



*The Judiciary, State of Hawai‘i*

**Testimony to the Thirty-Second State Legislature, 2023 Regular Session**

**Senate Committee on Judiciary**

Senator Karl Rhoads, Chair

Senator Mike Gabbard, Vice Chair

Friday, March 24, 2023, 9:35 a.m.

State Capitol, Conference Room 016 & Videoconference

by

Catherine H. Remigio, Chair

Hawai‘i Supreme Court Standing Committee On the Hawai‘i Rules of Evidence

**WRITTEN TESTIMONY ONLY**

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**Bill No. and Title:** House Bill No. 1502, H.D. 1, Proposed S.D. 1, Relating to Evidence.

**Purpose:** Limits compelled disclosure of sources or unpublished information for journalists, newscasters, and persons participating in collection or dissemination of news or information of substantial public interest. Establishes exceptions. Effective 6/30/3000. (Proposed SD1)

**Judiciary's Position:** The Hawai‘i Supreme Court Standing Committee on the Rules of Evidence respectfully offers the following comments on House Bill No. 1502, H.D. 1, Proposed S.D. 1 and respectfully requests that the Legislature defer action on the measure and refer it to the Committee for an updated study and report.

1. The preamble to H.B. 1502, H.D. 1, Proposed S.D. 1 contains statements that require clarification.<sup>1</sup> In its December 2011 Report to the Legislature (2011 Report), the Committee made several recommendations regarding Act 210, Session Laws of 2008. The Committee recommended that Act 210 be retained under HRS Chapter 621, and it also suggested that the Legislature consider specific amendments to Act 210. As directed by the Legislature, the 2011 Report included relevant research and legal memorandum, to include other state’s journalists’ shield laws in existence at the time. H.B. 1502, H.D. 1, Proposed S.D. 1 and Act 210 of Session

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<sup>1</sup> The statements appear on page 2 of H.B. 1502, H.D. 1, Proposed S.D. 1, lines 1-8.

Laws 2008 are virtually identical.<sup>2</sup> Yet H.B. 1502, HD1, Proposed SD1 contains none of the suggested amendments provided in the 2011 Report to the Legislature. What follows below is a more detailed clarification of the Committee’s position on H.B. 1502, HD1, Proposed SD1/Act 210.

2. It has been 15 years since the passage of Act 210, and 12 years since the Committee’s 2011 Report to the Legislature. More time is needed to update the research compiled in 2011 to determine whether other states are now using the same or similar provisions, how H.B. 1502, H.D. 1, Proposed S.D. 1 compares to the law of other states, and whether the standards expressed in H.B. 1502, H.D. 1, Proposed S.D. 1 have counterparts in current federal law, Hawai‘i law, or in the law of other states.

### **2008-2011: Standing Committee on Rules of Evidence – Comments on Act 210**

#### **Act 210**

Act 210 started as House Bill No. 2557. H.B. 2557 was introduced on January 18, 2008 and proposed a new section to HRS Chapter 621 entitled, “Limitation on compellable testimony from journalists and newscasters; exception.”

During the 2008 Legislative Session, the Standing Committee on Rules of Evidence submitted written testimony on H.B. 2557 to 1) the House Committee on Judiciary, 2) the Senate Committee on Judiciary and Labor, and 3) the Joint Conference Committee. The Committee’s written testimony consistently provided no position or comment on the measure, but instead requested that H.B. 2557 be deferred and referred to the Standing Committee on Rules of Evidence “for interim study and a report to the 2009 Legislature.”

H.B. 2557 was not referred to the Standing Committee on Rules of Evidence in 2008, becoming Act 210 in 2008 of the Session Laws of 2008 with a repeal date of June 30, 2011.

#### **Act 114**

In 2011, H.B. 1376 proposed elimination of Act 210’s June 30, 2011 sunset clause. The Standing Committee on Rules of Evidence submitted written testimony on H.B. 1376, again requesting that the measure be deferred and referred to the Committee for an interim study and a full report. In its written testimony, the Committee noted:

*The committee observes that the drafters of evidence rules did not recommend a journalists’ privilege, and the 1980 Legislature did not adopt one. Nor do the Uniform Rules of Evidence contain such a privilege. The committee has no present information regarding the status of journalists in the other 49 states, but would undertake this kind of research if the matter were referred to it.*

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<sup>2</sup> The only difference is a stylistic modification in section (c)(2), and the addition of section (e).

H.B. 1376 became Act 114 of the Session Laws of 2011. It extended the repeal date of Act 210 from June 30, 2011 to June 30, 2013. Act 114 also directed the Standing Committee on Rules of Evidence to report to the Legislature the following information or recommendations:

1. Whether to:
  - A. Retain Act 210 under HRS Chapter 621,
  - B. Codify Act 210 under HRS Chapter 626 (the Hawai‘i Rules of Evidence), or
  - C. Allow Act 210 to be repealed;
2. Cite to other states that have enacted legislation similar to Act 210;
3. The effects of Act 210 on the media and prosecution of cases; and
4. Any proposed legislation to amend Act 210.

### **The 2011 Report to the Legislature**

The Standing Committee on Rules of Evidence submitted its “Report on the Limited News Media Privilege Against the Compelled Disclosure of Sources and Unpublished Information” to the Legislature in December 2011. The Committee’s Report included the following responses:

1. Recommended Act 210 remain under HRS Chapter 621 and that the sunset provision be eliminated.
2. Attached memorandum drafted by Professor Addison Bowman, including his preliminary research of journalists’ privilege and comparative analysis of the shield laws of 18 states.
3. Suggested that the Legislature take another look at the language of Act 210 in 3 areas: subsections (a)(2), (c)(3), and (d). Reasons for the suggestion were included.
4. Attached memorandum provided by the Department of the Attorney General entitled “Proposed Amendments to Journalists’ Shield Law”.

Act 210 was not amended or enacted. It did not become law, and was effectively repealed on June 30, 2013.

### **H.B. 1502, H.D. 1, Proposed S.D. 1**

H.B. 1502, H.D. 1, Proposed S.D. 1 is a reiteration of Act 210. It contains none of the Committee’s 2011 suggested amendments.

### **Conclusion**

The Standing Committee on Rules of Evidence was established to study and evaluate proposed evidence law measures referred by the Hawai‘i Legislature and to consider and propose appropriate amendments to the Hawai‘i Rules of Evidence. The Committee convened on February 17, 2023 to consider H.B. 1502, H.D. 1. Nothing in H.B. 1502, H.D. 1, Proposed S.D. 1 changes the Committee’s prior analysis. It has been 12 years since its 2011 Report to the Legislature and 15 years since Act 210 passed.

Testimony to the Senate Committee on Judiciary  
House Bill No. 1502, H.D. 1, Relating to Evidence  
March 24, 2023  
Page 4

The Committee respectfully requests that the Legislature defer action on the measure and refer it to the Committee for an updated study and report.

Thank you for the opportunity to provide comments on H.B. 1502, H.D. 1, Proposed S.D.  
1.



SENATE COMMITTEE ON JUDICIARY

Friday, March 24, 2023, 9:35 am, State Capitol Room 016 & Videoconference

HB 1502 Proposed SD1

Relating to Evidence

**TESTIMONY**

Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Rhoads, Vice Chair Gabbard, and Committee Members:

The League of Women Voters of Hawaii supports HB1502 Proposed SD1.

The League suggests amending this bill to direct the Hawaii Supreme Court Standing Committee on the Rules of Evidence to update its 2011 Report to the Legislature concerning Act 210, SLH 2008. We are not aware of any compelling justification to defer action on HB 1502 Proposed SD1 until the Committee has prepared an updated study and report.

Thank you for the opportunity to submit testimony.



# Big Island Press Club

Since 1967, protecting the public's right to know

Big Island Press Club  
P.O. Box 1920  
Hilo, Hawaii 96721

CONTACT:  
mphillips@bigislandpressclub.org

March 22, 2023

To: Senate Committee on Judiciary

From: Michael Phillips, President, Big Island Press Club

## **In SUPPORT of HB 1502 SD1 Relating to Evidence**

The Big Island Press Club, Hawaii's oldest press club, is in strong support of HB 1502 SD1 (Proposed) relating to Evidence.

Since 1967, the Big Island Press Club has been protecting the public's right to know. Serving as a watchdog for openness and credibility for Hawaii Island, we support the valuable service to society that journalists make by publishing and broadcasting information on issues of great public importance.

Sometimes to get information of public importance out, journalists will need to rely on confidential sources. Typically shield laws exist to facilitate the news gathering process by excusing journalists from disclosing confidential sources or information obtained from such sources.

In 2008, Hawaii enacted a shield statute (Act 210, HB 2557) that included a sunset provision that would repeal the statute on June 30, 2011, unless the legislature reauthorized its extension before that time. While the legislature did extend the

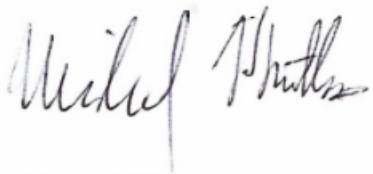
statute for two more years, it finally lapsed in 2013, leaving the state without a shield statute since. Subsequent efforts have failed, not only leaving Hawaii without a shield statute, but also leaving Hawaii as one of only two states in the entire country without one.

Currently, the other state without a shield statute, Wyoming, is working on resolving that with their own shield law this year.

We encourage you to reinstate what was one of the best shield laws in the country so that journalists, through their confidential sources, can continue to report on issues of importance to the community as they can most everywhere else in the United States.

With that said, we wholeheartedly support HB 1502 SD1 – Proposed. Thank you for the opportunity to testify on this important matter.

Signed,

A handwritten signature in cursive script that reads "Michael Phillips". The signature is written in dark ink and is positioned below the word "Signed,".

Michael Phillips  
President, Big Island Press Club



March 24, 2023

Karl Rhoads  
Senate Judiciary Committee  
State Capitol  
Honolulu, HI 96813

Re: House Bill 1502, HD1, Proposed SD1

Chairman Rhoads and Committee Members:

Thank you for considering House Bill 1502, HD1, Proposed SD1, which would resurrect Hawaii's Shield Law to protect the identities of newsmen's confidential sources and reporters' unpublished notes. It was in effect for five years from 2008 to 2013 as we were not able to remove the sunset date from the law.

Hawaii went from having a foresighted Shield Law to being one of two states that does not have a Shield Law. Wyoming is the other state.

We support this bill, which is almost the same as the former Shield Law with a couple minor exceptions.

Very often the people who provide the best information (oftentimes hidden from view) about a story don't want their names revealed for fear of losing jobs or being retaliated against, and a reporter will risk going to jail rather than give up a source and never get news tips as no source will ever trust him or her.

The original Hawaii law was visionary, envisioning that there were people doing the work of news reporters but not working for newspapers or radio or TV stations. Bloggers, such as Ian Lind, provide a service using the tools of a reporter but do not work for a traditional news outlet.

The law was in effect for three years and did not cause problems, and was tested in court once, in the case of a filmmaker working on documentary about Native Hawaiian burial sites, an issue clearly of public interest and concern. A committee of the state Supreme Court also has recommended that the law be made permanent.

A legislative compromise extended it for two more years.

Now, we are now hearing calls from Congress to push for provisions to force reporters to reveal their sources.



The bill would grant the source- and note-protection in all civil cases except for libel cases in which the reporter is a named party.

In criminal cases, there are some exceptions:

- If there is probable cause to believe that the journalist has committed a crime or is about to commit a crime
- If the journalist observes an alleged crime, he or she will have to testify as a witness but does not have to reveal information gathered from a source.
- In cases where there is substantial evidence that the information is important to the investigation of a felony, a three part test would apply: The information cannot be obtained through alternative sources; the information is not available elsewhere; and the information is relevant.
- If the reporter has information critical to prevent serious harm to life or public safety
- If the source consents, then journalists must turn over unpublished or other documents provided by the source.

We think this bill will reinstitute one of the best Shield Laws in the country. It protects the interest of every journalist in Hawaii whether they've been subject to a subpoena or not.

Thank you for your time and attention,

A handwritten signature in black ink, appearing to read "Stirling Morita". The signature is fluid and cursive, with a large initial "S" and "M".

Stirling Morita  
President  
Hawaii Chapter SPJ

**HB-1502-HD-1**

Submitted on: 3/20/2023 6:30:12 PM

Testimony for JDC on 3/24/2023 9:35:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Andrew Crossland	Individual	Oppose	Written Testimony Only

Comments:

I **strongly oppose** this Bill which will allow more "anonymous sources" to spread fake news and propaganda with impunity. This Bill is asinine and should be rejected by the committee.

**HB-1502-HD-1**

Submitted on: 3/20/2023 9:07:23 PM

Testimony for JDC on 3/24/2023 9:35:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Gerard Silva	Individual	Oppose	Written Testimony Only

Comments:

They should always be Trasparent!!!

Gerald Kato  
[kato\\_gerald@yahoo.com](mailto:kato_gerald@yahoo.com)  
808-223-3844

**To: Senate Committee on Judiciary**  
**Hearing: 9:35 AM, Friday, March 24, 2023**  
**Conference Room 016**  
**State Capitol**

## **TESTIMONY IN SUPPORT OF HB 1502, HD1, SD1, RELATING TO EVIDENCE**

Chair Rhoads and members of the Committee on Judiciary:

My name is Gerald Kato. I recently retired after a long career on Journalism and Communication faculty at the University of Hawai`i. Prior to joining the faculty, I was a newspaper and broadcast reporter who spent many years covering government and politics in Hawai`i.

I speak on behalf of myself and First Amendment attorney Jeffrey Portnoy, who could not be present today.

We strongly support creating a limited privilege to journalists, and those acting in similar capacity, against compulsory disclosure of sources and unpublished information. Portnoy and I were among the primary authors of legislation known as the Hawaii's Shield Law, which was considered one of the most progressive in the country when it was enacted. We believe it achieved that delicate balance to protect the free flow of information in a democratic society while balancing the legitimate need for information in pursuit of justice.

Today, Hawaii and Wyoming are the only states without a Shield Law or other legal protections for confidential sources. Such protections are essential to the preservation of First Amendment freedoms embedded in our federal and state constitutions.

The Senate draft proposes to restore and codify the law with an amendment to clarify that the privilege attaches to the journalist and not the source. This has always been our understanding and intent of the law as it was proposed, and we support an explicit amendment to that effect if the committee believes it is necessary.

On a personal note, I have been a journalist and taught journalism for fifty years. During that time, I have witnessed how the media industry has undergone tremendous change as has the technology we use to communicate news and information. I believe the strength of this bill is that it is a template for recognizing and working within those changes to preserve and defend a model for robust protections for journalists and journalism.

Thank you for this opportunity to testify in Support of HR1502 Proposed Senate Draft 1.

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**HB-1502-HD-1**

Submitted on: 3/23/2023 7:30:40 AM

Testimony for JDC on 3/24/2023 9:35:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Dayle K. Turner	Individual	Support	Written Testimony Only

Comments:

Journalism is a vital pillar of democracy. It serves to keep the public informed and hold those in power accountable. However, journalists often face immense pressure from powerful individuals or institutions to reveal their sources or disclose unpublished information. The proposed law to make the temporary news media privilege permanent is a step in the right direction to protect journalists and their sources. This law recognizes the importance of the role journalists play in society and provides them with the necessary protection to do their jobs without fear of retribution. The exceptions provided in the law ensure that it does not interfere with investigations or the public's right to information. To sum up, the proposed law is a crucial step in safeguarding the freedom of the press and maintaining a transparent and accountable society, and I stand in strong support of it. Mahalo for this opportunity to testify.

**HB-1502-HD-1**

Submitted on: 3/23/2023 6:50:28 PM

Testimony for JDC on 3/24/2023 9:35:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Will Caron	Individual	Support	Written Testimony Only

Comments:

As a former journalist and editor of various publications, I strongly support this measure. Journalism shield laws are important protections that enable internal sources to provide information to reporters that is of critical public interest even—and especially—when it may reveal government wrongdoing or negligence. Whistleblowers need to know that reporters can protect their identities before they can share vital information with them. This is a fundamental aspect of investigative journalism, which is itself a critical component of a healthy democracy.

Journalists, when doing their true duty, are in the profession of speaking truth to power. They need legal protections from retaliation by those in power and authority positions. Please pass HB1502 HD1.