TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA ʻOIHANA O KA LOIO KUHINA
THIRTY-THIRD LEGISLATURE, 2025

ON THE FOLLOWING MEASURE:
H.B. NO. 996, RELATING TO ABOLITION OF JOINT AND SEVERAL LIABILITY FOR GOVERNMENT ENTITIES IN HIGHWAY-RELATED CIVIL ACTIONS.

BEFORE THE:
HOUSE COMMITTEE ON TRANSPORTATION

DATE: Tuesday, February 4, 2025 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 430

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Amanda J. Weston, Deputy Attorney General

Chair Kila and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

This bill abolishes the government's joint and several liability in highway maintenance and design claims and limits the government's liability to its proportionate share of fault in those claims, as the Legislature originally intended when it first enacted section 663-10.5, Hawaii Revised Statutes (HRS), in 1994. The amendments to section 663-10.5, HRS, to require the government's joint and several liability only in highway maintenance and design claims were made in 2006. The deletion of the 2006 amendments by this bill will return the tort claims against the State for highway cases back to parity with all other tort claims against the State.

Since 2006, when claims arising out of an accident on a government roadway are brought against multiple defendants, if the person primarily at fault cannot pay the person's share of court-ordered damages, then the government defendant is required to pay the balance of the damages attributed to the person primarily at fault. For example, if the primary tortfeasor is found to be ninety-nine percent at fault and the State is found to be one percent at fault, the State must pay one hundred percent of the damages if the primary tortfeasor does not pay. As a result of this joint and several liability, the State and counties not only expend disproportionately higher amounts of public money to pay damages for which they were not at fault, amounting to judgments in the millions

of dollars, but they must also take into consideration the risk and threat of joint and several liability when they settle catastrophic tort claims.

In cases where highway maintenance and design are at issue, section 663-10.9(4), HRS, allows courts to find persons (including governmental entities) jointly and severally liable with the primary tortfeasor when there is "reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim is based." This "one prior accident" wording is contrary to, incompatible with, and will continue to undermine the State's reliance on federal and nationally accepted standards and guidelines in the field and practice of transportation and traffic engineering.

If a judge finds that there had been "one prior accident" that occurred under similar circumstances, the wording permits that judge to use non-engineering and non-scientific judgment, contrary to that of the accepted transportation and traffic engineering standards, guidelines, options, and judgment based on decades of continuing studies and tests, as a substitute for the State's exercise of engineering judgment.

However, in the field and practice of transportation and traffic engineering, "one prior accident" is rarely the standard or guideline that determines whether corrective or other remedial measures were justified or otherwise warranted. The standards and guidelines and the transportation and traffic engineering professionals who rely on them focus on identifying correctable patterns rather than a single isolated occurrence or a few disparate and unrelated occurrences.

The transportation and traffic engineering standards and guidelines illustrate focus on *patterns* instead of "one prior accident." The Manual on Uniform Traffic Control Devices (MUTCD) has been published and continually updated by the Federal Highway Administration (FHWA) under title 23 Code of Federal Regulations (CFR), part 655, subpart F. All the states, including Hawaii, follow, or otherwise have their own manual that is in substantial conformance with, the MUTCD. The MUTCD defines the standards and guidelines used by transportation and traffic engineers nationwide

regarding the installation and maintenance of traffic control devices on streets and highways.

In determining whether the installation of a traffic control signal is justified or warranted, engineers look at "crash experience," referred to by non-engineers as "accident history." MUTCD Section 4C.08, Crash Experience, provides that the need for a traffic control signal shall be considered if an engineering study finds that all of the following criteria are met: (A) First, adequate trial of alternatives with satisfactory observance and enforcement has failed to reduce the crash frequency; and (B) Five or more reported crashes, of the type susceptible to correction by a traffic control signal, have occurred within a consecutive twelve-month period, each crash involving personal injury or property damage apparently exceeding the applicable threshold requirements for a reportable crash; and (C) Threshold minimum vehicular volumes for each of any 8 hours of an average day. The criteria focuses on patterns of crashes. The MUTCD makes clear that the criteria must be met to avoid the premature installation of remediation that may result in unintended consequences such as an increase in rear-end collisions or other deterioration of the overall safety at the intersection when an unwarranted traffic control signal is installed. "One prior accident" is not used to trigger or justify remediation.

The Highway Safety Manual (HSM) is published by the American Association of State Highway and Transportation Officials (AASHTO). Hawaii, along with most other states, consider the AASHTO publications authoritative for design and operations purposes.

The HSM discusses the use of comparing predicted, expected, and observed crash frequencies for particular sites in determining the safety performance of the sites. Roadway crashes are predicted. Crashes are expected. Crashes are observed. Crash frequencies are analyzed by the roadway type, type and severity of the crash, and the average annual daily traffic volume for the roadway segment being analyzed. The observed crash frequency of particular sites is compared to the predicted or expected crash frequency for similar sites using U.S. data. "One prior accident" or even a few

disparate and unrelated prior accidents are not determinative of whether the sites studied are performing as predicted or expected.

The Hawaii Department of Transportation (HDOT) has had for decades a Highway Safety Improvement Program (HSIP). The primary objection of HDOT's HSIP is to incorporate highway safety to reduce the number and severity of fatalities and injuries. The HSIP collects major traffic crash data, analyzes the data, proposes safety improvement projects and evaluates the benefits from those projects to better allocate funds to meet its objectives. Pursuant to title 23 U.S.C. section 148(h) and title 23 CFR section 924.15, just as all the other states do, Hawaii generates and submits an annual HSIP report.

The Hawaii Supreme Court case of Taylor-Rice v. State, 91 Hawai‘i 60, 979 P.2d 1086 (1999), illustrates how joint and several liability and the "one prior accident" provision have adversely impacted the State in judgments. In that case, a vehicle struck and ramped off a guardrail along Kuhio Highway on Kaua‘i, then struck a utility pole, resulting in two fatalities. The vehicle was traveling at eighty miles per hour, and the driver's blood alcohol content level was more than twice the legal limit. The judge assigned sixty-five percent fault to the driver, fifteen percent to the passengers, and twenty percent to the State. The Hawaii Supreme Court held that the State was jointly and severally liable under section 663-10.9(4), HRS, because the State had "reasonable prior notice of a prior occurrence under similar circumstances." In fact, only a single accident had occurred in the vicinity several years earlier, and it had not involved the subject guardrail. In addition to paying its own proportionate share, the State was required to pay the balance of the damages left unpaid by the driver.

The 2006 amendments to section 663-10.5, HRS, ensure that the risk and threat of joint and several liability will remain a significant factor in the State's decision-making regarding whether and for how much to settle cases. For example, as recent as in the 2023 regular session, Act 39, Session Laws of Hawaii 2023, listed a settlement in James Braddock v. Misty Mitchell, Civil No. 19-1-0994-06, First Circuit Court, which resulted in a $26 million settlement with plaintiffs, $17 million of which was paid by HDOT and $9 million of which was paid by HDOT's excess insurers, and a $500,000

settlement in Satya Simmons v. State of Hawaii, Civil No. 2CCV-17-000224, Second Circuit Court. In both cases the risk and threat of joint and several liability was a factor in the decision to settle those cases. After the Braddock settlement, in other large exposure cases that were still pending, the State was left with no excess insurance coverage, which had been exhausted in that settlement.

The State should not be the insurer for other tortfeasors, and public money should not be used to cover their fault. Unfortunately, section 663-10.9(4) permits the courts to make the State the insurer for other tortfeasors.

We therefore respectfully request passage of this bill.

TESTIMONY OF EVAN OUE ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION OF HB 996

Date: Tuesday February 4, 2025

Time: 10:00 a.m.

Aloha Chair Kila, Vice Chair Grandinetti, Members of the Committee on Transportation:

My name is Evan Oue and thank you for allowing me to submit testimony on behalf of the Hawaii Association for Justice (HAJ) in **STRONG OPPOSITION** to HB 996 - RELATING TO ABOLITION OF JOINT AND SEVERAL LIABILITY FOR GOVERNMENT ENTITIES IN HIGHWAY-RELATED CIVIL ACTIONS.

Under the current law, government is only subject to joint and several liability for highway design and maintenance if it is 25% to 99% responsible or if it had reasonable notice of a hazardous condition because there was a similar accident. The government has no joint and several liability where it is less than 25% at fault and did not know of a hazardous condition based on an earlier similar accident.

HB 996 seeks to reduce government's responsibility to safely design and maintain our highways. This is bad public policy because providing safe highways is a core government function that the government has exclusive control over, and which touches most of our families on a daily basis. The public welfare depends on government to employ reasonable diligence in the design and maintenance of public highways and is at the complete mercy of the government which retains sole control over the design and maintenance of our highways.

Citizens are unable to protect themselves against defective highway designs and inadequate maintenance in what likely presents the greatest danger routinely encountered on a daily basis by our citizens. It is for this reason that this legislature originally retained joint and

several liability for highway design and maintenance when it first abolished governmental joint and several liability in other situations; and why the legislature has continued to reject attempts to reduce government's responsibility to safely design and maintain our highways to the present.

The Legislature recognized its unique responsibility as in 2006, in which HB 237 affirmatively solidified the Legislature's intent to conform the application of HRS 663-10.5 with the Hawaii Supreme Court's ruling in *Kienker v. Bauer* which expressed that the abolition of joint and several liability did not apply to highway design and maintenance. This decision was based on the legislative intent to retain governmental joint and several liability for highway claims expressed in the legislative history of Act 213, Session Laws of 1994. Specifically, the Legislature solidified this intent in Conference Committee Report No. 86-06 states:

> [Y]our Committee on Conference acknowledges **government's unique role in highway maintenance and design** and the **strong public policy of providing safe roads for Hawaii's families,** as expressed in the past legislative history on this subject . . . . this bill abolishes governmental joint and several liability, **except for all damages in highway cases where government has prior notice or negligence of 25% or more, consistent with the Kienker decision.**

Moreover, in 2012, the Legislature again rejected the State's request in SB 2075 to avoid responsibility and retained joint and several liability for highway design and maintenance where governmental negligence was 25% or more and where government had reasonable prior notice of a hazardous condition.

This long standing strong public policy to provide safe roads for our families based on government's unique role in designing and maintaining our highways is no less valid today than it has been in the past. Indeed, this policy is stronger today as we continue to have more cars and more drivers on our roads.

Thank you very much for allowing me to testify in **OPPOSITION** of this measure.

Please feel free to contact me should you have any questions or desire additional information.