

# LATE SB2238

Relating to  
Judicial Elections



## HAWAII GOVERNMENT EMPLOYEES ASSOCIATION

AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

**LATE**

The Twenty-Eighth Legislature, State of Hawaii  
The Senate  
Committee on Judiciary and Labor

Testimony by  
Hawaii Government Employees Association

February 10, 2016

### S.B. 2238 – RELATING TO JUDICIAL ELECTIONS

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly opposes the purpose and intent of S.B. 2238, which makes conforming amendment to implement a constitutional amendment that establishes judicial elections, as proposed in S.B. 2239. S.B. 2239, heard prior to S.B. 2238, proposes a constitutional amendment to require justices and judges be elected to serve six-year terms and additionally be subject to the consent of the Senate for subsequent judicial terms.

In order to function properly, our judicial system must have judges who have the authority and autonomy to exercise their independent judgement, free from coercion and the many distractions that surround running for office. When politics – inclusive of campaigning, fundraising, and seeking organizational and personal endorsements – come along with controversial, high stakes, precedent-setting decisions, abuse is prone to happen. It is shortsighted and unwise to create a situation where our judges are beholden to special interest groups and campaign financiers, or where the voting electorate with little knowledge of individual judges can be so easily swayed by public attacks. We respectfully insist that it is not in the state or public's best interests for a judge's decision making to be influenced by its donor base; a judge must have the independence to interpret law based solely on fact and merit.

Thank you for the opportunity to testify in strong opposition to S.B. 2238.

Respectfully submitted,

  
for Randy Perreira  
Executive Director

# HAWAII FILIPINO LAWYERS ASSOCIATION

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Date: February 10, 2016

To: Senator Gilbert S.C. Keith-Agaran, Chair  
Senator Maile S.L. Shimabukuro, Vice Chair  
Senate Committee on Judiciary and Labor

Re: Testimony on S.B. 2238 / SB2239 - Relating to Judicial Elections and  
Proposing an amendment to Article VI of the Constitution of the State of  
Hawaii Relating to the Selection and Retention of Justices and Judges.

HEARING: 2/10/16 9am Room 16

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The Hawaii Filipino Lawyers Association (HFLA) appreciates the opportunity to submit this testimony in **OPPOSITION** to both **SB2238** RELATING TO JUDICIAL ELECTIONS and **SB2239**, PROMOTING AN AMENDMENT TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII RELATING TO THE SELECTION AND RETENTION OF JUSTICES AND JUDGES.

Among the purposes of the HFLA is to promote participation in the legal community by Filipino lawyers; to represent and to advocate the interests of Filipino lawyers and their communities; to foster the exchange of ideas and information among and between HFLA members and other members of the legal profession, the Judiciary and the legal community; to encourage and promote the professional growth of the HFLA membership; and to facilitate client referrals and to broaden professional opportunities for Filipino lawyers and law students.

Given HFLA's mission, it is thus necessary for us to express our deep concern that **these measures will significantly erode the diversity of Hawaii's bench**. As explained in the May 2015 article attached to this testimony from the publication "Mother Jones", minority candidates are more likely to lose a judicial and/or judicial retention election to a white candidate.

We concur with the theories presented in this article for the proposition that the general electorate may exhibit subconscious or implicit bias based on a candidate's name or

physical appearance. For example, the article explains how in Ohio, candidates with Irish names were consistently winning elections over minority incumbents.

We are also concerned about the costs, manpower, and other resources that are needed to run an effective campaign; and whether minority judicial candidates can garner the kind of support that wins elections. Related to this is the troubling impact we expect as a result of the 2010 U.S. Supreme Court's decision in Citizens United, where the special interests of corporations and political action groups with deep pockets would subvert the purpose and policy of a merit-based judicial selection process.

As attorneys, officers of the court, and proponents of the balance and separation of powers in our democracy, we believe that our Justices and Judges should interpret and apply the law and should have the proven capacity to do so. While the leaders in our legislative and executive branches are selected by the general public, we support a more deliberative process for the selection of those in our judicial branch.

We therefore have much greater faith in the existing judicial selection process, which has been designed to carefully vet judicial candidates based upon: evaluations from members of the bar; confidential reports from practicing attorneys familiar with the candidates' fitness and aptitude for a judicial posts; as well as public sentiment and comment.

The existing process necessarily involves a robust inquiry into a candidate's professional conduct and ethics - matters that can be easily eclipsed by the physical appearance of a judicial candidate that may seem – on the surface - more attractive to a given voter, without considering the judicial candidate's commitment to understanding, interpreting, and upholding the law.

Thank you for this opportunity to testify on these measures in opposition.

## Judicial Elections Erode Diversity on the Bench

A new report shows that minority candidates have a harder time holding onto judicial seats than white justices.

—Pema Levy on Mon. October 26, 2015 5:00 AM PDT



**Supreme Court Justice Sonia Sotomayor reflects judicial diversity of a sort that has vanished on some state courts.** *Matt Slocum/AP*

In 2002, Texas Supreme Court Justice Xavier Rodriguez, a Republican, lost his seat on the bench to a white lawyer named Steven Wayne Smith. Smith, a fellow Republican who made a name for himself fighting affirmative action at the University of Texas, suggested that Rodriguez had been "underqualified" for his undergraduate education at Harvard. The *Houston Chronicle* reported that Smith decided to take on Rodriguez because "he thought a Hispanic wouldn't do well in the Republican primary."

Six years later, Wisconsin's first black state Supreme Court justice lost his reelection bid—the first member of the state's high court to lose a seat in 40 years—in the face of nasty, well-funded, and racially tinged ad campaign that harkened back to the infamous Willy Horton TV spot.



In Ohio, African American state Supreme Court justices seem cursed. Two of the three black justices ever to serve on the state's highest court lost their reelection bids the year after their appointment. In 2012, Justice Yvette McGee Brown, the first female African American on the court, lost reelection to a white woman with an Irish surname.\* In fact, the three winners in state Supreme Court races that year all had Irish last names, prompting a local reporter to note that new court "will resemble politicians at a St. Patrick's Day parade."

These may not be isolated incidents. A new report from the left-leaning Center for American Progress released Monday finds that minority Supreme Court justices around the country are reelected at lower rates than white judges. (Full disclosure: *Mother Jones* is participating in a panel discussion about the report Monday afternoon.)

The report, "More Money, More Problems: Fleeting Victories for Diversity on the Bench," finds that since 2000, the overall reelection rate for incumbent Supreme Court justices in contested races is 88 percent. For white justices, that number is 90 percent. But black justices have been reelected 80 percent and Hispanic justices 67 percent of the time.

"In many states with elections, advocates for diversity have succeeded in pressing for diverse appointments, but these victories are often fleeting," the report states. "In many states where diverse judges were appointed, they were voted off the bench in the next election. According to new research for this report, appointed black and Latino justices running in their first election only had a 68 percent re-election rate."

The possible causes of this trend are numerous. Perhaps voters in states like Ohio who knew nothing about the candidates let their subconscious biases come out when they voted for the candidate with the Irish (and therefore likely white) last name. Billy Corriher, one of the authors of the report, points out that in Texas, while the Latino justice lost his seat, two African American justices—whose last names don't obviously convey the color of their skin—were reelected and ultimately left the bench voluntarily.

In other instances, minority justices lost their seats due to partisan politics. In Alabama, two African American state Supreme Court justices, both Democrats, lost their seats in 2000 amid a Republican surge that year. Today, all of Alabama's Supreme Court and appellate court justices, including both its civil and criminal appellate courts, are white. "That, to me, was really shocking because you've got this state that has a very substantial African American population and it was the site of all these civil right battles that we've been celebrating recently—the march from Selma to Montgomery, Bloody Sunday—and we have all these people that fought for voting rights and then today none of those communities are represented on the appellate courts in Alabama," says Corriher, who studies state courts at CAP. "That's really tragic to me."

The rising flood of money into judicial elections tends to hurt minority candidates, whereas public financing programs have fostered diversity. The CAP report points in particular to North Carolina, where a public financing system brought newfound diversity to the bench.

"In 2002, before the shift to public financing and nonpartisan elections, all three black appellate judges who sought reelection lost," a 2010 report by the group Democracy North Carolina found. "[B]ut the four African-American judges who have run since then in regular elections all used public financing and won. That's a pretty remarkable turnaround."

That system no longer exists. After taking over the state legislature and governorship in 2012, Republicans repealed it.

*Correction: An earlier version of this article misstated the gender of Justice McGee Brown's opponent.*



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Niko Lotta • 3 months ago

Literally buying judges. We will never overturn citizens united at this rate. It is time to seriously consider retooling some of our framework.

4 ^ v • Reply • Share



gilhcan → Niko Lotta • 3 months ago

It is long past time for a peaceful but very effective revolt against the politicians and their backers who are blatantly defying our Constitution, separation of religion and government, church and state. Vital to freedom of religion is the freedom to reject religion.

1 ^ v • Reply • Share



Cassandra of Troy • 3 months ago

Texas, Wisconsin and Ohio are Conservative "poopholes" and it is beyond me why anyone sane would not want to leave. (Edit: Throw in Alabama and South Carolina into the mix.)

6 ^ v • Reply • Share



footballxpt → Cassandra of Troy • 3 months ago

Alabama has never elected a black in a state wide election. Blacks who are very qualified have been appointed to the Supreme Court, but when they have to run, they lose, sometimes to candidates who have very little experience.

1 ^ v • Reply • Share



greatjoy → footballxpt • 3 months ago

This article holds up Sotomayor as "diversity" of skin color, but she had no previous experience. She is not qualified to be a judge at all, let alone a Supreme Court judge. Politicians need to stop appointing unqualified judges who have no training in following the Constitution.



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**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB2238 on Feb 10, 2016 09:00AM  
**Date:** Tuesday, February 09, 2016 4:37:39 PM

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**SB2238**

Submitted on: 2/9/2016

Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
David Monk	Individual	Oppose	No

Comments: The impartiality of judges should not be subject to the reality or appearance of pressure from the need to campaign and raise funds for elections.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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Testimony opposing SB 2238 by Michael A. Town (retired circuit court judge)

Honorable Chair and members of the Committee on Judiciary and Labor  
Hawaii State Senate.

Aloha. This is a brief testimony opposing the above entitled bill.

Hawai'i is one of the many states that have a merit selection and retention system for judges. We have had it for years and it works. As a judge who served from 1979 and retired in 2010 after 30+ years of service including being Senior Judge of the Family Court, I had an opportunity to see a variety of systems across the country. I was retained three times during my tenure. The bottom line is we in Hawai'i have one of the best systems of selection and retention. An independent and accountable judiciary is essential to the rule of law and maintaining public trust and confidence in our government and judiciary. We have that.

For the reasons submitted by others opposing this bill I concur and stand ready to answer any questions.

I wish you well in your deliberations.

Sincerely, Judge Michael A. Town (retired)

LATE

Louise K. Y. Ing  
1080 S Beretania St #504  
Honolulu, HI 96814  
February 10, 2016

VIA E-MAIL

The Honorable Gilbert S.C. Keith-Agaran, Chair  
The Honorable Maile S. L. Shimabukuro, Vice-Chair  
Senate Committee on Judiciary and Labor  
415 S. Beretania St.  
Honolulu, Hawai'i 96814

RE: SB 2238 and SB 2239 – Judicial Elections in Hawai'i  
Hearing: Wednesday, February 10, 2016, at 9:00 AM  
Conference Room 016  
State Capitol

Dear Chair Keith-Agaran, Vice Chair Shimabukuro and Members of the Senate  
Judiciary and Labor Committee:

I respectfully submit comments on SB 2238 and SB 2239 as an interested citizen and from the perspective of a lawyer with over thirty years of litigation experience in Hawai'i and a former president of the Hawaii State Bar Association. Thank you for this opportunity to submit comments and for your careful and thoughtful consideration of this important and dangerous bill.

I strongly oppose legislation that would change the selection of judges from the existing judicial election process to a judicial election process. Judicial elections run counter to the separation of the executive, legislative and judicial branches on which our country and state's system of government is founded.

Judges should be impartial, free from political influence, and not distracted from their important jobs of applying the rule of law. Requiring judges to campaign, fundraise and appeal to the popular vote would distract them from their already heavy caseloads, influence their decisionmaking and as Justice Sandra Day O'Connor wrote, make them "likely to feel that they have at least some personal stake in the outcome of every publicized case." See Justice O'Connor's separate concurring opinion in *Republican Party of Minnesota v. White* (expressing disapproval of the state's judicial election process).

It is enough of a challenge to recruit experienced and highly qualified lawyers to apply to be judges, given the level of judicial compensation compared to compensation levels in private practice and state judges' heavy workload. Add to that economic challenge the need for judicial candidates to raise substantial campaign funds, and chances are that the pool of candidates will be further limited to those with independent wealth; those with the ability to attract funds from special interest groups; and/or those who need to



spend more time campaigning than attending to their judicial duties. “The increase in political funding has raised questions about how courts can maintain their independence when campaign donors and interest groups spend so much money seeking influence on the bench.” Christina Cassidy, *Campaign Cash in State Judicial Elections Grows*, [www.salon.com](http://www.salon.com) (12/28/15).

Our state already has a rigorous and balanced judicial selection process administered by the Judicial Selection Commission and has an established avenue for obtaining an array of information about judicial candidates in a confidential setting through the Hawaii State Bar Association’s qualification process. Both the executive and legislative branches have the ability to participate in the selection process through the Governor’s power to select Circuit Court judges and above from a slate of candidates vetted by the Judicial Selection Commission and the Senate confirmation process. There have been criticisms from time to time about certain aspects of that process, but the answer is to tweak a process that works, not “throw the baby out with the bathwater.”

In short, judicial elections would be bad for the citizens of the State of Hawai`i and harmful to our judicial system and to the delivery of fair and impartial justice.

Respectfully Submitted,

*Louise K. Y. Ing*

February 8, 2016

**Senate Committee on Judiciary and Labor**

Hawaii State Capitol  
415 South Beretania Street  
Honolulu, Hawaii 96813

Wednesday, February 10, 2016, 9:00 a.m.

**RE: Opposition to SB2238, SB2239, and SB2420**

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and Esteemed Committee Members:

My name is Brandon Marc Higa; I am the President of the Student Bar Association (SBA) and currently a first-year law student at Richardson. The SBA is Richardson's student government and serves as the official voice of the student body.

On behalf of the student body at the William S. Richardson School of Law, I write in support of the American Constitution Society for Law and Policy's (ACS) position **in opposition to SB2238, SB2239, and SB2420**. These proposals would result in an infusion of politics into judicial selection and retention processes.

SB2238 and SB2239 would undermine the judiciary's independence and harm the community. An ethical framework for judicial elections would be difficult for our state to police and increase the likelihood of judicial misconduct.<sup>1</sup> It is important to consider that elected judges are disciplined at higher rates and for more serious crimes than appointed judges,<sup>2</sup> and elected judges are substantially harsher on parties in criminal matters.<sup>3</sup> Campaign financing would also lead many in the community to question the judiciary's independence and leave judges subject to attacks from those with deep pockets and political agendas.<sup>4</sup>

SB2420 would undermine the ability of the Judicial Selection Committee ("JSC") to make well-informed judicial retention decisions. The JSC reviews confidential comments from the community, bar members, and other judges that would not be available to the Senate during its proposed review. Judges are able to respond to JSC retention proceedings because they are confidential; however, a judge would not be able to respond publicly before the Senate. Politics will also be further infused into retention decisions if consent power is consolidated in the Senate, for retention decisions are reached with input from members designated by the other legislative body, the executive branch, the judicial branch, and the state's bar.

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<sup>1</sup> See *Williams-Yulee v. The Florida Bar*, 135 S.Ct. 1656 (2015).

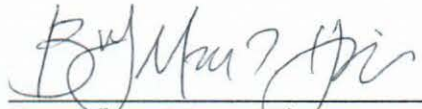
<sup>2</sup> Malia Reddick, *Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline*, available at [http://www.judicialselection.us/uploads/documents/Judging\\_the\\_Quality\\_of\\_Judicial\\_Sel\\_8EF0DC3806ED8.pdf](http://www.judicialselection.us/uploads/documents/Judging_the_Quality_of_Judicial_Sel_8EF0DC3806ED8.pdf).

<sup>3</sup> Erik Opsal, *New Analysis: Judicial Re-Election Pressures Tied to Harsher Criminal Sentencing*, COMMON DREAMS (Dec. 2, 2015, 11:30 a.m.), <http://www.commondreams.org/newswire/2015/12/02/new-analysis-judicial-re-election-pressures-tied-harsher-criminal-sentencing>.

<sup>4</sup> *Koch Brothers Set Sights on Florida Supreme Court Justices*, FLORIDA CENTER FOR INVESTIGATIVE REPORTING (Oct. 1, 2012), <http://fcir.org/2012/10/01/koch-brothers-set-sights-on-florida-supreme-court-justices/>.

As President of the Student Bar Association and on behalf of the student body, I write in support of the American Constitution Society for Law and Policy's opposition to SB2238, SB2239, and SB2420 for the aforementioned reasons.

Signed: February 9, 2016

A handwritten signature in dark ink, appearing to read "Brandon Marc Higa", written over a horizontal line.

**Brandon Marc Higa**  
**President, Student Bar Association**

LATE

From: [Eyke BrathHurdman](#)  
To: [JDLTestimony](#)  
Subject: SB 2238, SB 2239, SB 2420  
Date: Tuesday, February 09, 2016 5:19:04 PM

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Dear Chair Keith-Agaran, Vice Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor:

I am writing in opposition of the proposed bills listed above. I have read other submitted oppositions and agree with the many good arguments made in these oppositions.

My arguments are practical arguments-

- 1) Our court calendars are already over scheduled with our hearings being limited to 15 minutes if we are fortunate, hearings must be set within certain statutory requirement, but if a hearing must be continued, then we must wait 3-4 weeks to reset.
- 2) Our Judges are working long hours as it is and to add campaigning to their schedule can only take away much needed time for them to focus on their cases and to also have necessary quality personal time for themselves. The human aspect of our Judges seems to be overlooked time and time again. We cannot expect healthy Judges to make good decisions if we are pushing them to their physical, mental and emotional limit. Forcing them to now campaign mean they must now allocate time away from their work as a Judge and their personal life. Another negative aspect of an election process is the lack of privacy. Spouses, parents, children-all become "fair game" , I cannot see how this would encourage attorneys to seek Judicial positions.

Sincerely,

Ms.Eyke L. BrathHurdman, Esq.

Immediate Past President of MCBA

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LATE

February 9, 2016

Senate Committee on Judiciary and Labor  
Wednesday, February 10, 2016, 9:00 a.m.

**RE: Opposition to SB2238, SB2239, and SB2420**

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and Esteemed Committee Members:

Thank you for your service to our community. I am a second-year student at the William S. Richardson School of Law (WSRSL), and I sit on the board of the our school's chapter of the American Constitution Society (ACS). I write on behalf of the board and members of the WSRSL chapter of ACS in opposition to SB2238, SB2239, and SB2420. We are concerned that the judicial election system proposed by Senate Bill 2238 and 2239 would endanger the fairness and impartiality of Hawaii judges.

SB2238 and SB2239 would undermine the judiciary's independence and harm the community. An ethical framework for judicial elections would be difficult for our state to police and increase the likelihood of judicial misconduct.<sup>1</sup> It is important to consider that elected judges are disciplined at higher rates and for more serious crimes than appointed judges,<sup>2</sup> and elected judges are substantially harsher on parties in criminal matters.<sup>3</sup>

Forcing judges to campaign and to raise money for their elections campaigns threatens to tilt the scales of justice as various interest groups may use the opportunity to shape the judiciary. According to Justice at Stake polls, 87% of Americans believe that campaign contributions affect courtroom decisions. Nearly 50% of judges believe that campaign contributions do influence judges' decisions. Recent studies provided by the American Constitution Society confirm a significant relationship between campaign donations and judicial decisions. It is vital that that the public has confidence in the judiciary. Courts need to stay fair and independent -- and private money involvement should be minimized. Instead of boosting public confidence in our court system, the involvement of campaign money through an election process will do just the opposite.

Judges are not politicians; they should be selected based on a merit, not based on campaign promises. Moreover, judges need to be able to protect the rule of law without fear of political retribution. The cornerstone of justice is an independent judiciary that is free from political restraints. It is the duty of courts to protect the rights of people, no matter what the politics of the day may demand.

I write in opposition to SB2238, SB2239, and SB2420 for the aforementioned reasons.

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<sup>1</sup> See *Williams-Yulee v. The Florida Bar*, 135 S.Ct. 1656 (2015).

<sup>2</sup> Malia Reddick, *Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline*, available at [http://www.judicialselection.us/uploads/documents/Judging\\_the\\_Quality\\_of\\_Judicial\\_Sel\\_8EF0DC3806ED8.pdf](http://www.judicialselection.us/uploads/documents/Judging_the_Quality_of_Judicial_Sel_8EF0DC3806ED8.pdf).

<sup>3</sup> Erik Opsal, *New Analysis: Judicial Re-Election Pressures Tied to Harsher Criminal Sentencing*, COMMON DREAMS (Dec. 2, 2015, 11:30 a.m.), <http://www.commondreams.org/newswire/2015/12/02/new-analysis-judicial-re-election-pressures-tied-harsher-criminal-sentencing>.

Sincerely,  
Kaily Wakefield  
William S. Richardson School of Law Student Chapter of  
American Cconstitution Society  
Public Relations Manager  
JD Candidate, Class of 2017

LATE

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDL Testimony](#)  
**Cc:**  
**Subject:** \*Submitted testimony for SB2238 on Feb 10, 2016 09:00AM\*  
**Date:** Wednesday, February 10, 2016 12:15:46 AM

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**SB2238**

Submitted on: 2/10/2016

Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Thomas Michener	Individual	Oppose	No

Comments:

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