



## *The Judiciary, State of Hawai‘i*

### **Testimony to the House Committee on Finance**

Representative Sylvia Luke, Chair  
Representative Ty J. K. Cullen, Vice Chair

Tuesday, February 27, 2018 11:00 AM – Agenda #1  
State Capitol, Conference Room 308

by  
Rodney A. Maile  
Administrative Director of the Courts

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**Bill No. and Title:** House Bill No. 2194, House Draft 1 Relating to the Judiciary; Supreme Court; Certified Question.

**Purpose:** Allows a court of inferior jurisdiction to certify to the Hawai‘i Supreme Court a question or proposition of law on which the court of inferior jurisdiction seeks instruction for the proper decision of a remanded case. Requires the Supreme Court to answer the question within an unspecified number of calendar days. (HB2194 HD1).

#### **Judiciary's Position:**

The Judiciary supports the intent of the bill, which we understand is to provide an expedited method for designated courts to seek clarification of a supreme court decision when a question arises as to the remand instructions directed to that court.

By way of background, the Judiciary notes that pursuant to Hawai‘i Revised Statutes (HRS) § 602-5(2), the supreme court already has jurisdiction:

To answer, in its discretion, any question of law, reserved by the circuit court, the land court, or the tax appeal court, or any question or proposition of law certified to it by a federal district or appellate court if the supreme court shall so provide by rule.

In accordance with HRS § 602-5(2), the supreme court adopted Rule 13 of the Hawai‘i Rules of Appellate Procedure (HRAP) to provide for a process to handle certified questions from the federal courts. In addition, the supreme court adopted HRAP Rule 15<sup>1</sup> for reserved questions

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<sup>1</sup> Rule 15. RESERVED QUESTIONS.



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from the circuit court, land court, and tax appeal court. If this measure is passed, the supreme court will adopt corresponding court rules.

Inasmuch as HRS § 602-5(2) provides that certified questions to the supreme court are from the federal courts and reserved questions to the supreme court are from Hawai'i circuit and other specified courts, the Judiciary suggests that the questions contemplated by HB 2194, HD1 be designated as "reserved questions" instead of certified questions. Accordingly, the Judiciary suggests that "certify" or "certified" be replaced with "reserve" or "reserved" as applicable.

Because circuit, land, and tax appeal courts already may reserve questions of law to the supreme court under current law, it appears this proposal is intended to provide these courts with a process to seek clarification of instructions given in supreme court decisions upon remand. The Judiciary, therefore, suggests the word "clarify" or "clarification" be substituted as appropriate.

The Judiciary suggests that the bill provide a 60-day response time to allow the supreme court time to request briefing by the parties, when necessary. Finally, any reserved question seeking clarification of the remand instructions should be submitted to the court within 90 days of the judgment on appeal.

If these suggestions are adopted, the proposed language would provide as follows:

§602- Reserved Question Seeking Clarification of Instructions on Remand; Procedure (a) A circuit court, land court, or tax appeal court may reserve for consideration by the supreme court a question on which the court seeks clarification of remand instructions in a case decided by the supreme court. The reserved question shall contain a

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**(a) From what court.** A circuit court, the land court, the tax appeal court and any other court empowered by statute, may reserve for the consideration of the supreme court a question of law arising in any proceedings before it. Questions may be reserved on motion of any party or on the court's own motion. Reserved questions shall be electronically filed by the clerk of the court.

**(b) Record.** The court reserving the question shall electronically transmit images of as much of the record as may be necessary to a full understanding of the questions reserved to the appellate clerk.

**(c) Disposition.** The supreme court may, in its discretion, return any reserved question for decision in the first instance by the court reserving it.



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statement as to the nature of the case and the facts on which the question arises. Only questions regarding remand instructions in decisions of the supreme court may be reserved for clarification under this section, and such questions shall be stated with precision.

(b) The supreme court shall answer the reserved question within 60 calendar days of receipt. Any question seeking clarification of remand instructions must be reserved within 90 days of the judgment on appeal.

The Judiciary believes that with these suggested changes, this measure, if passed, will be more consistent with the processes already in place for certified and reserved questions.

Thank you for the opportunity to comment on this measure.

**Justin F. Kollar**  
Prosecuting Attorney

**Jennifer S. Winn**  
First Deputy



**Rebecca A. Vogt Like**  
Second Deputy

**Diana Gausepohl-White**  
Victim/Witness Program Director

## OFFICE OF THE PROSECUTING ATTORNEY

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**February 26, 2018**

#### **Testimony for:**

**HB 2191:** Relating to Appellate Jurisdiction; and

**HB 2194:** Relating to the Judiciary; Supreme Court; Certified Question

The County of Kauai, Office of the Prosecuting Attorney, takes the following positions concerning these two bills:

#### **House Bill 2191:**

The Office of the Prosecuting Attorney, County of Kauai, opposes this measure. HB 2191 contains no policy justification for the proposed structural change in appellate procedure. In contrast, substantial planning and policy consideration went into the 2006 amendments (Act 94), whereby the current system was designed: cases on appeal are initially heard by the Intermediate Court of Appeals as a default court.

#### **House Bill 2194:**

The Office of the Prosecuting Attorney, County of Kauai, echoes the testimony of the State of Hawaii Judiciary on this bill. Chiefly, Kauai OPA is concerned that the 15-day proposed deadline, for the Hawaii Supreme Court to provide a response to the reserved question, is an unrealistic time frame. OPA Kauai supports the Judiciary's proposed timelines: that the bill allow the Hawaii Supreme Court 60 days to answer the reserved question; and that the reserved question be submitted to the court within 90 days of the filing of the judgment on appeal.

Thank you for this opportunity to comment on these bills.

Tracy Murakami,  
Deputy Prosecuting Attorney  
County of Kauai, State of Hawaii

# Hawaii State Bar Association Appellate Section

February 26, 2018

Chair Sylvia Luke  
Vice Chair Ty J.K. Cullen  
Committee on Finance  
House of Representatives, State of Hawaii

Re: **House Bill 2191 Relating to Appellate Jurisdiction,  
House Bill 2194 Relating to the Judiciary  
Testifying in STRONG OPPOSITION**

Dear Chair Luke, Vice Chair Cullen, and members of the Finance Committee:

On behalf of our colleagues in the Hawaii State Bar Association's Appellate Section,<sup>1</sup> we write in **STRONG OPPOSITION** to both **House Bill 2191** (relating to appellate jurisdiction) and **House Bill 2194** (relating to the Judiciary).

## **I. HB 2191—Direct Appeal to the Supreme Court; Advisory Opinions**

### **A. Direct Appeal to Supreme Court**

By reversing the last twelve years of progress and returning the appellate process to the way it was prior to the well-received and useful changes adopted by the Legislature in 2006, House Bill 2191 would make our appellate courts much less efficient and timely by making the Supreme Court of Hawaii the first stop in Hawaii's appellate process, not the last.

HB 2191 would amend the "appellate jurisdiction of the supreme court and the intermediate appellate court to conditions as they existed prior to July 1, 2006, [and require] that most appeals be filed with the supreme court instead of the intermediate appellate court." As lawyers who practice in the appellate courts of Hawaii, we believe HB 2191 represents a step backwards that will not be helpful to the goal of prompt and fair administration of justice, and in fact will only make the appellate process more confusing and costly.

The measure would deprive the Intermediate Court of Appeals (ICA) of Hawaii of its primary jurisdiction to consider appeals from District and Circuit courts and certain agencies in the first instance, and shift that burden to the Hawaii Supreme Court. Our experience informs us that the current system—in which most cases are first appealed to the ICA as of right, and then considered by the Supreme Court on a discretionary basis by way of an application for certiorari—is the most efficient and least costly process to consider and dispose of appeals.

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<sup>1</sup> The views and opinions expressed in this testimony are those of the HSBA's Section on Appellate Law. The HSBA Board has not reviewed or approved of the substance of the testimony submitted.

It is also the process that most likely results in the orderly development of the common law by permitting legal arguments to be analyzed and developed by the judges of the ICA and the parties' lawyers prior to the Supreme Court being presented with the case. The existing process efficiently winnows cases and arguments, and while not perfect, is certainly better and less obtuse than the pre-2006 process in which appeals would go directly to the Supreme Court from District and Circuit courts. Under the old system, the Supreme Court was required to undertake the inefficient, time-consuming process of reviewing each appeal to determine whether the Supreme Court would retain that appeal or assign it to the ICA for decision. Moreover, in cases decided by the ICA upon assignment, the losing party could still seek further review by the Supreme Court, giving those cases the opportunity for an extra level of appeal versus those retained by the Supreme Court in the first instance. Under the current system, which mirrors those of almost every other state as well as the federal court system, all appeals are subject to review by the ICA, and those warranting further discretionary review will still be heard by the Supreme Court. Moreover, the current system also already permits parties to apply to transfer cases pending in the ICA to the Supreme Court, so that the Supreme Court may decide those cases without waiting for a decision by the ICA.

In our view, the system as it is now structured works well with the ICA disposing of most of the cases on appeal, with the Supreme Court considering on secondary appellate review those cases which, in the court's discretion, are of statewide interest or public importance, or where a decision is needed to correct outdated or conflicting case law. Prior to the 2006 amendments, Hawaii's appellate system was among the few in the nation where jurisdictions with an intermediate court of appeals was not the first stop in the appellate process, and this process originated in a time when the caseload of the appellate courts was significantly lower than it is today.

Statistically, most appeals to the ICA involve family law and criminal matters. If these cases were required to be considered by the Supreme Court in the first instance, this would simply shift any delays from one court to another. If what is motivating HB 2191 is a concern about appeals taking a long time to be resolved, returning to the pre-2006 process will only make any delay worse by shifting the burden from the ICA which is able to sit in three-judge panels in most appeals, to the Supreme Court, which sits as an entire court (en banc) in practically every case.

As a whole, it appears that the primary goal of HB 2191 is to resurrect the outdated and inefficient process that existed prior to 2006, and we do not recommend that this committee pursue such a course of action. Our experience is that the appellate process is inherently more speedy under the current system.

## **B. Advisory Opinions**

Section 51 of HB 2191 would also amend Haw. Rev. Stat. § 602-5 to grant the Supreme Court jurisdiction to issue advisory opinions. We oppose this amendment.

Currently, Hawaii's courts—including the Supreme Court of Hawaii—do not have the jurisdiction to consider a legal issue outside of the context of an actual controversy between the parties, and seek to avoid doing so, even though our courts are not bound by the Article III justiciability requirements which govern federal courts. *See Corboy v. Louie*, 128 Haw. 89, 103-

04, 283 P.3d 695, 709-10 (2011). Although not subject to this formal limitation, the jurisdiction of Hawaii courts is generally limited to “actual controversies.” *Wong v. Board of Regents*, 62 Haw. 391, 394-95; 616 P.2d 201, 204 (1980); *see also State v. Hoang*, 93 Haw. 333, 336, 3 P.3d 499, 502 (2000). The jurisdiction of the courts is limited by whether the plaintiff has alleged “injury in fact” by the defendant. *Hanabusa v. Lingle*, 119 Haw. 341, 347, 198 P.3d 604, 610 (2008).

We believe this is an appropriate limitation on the power of courts, and the ability to institute a case in Hawaii’s courts—including the Supreme Court—should continue to be a prudential doctrine of judicial self-restraint grounded in separation of powers, designed to insulate the courts from becoming entangled in politics. *See Kapuwai v. City & Cnty. of Honolulu*, 121 Haw. 33, 41, 211 P.3d 750, 758 (2009). The limited circumstances in which the courts are granted jurisdiction to consider legal issues without a present “case and controversy” should not be expanded. *See, e.g., Haw. Rev. Stat. § 37D-10.*

We strongly urge your Committee and the House of Representatives to decline to adopt HB 2191.

## **II. HB 2194—Certified Questions to the Supreme Court from the District, Circuit, and Intermediate Appellate Courts**

Similarly, HB 2194 will not help resolve cases more quickly or efficiently. Instead, it will make the process more confusing and time-consuming. That measure provides “that a court of inferior jurisdiction may certify to the Hawaii Supreme Court a question or proposition of law on which the court of inferior jurisdiction seeks instruction for the proper decision of a remanded case,” and “[r]equires the Supreme Court to answer the question within 15 calendar days.”

We believe that Hawaii’s District, Circuit, and ICA judges are fully capable of determining what the applicable law is, and do not need instruction about how to process a remanded case, beyond the current process which already allows for interlocutory review in appropriate cases. Currently, the trial courts have the power to allow the parties to seek appellate review prior to a final judgment, either through the interlocutory appeal process, or by certifying that an issue has been resolved for or against a party and there is no reason to delay entry of final judgment. Moreover, the parties to an appeal in the ICA may seek transfer of the case to the Supreme Court if they believe that the law is not certain and that immediate resolution by the Supreme Court is necessary. Thus, the current system already gives lower courts and litigants the ability to ask for the Supreme Court’s immediate instruction and guidance, and we believe there is no need for the amendment which HB 2194 would implement.

We strongly urge your Committee and the House of Representatives to decline to adopt HB 2194.

Thank you for the opportunity to provide testimony on House Bills 2191 and 2194.

Very truly yours,

Christopher J.I. Leong  
Chair, Appellate Section

Ewan C. Rayner  
Vice-Chair, Appellate Section

Robert T. Nakatsuji  
Treasurer, Appellate Section

Benjamin E. Lowenthal  
Secretary, Appellate Section

Rebecca A. Copeland  
Appellate Section Liaison to the Hawaii Appellate Pro Bono Project

Robert H. Thomas  
Advisor to the Appellate Section Board



**HB-2194-HD-1**

Submitted on: 2/26/2018 7:49:51 AM

Testimony for FIN on 2/27/2018 11:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
De MONT R. D. CONNER	Ho'omanapono Political Action Committee (HPAC)	Oppose	Yes

Comments:

We STRONGLY OPPOSE this bill, as it would greatly diminish the PEOPLE's RIGHT TO DUE PROCESS in a fair & formal process in our so-called "inferior courts". It is at the District & Circuit Court levels where the PEOPLE have the opportunity to contest & defend ourselves from the abuses of government, the affluent & big business. When, a case is remanded, there should be no need, if a judge is truly qualified to even sit on the bench, to have to request the Superior Court to explain what it meant in their ruling. This says that regardless of rulings by our appellate courts, the appellate courts are incapable of issuing rulings in the "plain language" that it has repeatedly ruled in past cases, that our laws are written in. This proposed law would produce an absurd result between Courts of Inferiority & Superiority. We ask this committee to defer or hold this bill. Mahalo.

**HB-2194-HD-1**

Submitted on: 2/24/2018 12:20:01 PM

Testimony for FIN on 2/27/2018 11:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
lynne matusow	Individual	Oppose	No

Comments:

**LATE**

**HB-2194-HD-1**

Submitted on: 2/26/2018 9:44:44 PM  
Testimony for FIN on 2/27/2018 11:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Rachel L. Kailianu	Ho`omana Pono, LLC	Oppose	Yes

Comments:

In STRONG OPPOSITION!!!



February 27, 2018

Representative Sylvia Luke, Chair  
Representative Ty J.K. Cullen, Vice Chair  
House Committee on Finance

**Comments in Support of HB 2194, HD1, Relating to the Judiciary (Provides that a court of inferior jurisdiction may certify to the Hawaii Supreme Court a question or proposition of law on which the court of inferior jurisdiction seeks instruction for the proper decision of a remanded case. Requires the Supreme Court to answer the question within an unspecified number of calendar days.)**

**Tuesday, February 27, 2018, at 11:00 a.m., in Conference Room 308**

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. LURF's mission is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources, and public health and safety.

LURF appreciates the opportunity to provide comments and **support** of HB 2194, HD1.

**HB 2194, HD1.** This bill proposes to provides that a court of inferior jurisdiction may certify to the Hawaii Supreme Court a question or proposition of law on which the court of inferior jurisdiction seeks instruction for the proper decision of a remanded case; and requires the Supreme Court to answer the question within an unspecified number of calendar days.

**LURF's Position.** LURF supports the intent and purpose of this measure, as it could lead to quick clarification and resolution of issues in appellate cases remanded by the Hawaii Supreme Court to the circuit courts, and is consistent with Rule 15, of the Hawaii Rules of Appellate Procedure, which allows certain courts to reserve for consideration of the Hawaii Supreme Court a question of law arising in any proceedings before it. LURF would, however, respectfully recommend that the Legislature and the Supreme Court attempt to reach a consensus regarding whether the calendar day period for the response is reasonable.

For the reasons set forth above, LURF is **in support of HB 2194, HD1** and respectfully urges your favorable consideration of this bill.

Thank you for the opportunity to present testimony regarding this measure. Please contact David Z. Arakawa, LURF Executive Director, if there are any questions.