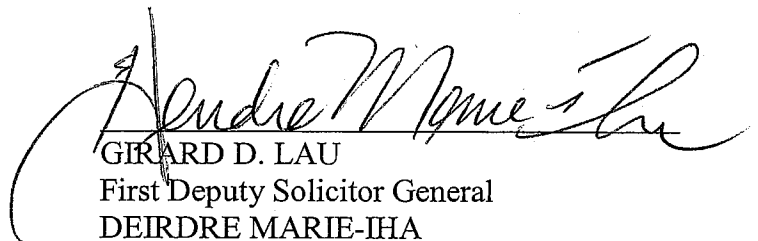
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**HAWAII STATE LEGISLATURE'S
MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

The Legislature of the State of Hawaii, as a separate and equal branch of government, respectfully moves for leave to file an *amicus curiae* brief in support of the Department of Transportation's motion for reconsideration of this Court's opinion in Sierra Club v. Department of Transportation (Sierra Club II), Supreme Court No. 29035.

If leave is granted, the amicus brief will address concerns raised by the Court's opinion as it impacts the reach of the Legislature's power in Hawaii and the continued utility of severability clauses. Because these concerns spring directly from the Court's opinion, this motion is timely. This motion is filed pursuant to Hawaii Rules of Appellate Procedure (HRAP) Rules 27 and 28(g).

DATED: Honolulu, Hawaii, March 20, 2009.


GERARD D. LAU
First Deputy Solicitor General
DEIRDRE MARIE-IHA
Deputy Solicitor General

*Counsel for the Legislature
of the State of Hawaii*

MEMORANDUM IN SUPPORT OF MOTION

The Legislature of the State of Hawaii, as a separate and equal branch of government, has a distinct interest in the Sierra Club II case and in the resolution of any motion for reconsideration. Leave is sought as the Legislature believes that the Sierra Club II decision will lead to significant uncertainty regarding several key issues.

First, the Court's opinion turned in large part on the "general law" provision of Haw. Const. Art. XI § 5. Because, as the Court noted, there are many such "general law" provisions in the Hawaii Constitution, slip op. at 31, the interpretation of this language is of critical importance to the Legislature. The Legislature has long relied on the precedent and guidance provided in Bulgo v. County of Maui, 50 Haw. 51, 430 P.2d 321 (1987), in exercising its legislative power over a wide variety of subjects. An overbroad interpretation of the "general law" requirement may significantly limit the Legislature's ability to enact laws or to address specific public policy challenges as they arise.

Second, the Legislature is concerned about the constitutionality of repeal provisions after the Sierra Club II decision. Sunset clauses give the Legislature flexibility to ensure prompt compliance, and are a method of guaranteeing an ongoing conversation about the effectiveness of newly-enacted laws. It is in the Legislature's interest to maximize the utility, generally, of sunset provisions. In this case, the Legislature is concerned that the sunset clause itself may have caused the constitutional problems discussed in the Court's opinion. Slip op. at 49-62; Act 2 § 18. The Legislature is concerned that the Court's opinion may have undervalued the importance of the substantive portions of Act 2, relative to the sunset provision itself.

Third, the Legislature is concerned about the severability clause in Act 2. The Court's opinion apparently strikes down all of Act 2 as unconstitutional, but does not discuss the

severability provision. Portions of Act 2 (particularly section 16) “can be given effect” without the invalid provisions and so should not be struck down by this Court’s ruling. The Legislature is also concerned about guaranteeing the effectiveness of severability (or non-severability) clauses generally, in this law and in others.

Finally, the Legislature is also concerned that significant uncertainty may result if Art. XI, § 5 of the Hawaii State Constitution is applied to legislation that does not seek to transfer real property outside the political subdivisions and departments or agencies of the State.

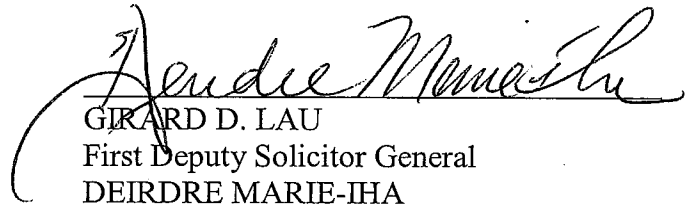
The scope of the uncertainty potentially created by the Sierra Club II opinion only became fully evident after the Court issued its ruling. The arguments currently being considered by the Legislature spring directly from this Court’s ruling in Sierra Club II, and are therefore timely. In addition, these arguments are uniquely focused on the Legislature’s role in State government. An expansive reading of Sierra Club II could unnecessarily chill the power of the Legislature to address the most pressing concerns of the people of the State of Hawaii. If leave is granted, the arguments that would be presented are distinct from the arguments made by the Department of Transportation on appeal, and are tailored to the specific interests of the Legislature. They would therefore be helpful to the Court while it is considering the Department’s motion for reconsideration.

The Legislature requests leave to file an amicus brief for the reasons articulated above, and also requests that it be given until April 17, 2009 to do so. This Court granted the State

special leave to file its motion for reconsideration no later than April 13, 2009. This amicus brief would be due no more than four days later, and therefore would not delay the Court's disposition of the motion for reconsideration.

Dated: Honolulu, Hawaii, March 31, 2009.

Respectfully submitted,



GIRARD D. LAU

First Deputy Solicitor General
DEIRDRE MARIE-IHA
Deputy Solicitor General

*Counsel for the Legislature
of the State of Hawaii*

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Judge Joseph E. Cardoza

CERTIFICATE OF SERVICE

I certify that on March 30, 2009, a copy of the Legislature's motion for leave to file
an amicus brief was mailed postage prepaid by the last mail pickup of the day to:

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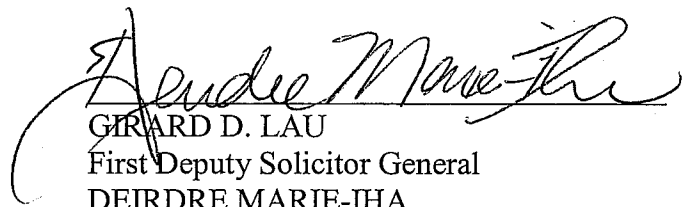
Attorneys for Hawaii Superferry, Inc.

and a copy of the same was hand-delivered to:

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Department of Transportation

DATED: Honolulu, Hawaii, March 30, 2009.



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of the State of Hawaii*