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NO. 29035

2008 JUN -6 PM 3:33

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawaii; MAUI TOMORROW, INC., a Hawaii non-profit corporation; and the KAHULUI HARBOR COALITION, an unincorporated association,

Plaintiffs-Appellants/ Cross-Appellees/ Appellees/Cross-Appellants,

vs.

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; BRENNON MORIOKA, in his capacity as Director of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; MICHAEL FORMBY, in his capacity as Director of Harbors of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII,

Defendants-Appellees/ Cross-Appellants/ Appellants/Cross-Appellees,

HAWAII SUPERFERRY, INC.

Defendant-Appellee/ Cross-Appellant/ Appellant/Cross-Appellee.

Civil No. 05-1-0114 (3)

(Declaratory Judgment)

C. CASIL, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII
Clerk, Second Judicial Circuit Court and
ex-officio Clerk, Supreme Court

APPEAL **AND** CROSS APPEAL FROM A) FINAL JUDGMENT; CERTIFICATE OF SERVICE FILED JANUARY 31, 2008; B) ORDER GRANTING 1) DEFENDANT STATE OF HAWAI'I'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT; AND 2) DEFENDANT HAWAII SUPERFERRY, INC.'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT; CERTIFICATE OF SERVICE FILED NOVEMBER 14, 2007; C) ORDER GRANTING PLAINTIFFS' MOTION FOR REIMBURSEMENT OF REASONABLE ATTORNEY'S FEES AND COSTS FILED ON JANUARY 15, 2008 FILED MARCH 27, 2008; **AND** CROSS APPEAL FROM A) ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR TEMPORARY, PRELIMINARY AND/OR PERMANENT INJUNCTION; CERTIFICATE OF SERVICE FILED OCTOBER 9, 2007 AND B) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER IN SUPPORT OF ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR

)	TEMPORARY INJUNCTION;
)	CERTIFICATE OF SERVICE FILED
)	NOVEMBER 9, 2007
)	
)	CIRCUIT COURT OF THE SECOND
)	CIRCUIT, STATE OF HAWAI'I
)	
)	The Honorable Joseph E. Cardoza,
)	Judge
)	
)	

khc/SCII/opbrief

OPENING BRIEF OF PLAINTIFFS/APPELLANTS/CROSS-APPELLEES/ APPELLEES/CROSS-APPELLANTS THE SIERRA CLUB, MAUI TOMORROW, INC. AND THE KAHULUI HARBOR COALITION

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CERTIFICATE OF SERVICE

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Plaintiffs-Appellants/Cross-Appellees/Appellees/Cross-Appellants the Sierra Club, a California non-profit corporation registered to do business in the State of Hawaii; Maui Tomorrow, Inc., a Hawaii non-profit corporation; and the Kahului Harbor Coalition, an unincorporated association (referenced hereafter as "Sierra Club"), file this Opening Brief, pursuant to Rule 28(a) of the Hawaii Rules of Appellate Procedure ("HRAP"). Defendant-Appellees/Cross-Appellants/ Appellants/Cross-Appellees the Department of Transportation of the State of Hawaii; Brennon Morioka, in his capacity as Director of the Department of Transportation of the State of Hawaii; Michael Formby, in his capacity as Director of Harbors of the Department of Transportation of the State of Hawaii will be referenced hereafter as "HDOT." Defendant-Appellee/Cross-Appellant/ Appellant/Cross-Appellee Hawaii Superferry, Inc. will be referenced hereafter as "Superferry."

I. INTRODUCTION

Sierra Club secured a significant environmental decision from the Hawaii Supreme Court establishing procedural standing for the first time in the State of Hawaii, in a case in which the Supreme Court issued a ruling on the merits several hours after oral argument, directing the Circuit Court to enter summary judgment in favor of Sierra Club on its claim for an environmental assessment ("EA") pursuant to Chapter 343. *Sierra Club v. The Department of Transportation of the State of Hawaii,* 115 Hawai'i 299, 167 P.3d 292 (2007).

The Circuit Court thereafter also entered a permanent injunction, after a four (4) week trial, on October 9, 2007, supported later by detailed findings of fact and conclusions of law, prohibiting the operation of Superferry, finding, in part, that a permanent injunction was in the public interest and that it was possible that Superferry would cause irreparable harm to multiple environmental resources if it operated during the time it takes to prepare an EA in this case. The Circuit Court also entered an Order declaring the Operating Agreement between HDOT and

Superferry void, as it grants Superferry the right to use state lands and to use and construct certain improvements at Kahului Harbor.

The Judiciary had spoken in final terms on this matter through the Hawaii Supreme Court and the Circuit Court. Dissatisfied, HDOT and Superferry sought to have the Hawaii State Legislature overrule these findings and conclusions. The Legislature then passed Act 2 attempting to "reweigh the equities" and to "direct a different outcome" in Article III Courts. Defendants' Motions to Dissolve and Vacate, based upon this subsequently enacted legislation, were granted over Sierra Club's objections that Act 2 is unconstitutional.

This case is now a case of even greater public importance. The singular provisions within the Hawaii Constitution placed there to protect against the types of actions taken here and to assure that Hawaii's fragile environment is actually protected must be applied to declare that Act 2 is unconstitutional, to require the preparation of the "real" EA mandated by Hawaii's Constitution, Chapter 343 and the Hawaii Supreme Court and the reinstatement of the Circuit Court permanent injunction until the Chapter 343 environmental process is lawfully concluded.

Sierra Club prevailed on their main claims in this case. Sierra Club raised certain limited issues with respect to the award to them of reasonable attorney's fees and costs, both in their Notice of Appeal and in their Cross-Appeal. Sierra Club files concurrently a separate Opening Brief on Cross-Appeal addressing these issues, because the subject matters of the appeal and cross-appeal are different, for the sake of coherency and to comply with the mandate of Rule 28(f) HRAP that "separate" briefs be filed.

II. STATEMENT OF THE CASE

A. The Hawaii Superferry Project and The Operating Agreement Between HDOT and Superferry

"The Hawaii Superferry project ("HSP") generally involves an inter-island ferry service between the islands of O'ahu, Maui, Kaua'i and Hawai'i using harbor facilities on each island." *Sierra Club v. DOT*, 115 Haw. at 303.

HDOT and Superferry entered into a Harbors Operating Agreement initially on September 7, 2005. HSF-9; Record on Appeal ("ROA") 2954, Finding of Fact ("FoF") 18. The Operating Agreement grants Superferry the entitlement to use certain "premises" or state lands at the Kahului Harbor for the Superferry. HSF-9, pp. 8-10, 63, 69; ROA 2954, FoF 18. The Operating Agreement also provides that the Agreement is subject to Superferry's compliance with state laws, including state environmental laws. HSF-9, pp. 21-22, 44-45; ROA 2954, FoF 18.

Through the Operating Agreement, HDOT provides certain facilities at Kahului Harbor, such as a barge. HSF-9, pp. 16-22; ROA 2954-2955, FoF 19 – 22. Through the Operating Agreement, HDOT granted Superferry the right to use approximately 5.1 acres of state land at Kahului Harbor and to construct certain facilities thereupon, with the approval of HDOT. P-89 p. 2 and attached Exhibit; HSF-22, 50; ROA 2955, FoF 20.

Superferry, in 2007, constructed certain improvements on the 5.1 acre parcel of state land at Kahului Harbor including a passenger terminal, bathroom facilities, check-in counter, sales counter, security area partition/fencing, electrical and water infrastructure, grading, gates, paved roadway and paved inspection areas for vehicles. HSF-9, p. 28, ¶ VI.A.2; ROA 2955, FoF 21.

HDOT, based upon the Operating Agreement, also constructed certain improvements including a barge, vehicle boarding ramp and gangways for use at Kahului Harbor by Superferry. ROA 2955, FoF 22. These necessary facilities are "a prerequisite to Superferry's commencement of its operations." ROA 1493.

B. Sierra Club's Complaint and Initial Circuit Court Dismissal

On March 21, 2005 the Sierra Club filed a five (5) count Complaint in the Second Circuit Court seeking determinations, inter alia, that (1) the exemption determinations were illegal and void, (2) an EA was required as a matter of law, (3) any approvals were void, (4) the project could not be implemented and (5) Sierra Club was entitled to an award of fees and costs. ROA 1-45.

On May 12, 2005 HDOT filed a Motion to Dismiss the case. ROA 139-962. Superferry filed a similar motion. ROA 964-991. On July 12, 2005 the Circuit Court

issued an Order granting both motions. ROA 1502-1505. The Sierra Club appealed to the Hawaii Supreme Court. ROA 1513-1523.

C. Hawaii Supreme Court Reversal and Judgment

1. Order Issued on August 23, 2007 Requires an EA, Triggering Non-implementation Provisions of HEPA

The Hawaii Supreme Court entered an Order on August 23, 2007 determining that: (1) the July 12, 2005 Judgment of the Circuit Court was reversed; (2) HDOT's determination that the improvements to the Kahului Harbor, on the Island of Maui, are exempt from the requirements of Hawai`i Revised Statutes (HRS) Chapter 343 was determined to be erroneous as a matter of law; (3) the EA requirement of HRS § 343-5 was determined to be applicable; and (4) the Circuit Court was instructed to enter summary judgment in favor of Sierra Club on their claim as to the request for an EA. The Supreme Court remanded the case to the Circuit Court. ROA 1552-1553.

2. Opinion Issued on August 31, 2007 and Judgment Entered on October 3, 2007

On August 31, 2007 the Supreme Court issued its opinion in *Sierra Club v. DOT*. ROA 1953-2056. The Court held that the "[t]he Hawai'i Department of Transportation's determination that the improvements to the Kahului Harbor, on the Island of Maui, are exempt from the requirements of Hawai'i Revised Statutes (HRS) chapter 343 (Supp.2004) was erroneous as a matter of law." *Sierra Club v. DOT*, 115 Haw at 298, 167 P.3d at 305. The Court further held that the "DOT did not consider whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both primary and secondary, on the environment. Therefore, ... DOT's determination that the improvements [ ] are exempt from the requirements of HEPA [the Hawaii Environmental Protection Act] was erroneous as a matter of law. The exemption being invalid, the requirement of 343-5 [that an environmental assessment would be required before continuing with the proposed action] is applicable." Id., 115 Haw. at 382.

The Hawaii Supreme Court entered a Final Judgment on Appeal on October 3, 2007. ROA 2233-2236.

D. Superferry and HDOT Illegally Implement Project

On August 24, 2007, the day after the Supreme Court ordered that HDOT's exemption determination letter(s) were invalid, thereby effectively voiding the Operating Agreement between Superferry and HDOT, and necessitating an EA in order for Superferry to use State harbors, HDOT and Superferry immediately accelerated the previously scheduled start date. ROA 2957-2958, FoF 35-36.

On August 26, 2007, the State made its lands available for Hawaii Superferry's operations and Superferry began its operations in plain violation of the non-implementation provisions of HEPA, without first completing the EA required by the Supreme Court only days earlier. ROA 2957-2958, FoF 36.

E. Temporary, Preliminary and Permanent Injunctive Relief Issued by the Circuit Court

On Monday, August 27, 2007, Judge Cardoza issued a Temporary Restraining Order, as requested by Sierra Club, enjoining the Superferry from commencing operations until a preliminary injunction could be heard. ROA 1570-1576. The August 27, 2007 Restraining Order stated that the acceptance of a required final statement in accordance with HRS § 343-5(b) is a "condition precedent" to: (1) the commencement or implementation of a proposed project, (2) the use of state lands or funds in implementing the proposed action, and (3) the issuance of approvals or entitlements for the project. ROA 1571-1572.

The Court converted the Temporary Restraining Order into a Preliminary Injunction through an oral ordered issued on September 14, 2007 and entered in writing on November 7, 2007. ROA 2935-2937.

The Circuit Court, on October 9, 2007, entered an "Order Granting Plaintiff's Motion to Enforce Judgment by Requiring Environmental Assessment by Prohibiting Implementation of Hawaii Superferry Project, for Temporary, Preliminary and/or Permanent Injunction", permanently enjoining Superferry operations until lawful completion of the environmental process and voiding the Operating Agreement, as it applied to Kahului Harbor, after conducting twenty (20) days of evidentiary hearings over a four (4) week period of time. ROA 2273-2281.

The permanent injunction was granted on three (3) major bases: (1) the "no action" requirements in HRS 343-5(b),(c) in Chapter 343 prohibit implementation of the project until lawful completion of the environmental process (ROA 2274-2277); (2) the Court "finds and concludes that the balance of irreparable damage favors the issuance of a permanent injunction in this case as Plaintiffs have demonstrated the possibility of irreparable injury with respect to the environmental impacts of Hawaii Superferry operations on natural resources, protected species, increased introduction of invasive species and causing social and cultural impacts" if Superferry is allowed to operate while an EA/EIS is being prepared (ROA 2278) and (3) the Court "finds and concludes that that the public interest in implementing the environmental review process supports the granting of this permanent injunction in this case." (ROA 2278) The Circuit Court also voided the Operating Agreement based upon *Kepoo v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005)(ROA 2279-2280). See Appendix "A".

The trial court, on November 9, 2007, entered detailed "Findings of Fact, Conclusions of Law in Support of Order Granting Plaintiff's Motion to Enforce Judgment by Requiring Environmental Assessment by Prohibiting Implementation of Hawaii Superferry Project, for Temporary, Preliminary and/or Permanent Injunction." ROA 2946-2973.

Defendants requested, on October 9, 2007, stays pending appeal of the findings, conclusions and orders issued by the trial court on October 9. 2007, which requests were denied by the trial court. ROA 2938-2940. No efforts were made by Defendants to appeal to an Article III Court to overrule these findings and conclusions at this juncture. Defendants sought instead to overturn these rulings in the Legislative and Executive Branches of Hawaii's government.

F. The Proclamation of the Governor and Act 2 of the Legislature

The Governor signed a Proclamation, on October 23, 2007 to convene the Legislature in a special session. ROA 3054-3055. The Legislature enacted Act 2 on October 31, 2007 and the Governor signed Act 2 on November 2, 2007 granting Hawaii Superferry the rights to operate, to use state lands and the improvements constructed on these state lands for Superferry at Kahului

Harbor while an "EIS" – not subject to Chapter 343 – is prepared. Act 2 is found in ROA 2587-2638 and attached as Appendix "B."

G. The Motions to Dissolve the Permanent Injunction Are Granted

Defendants filed Motions to Dissolve Injunction and Vacate Order Voiding Operating Agreement, based upon the import of Act 2, on November 5, 2007. ROA 2544-2833. Defendants filed ex parte motions to shorten time for the hearings on November 7, 2007. ROA 2842-2945. Sierra Club was only given until November 13, 2007 to file a Memorandum in Opposition and the hearings on the Motions were set for November 14, 2007. ROA 2842-2918. Defendants filed Reply Memoranda on November 13, 2007 to which Sierra Club could not respond. After oral argument on November 14, 2007, the trial court immediately entered an "Order Granting (1) Defendant State of Hawaii's Motion to Dissolve Injunction and Vacate Order Voiding Operating Agreement and (2) Defendant Hawaii Superferry, Inc.'s Motion to Dissolve Injunction and Vacate Order Voiding Operating Agreement." Tr. No. 7961, 11/14/07; ROA 3336-3340. See Appendix "C." No evidentiary hearing was held. The trial court did not issue findings of fact or conclusions of law supporting the dissolution of the permanent injunction.

Sierra Club received the benefits of injunctive relief from August 27, 2007 until November 14, 2007. This is a period of almost three (3) months duration, lasting for eighty (80) days and 11.5 weeks.

H. Final Litigation in Circuit Court and Appeals

The trial court entered a Final Judgment on January 31, 2008. ROA 3718-3722. See Appendix "D." Sierra Club filed a Notice of Appeal on February 29, 2008. ROA 3898-3912. HDOT filed a Cross-Appeal on March 14, 2008. ROA 3936-3945. Superferry filed a Cross-Appeal on March 17, 2008. ROA 3984-4041.

Sierra Club filed a Motion for Reimbursement of Reasonable Attorney's Fees and Costs on January 15, 2008. ROA 3517-3643. After a hearing on February 13, 2008, the trial court entered a written order granting this motion on March 27, 2008. ROA 4115-4117.

After the entry of this Order, HDOT filed a Notice of Appeal on April 4, 2008. ROA 4124-4131. Superferry also filed a Notice of Appeal on April 4, 2008. ROA 4141-4149. Sierra Club filed a Cross-Appeal on April 15, 2008. ROA 4217-4223.

HDOT and Superferry moved for stays pending appeal of the award of fees and costs. ROA 4199-4216. A stay was granted in favor of Hawaii Superferry conditioned and effective upon the posting of a supersedeas bond in the amount of $147,069.62.00 or of the depositing of the same amount with the court.

III. POINTS OF ERROR

1. The Circuit Court erred in granting HDOT's and Superferry's Motions to Dissolve Injunction and Vacate Order Voiding Operating Agreement, by dissolving the permanent injunction, by vacating the Order voiding the Operating Agreement and by not ruling that Act 2 is unconstitutional; ROA 3336-3340; Tr. No. 7961, 11/14/07. Sierra Club objected by filing an appeal to the Final Judgment incorporating the Order that includes this ruling. ROA 3898-3912.

2. The Circuit Court erred thereafter by entering a Final Judgment dismissing the claims in Sierra Club's Complaint, as amended, as moot. ROA 3718-3722. Sierra Club objected by filing an appeal to the Final Judgment. ROA 3898-3912.

IV. STANDARDS OF REVIEW ON QUESTIONS OF CONSTITUTIONAL LAW

"This court reviews questions of constitutional law de novo, under the 'right/wrong' standard, and, thus, exercises its own independent constitutional judgment based on the facts of the case." *In re Guardianship of Carlsmith,* 113 Hawai`i 236, 239, 151 P.3d 717, 720 (2007) (quoting *State ex rel. Anzai v. City and County of Honolulu,* 99 Hawai`i 508, 515, 57 P.3d 433, 441 (2002) (other citation omitted)). "'We have long recognized that the Hawai`i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional principle is to give effect to that intent.'" *Save Sunset Beach Coal. v. City & County of Honolulu,* 102 Hawai`i 465, 474, 78 P.3d 1, 10 (2003) (quoting *Convention Center Auth. v. Anzai,* 78 Hawai`i 157, 167, 890 P.2d 1197, 1207

(1995).

'The general rule is that, if the words used in a constitutional provision . . . are clear and unambiguous, they are to be construed as they are written." *Kelly v. 1250 Oceanside Partners*, 111 Hawai`i 205, 223-224, 140 P.3d 985, 1003-04 (2006) (quoting *Taomae v. Lingle*, 108 Hawai`i 215, 251, 118 P.3d 1188, 1191 (2004). Furthermore, in interpreting a constitutional provision, "this court 'may look to the object sought to be established and the matters sought to be remedied along with the history of the times and state of being when the constitutional provision was adopted.'" Id. at 225, 140 P.3d at 1005 (quoting *City & County of Honolulu v. Ariyoshi*, 67 Haw. 412, 419, 689 P.2d 757, 763 (1984) (citation omitted)). "[W]here it is alleged that the legislature has acted unconstitutionally, this court has consistently held that every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt. The infraction should be plain, clear, manifest, and unmistakable." *Watland v. Lingle,* 104 Hawai`i 128, 133, 85 P.3d 1079, 1084 (2004).

Even applying this standard, the Hawaii Supreme Court has recently held Acts of the Hawaii legislature unconstitutional. *Kahoohanohano v. State,* 114 Haw. 302, 162 P.3d 696 (2007); *Silva v. City and County of Honolulu,* 115 Haw. 1, 165 P.3d 247 (2007). Courts have not hesitated to declare legislation unconstitutional special legislation, even after applying this standard. *Republic Investment Fund I v. Town of Surprise,* 166 Ariz. 143, 800 P.2d 1251 (1990).

V. ARGUMENT

A. Act 2 Deprives Sierra Club and the Public of Vested Rights to A Chapter 343 EIS and Replaces This With An Environmentally Non-protective "EIS", as a Matter of Law

The Hawaii Supreme Court entered an Order on August 23, 2007 through which the Court recognized the applicability of the EA requirement of Chapter 343. This "recognition" brought to legal life and vested in Sierra Club and the public a panoply of environmental rights and protections, now having their base in Article XI, Section 9 of the Hawaii Constitution.

Sierra Club was entitled to an EA as of, at least, February 23, 2005. The

Hawaii Supreme Court Order reversed the exemption determination(s) issued by HDOT entered on February 23, 2005. An EA shall be required for actions that propose the use of state lands or the use of state funds, which are not the specific type of action declared exempt. HRS §§ 343-5 (a)(1), (b) and (c). If the project was not exempt on that date, as it was not, an EA was required as of that date, February 23, 2005.

The EA to which Sierra Club became entitled was that described in Chapter 343. The purpose of Chapter 343, found in HRS § 343-1, is, in part:

> **The legislature finds** that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and **that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions**. (Emphasis added.)

The whole point of the environmental review process, mandated by the Hawaii Supreme Court, is to prepare environmental disclosure studies to alert decision-makers to the impacts of a proposed action **prior to the implementation of that action**.

The non-implementation provisions of Chapter 343 were automatically triggered once the Hawaii Supreme Court ordered the preparation of an EA. Chapter 343 prohibits the implementation of the project while the environmental studies are being prepared, HRS § 343-5(b),(c). HAR § 11-200-23(c) prohibits the use of state lands and funds while an EA is being prepared, such that the Kahului Harbor improvements for Superferry could not be used and state lands granted to Superferry at Kahului Harbor through the Operating Agreement could not be used.

The Harbors Operating Agreement entered into on September 7, 2005 between HDOT and Superferry, granting the state the right to use state lands at Kahului Harbor and to construct improvements at Kahului Harbor, was void ab initio, as dictated by *Kepoo v. Kane,* 106 Haw. 270, 103 P.3d 939 (2005), since an EA was required as of February 23, 2005 and the Agreement was based upon

an erroneous exemption determination.

Chapter 343 assures the development of mitigation measures in advance so that these measures can be imposed on projects before they commence and cause adverse impacts, HAR § 11-200-10(7), HAR § 11-200-17(m).

Sierra Club and other members of the public had vested rights to the judicial review of any determination that an EIS was not necessary and a vested right to the judicial review of the adequacy of any EIS prepared thereafter. It is this right to judicial review that, in large part, assures the integrity of the environmental process and that compliance with the mandates of Chapter 343 has been achieved. HRS §§ 343-7(b), (c).

Through Act 2, the Legislature and the Governor attempt to unconstitutionally supplant this process with a pseudo-process that falls far short of the Chapter 343 environmental review process, for Superferry alone, that does not protect Hawaii's fragile environment, thus stripping Sierra Club and the public of the benefits afforded by the Hawaii Supreme Court Judgment, retroactively. The "EIS" required by Act 2 is not the same as the EIS required by Chapter 343. Act 2, Section 5. ROA 2604. Because Superferry is permitted to operate during the preparation of the "EIS", all of the procedural harms, including the likely tolerance of actual environmental harm, will occur. *Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i,* 91 Haw. 94, 105, 979 P2d 1120 (1999). See Section 6 of Act 2. ROA 2604.

In addition, the Legislature has stripped those with standing of their normal right of judicial review. ROA 2587-2638. Act 2 does not include any right to challenge the adequacy of the "EIS" depriving Sierra Club and the public of their primary ability to assure compliance with the "mandates" of Act 2.

Through Act 2 the Legislature imposes "mitigation" measures in an arbitrary and capricious fashion without the benefit of the EA or EIS whose purpose it is to fashion mitigation measures before a project is implemented. Act 2, Section 4. ROA 2598-2604.

Sierra Club's rights to Chapter 343 environmental review vested with the issuance of the Supreme Court Opinion on August 31, 2007 and the Final

Judgment on Appeal on October 3, 2007. As of October 3, 2007, the Judicial Branch of Hawaii's government had entered a final ruling on the matter completed through the entry of the Final Judgment. The vested rights of the Sierra Club and the public became irrevocable against reopening or reversal by another branch of the government, as argued below.

B. Hawaii's Unique Constitutional Protections Against Special Legislation

Hawaii's Constitution makes the special legislation effected in Act 2 unconstitutional. [1] The Hawaii Constitution makes all special legislation unconstitutional in Article I, Section 21 that provides:

> The power of the State to act in the general welfare shall never be impaired by the making of any irrevocable grant of special privileges or immunities.

Article XI, entitled "Conservation, Control and Development of Resources," in Section 5, entitled "General Laws Required; Exceptions," of the Hawaii Constitution further makes it unconstitutional for the Legislature to exercise power over public lands through special legislation:

> **The legislative power over the lands owned by or under the control of the State** and its political subdivisions **shall be exercised only by general laws**, except in respect to

---

[1] The Hawaii Constitution includes other unique protections including the following. Article XI, Section 1 of the Hawaii Constitution provides that:

> All public natural resources are held in trust by the State for the benefit of the people.

Section 1 of the Constitution requires the State to protect and preserve all of the natural resources in the State for the benefit of its people:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

Section 9 of this Article, entitled "Environmental Rights" further provides:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

The State, including the Legislature and the Governor, must exercise all of the foregoing duties consistently with its Public Trust Doctrine legal duties to the citizens of Hawaii and Sierra Club. *Kelly v. 1250 Oceanside,* 111 Hawai'i 205, 140 P.3d 985 (2006).

transfers to or for the use of the State, or a political subdivision, or any department or agency thereof. (Emphasis added)

C. Act 2 Is Unconstitutional Special Legislation

1. The State Agrees on What Constitutes Unconstitutional Special Legislation and is Judicially Estopped by Its Own Attorney General Opinion

An Attorney General's Opinion was issued on September 11, 2007 describing what constitutes "special legislation," definitively construing Article XI, Section 5 of the Constitution and opining that a different legislative action, Act 3, setting aside state lands for one entity or business, is unconstitutional. ROA 3049-3053. See Appendix "E." Because this is precisely what occurred here, Act 2 must also be declared unconstitutional.

The Legislature passed Act 3 in it First Special Session in 2007. Act 3 requires the Hawaii Community Development Authority ("HCDA") to set aside specific state lands for the use by and benefit of a particular private entity, the Kewalo Keiki Fishing Conservancy ("KKFC"). The Attorney General Opinion applies Article XI, Section 5 of the Hawaii Constitution and declares that Act 3 constitutes unconstitutional special legislation. In pertinent part, the Attorney General Opinion provides as follows:

> The Hawai'i Constitution clearly states that the legislative power over "lands owned by or under the control of the State and its political subdivisions **shall be exercised only by general laws.**" [Emphasis Added.] There is no dispute that the land in question is State land.
>
> General laws are "laws which apply uniformly throughout all political subdivisions of the State ... . . [or] uniformly to a class of political subdivisions". *Bulgo v. Maui County, 50* Haw. 51,58, 430 P.2d 321,326 (1967). See also *People ex rel. City of Canton v. Crouch,* 79 Ill. 2d 356, 403 N.E. 2d 242 (1980); *Sheffield v. Rowland,* 87 Ohio St. 3d 9, 716 N.E. 2d 1211 (1999). A law uniformly applying to a class of persons or things having a reasonable and just relationship to the regulated subject matter is a general law. 73 Am. Jur. 2d Statutes § 3 (2001). A law is a "special," not a general, law if it operates upon and affects only a fraction of persons or a portion of the property encompassed by a classification, granting privileges to some and not others. *Hamen v. Marsh,*

237 Neb. 699, 467 N.W. 2d 836 (1991) (holding unconstitutional legislation appropriating money to compensate depositors for losses on deposits in failed industrial loan and investment companies). Special legislation discriminates in favor of a person or entity by granting them a special or exclusive privilege. A statute relating to particular persons, places, or things is a special law, not a general law

Act 3 can only be interpreted as being a special legislation because it was enacted to benefit the KKFC specifically and is limited to a specific property. Although courts will generally defer to a legislature's decision regarding general law, no deference can be accorded in this case because there is no way that Act 3 can be interpreted to be a regarding general law. See *Republic Inv. Fund I v. Town of Surprise,* 166 Ariz. 143, 800 P.2d 1251 (1990) (deannexation statute limited in application to twelve small cities and towns in one county was unconstitutional special legislation).

In interpreting article XI, section 5, we apply the cardinal rule of statutory construction that "if the words used in a constitutional provision . . . are clear and unambiguous, they are to be construed as they are written." *Hawaii State AFL-CIO v. Yoshina,* 84 Hawai'i 374, 376, 935 P.2d 89, 91 (1997).

Article XI, section 5 is a simple, unambiguous sentence which provides that control of lands owned by or under the control of the State is to be exercised pursuant to general laws only, except for land transfers to or for the use of the State, a political subdivision, or any department or agency thereof.

The Attorney General Opinion continues:

> There is no conceivable way to interpret Act 3 other than as special legislation that treats KKFC differently from all other persons or entities that might wish to use [the particular state land] for other purposes

The Attorney General Opinion concludes:

> **For the foregoing reasons, we believe that Act 3 violates article XI, section 5 of the Hawaii Constitution. Because Act 3 violates article XI, section 5, we advise that no steps be taken to implement Act 3**. (Emphasis added).

The same legal principles applied by the Attorney General in its Opinion dated September 11, 2007, are applicable with equal force in this case. Since

this was an unconstitutional violation of Article XI, Section 5 with respect to Act 3, this is equally an unconstitutional violation of Article XI, Section 5 with respect to Act 2.

HDOT, by the doctrine of judicial estoppel, cannot be permitted to maintain inconsistent positions, blowing "hot and cold" regarding the same public trust legal issues. *Lee v. Puamana Community Ass'n,* 109 Hawai`i 561, 575-576, 128 P.3d 874 (2006), *Roxas v. Marcos,* 89 Hawai`i 91, 124, 969 P.2d 1209, 1242 (1998). [2]

2. Through Act 2 the Legislature Has Unconstitutionally Exercised Power Over Public Lands Implicating the Prohibited Category Listed in Article XI, Section 5 of the Hawaii Constitution

The trial court dissolved the permanent injunction and vacated its voidance of the Operating Agreement on November 14, 2007. No evidentiary hearing was held. The Order entered by the Court included no reasons for the Court's actions. ROA 3336-3340. The trial court did not issue findings of fact or conclusions of law supporting the dissolution of the permanent injunction. The Circuit Court, in its oral ruling, did provide the bases for its rulings. Tr. No. 7961, 11/14/07. The trial court stated that if Act 2 was constitutional the motions must be granted. The trial court found no violation of Article XI, Section 5, stating that "Act 2 does not involve the exercise of legislative power over the lands of the State. Act 2 instead alters the applicability of Chapter 343 of the Hawaii Revised Statutes and the environmental review process of this state as it relates to large capacity vessels." Tr. No. 7961, 11/14/07; p. 82, l. 6-11. This ruling obfuscates the facts and the law and constitutes clear error.

In deciding whether a statute is unconstitutional special legislation a Court determines whether one of the express prohibitions enumerated in the constitutional provision is implicated. *People v. Canister,* 110 P.3d 380, 383 (Colo. 2005). Article XI, Section 5 of the Hawaii Constitution clearly prohibits the Legislature from exercising power "over the lands owned by or under the

[2] At a minimum, HDOT had a duty to inform the trial court of the opposite result dictated by cases cited in the Opinion, namely *Haman v. Marsh,* 237 Neb. 699, 467 N.W. 2d 836 (1991) and *Republic Investment Fund I v. Town of Surprise,* 166 Ariz. 143, 800 P.2d 1251 (1990).

control of the State" except by general laws. Article XI, Section 5 makes it unconstitutional for the Legislature to exercise power over state lands through special legislation.

The State, through an administrative agency, HDOT, in an Operating Agreement, had granted the use of 5.1 particular acres of state land at Kahului Harbor to Superferry. The trial court entered a permanent injunction prohibiting the use of the 5.1 acres of state lands and also voided the Operating Agreement, granting Superferry the right to use these 5.1 acres of state lands at the Kahului Harbor.

The Legislature, through Act 2, violated the Hawaii Constitution by exercising control over these same state lands through this special legislation. The Legislature has exercised control over state lands as follows:

Section 1 (d) of Act 2 (ROA 2592-2593) provides:

> **The purpose of this Act is to facilitate the establishment of inter-island ferry service** and, at the same time, protect Hawaii's fragile environment **by clarifying that neither the preparation of an environmental assessment, nor a finding of no significant impact, nor acceptance of an environmental impact statement shall be a condition precedent to, or otherwise be required prior to**:
>
> (4) The appropriation or expenditure of any funds, **the use of state lands**, the issuance of any permits, or the entering into of any agreements; (Emphasis added).

Section 15 of Act 2 (ROA 2635) provides:

> **Any state lands previously authorized to be used to facilitate or support the operation of a large capacity ferry vessel, shall be authorized to be used to effectuate the provisions of this Act.** (Emphasis added).

Through this Act, the Legislature has plainly authorized Superferry to use the specific 5.1 acres of state lands at Kahului Harbor that were the subject of the Operating Agreement voided by the trial court. Thus, Act 2 addresses a prohibited category in the constitutional provision. The trial court clearly erred

in determining that Act 2 does not involve the exercise of legislative power over state lands.

3. Because Superferry is the Only Entity to Whom Act 2 Will Ever Apply, the Classification Adopted by the Legislature is Logically and Factually Limited to a "Class of One," and thus is Illusory and Unconstitutional.

Act 2, alternatively, is unconstitutional special legislation violating Article I, Section 21 of the Hawaii Constitution, even if the Legislature was not exercising power over state lands (which Sierra Club denies). Courts will not refrain from declaring a legislative act an unconstitutional special or local law when the facts so require, even when a strong presumption in favor of a statute's constitutionality generally exists and even when, in doubtful cases, courts generally defer to legislative determinations of policy. 2 N. Singer, *Sutherland, Statutes and Statutory Construction* ("Sutherland") §§ 40.02, 40.09, at 233 (4th ed. 1986); *Republic Investment Fund I v. Town of Surprise*, 166 Ariz. 143, 800 P.2d 1251, 1258 (1990). Whether a statute is general or specific depends upon its substance and practical operation, rather than on its title, form or phraseology. 2 E. McQuillan, *The Law of Municipal Corporations* § 4.65, at 201 (3rd ed. 2006).[3]

The Court must address "whether the classification adopted by the legislature is a real or potential class, or whether it is logically and factually limited to a class of one and thus illusory." *People v. Canister,* 110 P.3d 380, 383 (Colo. 2005). Classifications created by the Hawaii legislature must be "real." *Robertson v. Pratt,* 13 Haw. 590, 601 (1901). If the Legislature has created a "class of one" that was "conceived, cut and tailored" for a particular entity, the legislation is special. *In re Senate Bill No. 95 of Forty-Third Gen. Assembly,* 146

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[3] For this analysis it is not necessary to show that there is no rational basis for the classification, however cases exist supporting that determination. *Silva v. City and County of Honolulu,* 115 Haw. 1, 165 P.3d 247 (2007); *Town of Secaucus v. Hudson County Bd. of Taxation,* 133 N.J. 482, 492-93, 626 A.2d 288 (1993), *cert. denied,* 510 U.S. 1110, 114 S.Ct. 1050, 127 L. Ed.2d 372 (1994) (Statute that exempts the city of Bayonne from paying its share of taxes allocated to the operation of the Hudson County Vocational School is unconstitutionally invalid as special legislation). See, also, *Lake County Riverboat vs. Illinois Gaming Board,* 313 Ill. App. 3d 943, 730 N.E.2d 524 (2000).

Colo. 233, 361 P.2d 350, 354 (Colo.1961). This issue often turns upon an analysis of whether any other entity other than the targeted entity, here Superferry, will ever meet the statutory criteria and, in turn, on whether the statute has potential future applicability or only such short effectiveness that the class of benefited entities is closed upon passage of the Act. *People v. Canister*, 110 P.3d 380 (Colo. 2005); *In re Senate Bill No. 95 of Forty-Third Gen. Assembly*, 146 Colo. 233, 361 P.2d 350 (Colo.1961).

This test has sometimes been described differently requiring the Court to review the "elasticity" of the class created by the legislature, "whether the class is elastic, allowing members to move into and out of the class." In *Republic Investment Fund I v. Town of Surprise*, 166 Ariz. 143, 800 P.2d 1251, 1258-1259 (1990), a case relied upon in the Attorney General Opinion, the Supreme Court of Arizona, held that to be general, the classification must be elastic, or open to admit additional entries but also to enable others to exit when they no longer meet the criteria established by the legislature. Id. at 1258; *Sutherland* § 40.09, at 2.33. Where the prospects of entries into the classification or exits from the classification "is only theoretical, and not probable, we will find the act special and local in nature." Id at 1258; *Sutherland* § 40.09, 432-33. The Supreme Court of Arizona, applying these standards of review, declared the acts under consideration unconstitutional special legislation because the classifications lacked "elasticity" and prevented any municipalities, other than those designated, from entering or exiting from its operation. Id. at 1259.

In *Haman v. Marsh,* 237 Neb. 699, 467 N.W. 2d 836 (1991), another case relied upon in the Attorney General Opinion, legislation aimed at reimbursing the long-suffering depositors of Nebraska's failed savings and investment companies was held to be unconstitutional special legislation because "a classification which limits the application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the...constitution." Id. at 848. The Nebraska Court ruled that while Plaintiffs had the burden of proving unconstitutionality, Plaintiffs did not have to prove that the possibility of

future growth or development was definite or certain to sustain a constitutional challenge based upon a closed class. The Court is not limited to the face of the legislation but may consider the Act's application. The Court found that the "realities of the situation" were that only "except for a highly improbable set of events the class is closed to future members", and therefore an unconstitutional closed class. Id. at 849.

The Supreme Court of Colorado ruled that an "illusory" "class of one" had been created, on these grounds, in *In re Senate Bill No. 95 of Forty-Third Gen. Assembly*, 146 Colo. 233, 361 P.2d 350 (Colo.1961) the Court found a bill annexing the town of Glendale into the City and County of Denver to be unconstitutional special legislation because it created an "illusory" class of one. The Court ruled, on p. 354:

> Senate Bill No. 95 was unquestionably cut, tailored and amended to accomplish a particular result with reference to a particular area, to-wit, Glendale. Once having accomplished that purpose the act would die before it could accomplish a like purpose in any other place. The thin veneer of language used to 'get around' the constitutional prohibition, and to give the measure a mask of general application, falls in the face of the bill when considered in light of common knowledge of which we may take judicial notice.

In *People v. Canister*, 110 P.3d 380 (Colo. 2005), the Supreme Court of Colorado more recently ruled identically.[4] The Court found on pp. 384-385:

> The General Assembly convened for only four days, from July 8, 2002, through July 11, 2002. The statute at issue became effective on the next day July 12, 2002, when it was approved by the Governor. During that brief period, the section was "conceived, cut and tailored" to accomplish the purpose of ensuring that the death penalty was available for Canister and Hagos. .... **there were no other individuals who could fit within the requirements of section 181.4102(e).** .... The precise drafting of section 181.4102(1)(e) leaves no doubt

[4] *Bulgo v. County of Maui*, 50 Haw. 51, 430 P.2d 321 (1967) is clearly distinguishable from the other cases cited above because the Court found that the challenged Act as written was not just applicable to the class of Maui County alone but was applicable equally as written to all of the State's counties and was therefore not special legislation.

as to the identity of the individuals to whom it was intended to apply.

a. The Statutory Criteria in Act 2 are So Narrowly Drawn that They Create a Closed "Class of One", Superferry

Act 2 is unconstitutional special legislation for the same reasons. Act 2 creates a "class of one" and was "conceived, cut and tailored" to apply to Superferry alone. The Legislature, in Act 2, created the class of "large capacity ferry vessels," service and companies, much like the municipal population classes created in other cases. A population category, like the category in Act 2, is a special law, if it is designed to operate upon or benefit a particular entity and thus is essentially no different than if the statute identified the benefited entity by name. *Municipal City of South Bend v. Kimsey,* 781 N.E.2d 683, 685 (Ind. 2003). Because the legislation in that case was clearly drafted to apply to St. Joseph County, no differently than if the name St. Joseph County had actually been used, even though general language was utilized, the Act was unconstitutional special legislation.

It was well known that the subject of Act 2 was Superferry, even though a half-hearted effort was made to "give the measure a mask of general application" by suggesting that it would apply to any "large capacity ferry vessel company." The Colorado Court, in Ftn. 9 of *People v. Canister,* 110 P.3d 380, 383 (Colo. 2005), stated that the Appellate Court could take judicial notice of the actual intended target of the legislation:

> *In Senate Bill No. 95,* we took judicial notice of the fact that the bill was known by all interested parties as "the Glendale Bill."

First, in this case, the Governor admits, in describing her Proclamation in her Press Release, that the proposed bill is "to allow the Superferry service to resume while the state conducts an environmental impact statement relating to harbor improvements for the ferry operation." ROA 3056-3057. Second, the Attorney General, in his testimony to the Legislature, states that the legislation

"allows the Hawaii Superferry to operate." ROA 3058-3061. Third, the Legislature, on its website, referred to Act 2, as the "Superferry Bill." ROA 3062.

The "precise drafting" of Act 2 leaves no doubt as to the identity of the "large capacity ferry vessel company" to whom it was intended to apply, namely Hawaii Superferry. Section I.(a) of Act 2 (ROA 2587-2588) states that:

> **The Hawaii supreme court has determined that an environmental assessment be performed with respect to certain improvements at Kahului harbor intended for and to be used by a large capacity ferry service between the islands of Oahu, Maui, Kauai, and Hawaii**, using harbor facilities on each island, and that the environmental assessment must take into account **secondary effects** of the Kahului harbor improvements.

and further notes:

> **the construction and completion of the harbor improvements**

and

> **the subsequent operation of a large capacity vessel for a limited period of time**

and that these operations were

> **approved by the lower court approximately two years earlier**

such that:

> a large capacity ferry vessel service should commence as soon as possible, and that harbor improvements continue to be constructed and be allowed to be used, while any environmental studies, including any environmental assessments or environmental impact statements, are conducted.

As of November 2, 2007, these can only be references to (a) the Order, Opinion and Judgment on Appeal of the Hawaii Supreme Court in *The Sierra Club v. The Department of Transportation of the State of Hawaii,* 115 Hawai'i 299, 167 P.3d 292 (2007), (b) the permanent injunction entered by the trial court in this case, (c) the harbor improvements constructed for the Hawaii Superferry project and

(d) the commencement of operations by the Hawaii Superferry utilizing the improvements on the 5.1 acres of state lands at Kahului harbor.

Further, Section 1.(e) of Act 2 (ROA 2594-2595) states:

> The purpose of this Act is also to amend all relevant existing laws to provide that, while any environmental review and studies, including environmental assessments or environmental impact statements, are prepared and following their completion:
>
> (1) A large capacity ferry vessel company and large capacity ferry vessels may operate;
>
> (2) Agreements with respect to such operation, including the operating agreements, entered into between the State and a large capacity ferry vessel company may be enforced, executed, or re-executed; and
>
> (3) Related harbor improvements may be constructed and used by the State, by a large capacity ferry vessel company, and by others.

and Section 15 of Act 2 (ROA 2635-2636) provides that:

> Any previously made appropriation or previously authorized expenditure of funds for any inter-island ferry operations of a large capacity ferry vessel company, or for improvements or operating expenses to accommodate its provision of inter-island ferry service, shall be approved and authorized to the extent they are needed to effectuate the provisions of this Act.
>
> **Any state lands previously authorized to be used to facilitate or support the operation of a large capacity ferry vessel, shall be authorized** to be used to effectuate the provisions of this Act.
>
> Any state harbor improvement or state or county facilities previously made or made available to facilitate or support the operation of a large capacity ferry vessel may be used by any large capacity ferry vessel company or any other person to effectuate the provisions of this Act.
>
> **Any certificate of public convenience and necessity** previously issued to a large capacity ferry vessel company may be used to effectuate the provisions of this Act.
>
> Any tariffs issued for the purpose of facilitating the provision of service by a large capacity ferry vessel may be used to effectuate the provisions of this Act.
>
> **Any agreements between the department of transportation or the state and a large capacity ferry vessel company previously entered into** for the purpose of

facilitating the provision of service by a large capacity ferry vessel may be used to effectuate the provisions of this Act.

With reference Sections 1.(e) and 15 of Act 2, there is only one (1) Harbor Operating Agreement between the State and a "large capacity ferry vessel company" that was "previously entered into" and voided by a Court and is, by this Act, either to be "enforced, executed, or re-executed" and that is the Operating Agreement between the State and Hawaii Superferry. With reference to Section 15 of Act 2, the Certificate of Public Convenience and Necessity issued to a large capacity ferry vessel company that "shall not be revoked or modified" by the terms of Act 2 can only be the one issued by the PUC to Superferry.

With reference to Sections 1.(e) and 15 of Act 2, the "Kahului harbor improvements" that the large capacity ferry vessel company shall have the right to utilize by Act 2 can only be the improvements on the 5.1 acres of state land at Kahului harbor constructed by the State and Superferry specifically for Superferry which the Second Circuit Court enjoined Superferry and the State from using and, with reference to Sections 1.(e) of Act2, the term that the preparation of environmental documents shall not be a "condition precedent" to the appropriation or expenditure of any funds, the use of state lands, the issuance of any permits, or the entering into of any agreements and the operation of a large capacity ferry vessel company can only mean the Superferry as it is the only ferry vessel company that has been heretofore prevented from using state lands or relying upon harbor agreements with the State.

The provision in Section 16 of Act 2 (ROA 2636-2637) that the large capacity ferry vessel company shall indemnify the State for "claims that have accrued or arisen as of the effective date of this Act" can only mean Superferry. This Court can take judicial notice of the fact that Superferry was the only inter-island large capacity ferry vessel operating before November 2, 2007.

The precise language used in drafting of Act 2 leaves no doubt here either as to the identity of the "large capacity ferry vessel company" to whom Act 2 was intended to apply, namely Superferry alone. The Supreme Court Order, Opinion and Judgment apply to Superferry. The subject of the Circuit Court injunction

is Superferry. The Agreement "previously entered into", that was voided, that may be "re-executed" can only be the Operating Agreement between Superferry and HDOT. The Certificate of Public Convenience and Necessity is that issued for Superferry by the PUC. The EA that is no longer required is the EA ordered by the Hawaii Supreme Court. Act 2 "sunsets" once the Act 2 "EIS" is prepared.

Act 2 was "conceived, cut and tailored" in an unconstitutional fashion to apply to Superferry alone.

b. The Time Limitation in Act 2 Closes the Class to Superferry Only

An Act will be struck down as unconstitutional special legislation where the Act has such a short duration that it can only apply to a "class of one." In *Republic Investment Fund I v. Town of Surprise*, 166 Ariz. 143, 800 P.2d 1251 (1990), the Supreme Court of Arizona, also relied upon the short period of effectiveness of the acts under consideration as a basis for declaring these acts unconstitutional special legislation. The Court held, on p. 1259: "Moreover, the statute's focus, limited to a particular census for only 13 months, prevents any municipality from either coming within or exiting its operation in the future."

In *In re Senate Bill No. 95 of Forty-Third Gen. Assembly*, 146 Colo. 233, 361 P.2d 350 (Colo.1961) the Legislature passed a bill in March 1961 setting forth certain statutory criteria for the annexation of towns and cities. The bill provided that it was automatically repealed on July 1, 1962, slightly over one (1) year later. Although the language of the bill was general, it contained a clause that would provide for its automatic repeal shortly after its enactment. This time limitation "made absolutely certain that the bill can apply only to a town now in existence and meeting the very special requirements" incorporated in the bill. The bill also could not "operate prospectively because it is impossible that before July 1, 1962, any circumstance can occur to allow another town" to fit its requirements. The Court held that what occurred "is exactly what the constitution forbids in plain language." Id. at 354.

The class of benefited entities closed upon passage of Act 2 and the Act has no potential future applicability. The Circuit Court entered its permanent

injunction on November 9, 2007. The Governor signed her Proclamation on October 23, 2007. The Legislature convened on October 24, 2007 and ten (10) days later the Governor approved Act 2 and it became effective on November 2, 2007. ROA 3054-3055, 2638.

Act 2, by Section 18 (ROA 2637-2638) is repealed, on the earlier of, (a) the forty-fifth day following the regular [legislative] session of 2009 or (b) "acceptance of the final environmental impact statement as provided in this Act." Act 2 has a life, effectiveness or period of applicability of **less than two years**.

As the Colorado Court held in *People v. Canister*, 110 P.3d 380 (Colo. 2005) at p. 365:

> **Because of the time limitation built into the section, Canister and Hagos are the only two people to whom it will ever apply.** Like the legislation in *Senate Bill No. 95*, section 181.4102(1)(e) cannot operate prospectively, and will have no future effect after accomplishing its purpose of making the death penalty available as a punishment for Canister and Hagos .... Here, the statutory category was closed at the same time the statute became effective, and only Canister and Hagos were in it.

The Colorado Supreme Court concluded at p. 365 that the legislation was unconstitutional special legislation as follows:

> Because those two people [Canister and Hagos] are the only individuals to whom the statute will ever apply, the classification adopted by the legislature is logically and factually limited to a "class of one," and thus is illusory. An illusory classification is not rational, and the section violates the constitutional prohibition against special legislation.

The same result, for the same reasons, must be reached here. The Hawaii Legislature created an unconstitutional, illusory "class of one."

D. Act 2 Violates Article III of the Hawaii Constitution

1. Article III of the Hawaii Constitution

The application of Act 2 in this case is unconstitutional. The Governor and the Legislature simply disagreed with the Hawaii Supreme Court's Order,

Opinion and Judgment and the findings and conclusions of the Circuit Court that the permanent injunction would protect public interests while also preventing possible "irreparable injury with respect to the environmental impacts of Hawaii Superferry operations on natural resources, protected species, increased introduction of invasive species and causing social and cultural impacts." Since the grounds for the Governor's Proclamation and the Legislature's Act 2 are the same grounds as the Hawaii Supreme Court's Order, Opinion and Judgment and the findings and conclusions supporting the permanent injunction of the Circuit Court, Act 2 reviews and overturns the Judgment and Orders of Article III Courts.

Article III of the Hawaii and United States Constitutions adopt the "separation of powers" doctrine, prohibiting the Legislative and Administrative Branches of the government from unconstitutionally interfering with the Judicial Branch of the government. Article III, Section 1 of the Hawaii Constitution provides as follows:

> The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

This unconstitutional interference in violation of the separation of powers doctrine can occur in at least four distinct fashions according to the United States Supreme Court in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995): (1) The legislature may not prescribe rules of decision to the judiciary and may only amend applicable law; (2) The legislature cannot vest review of the decisions of Courts in officials in the executive branch; (3) The legislature cannot retroactively compel the Courts to reopen final judgments and (4) The legislature cannot apply as well as make the law through enacting legislation that, taken together, is retroactive, special and reopens closed judgments.

2. The Legislative and Executive Branches Reweighed the Equities and Directed a Different Outcome Through Act 2 Thus Violating Article III of the Constitution

The decision of an Article III court is subject to the review only of a higher

court. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Even though the legislature may change or amend the underlying law, even if this would change the outcome in pending litigation, the political branches may neither review the decisions of the courts nor direct the outcome of pending cases. See *Plaut; Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441 (1992); *United States v. Klein, 13 Wall. 128 (1872); Stop H-3 Ass'n v. Dole*, 870 F.2d 1419 (9th Cir. 1989); *UFO Chuting of Hawaii, Inc. v. Young*, 380 F.Supp.2d 1166 (D.Haw. 2005). The trial court summarily, and incorrectly, agreed that Act 2 only amended the underlying law. Tr. No. 7961, 11/14/07; p. 81, l. 16-21. Interference with the judiciary violating the separation of powers occurs when the legislature prescribes rules of decision. *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), cert. denied, 125 S. Ct. 1086 (2005). As the U.S. Supreme Court has explained in *Plaut*, 514 U.S. at 218-19:

> The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy - with an understanding, in short, that "a judgment conclusively resolves the case" because "a `judicial Power' is one to render dispositive judgments. .... Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.

In *NRDC v. Winter*, 527 F. Supp 2d 1216 (C.D. Cal. 2008) the National Resources Defense Council ("NRDC") and several other environmental groups filed suit in against the U.S. Navy seeking to enforce NEPA and to enjoin sonar operations scheduled between February 2007 and January 2009 as part of fourteen training exercises in the Southern California Operating Area ("SOCAL"). The District Court found a NEPA violation and enjoined the naval operations finding the national security argument less compelling than competing concerns about sonar impacts on marine mammals.

On January 15, 2008, President Bush signed an exemption authorizing the Navy's continued use of sonar in its SOCAL exercises. In the exemption, the

President stated that the sonar exercises "[we]re in the paramount interest of the United States" and that compliance with the mitigation measures would "undermine the Navy's ability to conduct realistic training exercises that [we]re necessary to ensure the combat effectiveness of carrier and expeditionary strike groups.'

The District Court thereafter refused to dissolve the injunction. The District Court, after reviewing Article III requirements, determined that the President's exemption was constitutionally suspect on two grounds. The first ground was "timing." The Navy, with several opportunities to appeal, did not seek the exemption until the District Court refused a stay upon appeal. This tactic struck the District Court, on p. 1236, as:

> ... the inter-branch equivalent of forum shopping: So long as the Navy could manage to continue unobstructed, it would consent to appear before this Court and before the Ninth Circuit. Only once the Navy found it could no longer avoid this Court's injunction did it seek more favorable review from the President. **Clearly, this exemption does not change the underlying law. Rather the exemption appears to strip the Court of its ability to provide effective relief**. (Emphasis added)

Timing is a dispositive issue here as well. HDOT and Superferry could have appealed the findings and conclusions of the Circuit Court. Instead, they "pulled the plug" on the Article III courts by going to the Governor and the Legislature. HDOT and Superferry stripped the Hawaii Supreme Court and the Circuit Court of their abilities to provide effective relief to Sierra Club.

The second ground for an Article III violation is "the absence of any considerations other than those weighed by the Court." *NRDC v. Winter,* at 1237. The District Court notes that the President's exemption memorandum makes it clear that there are no "extraordinary circumstances" arising **after** the Court's injunction was issued and that the President "appears to have **reweighed the equities, and come to a different conclusion**. The President's exemption, therefore, renders the Court's opinion advisory." (Emphasis added) Id at 1237. The exemption relieved the Navy of the mitigation measures that the Navy deemed too burdensome. "This leads the Court to the conclusion that its jurisdiction over this case has been illusory: the Court never really had the

power to 'conclusively resolve the case,' as the judicial power requires." Id at 1237.

The Ninth Circuit, in *NRDC v. Winter*, 518 F.3d 658 (9th Cir. 2008) affirmed the District Court. In its Opinion, the Ninth Circuit, on pp. 686-687, noted that:

> The separation of powers doctrine prevents Congress from vesting review of the decisions of Article III courts in the Executive Branch. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (explaining that Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy"); *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792). Here, the Navy represented, and CEQ determined, that "emergency circumstances" existed because the district court's preliminary injunction prevented the Navy from effectively training and certifying its strike groups for deployment. In making this determination, CEQ presumably reviewed the same evidence that the Navy presented to the district court (without, as noted above, the benefit of NRDC's evidence) and concluded, *despite the district court's explicit factual finding to the contrary*, that the imposed mitigation measures would compromise the Navy's ability to train and certify its forces. **We find substantial merit in NRDC's argument that even if the district court's factual findings with respect to the effect of its mitigation measures were erroneous, it was the job of the appellate court–and not the Executive Branch–to so conclude.** [5]

In this case, Judge Cardoza conducted a four week long trial on whether to issue a permanent injunction. One of the central issues was whether or not Superferry operations would cause harm to the environment during the time it took to prepare an EA and whether the public interest supported an injunction. The Circuit Court entered the permanent injunction finding and concluding that "the balance of irreparable damage favors the issuance of a permanent injunction in this case as Sierra Club has demonstrated the possibility of irreparable injury with respect to the environmental impacts of Hawaii Superferry operations on natural resources, protected species, increased introduction of invasive species and causing social and cultural impacts" and

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[5] Both the District Court and the Ninth Circuit decided *NRDC v. Winter* on non-constitutional grounds, as they were required to do, if it was possible. The government had filed a petition for certiorari at the time of the filing of this Opening Brief.

that "that the public interest in implementing the environmental review process supports the granting of this permanent injunction in this case." Sierra Club had already received the benefit of eighty (80) days of injunctive relief.

Act 2 simply "reweighs the equities" and "comes to a different conclusion" than the Hawaii Supreme Court in its Order, Opinion and Judgment and the Circuit Court's "Order Granting Plaintiff's Motion to Enforce Judgment by Prohibiting Implementation of Hawaii Superferry Project, for Temporary, Preliminary and/or Permanent Injunction" entered on October 9, 2007 and the "Findings of Fact, Conclusions of Law" in support of this Order entered on November 9, 2007. Act 2 begins in Section I.(a) (ROA 2587) by noting the Hawaii supreme court decision, its requirement of an EA taking into account the secondary impacts of the HSP, the construction and completion of the harbor improvements, the subsequent operation of a large capacity vessel for a limited period of time and that these operations were approved by the lower court approximately two years earlier. The Legislature then finds that, under these circumstances, Superferry operations are clearly in the public interest and "should commence as soon as possible" while harbor improvements are "allowed to be used" and "while any environmental assessments ... are conducted."

Act 2 amounts to a legislative and executive revision of judicial decisions and thus violates the principle that the legislative branch cannot vest review of the decisions of Article III courts in officials of the Legislative and Executive Branches. The Legislature and the Governor found that the EA requirement and the non-implementation requirements mandated by the Judgment of the Hawaii Supreme Court and the terms of the permanent injunction issued by the Circuit Court were all "erroneous." As in *NRDC v. Winter, supra,* the Governor's Proclamation and Act 2 are plainly taking aim at specific findings and conclusions of the Hawaii Supreme Court and the Circuit Court, treating them as erroneous, or reopening them and reversing them. Even if these findings and conclusions were erroneous, it was the job of the appellate court–and not the Executive or Legislative Branch–to so conclude. An Article III violation has occurred and Act 2 must be declared unconstitutional in full.

3. The Governor's Proclamation Convening the Special Session is Illegal and Void

HRS § 601-5, entitled "Independence of judiciary," provides as follows:

> The judiciary branch and the several judges and other judicial officers thereof shall be independent of both the executive and legislative departments. **The governor shall have no power to interfere with, alter, or overrule any order, writ, judgment, or decision of any court, judge, or other judicial officer**, except in the exercise of the power to grant reprieves and pardons in pursuance of law. (Emphasis added)

The Hawaii Supreme Court and the Second Circuit Court issued judgments and orders permanently enjoining Hawaii Superferry from operating at the Kahului Harbor, from using state lands at Kahului Harbor and from using improvements constructed at the Kahului Harbor for Hawaii Superferry until the environmental process required by Chapter 343 is lawfully completed.

Instead of respecting the judicial branch of the government, immediate efforts were made by the Governor to overrule the judiciary. Either the Governor or the Legislature could convene a special session. Only the Governor took action to convene the special session. The Proclamation of the Governor was a necessary condition precedent to the special session.

The Governor executed a Proclamation convening the Legislature in a Special Session for the precise purpose of interfering with, altering, or overruling an order, writ, judgment, or decision of a court, judge, or other judicial officer by allowing Superferry to operate without complying with Chapter 343, as required by the Judgment of the Hawaii Supreme Court and the Order of the Second Circuit Court. The Governor, in executing the Proclamation, plainly violates HRS § 601-5. The Proclamation is illegal and void. Without a valid Proclamation the Legislature had no authority to convene, to take any action or to enact Act 2.

E. The Legislature Directs the Retroactive Reopening of Judgments or Orders Causing, Also, a Denial of the Due Process of Law

1. Reopening Final Judgment

Unconstitutional interference with the judiciary occurs when the

legislature retroactively causes a court to reopen a final judgment. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Act 2 overrules judicial judgments, decisions and orders in the following fashions: (a) by overruling or causing the reopening of the Final Judgment of the Hawaii Supreme Court requiring the preparation of an EA, itself required as of February 23, 2005; (b) by overruling or causing the reopening of the Final Judgment of the Hawaii Supreme Court bringing to legal life the "non-implementation" provisions of Chapter 343; (c) and by overruling or causing the reopening of the Final Judgment of the Hawaii Supreme Court effectively causing the voidance of the Harbors Operating Agreement entered into on September 7, 2005, by application of *Kepoo v. Kane,* 106 Haw. 270, 103 P.3d 939 (2005). The trial court disposed of this claim summarily, and erroneously, stating that no final judgment had been entered in this case. Tr. No. 7961, 11/14/07; p. 81, 1. 22-25; p. 82, l. 1-4. The trial court ignored the entry of this final judgment and, as importantly, the legal effect of the entry of this final judgment, as described above, in vesting environmental rights in Sierra Club.

While the rights conferred by NEPA and HEPA have sometimes been described as procedural, there can be no mistake that they are, as a matter of fact and law, also substantive rights as they are the primary mechanisms for guaranteeing Sierra Club's constitutional right to a "clean and healthful environment" and to the actual conservation and protection of Hawaii's natural beauty and natural resources. These public trust resources are held by the State, the Legislature and the Governor, as trustees for the people of the State of Hawaii. In the case at issue here, there has been a denial of both procedural rights and substantive constitutional rights. *Silva v. City and County of Honolulu,* 115 Haw. 1, 165 P.3d 247 (2007).

2. Act 2 is an Unconstitutional Denial of Due Process

Retroactive legislation, such as Act 2, is an unconstitutional violation of the Due Process Clause, Article I, Section 5, of the Hawaii Constitution, where the legislation involves substantive rights that have vested under the existing law. *Dash v. Wayne,* 700 F.Supp. 1056 (D.Haw. 1988).

In determining whether Act 2 may be applied retroactively, this court must determine: (1) whether there is clear evidence of legislative intent to apply the law retroactively; and (2) whether retroactive application is constitutionally permissible, in that the new law does not create new obligations, impose new penalties, or impair vested rights. *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla.1999). The first prong is not decisive.

The second prong focuses on the destruction of existing rights. The law has long disfavored retroactive legislation that destroys existing vested rights. Justice Stevens described the various provisions of the Constitution that demonstrate this "anti-retroactivity" principle, including the Due Process Clause, and stated in *Landgraf v. USI Film Products,* 511 U.S. 244 (1994) at 266:

> These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Justice Kennedy later wrote in *Eastern Enterprises v. Apfel.* 524 U.S. 498 at 549, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998):

> Groups targeted by retroactive laws, were they to be denied all [due process] protection, would have a justified fear that a government once formed to protect expectations now can destroy them.

The concerns of Justices Stevens and Kennedy may be aptly applied to the Superferry case.

Here, the trial court voided the Harbors Operating Agreement entered into on September 7, 2005 between HDOT and Superferry, granting Superferry the right to use state lands and to construct improvements upon these state lands at Kahului Harbor. By Section 1.(e) of Act 2, the Legislature provides that "the operating agreements, entered into between the State and a large capacity ferry vessel company may be enforced, executed, or re-executed." This provision of Act 2 reaches back retroactively two (2) years.

Most importantly, Act 2 is a clear deprivation of Sierra Club's rights to an environmental review process vested by the Hawaii Supreme Court. The Hawaii Court decision provided Sierra Club with all of the rights set forth in Chapter 343. The Hawaii Supreme Court's Final Judgment vested these rights in Sierra Club. The subject legislation cannot retroactively create a pseudo-process, stripping Sierra Club of rights that had already vested in them, without violating the Due Process Clause of the Hawaii Constitution. [6]

VIII. CONCLUSION/ RELIEF REQUESTED

Based upon the foregoing, Sierra Club respectfully requests that this Court grant the following relief:

A. Reverse, as a matter of law, the ruling of the trial court by declaring that Act 2 and the Governor's Proclamation do not pass constitutional muster, are unconstitutional, are applicable to the state lands and improvements constructed for the Hawaii Superferry project at Kahului Harbor and the Hawaii Superferry project by force of the Order, Opinion and Final Judgment on Appeal entered in *The Sierra Club v. The Department of Transportation of the State of Hawaii,* 115 Hawai'i 299, 167 P.3d 292 (2007).

B. Reinstate the order requiring the preparation of an EA, pursuant to Chapter 343, by force of the Order, Opinion and Final Judgment on Appeal entered in *The Sierra Club v. The Department of Transportation of the State of Hawaii,* 115 Hawai'i 299, 167 P.3d 292 (2007).

C. Reverse the ruling of the trial court vacating the Order voiding the Harbors Operating Agreement entered into on September 7, 2005 between HDOT and Superferry, and void that Agreement pending real Chapter 343

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[6] Due to space or page limitations, Sierra Club is unable to include in this Opening Brief, in detail, but incorporate their arguments below and do not waive their arguments that (1) Act 2 violates other cited provisions of the Hawaii Constitution, the public trust duties of the Executive and the Legislative Branches as well as the duty to protect Native Hawaiian traditional and customary rights; (2) Act 2 is an unlawful delegation of legislative authority both to the Governor and to Superferry based upon *Ka Paakai O Ka'Aina v. Land Use Comm'n, State of Hawai'i,* 94 Hawai'i 31, 7 P.3d 1068 (2000) and *Hui Alaloa v. Planning Commission of the County of Maui,* 68 Hawai'i 135, 136, 795 P.2d 1042, 1044 (1985); and (3) the permanent injunction protecting against possible irreparable harm caused by the operation of the Hawaii Superferry should not, in equity, have been dissolved, in any event or without an evidentiary hearing.

environmental review. *Kepoo v. Kane,* 106 Haw. 270, 103 P.3d 939 (2005).

D. Reverse the ruling of the trial court dissolving the permanent injunction and enter an order reinstating the permanent injunction because (a) the permanent injunction is still necessary to prevent possible irreparable harm caused by Hawaii Superferry operations, based upon the findings of the trial court; and (b) the non-implementation requirements of Chapter 343.

E. Reverse the Final Judgment to the extent that it dismisses Sierra Club's claims as moot and order the entry of a Final Judgment recognizing that Sierra Club has prevailed on the core claims presented in their Complaint.

F. Affirm that Sierra Club is the prevailing party in this case, whether or not Sierra Club secured the relief requested in paragraphs A. through E. above.

G. Affirm the Order Granting Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs, in general, provided that the Order is reversed to the extent that it did not award fees at the enhanced amount of $300.00 per hour and to the extent that it did not award fees for that period of litigation in the Circuit Court prior to the initial Supreme Court appeal.

H. Award Sierra Club their reasonable attorney's fees and costs on appeal, pursuant to Rule 39 HRAP.

DATED: Wailuku, Maui, Hawai'i 6.6.08

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