## *The Judiciary, State of Hawai‘i*

**Testimony to the House Committee on Judiciary**
Representative Scott Y. Nishimoto, Chair
Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 13, 2018 2:00 PM
State Capitol, Conference Room 325

by
Rodney A. Maile
Administrative Director of the Courts

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

**Purpose:** Provides that a court of inferior jurisdiction may 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 15 calendar days.

**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 Statues (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[1] for reserved questions

[1] Rule 15. RESERVED QUESTIONS.

from the Circuit court, land court, and the 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 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, tax appeal, and land 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.

It is also noted that the 15-day deadline proposed in the bill in which the supreme court is required to provide a response to the reserved question may not be sufficient in many circumstances. The Judiciary suggests 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

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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.

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 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 HB 2194.

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**HB-2194**
Submitted on: 2/12/2018 7:13:50 AM
Testimony for JUD on 2/13/2018 2:00:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---|---|---|---|
| John Price | | Support | No |

Comments:

Rule 1 of the Hawaii Rules of Civil Procedure sets forth the guidance that the court rules shall be interpreted to secure the just, speedy and inexpensive determination of every action. The proposed bill will further that goal.

By the time a decision is rendered by the Supreme Court the parties have invested years of time and significant sums of money in their case. When the Supreme Court remands the case back to the trial court for further action, the trial court needs to know as clearly and precisely as possible how the Supreme Court views the key legal isues under a particular factual scenario. Otherwise the trial court may not have the full measure of legal guidance necesary to reach the proper conclusion.

The result is another round of appeals, consuming yet more time and money while justice is delayed.

This bill provides a mechanism to expedite closure for cases that have been remanded after appeal for further proceedings. It helps achieve the goal of HRCP Rule 1 and provides clarity in the decision making process at far less cost of a second round of appeals. It saves time and money for the parties and the courts.

The measure is a good one and should be enacted. Thank you.

**HB-2194**
Submitted on: 2/12/2018 11:15:22 AM
Testimony for JUD on 2/13/2018 2:00:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---|---|---|---|
| Dylan Gentaro Fujitani | Individual | Oppose | No |

Comments:

Dear Chair Nishimoto, Vice Chair San Buenaventura, and members of the Judiciary Committee:

As a member of the Hawai‘i State Bar Association and former Summer Law Clerk at the Hawai‘i Supreme Court, I would like to express my opposition to HB2194. I substantively agree with the arguments put forth by the HSBA Appellate Section, whose testimony you have already received.

Sincerely,

D. Gen Fujitani

# Hawaii State Bar Association
# Appellate Section

February 12, 2018

Chair Scott Y. Nishimoto
Vice Chair Joy A. San Buenaventura
Committee on Judiciary
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 Nishimoto, Vice Chair San Buenaventura, and members of the Judiciary Committee:

On behalf of our colleagues in the Hawaii State Bar Association's Appellate Section,[1] 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.

[1] 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

LATE

**HB-2194**
Submitted on: 2/12/2018 6:23:09 PM
Testimony for JUD on 2/13/2018 2:00:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---|---|---|---|
| Jane Sugimura | Individual | Oppose | No |

Comments:

LATE

**HB-2194**
Submitted on: 2/12/2018 10:40:06 PM
Testimony for JUD on 2/13/2018 2:00:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---|---|---|---|
| lynne matusow | Individual | Oppose | No |

Comments:

Please accept this as oppostion to this bill.

lynne matusow

Rep. Scott Y. Nishimoto, Chair
Rep. Joy A. San Buenaventura, Vice Chair
Committee on Judiciary

House of Representatives of the State of Hawai'i

Lance D. Collins, Ph.D
Law Office of Lance D. Collins

Tuesday, February 13, 2018
Opposition to House Bill No. 2194, Relating to the Judiciary

My name is Lance D. Collins. I am an attorney in private practice. I strongly oppose House Bill No. 2194, Relating to the Judiciary.

Long before the introduction of the Rules of Civil Procedure, there were two ways in which the Supreme Court could be called to review the judgment of lower courts. One was through a writ of error and the other by appeal. The writ of error was a cumbersome common law process that limited consideration of the case before the trial court and fell into disuse while review by appeal, which was originally for review of equity cases, became the favored and now, generally, the only way to review a lower court's judgment. The benefit of appeal as opposed to writ of error was that it allowed the reviewing court to review the entire record before the trial court. That together with the final judgment rule helps to prevent piecemeal litigation.

This bill would re-open the door for piecemeal litigation. Even worse, instead of utilizing the presently available interlocutory appeal process, that would provide the appellate court with a record of the case up until that time, it would limit consideration of a point of law to so-called certified facts. An error in that certification could render the entire certifying process and the decision irrelevant to the actual proceeding that sought a certified question decision in the first place.

This bill also forecloses meaningful advocacy and meaningful deliberation over these questions of law. The determination of a question of law by the highest appellate court is final. It requires thorough advocacy by the parties and thorough and meaningful deliberation by the justices to carefully consider the effect of the decision as precedent. Presently, a circuit court and the parties are given a minimum of 18 days to decide a civil motion (20 days if service by mail). Where the effect of a decision is more generally applicable, how can giving the Supreme Court less time make sense?

Finally, if the legislature is concerned with appellate judicial efficiency, please consider authorizing an additional judge or two for the Intermediate Court of Appeals and appropriating the money for those positions.

Thank you for this opportunity to testify.

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LATE

*The Judiciary, State of Hawai'i*

**Testimony to the House Committee on Judiciary**
Representative Scott Y. Nishimoto, Chair
Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 13, 2018 2:00 PM
State Capitol, Conference Room 325

by
Rodney A. Maile
Administrative Director of the Courts

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The Judiciary supports the intent of the bill, which we understand is to provide an expedited method for designated court 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 Statues (HRS) § 602-5(2), the supreme court already has jurisdiction:

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[1] Rule 15. RESERVED QUESTIONS.

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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 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, tax appeal, and land 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.

It is also noted that the 15-day deadline proposed in the bill in which the supreme court is required to provide a response to the reserved question may not be sufficient in many circumstances. The Judiciary suggests 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:

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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.

§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 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 HB 2194.

LAND USE RESEARCH
FOUNDATION OF HAWAII
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(808) 521-4717
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LATE

February 13, 2018

Representative Scott Y. Nishimoto, Chair
Representative Joy A. San Buenaventura, Vice Chair
House Committee on the Judiciary

**Comments in Support of HB 2194, 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 15 calendar days.)**

**Tuesday, February 13, 2018, at 2:00 p.m., in Conference Room 325**

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.

**HB 2194.** 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 15 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 15 calendar day period for the response is reasonable.

For the reasons set forth above, LURF is **in support of HB 2194**, 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.