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No. SCOT-14-0001069

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

FRANCES LATHERS; MERRILL  
LATHERS; CASSANDRA WYLIE;  
BRAD L. COFFEL; KATHLEEN  
WALKER; ANDREW LEO; and  
AMERICAN CIVIL LIBERTIES UNION  
OF HAWAI‘I,

Plaintiffs,

v.

NEIL ABERCROMBIE, in his official  
capacity as the Governor of the State of  
Hawai‘i; DAVID M. LOUIE, in his  
official capacity as the Attorney General  
of the State of Hawai‘i; SCOTT NAGO, in  
his official capacity as Chief Election  
Officer for the State of Hawai‘i; and  
STEWART MAEDA, County Clerk,  
Office of Elections, County of Hawai‘i,

Defendants.

ORIGINAL PROCEEDING

FIRST AMENDED COMPLAINT;  
DECLARATION OF DANIEL M.  
GLUCK AND EXHIBIT 1;  
CERTIFICATE OF SERVICE

AMERICAN CIVIL LIBERTIES UNION  
OF HAWAI‘I FOUNDATION

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## I. NATURE OF THE CASE

1. This is an action for declaratory and injunctive relief to require the Defendants to allow the individual Plaintiffs (and any other registered voters in Hawai‘i County affected by Hurricane/Tropical Storm Iselle) the opportunity to exercise their fundamental right to vote in the 2014 primary election on or before September 20, 2014.<sup>1</sup>

2. In the wake of Hurricane/Tropical Storm Iselle, Defendants failed to take steps necessary to allow the individual Plaintiffs the opportunity to exercise their right to vote as guaranteed by article I, section 8 of the Hawai‘i Constitution and the first and fourteenth amendments to the United States Constitution. Pursuant to Hawai‘i Revised Statutes (“HRS”) § 11-92.3, the Legislature delegated authority to the Chief Elections Officer to determine whether, in the event of a natural disaster, to delay a vote (or to allow voters another opportunity to cast their ballots). Defendants exercised this discretion in such a way as to deny the individual Plaintiffs (and, on information and belief, many other registered voters

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<sup>1</sup> Article II, section 10 of the Hawai‘i Constitution requires that all primary elections for the State be conducted 45 days prior to the general election. As the general election is scheduled for November 4, 2014, the last day for any primary (or special election affecting the results) must be conducted and concluded by September 20, 2014.

Anticipating that the Court will require an expedited briefing schedule, Plaintiffs intend to file their Opening Brief no later than Tuesday, August 26, unless the Court orders otherwise. Plaintiffs’ counsel will attempt to serve the Complaint and Summons on all Defendants on Friday, August 22, and will also send courtesy copies of all pleadings to the Department of the Attorney General and the Hawai‘i County Office of the Corporation Counsel via e-mail as soon as practicable after filing.

in at least Precincts 04-03 and 04-04) the opportunity to vote. Defendants' exercise of discretion was unreasonable and unlawful under any standard of review.

3. The Legislature, however, created the conditions that allowed these constitutional violations to take place: the Legislature failed to fulfill its obligations under article II, section 4 of the Hawai'i Constitution, which requires that "The Legislature . . . shall prescribe the method of voting at all elections." By vesting unfettered discretion in the Chief Elections Officer, and/or the County Clerk in the case of County elections, as to whether and when to alter voting in the event of a natural disaster (via HRS § 11-92.3), the Legislature has abdicated its constitutional responsibilities. Plaintiffs seek a declaration that HRS § 11-92.3 is unconstitutional, insofar as the Legislature *permits* – but does not *require* – the Chief Elections Officer, and/or the County Clerk in the case of County elections, to make any accommodations in the event of a natural disaster.

4. To be clear, the instant case is *not* a typical election contest as contemplated by HRS §§ 11-172 or 11-173.5, in which a candidate, a political party, or a group of thirty voters seeks to have the Court declare a different result of the election. To that end, Plaintiffs need not comply with the standards of HRS §§ 11-172 and 11-173.5. As this Court has held, "Because the basis for jurisdiction over this manner of election challenge is not HRS § 11-172, the burden

of proof is different; the complaint does not need to allege that different action by Defendants would have affected the outcome of the election,<sup>1</sup> nor are Plaintiffs required to prove such an allegation in order to prevail.” *Taomae v. Lingle*, 108 Hawai‘i 245, 250-51, 118 P.3d 1188, 1193-94 (2005). *See also Watland v. Lingle*, 104 Hawai‘i 128, 134–36, 85 P.3d 1079, 1085–87 (2004).

5. Instead, Plaintiffs bring this action challenging the actions and inaction by Defendants in the aftermath of Hurricane/Tropical Storm Iselle, contending that such actions – or the lack thereof – led to the denial of the individual Plaintiffs’ (and others’) constitutional right to vote.

## **II. PARTIES**

6. Plaintiff FRANCES LATHERS lives in Pahoā, Hawai‘i, and is a registered voter in the State of Hawai‘i in Precinct 04-04. She was unable to vote on August 9, 2014 because of the damage caused by Hurricane/Tropical Storm Iselle and Defendants’ actions in opening the polls in Precinct 04-04.

Additionally, Plaintiff F. LATHERS was prohibited from voting on August 15, 2014 at the special election held at Keonepoko Elementary School. Plaintiff F. LATHERS is a member of the ACLU.

7. Plaintiff MERRILL LATHERS lives in Pahoā, Hawai‘i, and is a registered voter in the State of Hawai‘i in Precinct 04-04. He was unable to vote on August 9, 2014 because of the damage caused by Hurricane/Tropical Storm

Iselle and Defendants' actions in opening the polls in Precinct 04-04. Plaintiff M. LATHERS was prohibited from voting on August 15, 2014 at the special election held at Keonepoko Elementary School. Plaintiff M. LATHERS is a member of the ACLU.

8. Plaintiff CASSANDRA WYLIE lives in Pahoia, Hawai'i and is a registered voter in the State of Hawai'i in Precinct 04-04. She was unable to vote on August 9, 2014 because of the damage caused by Hurricane/Tropical Storm Iselle and Defendants' actions in opening the polls in Precinct 04-04. Plaintiff WYLIE was prohibited from voting on August 15, 2014 at the special election held at Keonepoko Elementary School.

9. Plaintiff BRAD L. COFFEL lives in Pahoia, Hawai'i and is a registered voter in the State of Hawai'i in Precinct 04-04. He was unable to vote on August 9, 2014 because of the damage caused by Hurricane/Tropical Storm Iselle and Defendants' actions in opening the polls in Precinct 04-04. Plaintiff COFFEL was prohibited from voting on August 15, 2014 at the special election held at Keonepoko Elementary School.

10. Plaintiff KATHLEEN WALKER lives in Pahoia, Hawai'i and is a registered voter in the State of Hawai'i in Precinct 04-04. She was unable to vote on August 9, 2014 because of the damage caused by Hurricane/Tropical Storm Iselle and Defendants' actions in opening the polls in Precinct 04-04.

11. Plaintiff ANDREW LEO lives in Kapoho, Hawai‘i and is a registered voter in the State of Hawai‘i in Precinct 04-04. He was unable to vote on August 9, 2014 because of the damage caused by Hurricane/Tropical Storm Iselle and Defendants’ actions in opening the polls in Precinct 04-04.

12. Plaintiff AMERICAN CIVIL LIBERTIES UNION OF HAWAII (“ACLU”) is a statewide, nonpartisan, non-profit organization of approximately 2,000 members dedicated to protecting the principles of liberty and equality enshrined in the United States and Hawai‘i Constitutions, including the right to vote guaranteed by the first and fourteenth Amendments to the United States Constitution and article I, section 8 of the Hawai‘i Constitution. Protecting the right to vote is germane to the purpose of the ACLU, insofar as the ACLU frequently litigates, lobbies, and educates the public on fundamental constitutional rights, including voting rights issues involving and/or affecting Hawai‘i residents. Plaintiff ACLU appears in an organizational capacity, insofar as it has expended resources to protect Hawai‘i voters’ fundamental right to vote. Plaintiff ACLU also appears in a representational capacity, insofar as one or more of its members were denied the right to cast a ballot in the August 2014 primary.

13. Defendant NEIL ABERCROMBIE is a resident of and the Governor of the State of Hawai‘i. Defendant ABERCROMBIE is the chief executive officer of the State of Hawai‘i. He is sued in his official capacity only.

14. Defendant DAVID M. LOUIE is a resident of and the Attorney General of the State of Hawai‘i. Defendant LOUIE is the chief legal officer of the State of Hawai‘i, and, as such, has the ultimate responsibility for enforcement (or preventing enforcement) of laws of statewide application, including HRS § 11-92.3. He is sued in his official capacity only.

15. Defendant SCOTT NAGO is a resident of and the Chief Election Officer of the State of Hawai‘i Office of Elections, appointed pursuant to HRS § 11-1.6. The Chief Election Officer is empowered to take certain actions regarding the administration of elections pursuant to HRS § 11-2 and is authorized – but not required – to take certain actions after a natural disaster pursuant to HRS § 11-92.3. Defendant Nago is sued in his official capacity only.

16. Defendant STEWART MAEDA is a resident of and the County Clerk of the County of Hawai‘i. As such, he is the Chief Elections Officer for the County of Hawai‘i, and the office he oversees is responsible for elections in the County of Hawai‘i. Defendant Maeda is sued in his official capacity only.

17. The violations of the fundamental right to vote, as set forth herein, were the result of Defendants – or their employees and/or agents – acting pursuant to the official policies and/or customs of the State and/or County, and because those actions have been approved, ratified, and/or enforced by persons and/or entities with decision-making authority.

### **III. JURISDICTION AND VENUE**

18. This Court has jurisdiction over the claims set forth in this complaint pursuant to article VI, section 1 of the Hawai‘i Constitution, H.R.S. chapter 11, Part XI, and HRS §§ 602-5(a)(5) and -5(a)(6).

19. Plaintiffs’ federal constitutional claims are actionable under the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1988, to redress the deprivation, under color of law, of rights secured the by the United States Constitution. Hawai‘i state courts have concurrent jurisdiction over claims for violations of federal constitutional rights pursuant to 42 U.S.C. § 1983. *See Makanui v. Dep’t of Educ.*, 6 Haw. App. 397, 403-04, 721 P.2d 165, 170 (1986) (citing *Martinez v. California*, 444 U.S. 277, 283–84 n. 7 (1980)).

20. This Court is authorized to order declaratory and injunctive relief pursuant to HRS §§ 602-5(a)(6) and 632-1.

21. Venue is proper in this Court because the events complained of herein occurred in the State of Hawai‘i.

### **IV. FACTUAL ALLEGATIONS**

22. On August 6, 2014, Governor Neil Abercrombie signed an emergency proclamation, in advance of two anticipated storms projected to impact Hawai‘i: Hurricanes Iselle and Julio. The proclamation – valid from August 6 through August 15 – stated, *inter alia*, that “the danger of disaster is of such magnitude to



warrant preemptive and protective action in order to provide for the health, safety, and welfare of the people[.]” Governor Neil Abercrombie, Proclamation, August 6, 2014 (available at [http://governor.hawaii.gov/wp-content/uploads/2012/09/20140806\\_iselle\\_proc.pdf](http://governor.hawaii.gov/wp-content/uploads/2012/09/20140806_iselle_proc.pdf)). Among other things, the proclamation suspended several chapters of the Hawai‘i Revised Statutes; authorized the Director of the Hawai‘i Emergency Management Agency to evacuate the public from danger areas; and authorized disaster relief funds.

23. On Friday August 8, 2014, at approximately 2:30 a.m. Hawai‘i Standard Time, Iselle (which was downgraded to a Tropical Storm) made landfall on Hawai‘i County, with its eye hitting approximately 5 miles east of Pahala.

24. Iselle caused significant damage throughout Hawai‘i, although the effects were particularly severe in Pahoā, Puna, and the surrounding areas of Hawai‘i County. The storm knocked down trees and power lines, blocked roads, and cut power for tens of thousands of residents. According to Hawai‘i Electric Light Company (“HELCO”), on August 8, an estimated 30,000 homes were without power.

25. At approximately 10:42 a.m. on August 8, the day before the scheduled primary election, the Office of Elections issued a press release announcing that the primary election would proceed as originally scheduled, despite the looming storms.

26. That afternoon, however, the Office of Elections changed course and issued a second press release, announcing the closure of two polling places: Hawai‘i Paradise Community Center (04-01) and Keoneopoko Elementary School (04-02). The press release quotes Defendant Nago as stating that “the damage to roadways have [sic] left some communities in Puna isolated.” The press release further announced that “voting in the rescheduled election will be done by absentee ballot,” but that all other polling places in Hawai‘i would be open the following day. Defendant Nago issued a proclamation to this effect at some time on August 8 but it is unknown if notice of any kind was mailed to any of the residents in Hawai‘i County.

27. On August 9, the day of the election, an estimated 9,200 homes remained without power, with the majority located in lower Puna, including Hawaiian Paradise Park, Orchidland Estates, Leilani Estates, Nanawale, Kapoho, Kalapana, Hawaiian Beaches, Hawaiian Shores, and Waipunahina. These areas included vast portions of Precincts 04-03 and 04-04.

28. Notwithstanding the damage from the storm and the public knowledge that numerous residents in Precincts 04-03 and 04-04 remained without power, the primary election took place, and all polling places – with the exception of 04-01 and 04-02 – were open. Signs were posted on the closed polling places stating that “all voters will be mailed a ballot at a later date” (all capital letter format omitted).

29. Defendants should have known, by virtue of the power outages (of which they had, or should have had, actual notice and/or knowledge), that the information they were receiving/disseminating regarding the accessibility of roads and safety issues was likely unavailable to thousands of residents in Precincts 04-03 and 04-04, insofar as the lack of power would have hampered communications with residents.

30. Furthermore, Defendants should have known that the continuing lack of power to thousands of people would have made it impossible (without phones, television, and internet) for affected residents to stay informed regarding Defendants' numerous and rapidly changing decisions concerning the primary election. Indeed, as of the last time most of the residents had power and connectivity, Defendant Abercrombie has issued an emergency proclamation effective through and including August 15.

31. Although the polls were open on August 9 (with the exception of polling places 04-01 and 04-02), many voters – particularly voters assigned to polling places 04-03 and 04-04, and including the individual Plaintiffs in the instant case – were physically unable to access the polls because of the storm's damage. In many cases (and as set forth in more detail *infra*), voters' driveways, and/or the roads leading from their homes to the polling places, were made completely impassable by felled trees.

32. Defendant Abercrombie did not issue any pronouncements or proclamations of any kind extending or postponing voting opportunities for any voters in the August 2014 primary election.

33. On August 11, 2014, at approximately 3:33 p.m., Defendant Nago issued another press release, announcing that an election would be held on Friday, August 15, but only for the two polling places that had been closed on August 9 (04-01 and 04-02). Defendants did not afford any method by which voters in other precincts – particularly those voters assigned to 04-03 and 04-04 who were physically unable to vote because of the storm – could cast their ballots.

34. Defendant Nago issued a proclamation on August 11, 2014 rescinding the proclamation of August 8. On information and belief, Defendant Nago mailed notice of his decision to revoke the previously announced absentee ballot voting and reinstate a walk-in election at a single location at Keonepoko Elementary School (located in 04-02). On information and belief, Defendant Nago mailed and/or delivered such notice to the registered voters in Precincts 04-01 and 04-02 only.

35. Some of the registered voters in Precincts 04-01 and 04-02 received Defendants' mailed notice on August 15, the day of the "postponed" election.

36. On August 14, 2014, Defendant Nago issued another press release and/or announcement stating that the election would proceed on August 15, and

that “[o]nly voters who are assigned to Hawaiian Paradise Community Center (04-01) and Keonepoko Elementary School (04-02), who did not previously vote by absentee mail ballot or at an early vote site[,] will be allowed to vote at Keonepoko Elementary School.” Notwithstanding this limitation, the press release/announcement also stated that “Election officials will also be accepting absentee ballots from voters who were unable to drop off their ballots during the Primary Election on August 9.”

37. Some voters – including some of the individual Plaintiffs in the instant case – believed that they would be authorized and permitted to cast ballots in person on August 15. Indeed, many voters who were assigned to precincts 04-03 and 04-04, but were physically unable to access their polling places because of the storm, traveled to Keonepoko Elementary School (the consolidated polling place for the “makeup” election on August 15), but were turned away and were denied the opportunity to vote.

38. Plaintiff Frances Lathers (“Mrs. Lathers”) lives in Pahoia, Hawai‘i, and is a registered voter in the State of Hawai‘i. Although her polling place – Precinct 04-04 – was open on August 9, 2014, she was unable to access her polling place on that date due to Hurricane/Tropical Storm Iselle. Specifically, although Mrs. Lathers intended to vote in the primary, she was physically prevented from doing so: approximately twenty downed trees blocked her driveway. Although

Mrs. Lathers is sometimes able to access the road by cutting through her neighbor's property, Mrs. Lathers was unable to do so because her neighbor's gate was locked. Even if Mrs. Lathers had been able to get past her own driveway, more trees blocked road access for much of the area of Kapoho Road, Pohoiki Road, and Leilani Avenue. Nevertheless, once Mrs. Lathers learned that a polling place was open on August 15, she went to that polling place in an attempt to cast a ballot. She was turned away because she was not registered to vote in either Precinct 04-01 or 04-02. She believes that, while individuals often do not have much power in America, one way that she and others can exercise power is by voting. Instead, she was disenfranchised. Mrs. Lathers is a member of the ACLU.

39. Plaintiff Merrill Lathers ("Mr. Lathers") lives in Pahoia, Hawai'i, and is a registered voter in the State of Hawai'i. Although his polling place – Precinct 04-04 – was open on August 9, 2014, Mr. Lathers was unable to access his polling place on that date due to Hurricane/Tropical Storm Iselle. Specifically, although Mr. Lathers intended to vote in the primary, he was physically prevented from doing so: approximately twenty downed trees blocked his driveway. Although Mr. Lathers is sometimes able to access the road by cutting through his neighbor's property, Mr. Lathers was unable to do so because his neighbor's gate was locked. Even if Mr. Lathers had been able to get past his own driveway, more trees blocked road access for much of the area of Kapoho Road, Pohoiki Road, and

Leilani Avenue. Nevertheless, once Mr. Lathers learned that a polling place was open on August 15, he went to that polling place in an attempt to cast a ballot. He was turned away because he was not registered to vote in either Precinct 04-01 or 04-02. Mr. Lathers has voted for many years, and believes that voting is important, but was disenfranchised in the 2014 primary election. Mr. Lathers is a member of the ACLU.

40. Plaintiff Cassandra Wylie lives in Pahoia, Hawai‘i, and is a registered voter in the State of Hawai‘i. Although her polling place – Precinct 04-04 – was open on August 9, 2014, Ms. Wylie was unable to access her polling place on that date due to Hurricane/Tropical Storm Iselle. Specifically, although Ms. Wylie intended to vote in the primary, she was physically prevented from doing so: the roads in all directions, including Flower, Kehau, and Ginger Roads, were blocked by debris and trees. Her home still lacked power as of the morning of August 21, 2014. Nevertheless, once Ms. Wylie learned that a polling place was open on August 15, she went to that polling place in an attempt to cast a ballot. She was turned away because she was not registered to vote in either Precinct 04-01 or 04-02, and she broke down in tears. Ms. Wylie’s grandmother did not have the right to vote, and Ms. Wylie believes it is especially important for her – and other women – to vote. Instead, she was disenfranchised.

41. Plaintiff Brad Coffel lives in Pahoia, Hawai‘i, and is a registered voter in the State of Hawai‘i. Although his polling place – Precinct 04-04 – was open on August 9, 2014, Mr. Coffel was unable to access his polling place on that date due to Hurricane/Tropical Storm Iselle. Specifically, although Mr. Coffel intended to vote in the primary, he was physically prevented from doing so: the road was blocked by trees and power lines in both directions. Nevertheless, once Mr. Coffel learned that a polling place was open on August 15, he went to that polling place in an attempt to cast a ballot. He was turned away because he was not registered to vote in either Precinct 04-01 or 04-02. He was disenfranchised, and felt like a second-class citizen at being denied the right to vote.

42. Plaintiff Kathleen Walker lives in Pahoia, Hawai‘i, and is a registered voter in the State of Hawai‘i. Although her polling place – Precinct 04-04 – was open on August 9, 2014, Ms. Walker was unable to access her polling place on that date due to Hurricane/Tropical Storm Iselle. Specifically, although Ms. Walker intended to vote in the primary, she was physically prevented from doing so: the roads were not passable, as trees and power lines were down. She did not know whether the downed power lines were still “hot,” and therefore did not want to go near them. Nevertheless, Ms. Walker learned that a polling place was open on August 15; she did not travel to the polling place on that day because she had a broken leg, but asked her husband, Plaintiff Brad Coffel, to go to the polling place



and to report back to her as to whether he was able to vote. She relied on his report that they were unable to vote at Keonepoko Elementary School on August 15, and therefore did not go to the polling place herself. She was disenfranchised, and feels that it was unfair she could not vote.

43. Plaintiff Andrew Leo lives in Kapoho, Hawai‘i and is a registered voter in the State of Hawai‘i. Although his polling place – Precinct 04-04 – was open on August 9, 2014, he was unable to access his polling place on that date due to Hurricane/Tropical Storm Iselle. Specifically, his driveway was completely covered in trees; even if he had been able to get to the road by cutting across his neighbor’s yard, there was a tree blocking the roadway itself. He did not attempt to vote at Keonepoko Elementary School on August 15 because he had heard that only voters registered in Precincts 04-01 and 04-02 would be permitted to vote there. He was disenfranchised, and felt cheated out of his right to vote.

44. On information and belief, many other registered voters in Hawai‘i County, particularly those in Precincts 04-03 and 04-04, were similarly denied the right to vote in the August 2014 primary election.

45. The individual Plaintiffs in the instant case are certainly not alone in having been denied the right to vote, based on the objectively verifiable fact that voter turnout was radically lower in Precinct 04-03 in 2014 than in 2012 (a difference which, on information and belief, is statistically significant). Although

the precinct boundaries were changed – a new Precinct 04-04 was created out of Precinct 04-02 – the 2014 data demonstrate substantially lower turnout in the areas affected by Iselle:

Precinct	In-person voter turnout 2012 Primary	In-person voter turnout 2014 Primary
04-01	24.2%	16.3%
04-02 (boundaries changed between 2012 and 2014)	22.6%	22.9%
04-03	20.4%	12.0%
04-04	(Created in October 2013, formerly part of Precinct 04-02)	12.3%

See <http://hawaii.gov/elections/results/2014/primary/elections/results/2014/primary/files/precinct.pdf> and <http://hawaii.gov/elections/results/2012/primary/elections/results/2012/primary/files/precinct.pdf>. The statewide turnout for the August primary was approximately 20%.

46. This reduction in voter turnout cannot be explained by any possible offset in early absentee ballots cast: 491 voters (16.0%) cast early

abstentee ballots in Precinct 04-03 in 2012, comparable to the 480 voters in that Precinct (14.4%) who cast early absentee ballots in 2014.

47. Plaintiffs do not assert – and need not assert in order to prevail in the instant case – that their votes *would* change the outcome of any primary election. Nevertheless, there is a possibility that the votes of those who were physically prevented from getting to the polls on August 9 *could* have altered the outcome of at least one race: the race for Hawai‘i County Council, District 4.

48. In that race, of the four candidates running for the office, one received 2,032 votes – 52.0% of the total votes cast. Pursuant to Hawai‘i County Charter, Article XIII, § 13-27, because that candidate received over 50% of the votes cast, that candidate is deemed elected at that time, and the contest will not appear on the November ballot. However, if no candidate receives more than 50% of the votes cast (including absentee ballots), the contest will appear on the November ballot between the two candidates who received the most votes. In other words, if the leading candidate had received 49.9% or less of the vote, rather than 52.0%, the leading candidate would face a challenger in November rather than winning outright in August.

49. According to Plaintiffs’ calculations, if 149 or more voters were to cast ballots for any one of the three non-leading County Council candidates, there would be a run-off election in November between the two top candidates. This is a

distinct possibility given that sheer number of people who were unable to cast votes in the August primary.

## **V. DECLARATORY AND INJUNCTIVE RELIEF**

50. Plaintiffs reallege and incorporate by reference, as though fully contained herein, all allegations set forth in Paragraphs 1 through 49 above.

51. For reasons including those stated in this Complaint, an actual and immediate controversy has arisen and now exists between Plaintiffs and Defendants, which parties have genuine and opposing interests and which interests are direct and substantial. Plaintiffs are therefore entitled to a declaratory judgment as well as such other and further relief as may flow from the entry of such a declaratory judgment.

52. Plaintiffs have no adequate remedy at law. Unless enjoined by the Court, no further action will be taken with respect to the 2014 primary elections, and numerous individuals will have been deprived of their fundamental constitutional right to vote, causing irreparable injury. This threat of injury to Plaintiffs – and to the public at large – requires permanent injunctive relief.

**FIRST CLAIM FOR RELIEF**  
**Violation of article I, section 8, of the Hawai‘i Constitution**

53. Plaintiffs reallege and incorporate by reference, as though fully contained herein, all allegations set forth in Paragraphs 1 through 52 above.

54. Defendants’ actions and inactions, in the wake of Hurricane/Tropical Storm Iselle, caused the disenfranchisement of numerous voters in Hawai‘i County, particularly those assigned to vote in Precincts 04-03 and 04-04.

55. The right to vote is fundamental. Although the Legislature vested the Chief Elections Officer, and/or the County Clerk in the case of County elections, with discretion to make decisions in the event of a natural disaster, the Chief Elections Officer (and the County Clerk in the case of County elections) cannot exercise that discretion unreasonably, and in such a manner as to disenfranchise large numbers of voters, as occurred in the instant case.

56. Similarly, to the extent that Defendant Abercrombie has authority and/or discretion to extend or postpone an election pursuant to article V of the Hawai‘i Constitution, HRS chapter 382, or some other source of law, Defendant Abercrombie exercised or declined to exercise that authority/discretion in such a manner as to disenfranchise large numbers of voters in the instant case.

57. Defendants should have taken additional steps to ensure the integrity of the primary election and to protect the right to vote upon suspecting – and later

confirming – that numerous voters would be physically unable to reach their polling places due to a natural disaster.

58. Defendants’ refusal to allow the individual Plaintiffs to vote – after the Governor proclaimed Hawai‘i to be a disaster area, after it became clear that a number of voters in Hawai‘i County were unable, or were likely unable, to access the polls because of a natural disaster, and after Defendant Nago issued multiple, conflicting directives concerning the administration of the election – violated article I, section 8 of the Hawai‘i Constitution.

59. Voters who were physically unable to cast a vote because of this natural disaster – particularly those in Precincts 04-03 and 04-04 – must be afforded a full and fair opportunity to cast a ballot.

**SECOND CLAIM FOR RELIEF**  
**Violation of article II, section 4, of the Hawai‘i Constitution**

60. Plaintiffs reallege and incorporate by reference, as though fully contained herein, all allegations set forth in Paragraphs 1 through 59 above.

61. HRS § 11-92.3 provides a panoply of discretionary options for the Chief Elections Officer to exercise in the event of a natural disaster.

62. HRS § 11-92.3 permits – but does not require – the Chief Elections Officer, and/or the County Clerk in the case of County elections, to accommodate voters who are physically unable to cast a ballot due to a natural disaster.

63. Article II, section 4 of the Hawai‘i Constitution provides that “[t]he legislature shall . . . prescribe the method of voting at all elections.”

64. In passing HRS § 11-92.3, the Legislature abdicated its constitutional responsibility: instead of passing a statute that prescribes the method of voting in the event of a natural disaster, the Legislature delegated unlimited discretion to the Chief Elections Officer, and/or the County Clerk in the case of County elections. Such delegation was unconstitutional, insofar as the Legislature lacked the power to delegate this unlimited discretion to the Chief Elections Officer, and/or the County Clerk in the case of County elections.

65. To the extent that the Legislature failed to delineate additional safeguards in the event of a natural disaster, and instead relied upon the Governor’s plenary authority to ensure voters are able to exercise their fundamental right to vote, the Legislature abdicated its constitutional responsibilities set forth in article II, section 4, thus injuring the Plaintiffs.

66. Plaintiffs seek a declaration that HRS § 11-92.3 is unconstitutional. Plaintiffs further seek an order directing Defendants to afford voters who were physically unable to cast a vote because of this natural disaster – particularly those in Precincts 04-03 and 04-04 – a full and fair opportunity to cast a ballot.

**THIRD CLAIM FOR RELIEF**  
**Violation of First and Fourteenth Amendments to the United States  
Constitution,  
Actionable Pursuant to 42 U.S.C. § 1983**

67. Plaintiffs reallege and incorporate by reference, as though fully contained herein, all allegations set forth in Paragraphs 1 through 66 above.

68. Defendants' actions and inactions, in the wake of Hurricane/Tropical Storm Iselle, caused the disenfranchisement of numerous voters in Hawai'i County, particularly those assigned to vote in Precincts 04-03 and 04-04.

69. The right to vote is fundamental. Although the Legislature vested in the Chief Elections Officer, and/or the County Clerk in the case of County elections, discretion to make decisions in the event of a natural disaster, the Chief Elections Officer (and the County Clerk in the case of County elections), cannot exercise that discretion unreasonably and in such a manner as to disenfranchise large numbers of voters, as occurred in the instant case.

70. Defendants should have taken additional steps to ensure the integrity of the primary election and to protect the right to vote upon suspecting – and later confirming – that numerous voters would be physically unable to reach their polling places due to a natural disaster.

71. Defendants' refusal to allow the individual Plaintiffs to vote, after the Governor proclaimed Hawai'i to be a disaster area, once it became clear that a number of voters in Hawai'i County were unable, or were likely unable, to reach



the polls because of a natural disaster, and after Defendant Nago issued multiple, conflicting directives concerning the administration of the election – violated the first and fourteenth amendments to the United States Constitution.

72. Voters who were physically unable to cast a vote because of this natural disaster – particularly those in Precincts 04-03 and 04-04 – must be afforded a full and fair opportunity to cast a ballot.

WHEREFORE, Plaintiffs pray that this Court:

- A) Issue a declaratory judgment that, in enacting HRS § 11-92.3, the Legislature abdicated its constitutional responsibility under article II, section 4 of the Hawai‘i Constitution to “prescribe the method of voting at all elections” and thereby declare such statute unconstitutional;
- B) Issue a declaratory judgment that Defendants’ refusal to allow individual Plaintiffs, and others similarly situated, to vote unduly infringed upon those individuals’ fundamental right to vote under both the Hawai‘i and United States Constitutions;
- C) Require Defendants to allow the individual Plaintiffs (and any other individuals who attest – by declaration under penalty of perjury, or otherwise as this Court may direct – that they were unable to cast ballots due to Hurricane/Tropical Storm Iselle and who had not already cast ballots), particularly those voters in Precincts 04-03 and 04-04, to cast

ballots (whether in-person or by absentee ballot), and to require that Defendants collect and tally those votes and certify all results no later than September 20, 2014;

D) Enjoin Defendants (and their divisions, officers, servants, employees, attorneys, agents and representatives, successors-in-office, and all persons acting or purporting to act in concert or in cooperation with Defendants or pursuant to their authority) from certifying the current results of the August 2014 primary election if not yet certified (or, in the alternative, order Defendants to rescind any certification that has already issued), and/or submitting the current results of the August 2014 primary election to the voters at the November 4, 2014, general election, until such time as all votes have been cast as contemplated herein;

E) Order Defendants (and their divisions, officers, servants, employees, attorneys, agents and representatives, successors-in-office, and all persons acting or purporting to act in concert or in cooperation with Defendants or pursuant to their authority) to notify the electorate through the most effective methods that those voters who were unable to cast ballots due to Hurricane/Tropical Storm Iselle shall be permitted to do so at a special election (possibly including ballots cast at polling places

and/or via absentee ballot) at an appropriate date and time prior to September 20, 2014;

- F) Award reasonable attorneys' fees, costs, and other expenditures incurred as a result of bringing this action pursuant to 42 U.S.C. § 1988, the private attorney general doctrine, *see Sierra Club v. Dep't of Transp. of State of Hawai'i*, 120 Hawai'i 181, 202 P.3d 1226 (2009) (adopting and applying the private attorney general doctrine), Hawai'i Rules of Appellate Procedure Rule 39, and other applicable laws; and
- G) Enter such other and further relief as this court deems just and proper.

Dated: Honolulu, Hawai'i, August 22, 2014.

/s/ Daniel M. Gluck

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ACLU OF HAWAI'I FOUNDATION

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