The Judiciary, State of Hawai'i

Testimony to the House Committee on Judiciary
Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair

Monday, February 24, 2020, 2:00 p.m.
State Capitol, Conference Room 325

by
Elizabeth Zack
Supreme Court Staff Attorney

Bill No. and Title: House Bill No. 2548, Relating to Courts of Appeal.

Purpose: Adds a new section to part 1 of Hawai'i Revised Statutes chapter 602 to prohibit the supreme court from affirming, modifying, reversing, or vacating a matter on grounds other than those raised by the parties to the proceeding, unless the parties are provided the opportunity to brief the court and present oral argument. HB 2548 also adds a new section to part II of Hawai'i Revised Statutes chapter 602 to prohibit the intermediate appellate court from affirming, modifying, reversing, or vacating matter or grounds other than those raised by the parties to the proceeding unless the parties are provided the opportunity to brief the court on the matter and present oral argument.

Judiciary's Position:

The Judiciary respectfully opposes this bill.

Article VI, section 7 of the Hawai'i Constitution sets forth the authority of the Hawai'i Supreme Court to promulgate rules, regulations and procedures for all state courts and provides:

> The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedures, and appeals, which shall have the force and effect of law.

In implementing its constitutional rulemaking authority, the supreme court adopted rules for all of the courts in the State. Some of the rules allow the courts to notice plain error, sua

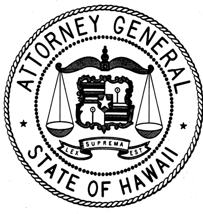
sponte, even in cases where the alleged error is not raised by the parties. For example, Rule 52(b) of the Hawai‘i Rules of Penal Procedure provides "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Similarly, in implementing its constitutional rulemaking authority, the supreme court adopted an appellate rule that allows the appellate courts to notice plain error. Rule 28(b)(4) of the Hawai‘i Rules of Appellate Procedure provides that [p]oints not presented in accordance with this section will be disregarded, except <u>that the appellate court, at its option, may notice a plain error not presented</u>. (Emphasis added).

Given the clear constitutional authority that Article VI, section 7 provides to the Hawai‘i Supreme Court to promulgate rules and procedure for the courts of the State, the Judiciary believes HB 2548 infringes on that constitutional authority.

The Judiciary notes the Hawai‘i Supreme Court is not alone in adopting rules that permit appellate courts to consider plain errors. The plain error doctrine exists in virtually all, if not all, jurisdictions. It has been stated that “[e]nsuring fundamental fairness in trial is the beacon of plain error review.” <u>Wend v. People</u>, 235 P.3d 1089, 1098 (Colo. 2010); <u>see</u> <u>United States v. Young</u>, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Rule 52(b) of the Hawai‘i Rules of Penal Procedure is based on the nearly identical provision of the Federal Rules of Criminal Procedure, and it is identically numbered. In fact, federal rule 52(b) serves as the template for the vast majority of the counterpart state rules, and provides that"[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention." As early as 1896, the United States Supreme Court recognized the plain error doctrine, s<u>ee</u> <u>Wiborg v. United States</u>, 163 U.S. 632 (1896), and to this day it remains an integral part of an appellate court’s responsibility in fulfilling its duties.

In addition, HB 2548 would prohibit appellate courts from sua sponte affirming a lower court on a different legal basis when the ultimate decision is correct, but was based on an erroneous interpretation of law. <u>See, e.g.</u>, <u>Reyes v. Kuboyama</u>, 76 Hawai’i 137, 140 (1994) (“[W]here the circuit court’s decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling.”) (citations omitted). This well-established practice facilitates the efficient resolution of disputes, rather than requiring remand to the trial court.

Thank you for allowing the Judiciary to comment on HB 2548.



TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020

LATE

ON THE FOLLOWING MEASURE:
H.B. NO. 2548, RELATING TO COURTS OF APPEAL.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Monday, February 24, 2020 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Ewan C. Rayner, Deputy Solicitor General

Chair Lee and Members of the Committee:

The Department of the Attorney General (Department) appreciates and supports the intent behind H.B. No. 2548. The Department offers suggestions for wording aimed at ensuring that the bill's requirements do not create further backlogs in the appellate courts and clarifying the available remedy should a court fail to provide an opportunity for briefing.

H.B. No. 2548 recognizes instances in which the Hawaiʻi Supreme Court has sua sponte decided material issues that were not raised by the parties without providing the parties the opportunity to brief the issues. The bill would therefore require the Supreme Court and the intermediate appellate court to provide the parties an opportunity to brief and present oral argument on any issue not raised by the parties before the courts could affirm, modify, reverse, or vacate any matter based on the issue not raised.

The Legislature has authority to place reasonable restrictions upon the courts' constitutional judicial functions, "provided that such restrictions do not defeat or materially impair the exercise of those functions." Op. No. 63-20, 1963 WL 134400, at *2 (Hawaii A.G. Apr. 1, 1963) (quoting *Brydonjack v. State Bar of California*, 281 P. 1018, 1020 (1929)); *see also Le Francois v. Goel*, 112 P.3d 636, 643 (Cal. 2005) ("Only if a legislative regulation truly defeats or materially impairs the courts' core functions, including . . . their ability to resolve controversies, may a court declare it invalid.").

The Department does not believe that requiring the appellate courts to provide an opportunity for parties to brief an issue before the court decides the issue would "defeat or materially impair" the courts' exercise of their constitutional functions. The State of California has a statute very similar to H.B. No. 2548. That statute provides:

> Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

Ann. Cal. Gov. Code § 68081.

California's statute has been in effect since 1986, and its appellate courts have applied the statute without problem. *See, e.g., Adoption of Alexander S.*, 750 P.2d 778, 783 (Cal. 1988). The Department therefore does not believe that H.B. No. 2548 would "defeat or materially impair" the core functions of this State's appellate courts to administer justice.

Moreover, many courts have recognized the importance of allowing parties the opportunity to brief any issue not raised by the parties before the court decides the issue:

> [W]e can perceive no reason why a reviewing court should be precluded from raising issues involving plain error or constitutional error sua sponte, <u>as long as the court provides an opportunity for the parties to be heard by way of supplemental briefing</u> and the other threshold conditions for review are satisfied.
>
> Similarly, we conclude that, with respect to unpreserved issues that do not involve subject matter jurisdiction, plain error or constitutional error, if the reviewing court would have the discretion to review the issue if raised by a party because important considerations of justice outweigh the interest in enforcing procedural rules governing the preservation of claims and adversarial principles, the court

> may raise the claim sua sponte, as long as it provides an opportunity for all parties to be heard on the issue.

Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Connecticut, 84 A.3d 840, 867–68 (Conn. 2014) (emphases added).

The Department therefore supports the intent of the bill. The Department, however, offers the following suggestions.

First, the Department suggests amending the bill's prefatory section as shown in the attached revised draft of the bill (*See* Attachment "A"). These suggested edits recognize the Hawaiʻi Supreme Court's role in determining the bounds of the due process clause in the Hawaiʻi Constitution.

Second, the Department suggests removing the requirement for the appellate courts to hold oral argument regarding any issue not raised by the parties. The Department believes the opportunity to brief any such issues sufficiently protects litigants' rights. Moreover, the time required to schedule, prepare for, and hold oral arguments would result in additional delays to the appellate courts, where substantial backlogs already exist.

Third, the wording in the present bill uses the term "the matter" twice but with two slightly different meanings on page 5, lines 4, 8, 13, and 16. To clarify the wording and avoid misinterpretation, the Department suggests replacing "the matter" with "the issue" on page 5, lines 8 and 16, to clarify that only issues not raised by the parties implicate the need for supplemental briefing.

The Department also suggests adding a final sentence to the bill to clarify the available remedy in the event that the appellate court fails to provide the required opportunity to the litigants. This remedy would be for the court to grant a petition for rehearing. The Department's suggested wording mirrors that of the California statute cited above.

In light of these suggestions, the Department suggests revising the bill as shown in Attachment "A" (wording the Department believes should be removed is shown with a strikethrough; wording the Department believes should be added is underscored).

The Department respectfully asks the Committee to pass this bill with the suggested amendments.

ATTACHMENT "A" -- AG Revised Draft of Bill

H.B. NO. 2548, H.D. 1 PROPOSED

A BILL FOR AN ACT

RELATING TO COURTS OF APPEAL.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. A basic philosophy and practice in civil and
2 criminal law is that parties should not be the victim of unfair
3 surprise. Relevant evidence and legal theories must be
4 disclosed throughout the course of litigation. Attorneys are
5 subject to penalties when they thwart proper disclosure.

6 ~~Appellate courts are not above the law. When an appellate~~
7 ~~court affirms, modifies, reverses, or vacates a judgment or order~~
8 ~~on factual or legal grounds that have not been litigated by the~~
9 ~~parties, the appellate court violates due process.~~ Appellate courts
10 should, at a minimum, afford the parties an opportunity to address
11 new factual or legal contentions that the appellate court wishes to
12 unilaterally insert into the proceeding.

13 The United States Supreme Court has held that sua sponte
14 decisions reached without full briefing or argument have less
15 precedential value and should be given less deference. For
16 example, the Court has recognized that it has been "less
17 constrained to follow precedent where, as here, the opinion was
18 rendered without full briefing and argument." *Hohn v. United*

1 *States*, 524 U.S. 236, 251 (1998).

2 The Court has also stated that "somewhat less deference [is
3 owed] to a decision that was rendered without benefit of a full
4 airing of all the relevant considerations. That is the premise of
5 the canon of interpretation that language in a decision not
6 necessary to the holding may be accorded less weight in subsequent
7 cases." *Monell v. Dep't. of Social Services.*, 436 U.S. 658 709 n.6
8 (1978) (Powell, J concurring).

9 Furthermore, "[s]ound judicial decisionmaking requires both a
10 vigorous prosecution and a vigorous defense of the issues in
11 dispute, and a constitutional rule announced sua sponte is entitled
12 to less deference than one addressed on full briefing and
13 argument." *Church of the Lukumi Babal Aye, Inc. v. City of*
14 *Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J concurring) (internal
15 citations and quotations omitted). Additionally, the Court has
16 stated that "a rule of law unnecessary to the outcome of the case,
17 especially one not put into play by the parties, approaches without
18 more the sort of dicta . . . which may be followed if sufficiently
19 persuasive but are not controlling." *Id.* at 572-573 (internal
20 citations and quotations omitted).

21 By making sua sponte decisions, an appellate court in effect
22 substitutes itself as a party to the proceeding by raising new
23 factual or legal theories. It does not allow the parties to
24 litigate their own cases. ~~Due process is especially violated when~~

~~an appellate court makes a sua sponte decision that alters the remedy sought by the parties.~~

For example, in *Cox v. Cox*, 138 Hawaiʻi 476 (2016), a majority of the Hawaiʻi supreme court sua sponte invalidated a family court rule to deny the prevailing party an award of attorneys' fees and costs. No one in the litigation requested that the rule be invalidated. Nor did the supreme court provide the parties with an opportunity to address the issue.

Again, in *State v. Chang*, SCWC-17-0000674, 2019 WL 2715512 (Haw. June 28, 2019) a majority of the Hawaiʻi supreme court vacated a conviction when the court unilaterally held that a motion to suppress may not be consolidated with a trial even when the parties consent to such an action. In making its decision, the majority overruled forty year old precedent. At no time did the majority afford the parties an opportunity to address the issue.

~~There are potential remedies that may prevent rash decisions. A party may be permitted to appeal the sua sponte decision to another court or an aggrieved party may be permitted to seek recovery for any damages it may have incurred as a result of the decision.~~

The legislature finds that the ~~better course of action~~ appropriate remedy is to simply prohibit an appellate court from rendering sua sponte decisions unless the parties have been heard. An appellate court must require supplemental briefing

~~and hold oral argument~~. This alternative will ~~ensure due process and~~ permit the parties, rather than the appellate court, to litigate their own case.

The purpose of this Act is to prohibit the courts of appeal from affirming, modifying, reversing, or vacating a matter on grounds other than those raised by the parties to the proceeding, unless the parties are provided the opportunity to brief the court ~~and present oral argument~~ on the issue.

SECTION 2. Chapter 602, Hawaii Revised Statutes, is amended by:

1. Adding to part I a new section to be appropriately designated and to read as follows:

"**§602- Supreme court; sua sponte decisions.** The supreme court, when acting on a matter on appeal, shall not affirm, modify, reverse, or vacate a matter ~~on grounds~~ based upon any issue other than those raised by the parties to the proceeding, unless the parties are provided the opportunity to brief the court ~~and present oral argument~~ on the ~~matter~~ issue. If the court fails to provide that opportunity, a rehearing shall be ordered upon a timely petition of any party."

2. Adding to part II a new section to be appropriately designated and to read as follows:

"**§602- Intermediate appellate court; sua sponte decisions.** The intermediate appellate court shall not affirm,

modify, reverse, or vacate a matter ~~on grounds~~ based upon any issue other than those raised by the parties to the proceeding, unless the parties are provided the opportunity to brief the court ~~and present oral argument~~ on the ~~matter~~ issue. If the court fails to provide that opportunity, a rehearing shall be ordered upon a timely petition of any party."

SECTION 3. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.

Report Title:
Courts of Appeal; Sua Sponte Decisions

Description:
Prohibits courts of appeal from affirming, modifying, reversing, or vacating a matter ~~on grounds~~ based upon any issue other than those raised by the parties to the proceeding, unless the parties are provided the opportunity to brief the court ~~and present oral argument~~ on the ~~matter~~ issue.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

LATE

REP. CHRIS LEE, CHAIR
REP. JOY A. SAN BUENAVENTURA, VICE CHAIR
HOUSE COMMITTEE ON JUDICIARY

TESTIMONY IN **OPPOSITION** TO HOUSE BILL NO. 2548

Monday, February 24, 2020, 2:00 p.m.
Conference Room 325
State Capitol
415 South Beretania Street

Dear Chair Lee and Vice-Chair San Buenaventura,

Earthjustice is compelled to **oppose** HB 2548 as written, based on various concerns as discussed below.

First, based on our organization's mission to uphold the rule of law and access to justice, we cannot emphasize enough the vital importance of judicial independence to our democracy. The overall approach and tone of HB 2548, as well as other bills directed against the courts in this and previous sessions, are not conducive to honoring this bedrock democratic principle.

Second, the legal authorities cited in HB 2548's preamble are misquoted and do not support the assertions in the bill. The cited U.S. Supreme Court opinions actually recognize that the Court has the authority to establish legal rules without full briefing or argument. The cited concurrence in the Monell v. Department of Social Services case, for example, recognizes: "Of course, the mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding. Marbury v. Madison [the seminal case that established the power of judicial review] . . . is a case in point."[1] While the opinions suggest that a court holding on an issue without briefing or argument may bear less precedential weight, this consideration is for the court to weigh in carrying out its independent judicial function.

Third, some of the most important court decisions in history addressed issues that were not necessarily raised by the parties. As civics students know, the Court in Marbury v. Madison

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[1] 436 U.S. 658, 709 n. 6 (1978) (Powell, J concurring); see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572 (1993) (Souter, J concurring) ("I am not suggesting that the . . . Court lacked the power to announce its rule.").

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independently declared the judiciary's fundamental "province and duty . . . to say what the law is."[2] As for the Hawai'i Supreme Court, the landmark McBryde v. Robinson case led the way in reaffirming that water was not the plantation litigants' private property, but a public resource that belonged to the people.[3] In these cases and others, the courts did not violate the law, as HB 2548 suggests, but rather performed its independent role in our democratic system.

Fourth, restricting the power of the courts to render legal rulings may cause more problems than it solves. For example, the long-standing "plain error" doctrine recognizes the court's authority to "correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights," even though not raised the parties.[4] Restricting the courts only to issues the parties' attorneys may raise could deprive parties of due process rights. It may also increase inefficiencies and spawn litigation on claims of legal malpractice or ineffective assistance of counsel, arguing over what the attorneys "could" or "should" have raised.

Finally, while Earthjustice can appreciate the disappointment litigants may feel when courts render rulings on issues that were not duly argued, we believe HB's 2548 proposal to require briefing and oral argument in each instance is too unwieldy, inflexible, and inefficient. In this regard, we note that HB 2548 misquotes the Hohn v. United States case as referring to decisions rendered without "briefing **and** argument," when the case actually states "briefing **or** argument."[5] In sum, while Earthjustice does not believe that a statutory mandate of a particular process is warranted (as opposed to a suggested process or standard that the court may consider; or perhaps simply a resolution urging the court to consider the policy issues the bill raises), any such requirement should be limited to a providing a duly noticed opportunity for briefing or argument, and not both.

Mahalo nui for this opportunity to testify. Please do not hesitate to contact us with any further questions or for further information.

Isaac H. Moriwake

Managing Attorney
Earthjustice, Mid-Pacific Office

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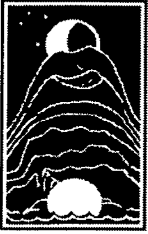
[2] 5 U.S. 137, 177 (1803).

[3] 54 Haw. 174, 504 P.2d 1330 (1973), cert. denied, 417 U.S. 962 (1974).

[4] State v. Miller, 122 Hawai'i 92, 98 (2010).

[5] 524 U.S. 236, 251 (1998).



Native Hawaiian
LEGAL CORPORATION

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REP. CHRIS LEE, CHAIR
REP. JOY A. SAN BUENAVENTURA, VICE CHAIR
HOUSE COMMITTEE ON JUDICIARY

TESTIMONY IN **OPPOSITION** TO HOUSE BILL NO

LATE

Monday, February 24, 2020, 2:00 p.m.
Conference Room 325
State Capitol
415 South Beretania Street

Dear Chair Lee and Vice-Chair San Buenaventura,

Native Hawaiian Legal Corporation is compelled to **oppose** HB 2548 as written, based on various concerns as discussed below.

First, the overall approach and tone of HB 2548, as well as other bills directed against the courts in this and previous sessions, are not conducive to honoring the vital importance of judicial independence to our democracy. As Native Hawaiian Legal Corporation's mission is to uphold the rule of law and access to justice for Native Hawaiians, we are greatly concerned about this bill's attack on the separation of powers which serves as a bedrock principle of our State government.

Second, the legal authorities cited in HB 2548's preamble are misquoted and do not support the assertions in the bill. The cited U.S. Supreme Court opinions actually recognize that the Court has the authority to establish legal rules without full briefing or argument. The cited concurrence in the Monell v. Department of Social Services case, for example, recognizes: "Of course, the mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding. Marbury v. Madison [the seminal case that established the power of judicial review] . . . is a case in point."[1] While the opinions suggest that a court holding on an issue without briefing or argument may bear less precedential weight, this consideration is for the court to weigh in carrying out its independent judicial function.

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[1] 436 U.S. 658, 709 n. 6 (1978) (Powell, J concurring); see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572 (1993) (Souter, J concurring) ("I am not suggesting that the . . . Court lacked the power to announce its rule.").

Third, some of the most important court decisions in history addressed issues that were not necessarily raised by the parties. As civics students know, the Court in Marbury v. Madison independently declared the judiciary's fundamental "province and duty . . . to say what the law is."[2] As for the Hawai'i Supreme Court, the landmark McBryde v. Robinson case led the way in reaffirming that water was not the plantation litigants' private property, but a public resource that belonged to the people.[3] In these cases and others, the courts did not violate the law, as HB 2548 suggests, but rather performed its independent role in our democratic system.

Fourth, restricting the power of the courts to render legal rulings may cause more problems than it solves. For example, the long-standing "plain error" doctrine recognizes the court's authority to "correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights," even though not raised the parties.[4] Restricting the courts only to issues the parties' attorneys may raise could deprive parties of due process rights. It may also increase inefficiencies and spawn litigation on claims of legal malpractice or ineffective assistance of counsel, arguing over what the attorneys "could" or "should" have raised.

Finally, while Native Hawaiian Legal Corporation can appreciate the disappointment litigants may feel when courts render rulings on issues that were not duly argued, such disappointment is miniscule in comparison to the drastic effects this bill will have on the rights of those without access to sufficient legal representation. Under this bill, pro se litigants and those with limited access to legal representation would not receive the benefit of a Court ruling *sua sponte* on a clear error of law, and would be forced to meet an unnecessarily burdensome standard of legal proficiency in order to have appropriate access to justice. There is no evil that this bill purportedly remedies that would justify unnecessarily restricting the public from having access to a fair legal process. The solution in situations where litigants believe they were denied an opportunity to address an issue or fact relied upon by the appellate courts is for those litigants to file a motion for reconsideration to address those points; not to take away the right of every other litigant to receive a fair adjudication of their appeal.

At the very least, we believe HB's 2548 proposal to require briefing and oral argument in each instance is too unwieldy, inflexible, and inefficient. In this regard, we note that HB 2548 misquotes the Hohn v. United States case as referring to decisions rendered without "briefing **and** argument," when the case actually states "briefing **or** argument."[5] In sum, while Native Hawaiian Legal Corporation does not believe that a statutory mandate of a particular process is

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[4] State v. Miller, 122 Hawai'i 92, 98 (2010).

[5] 524 U.S. 236, 251 (1998).

warranted (as opposed to a suggested process or standard that the court may consider; or perhaps simply a resolution urging the court to consider the policy issues the bill raises), any such requirement should be limited to a providing a duly noticed opportunity for briefing or argument, and not both.

Mahalo nui for this opportunity to testify.

Summer Sylva

Executive Director
Native Hawaiian Legal Corporation

STATE OF HAWAIʻI
OFFICE OF THE PUBLIC DEFENDER

LATE

Testimony of the Office of the Public Defender,
State of Hawaiʻi to the Senate Committee on Judiciary

February 24, 2020

H.B. No. 2584: RELATING TO COURT OF APPEAL.

Chair Lee, Vice Chair San Buenaventura, and Members of the Committee:

The Office of the Public Defender respectfully opposes H.B. No. 2584 in its current form. This bill would require additional briefing and mandatory oral argument in cases decided by our appellate courts if the decision is based on grounds not raised by the parties. The rationale is that the parties should have the opportunity to respond to an issue that has not been raised during the standard briefing process.

A significant concern with the bill in its current form is the requirement for oral argument. We do not think oral argument should be mandatory. Just because an issue was not previously raised does not mean it rises to the level of needing oral argument. We believe it is unnecessary to do so and oppose the mandatory requirement of the bill.

We note that it can be a good thing when the appellate courts identify an issue that was not previously raised by the parties. We do not believe these courts should be discouraged from doing so. We also want to caution against one equal branch of government intruding too far into the nuts and bolts of another co-equal branch of government.

Thank you for the opportunity to comment on this bill.