



GOV. MSG. NO. 1298

EXECUTIVE CHAMBERS
HONOLULU

DAVID Y. IGE
GOVERNOR

July 6, 2021

The Honorable Ronald D. Kouchi,
President and Members of the Senate
Thirty First State Legislature
State Capitol, Room 409
Honolulu, Hawai'i 96813

The Honorable Scott K. Saiki,
Speaker and Members of the
House of Representatives
Thirty First State Legislature
State Capitol, Room 431
Honolulu, Hawai'i 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

I am transmitting herewith SB639 SD1 HD1 CD1, without my approval and with the statement of objections relating to the measure.

SB639 SD1 HD1 CD1

RELATING TO COURTS OF APPEAL.

Sincerely,

DAVID Y. IGE
Governor, State of Hawai'i

EXECUTIVE CHAMBERS

HONOLULU

July 6, 2021

STATEMENT OF OBJECTIONS TO SENATE BILL NO. 639

Honorable Members
Thirty-First Legislature
State of Hawai'i

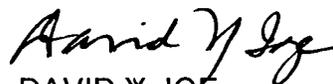
Pursuant to Section 16 of Article III of the Constitution of the State of Hawai'i, I am returning herewith, without my approval, Senate Bill No. 639, entitled "A Bill for an Act Relating to Courts of Appeal."

The purpose of this bill is to amend chapter 602, Hawaii Revised Statutes by adding new sections designated "[s]ua sponte decisions" that would prohibit the appellate courts, when acting on a matter on appeal, from affirming, modifying, reversing, or vacating a matter on grounds other than those raised by the parties unless the parties are provided the opportunity to brief the court. If an appellate court fails to give the parties the opportunity to submit supplemental briefing, a rehearing shall be ordered upon timely petition of any party.

This bill is objectionable in part because the concerns raised by this bill have been addressed by the judiciary. The Supreme Court of Hawai'i has proposed an amendment to the Hawai'i Rules of Appellate Procedure to address the concerns raised by this bill and is currently seeking public comment on the proposal.

For the foregoing reasons, I am returning Senate Bill No. 639 without my approval.

Respectfully,



DAVID Y. IGE

Governor of Hawai'i

A BILL FOR AN ACT

RELATING TO COURTS OF APPEAL.

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

1 SECTION 1. In one of her last published decisions, Justice
2 Ruth Bader Ginsburg wrote that a court abuses its discretion
3 when it departs from the principle of party presentation and
4 decides a case on grounds not raised by the parties. *United*
5 *States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020). Justice
6 Ginsburg explained that the American legal system follows the
7 principle of party presentation:

8 [I]n both civil and criminal cases, in the first
9 instance and on appeal . . . , we rely on the parties to
10 frame the issues for decision and assign to courts the
11 role of neutral arbiter of matters the parties
12 present.

13 *Id.* at 1579. This is because the American legal system "is
14 designed around the premise that [parties represented by
15 competent counsel] know what is best for them, and are
16 responsible for advancing the facts and argument entitling them
17 to relief." *Id.* (alteration in original).

18 Justice Ginsburg elaborated that:



1 [C]ourts are essentially passive instruments of
2 government. They do not, or should not, sally forth
3 each day looking for wrongs to right. [They] wait for
4 cases to come to [them], and when [cases arise,
5 courts] normally decide only questions presented by
6 the parties.

7 *Id.* (alteration in original) (internal quotation marks and
8 citation omitted).

9 Justice Ginsburg's decision comports with United States
10 Supreme Court precedent stating that decisions reached without
11 full briefing or argument have less precedential value and
12 should be given less deference. For example, the Court has
13 recognized that it has been "less constrained to follow
14 precedent where, as here, the opinion was rendered without full
15 briefing and argument." *Hohn v. United States*, 524 U.S. 236,
16 251 (1998).

17 The United States Supreme Court has also stated that
18 "somewhat less deference [is owed] to a decision that was
19 rendered without benefit of a full airing of all the relevant
20 considerations. That is the premise of the canon of
21 interpretation that language in a decision not necessary to the



1 holding may be accorded less weight in subsequent cases."
2 *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 709 n.6 (1978)
3 (Powell, J., concurring).

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

16 *Sua sponte* decisions that result from disregard of the
17 principle of party presentation violate due process. In those
18 situations, the court substituted itself as a party and denied
19 the parties the opportunity to litigate their own cases. Due
20 process is especially violated when an appellate court makes a



1 sua sponte decision that alters the remedy sought by the
2 parties.

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

9 Again, in *State v. Chang*, 144 Haw. 535 (2019), a majority
10 of the Hawaii supreme court vacated a conviction when the court
11 unilaterally held that a motion to suppress may not be
12 consolidated with a trial even when the parties consent to such
13 an action. In making its decision, the majority overruled
14 forty-year-old precedent. At no time did the majority afford
15 the parties an opportunity to address the issue.

16 Denying a party the opportunity to present its own case is
17 analogous to denying a party from engaging in a meaningful
18 colloquy with a judge. On multiple occasions, the Hawaii
19 Supreme Court has reiterated a party's right to discuss and
20 explore its rights, claims, and defenses through a colloquy.
21 *State v. Wilson*, 144 Haw. 454 (2019) (colloquy required before a



1 trial court accepts a stipulation to an element of a charged
2 offense); *State v. Eduwensuyi*, 141 Haw. 328 (2018) (colloquy
3 required to discuss right to testify); *State v. Ui*, 142 Haw. 287
4 (2018) (colloquy required to discuss party's waiver of right to
5 have State prove all elements of a charge); *State v. Kaulia*,
6 128 Haw. 479 (2013) (colloquy required when defendant intends to
7 leave courtroom during trial).

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

13 The legislature finds that the better course of action is
14 to simply prohibit an appellate court from rendering *sua sponte*
15 decisions unless the parties have been heard. This alternative
16 will ensure due process and permit the parties, rather than the
17 appellate court, to litigate their own case.

18 The purpose of this Act is to prohibit the courts of appeal
19 from affirming, modifying, reversing, or vacating a matter on
20 grounds other than those raised by the parties to the



1 proceeding, unless the parties are provided the opportunity to
2 brief the court.

3 SECTION 2. Chapter 602, Hawaii Revised Statutes, is
4 amended as follows:

5 1. By adding a new section to part I to be appropriately
6 designated and to read:

7 "§602- Sua sponte decisions. The supreme court, when
8 acting on a matter on appeal, shall not affirm, modify, reverse,
9 or vacate a matter on grounds other than those raised by the
10 parties to the proceeding, unless the parties are provided the
11 opportunity to brief the court. If the court fails to afford
12 that opportunity for the parties to submit supplemental
13 briefing, a rehearing shall be ordered upon timely petition of
14 any party."

15 2. By adding a new section to part II to be appropriately
16 designated and to read:

17 "§602- Sua sponte decisions. The intermediate
18 appellate court shall not affirm, modify, reverse, or vacate a
19 matter on grounds other than those raised by the parties to the
20 proceeding, unless the parties are provided the opportunity to
21 brief the court. If the court fails to afford that opportunity



1 for the parties to submit supplemental briefing, a rehearing
2 shall be ordered upon timely petition of any party."

3 SECTION 3. New statutory material is underscored.

4 SECTION 4. This Act shall take effect on September 1,
5 2021.

APPROVED this day of , 2021

GOVERNOR OF THE STATE OF HAWAII

THE SENATE OF THE STATE OF HAWAI'I

Date: April 27, 2021
Honolulu, Hawaii 96813

We hereby certify that the foregoing Bill this day passed Final Reading in the Senate of the Thirty-First Legislature of the State of Hawai'i, Regular Session of 2021.


President of the Senate


Clerk of the Senate

SB No. 639, SD 1, HD 1, CD 1

THE HOUSE OF REPRESENTATIVES OF THE STATE OF HAWAII

Date: April 27, 2021
Honolulu, Hawaii

We hereby certify that the above-referenced Bill on this day passed Final Reading in the House of Representatives of the Thirty-First Legislature of the State of Hawaii, Regular Session of 2021.



Scott K. Saiki
Speaker
House of Representatives



Brian L. Takeshita
Chief Clerk
House of Representatives