

NO. 29035

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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; HAWAII SUPERFERRY, INC.,
 Defendants-Appellees/Cross-Appellants/Appellants/Cross-Appellees.

APPEAL AND CROSS-APPEAL FROM THE SECOND CIRCUIT COURT (CIV. NO. 05-1-0114)

ORDER OF AMENDMENT

(By: Moon, C.J., Nakayama, Acoba, Duffy, JJ., and Circuit Judge Town, in place of Levinson, J., recused)

The Opinion of the court, filed on March 16, 2009 in the above-entitled appeal, is hereby amended as follows:

1. On page 68, the paragraph constituting Part IV.A.2.d., beginning as "Because we find that Act 2 created an illusory class . . . ," shall be replaced, so that as corrected the text reads as follows:

In summary, Article XI, section 5 of the Hawai'i Constitution, requires that "[t]he legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general law." Haw. Const. art. XI, § 5 (emphasis added). We now adopt the following test for determining if a law is general for the purpose of Article XI, section 5 of the Hawai'i Constitution.

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STATE OF HAWAII

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As previously stated by this court, a general law must apply uniformly. Bulgo, 50 Haw. at 58, 430 P.2d at 326. However, a law that applies uniformly to a particular class may also be a general law if: 1) the class created is genuine and not logically limited to a class of one and thus illusory, and 2) the class created is reasonable. See Canister, 110 P.3d at 383.

A class is not illusory if it could include other members in the future. Id. at 384. Further, the actual probability of other members joining the class must be considered when determining if a class is illusory. Haman v. Marsh, 467 N.W.2d at 849; Town of Surprise, 800 P.2d at 1259.

Because we find that Act 2 created an illusory class (i.e., "large capacity ferry vessel company"), we need not address the second step of this test. Canister, 110 P.3d at 383.

Accordingly, we hold that Act 2, is a special law in violation of Article XI, section 5 of the Hawai'i Constitution. The circuit court thus erred when it concluded that Act 2 was constitutional and dismissed Sierra Club's claims as moot.

2. On page 111, the second paragraph, beginning as "This constitutional limitation . . . ," and the third paragraph, beginning as "That our Constitution prohibits . . . ," shall be deleted.

3. On page 111, footnote "33" shall be inserted after the first sentence of the fourth paragraph, which begins as "Act 2 is a special law" The text of the inserted footnote shall read as follows:

Our holding is based solely on our "general law" analysis and does not in any way involve an "equal protection" analysis, which involves a different standard. As stated by the Arizona Supreme Court:

Although similar policies are involved,
constitutional prohibitions against special

legislation serve a purpose distinguishable from equal protection provisions. Equal protection is denied when the state unreasonably discriminates against a person or class. Prohibited special legislation, on the other hand, unreasonably and arbitrarily discriminates in favor of a person or class by granting them a special or exclusive immunity, privilege, or franchise.

Republic Inv. Fund I v. Town of Surprise, 800 P.2d 1251, 1256 (Ariz. 1990) (quoting Arizona Downs v. Arizona Horsemen's Found., 637 P.2d 1053, 1060 (Ariz. 1981)).

An amended opinion and the concurring and dissenting opinion are being filed concurrently with this order, incorporating the foregoing amendments. The original opinion and the original concurring and dissenting opinion filed on March 16, 2009 are vacated and the amended opinion and the concurring and dissenting opinion are substituted therefore.

IT IS HEREBY ORDERED that the Clerk of the Court is directed to provide a copy of this order and a copy of the amended opinion and the concurring and dissenting opinion to the parties and notify the publishing agencies of the changes. The Clerk of the Court is further instructed to distribute copies of this order of amendment to those who received the previously filed opinion.

DATED: Honolulu, Hawai'i, May 13, 2009.



Anna C. Nakamura



Kenneth E. Dally, Jr.

