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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

MEMORANDUM IN OPPOSITION TO
DEFENDANTS’ MOTIONS TO
DISMISS AND MOTION FOR
PERMANENT INJUNCTIVE RELIEF;
DECLARATION OF FRANCES H.
LATHERS; DECLARATION OF
MERRILL LATHERS; DECLARATION
OF BRAD L. COFFEL; DECLARATION
OF KATHLEEN WALKER;
DECLARATION OF ANDREW LEO;
DECLARATION OF CASSANDRA
WYLIE; DECLARATION OF
DANIEL M. GLUCK AND
EXHIBITS 2-9

AMERICAN CIVIL LIBERTIES UNION
OF HAWAI‘I FOUNDATION

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I. INTRODUCTION

The instant case is not a typical “election contest” within the meaning of Hawai‘i Revised Statutes (“HRS”) §§ 11-172 or 11-173.5, and Plaintiffs readily admit that they do not meet the requirements for an election contest as set forth therein (such as, *inter alia*, a minimum of thirty voters and evidence that the result would change).

Plaintiffs also readily admit that this case is novel: this Court has never previously decided a matter in which government officials prevented voters from casting ballots following a natural disaster, as Defendants did here, because no such situation has ever presented itself. Instead, Plaintiffs submit that this Court has jurisdiction pursuant to article VI, section 1 of the Hawai‘i Constitution, HRS chapter 11, Part XI, and/or HRS §§ 602-5(a)(5) and -5(a)(6) to allow Plaintiffs to exercise their right to vote. Should the Court agree with Defendants that it does not have jurisdiction over the instant matter, Plaintiffs agree that the case should be dismissed. However, as discussed more fully *infra*, Plaintiffs believe jurisdiction properly lies with this Court.

Although this Court has not previously exercised its jurisdiction in precisely this manner, no statute or constitutional provision prevents the Court from doing so. To the contrary, this Court has repeatedly taken original jurisdiction over constitutional questions in elections. *See Taomae v. Lingle*, 108 Hawai‘i 245, 250-51, 118 P.3d 1188, 1193-94 (2005); *Watland v. Lingle*, 104 Hawai‘i 128, 134–36, 85 P.3d 1079, 1085–87 (2004). While Defendants argue that Plaintiffs may not vindicate their right to vote in this Court due to lack of jurisdiction, less than two weeks ago, Defendant Nago and his attorneys argued that the Circuit Court *also* lacked jurisdiction to protect voters’ rights. *See Hanabusa v. Nago*, Civ. 14-1-307, Defendant’s Opposition to Plaintiff’s Motion for Emergency Temporary Restraining Order, Aug. 14, 2014 (attached hereto as Exhibit 8 to the Second Declaration of Daniel M. Gluck (Gluck Decl. #2)), at

4 n.1 (“Under our election process, the Hawai‘i Supreme Court's jurisdiction is limited to a *post* election review filed within six days after the primary election under HRS §§ 11-172 and -173.5. This jurisdiction does not include Plaintiff’s attempt to stop an election in *this court before* the election has concluded.”). In other words, State Defendants argue that *no* court has jurisdiction to hear a claim brought by disenfranchised voters under *any* circumstances unless the voters themselves prove that their ballots would have changed the result of a specific, identifiable election. It cannot be the case that no court in Hawai‘i has the authority to *hear* Plaintiffs’ claim.

Turning to the merits of Plaintiffs’ claims, in the instant case, Plaintiffs do not accuse any Defendant of acting in bad faith. To the contrary, every indication is that each Defendant exercised his duties faithfully, given the rapidly changing conditions in the wake of Hurricane/Tropical Storm Iselle. Nevertheless, the result of Defendants’ actions is clear: many voters were deprived of their fundamental, constitutional right to vote. Regardless of whether such deprivation was due to a mistake by one or more Defendants, or whether such deprivation was due to a structural flaw in the system established to accommodate voters in the event of a natural disaster, the simple truth is that the individual Plaintiffs were prohibited from voting (even when nearby, similarly situated voters were allowed to cast their ballots). This Court has the benefit of hindsight, combined with the rare luxury of time to correct this mistake. Plaintiffs respectfully request that the Court take that opportunity, to prevent otherwise irreparable harm, by allowing them (and others similarly situated) the chance to cast their ballots to be tabulated in the August 2014 primary.

II. STATEMENT OF THE CASE

A. Defendants Failed to Protect Voters' Rights After Hurricane/Tropical Storm Iselle Caused Massive Damage to Precincts 04-03 and 04-04

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[.]” Second Declaration of Daniel M. Gluck (“Gluck Decl. #2), Ex. 3 (Governor Neil Abercrombie, Proclamation, August 6, 2014). 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. *Id.*

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.¹ 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”), at 12:15 p.m. on August 8, over 17,000 homes were without power. *See* HELCO, Power restoration update from Hawaii Electric Light on August 8, Aug. 8, 2014, available at: http://www.hawaiielectriclight.com/helco/_hidden_Hidden/Hawaii-Electric-Light-asks-customers-to- conserve-energy?cpsexcurrchannel=1, last accessed August 24, 2014.

¹ *See* National Weather Service, TROPICAL STORM ISELLE TROPICAL CYCLONE UPDATE, 245 AM HST FRI AUG 8 2014, August 8, 2014, available at <http://www.prh.noaa.gov/cphc/tcpages/archive/2014/TCUCP3.EP092014.000.1408081245>.

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. Gluck Decl. #2, Ex. 4.

That afternoon, however, the Office of Elections changed course and issued a second press release, announcing the closure of two polling places: Hawaiian Paradise Community Center (04-01) and Keonepoko Elementary School (04-02).² Gluck Decl. #2, Ex. 5. The press release quotes Defendant Nago as stating that “the damage to roadways have [sic] left some communities in Puna isolated.” *Id.* 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. *Id.* Defendant Nago issued a proclamation to this effect at some time on August 8, requiring that all votes for Precincts 04-01 and 4-02 not already cast would be done by absentee ballot. Gluck Decl. #2, Ex. 8 at 22-23. Defendant Nago stated that a timeline for when ballots would be provided to the voters was forthcoming.

As of August 8 (the day before the primary), Defendants Nago and Louie – along with the Hawai‘i County Elections Program Administrator and others – had actual knowledge that at least some roads in Precinct 04-04 were closed due to Iselle. As set forth in the Declaration of Molly Stebbins, Hawaii County Corporation Counsel, Hawai‘i County Civil Defense Director Darryl Oliveira reported in a conference call that “many roads were closed due to downed trees and power poles in the Hawaiian Paradise Park, Hawaiian Shores, Hawaiian Beaches, *and Kapoho Beach Lots* subdivisions.” Gluck Decl. #2, Ex. 8 at 26 ¶ 5 (emphasis added). Kapoho

² A map showing Precincts 04-01, 04-02, 04-03, and 04-04 is attached as Exhibit 2 to the Second Declaration of Daniel M. Gluck (“Gluck Decl. #2”).

Beach Lots is in Precinct 04-04. Gluck Decl. #2, Ex. 2.³ In fact, Mr. Oliveira reported that there was extensive damage “primarily in Lower Puna area” and further that numerous roads were inaccessible due to downed trees and power lines. Gluck Decl. #2, Ex. 8 at 26 ¶¶ 5-6.

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. See HELCO, Power restoration update from Hawaii Electric Light on August 9, Aug. 9, 2014, available at <http://www.hawaiielectriclight.com/helco/hidden/Hidden/Hawaii-Electric-Light-continues-to-restore-power?cpsectcurrchannel=1> (last accessed August 24, 2014). These areas included vast portions of Precincts 04-03 and 04-04. See Gluck Decl. #2, Ex. 2.

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). See Gina Mangieri, *Fix for Disaster-Delayed Voting Law Promised*, KHON2, Aug. 10, 2014, available at <http://khon2.com/2014/08/10/fix-for-disaster-delayed-voting-law-promised/> (see video at 0:38-0:39, showing sign at polling place), last accessed August 23, 2014. Indeed, as of the last time most of the residents had power and connectivity, Defendant Abercrombie had issued an emergency proclamation effective through and including August 15.

³ Another detailed map of the area is available at <http://www.hiloagent.com/punamap.htm>.

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 and power lines.

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.

Defendant Nago was unable to communicate with Hawaiian Paradise Community Center, the designated polling place in precinct 04-01; consequently, on August 11, 2014, Defendant Nago decided to reopen the election only for precincts 04-01 and 04-02 and to do so in a single polling place, Keonepoko Elementary School (the designated polling place for precinct 04-02). Gluck Decl. #2, Ex. 8 at 18 ¶ 15. Defendant Nago issued another press release, at approximately 3:33 p.m. detailing his decision. Gluck Decl. #2 Ex. 6. 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.

Defendant Nago issued a proclamation on August 11, 2014, rescinding the August 8 proclamation’s pronouncement that voting would be done by absentee ballot, and instead proclaiming that voting for Precincts 04-01 and 04-02 would be done in person on August 15. Gluck Decl. #2, Ex. 8 at 24. 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. Gluck Decl. #2, Ex. 8 at 18 ¶ 17. On information and belief, Defendant Nago mailed and/or delivered such notice to the registered voters in Precincts 04-01 and 04-02 only. *Id.* .

Yet as late as August 13, over 6,000 Hawai‘i County homes still lacked electricity. *See UPDATES: Big Island Power Outage Status*, BIG ISLAND NOW, Aug. 13, 2014, available at <http://bigislandnow.com/2014/08/13/big-island-power-outage-status/> (last accessed August 24, 2014).

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.” Gluck Decl. #2, Ex. 7. Notwithstanding this limitation, the press release/announcement also stated that “[e]lection officials will also be accepting absentee ballots from voters who were unable to drop off their ballots during the Primary Election on August 9.” *Id.* The vote proceeded for Precincts 04-01 and 04-02 on August 15, though approximately 3,800 homes still lacked electricity. *See HELCO, Power restoration update from Hawaii Electric Light on August 15*, Aug. 15, 2014, available at http://www.hawaiielectriclight.com/helco/_hidden_hidden/Power-restoration-update-from-Hawaii-Electric-Light-on-August-15?cpsexcurrchannel=1, last accessed August 24, 2014.

B. Voters in Precincts 04-03 and 04-04 Were Prohibited From Voting on August 15, and the Individual Plaintiffs Were Disenfranchised

Plaintiff Frances H. Lathers and her husband, Merrill Lathers, live in Pahoia, Hawai‘i, and are registered to vote in Precinct 04-04 in Hawai‘i County. Declaration of Frances H. Lathers (“F. Lathers Decl.”) ¶¶ 4-5, 10; Declaration of Merrill Lathers (“M. Lathers Decl.”) ¶¶ 4-5, 10. They are both members of the ACLU.⁴ F. Lathers Decl. ¶ 3; M. Lathers Decl. ¶ 3. They both

⁴ As such, the ACLU has representational standing (that is, standing on behalf of its members, at least one of whom would have standing in her/his own right with respect to an issue germane to the ACLU’s mission) as a Plaintiff in this matter. *See Warth v. Seldin*, 422 U.S. 490,

intended to vote on August 9, 2014, but were unable to reach their polling place because of downed trees and debris. F. Lathers Decl. ¶¶ 5, 8; M. Lathers Decl. ¶¶ 5, 8. Specifically, downed trees blocked road access for much of the area of Kapoho Road, Pohoiki Road, and Leilani Avenue. F. Lathers Decl. ¶ 8; M. Lathers Decl. ¶ 8. Their own driveway was blocked by more than twenty downed trees, and they were unable to access the road via their neighbor's property. F. Lathers Decl. ¶¶ 8-9; M. Lathers Decl. ¶¶ 8-9. They attempted to vote at Keonepoko Elementary School on August 15, but were turned away because they do not live in either Precinct 04-01 or 04-02. F. Lathers Decl. ¶ 10; M. Lathers Decl. ¶ 10. They both feel very strongly about exercising their right to vote, but were denied the opportunity to do so. F. Lathers Decl. ¶ 11; M. Lathers Decl. ¶ 11.

Plaintiff Cassandra Wylie lives in Nanawale Estates (in Pahoa), in Precinct 04-04, and is registered to vote in Hawai'i. Declaration of Cassandra Wylie ("Wylie Decl.") ¶¶ 2-3. She intended to vote in the primary on August 9, *id.* ¶ 4, but was unable to get to her polling place because she "was blocked in on all sides by downed trees on Kehau Street, Ginger Street, and Flower Street." *Id.* ¶ 5. Indeed, electricity was not restored to her home until the evening of August 21, nearly two weeks after Iselle hit. *Id.* ¶ 7. Plaintiff Wylie attempted to vote at

511 (1975); *Hunt v. Wash. State Apple Adver.*, 432 U.S. 333, 343 (1977). Similarly, the issue of voting rights is germane to the mission of the ACLU and the ACLU has expended resources to protect the rights of Hawai'i voters, as evidenced by its work in bringing several voting rights cases in this Court, including the instant matter. *See, e.g., Rees v. Carlisle*, 113 Hawai'i 446, 153 P.3d 1131 (2007); *Taomae v. Lingle*, 108 Hawai'i 245, 118 P.3d 1188 (2005); *Watland v. Lingle*, 104 Hawai'i 128, 85 P.3d 1079 (2004). As such, the ACLU has organizational standing as a Plaintiff in this matter. *See, e.g., Hawaii Med. Ass'n v. Hawaii Med. Serv. Ass'n, Inc.*, 113 Hawai'i 77, 100, 148 P.3d 1179, 1202 (2006) ("An organization also has standing to sue for injury to its own interests, separate from any injury to its members, inasmuch as standing may be established in an individual or representative capacity.") (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (holding, in part, that the NAACP had standing, on its own behalf, to challenge a Georgia Voter ID law).

Keonepoko Elementary School on August 15, 2014, but was turned away because she did not live in either Precinct 04-01 or 04-02. *Id.* ¶ 6. She feels strongly about exercising her right to vote because her grandmother – like other women of her era – was systematically disenfranchised. *Id.* ¶ 9. As such, when she was denied the opportunity to vote on August 15, she was so upset that she cried. *Id.* ¶ 8.

Plaintiff Brad L. Coffel and his wife, Plaintiff Kathleen Walker, live in Nanawale Estates (in Pahoā), and are registered to vote in Precinct 04-04 in Hawai‘i County. Declaration of Brad L. Coffel (“Coffel Decl.”) ¶¶ 3-4, 7); Declaration of Kathleen Walker (“Walker Decl.”) ¶¶ 3-4, 7-8. They both intended to vote in the primary on August 9. Coffel Decl. ¶ 5; Walker Decl. ¶ 5. They were unable to get to their polling place on August 9, 2014 because their road was blocked in both directions by trees and power lines. Coffel Decl. ¶ 6; Walker Decl. ¶ 6. Plaintiff Walker’s declaration demonstrates why walking, hitchhiking, or otherwise attempting to reach the polls – despite the blocked roads – was impossible: “I had no way to know whether the downed power lines were live. If they were, walking or driving over them could have been deadly.” Walker Decl ¶ 6. Plaintiff Coffel attempted to vote at Keonepoko Elementary School on August 15, but was turned away because he did not live in Precinct 04-01 or 04-02; had he been allowed to vote, he planned to return home and drive Plaintiff Walker to Keonepoko Elementary School to cast her ballot as well. Coffel Decl. ¶ 9; Walker Decl. ¶ 7. Plaintiff Walker declares that “[she] felt it was extremely unfair that [she] was disenfranchised.” Walker Decl. ¶ 9. Plaintiff Coffel describes feeling like a “second-class citizen” at being denied the right to cast his ballot. Coffel Decl. ¶ 8.

Plaintiff Andrew Leo lives in Kapoho, a community in Pahoā, Hawai‘i, and is registered to vote in Hawai‘i. Declaration of Andrew Leo (“Leo Decl.”). Although his polling place was

open on Saturday, August 9, and he intended to vote in the primary election, he was unable to do so because trees had fallen across his driveway; he was unable to get out until Tuesday. *Id.*

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 in 2013 – the 2014 data demonstrate substantially lower in-person 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/2012/primary/elections/results/2012/primary/files/precinct.pdf> at 67, 70, and 73; <http://hawaii.gov/elections/results/2014/primary/elections/results/2014/primary/files/precinct.pdf> at 64, 67, 70, and 73. The statewide turnout for the August primary was approximately 20%. See <http://hawaii.gov/elections/results/2014/primary/elections/results/2014/primary/files/histatewide.pdf> at 6.

This reduction in voter turnout cannot be explained by any possible offset in early absentee ballots cast: 491 voters (16.0%) cast early absentee ballots in Precinct 04-03 in 2012, comparable to the 480 voters in that Precinct (14.4%) who cast early absentee ballots in 2014. See <http://hawaii.gov/elections/results/2012/primary/elections/results/2012/primary/files/precinct.pdf> at pages 68-69, 71-72, 74-75 and <http://hawaii.gov/elections/results/2014/primary/elections/results/2014/primary/files/precinct.pdf> at 65-66, 68-69, 71-72, 74-75.

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.

In that race, of the four candidates running for the office, one received 2,032 votes – 52.0% of the total votes cast. See <http://hawaii.gov/elections/results/2014/primary/elections/results/2014/primary/files/histatewide.pdf> at 5. 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 50.0% or less of the vote, rather than 52.0%, the leading candidate would face a challenger in November rather than winning outright in August.

According to Plaintiffs’ calculations, if 386 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.⁵ This is a distinct possibility given that sheer number of people who were unable to cast votes in the August primary.

Plaintiffs filed a Complaint in this Court on August 21, 2014, and a First Amended Complaint the following day. This Court ordered Defendants to respond to Plaintiffs' Complaint no later than Tuesday, August 26 at 4:30 p.m. Plaintiffs hereby submit this Opening Brief in order to provide as full a record to the Court (and as full an explanation of Plaintiffs' arguments to Defendants) as possible in as short a time as possible.

III. STANDARD OF REVIEW

As this Court set forth in *Blair v. Cayetano*, 73 Haw. 536, 541-42, 836 P.2d 1066, 1069 (1992):

This court accepted original jurisdiction of this matter, and therefore, there is no standard of review as such. However, where it is alleged that the legislature has acted unconstitutionally, this court “[has] consistently held ... that every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt.... [T]he infraction should be plain, clear, manifest, and unmistakable.” *Schwab v. Ariyoshi*, 58 Haw. 25, 31, 564 P.2d 135, 139 (1977) (citations omitted).

(Alterations in original.)

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

⁵ Plaintiffs' initial calculation (in Plaintiffs' Complaint and First Amended Complaint), alleging that only 149 additional votes could change the outcome, was incorrect. The leading candidate received 2,083 votes out of 3,780 cast. To reduce the leading candidate's share to 50.0% of the total, the other three candidates combined would have had to receive a total of 2,083 votes, or 386 more than they received:

- 3,780 (total) – 2,083 (leader) = 1,697 (total for three non-leading candidates)
- 2,083 (needed to equal leader's share) – 1,697 (received by three non-leading candidates) = 386 (needed to reduce leader's share to 50.0%).

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,¹ 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). 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.

IV. DISCUSSION

A. This Court Has Jurisdiction to Hear the Instant Case

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 a 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,¹ 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). Instead, Plaintiffs bring this action pursuant to article VI, section 1 of the Hawai‘i Constitution, HRS chapter 11, Part XI, and/or HRS §§ 602-5(a)(5) and -5(a)(6), 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. Such exercise of jurisdiction is consistent with this Court's rulings in *Taomae* and *Watland*.

Plaintiffs readily admit, however, that the question of jurisdiction is novel and a preliminary matter that the Court must determine. To the extent that the Court agrees with Defendants that it does not have jurisdiction under article VI, section 1 of the Hawai'i Constitution, HRS chapter 11, Part XI, and/or HRS §§ 602-5(a)(5) and 5(a)(6), Plaintiffs do not contest that dismissal is appropriate pursuant to Haw. R. Civ. P. 12(b)(1); similarly, to the extent that this Court determines that the instant case *is* an election contest, then Plaintiffs do not contest that dismissal is appropriate pursuant to Haw. R. Civ. P. 12(b)(6).

Defendants also raise legitimate concerns about delays in the election process, *see* State Defendants' Memorandum in Support of Motion to Dismiss at 14-15, Defendant Maeda's Memorandum in Support of Motion to Dismiss at 6 n.4, yet this concern militates in favor of original jurisdiction in *this* Court; indeed, the need for prompt action is likely the very reason why the Legislature required election contests pursuant to HRS §§ 11-172 and 11-173.5 to be brought in this Court rather than in the Circuit Courts.

B. Plaintiffs are Entitled to Permanent Injunctive Relief

This is a novel case. Regardless of how this Court rules, the Court will likely break new ground in interpreting at least one Hawai'i statute, HRS § 11-92.3, and/or constitutional provision (article I, section 8 and/or article II, section 4 of the Hawai'i Constitution and/or the first and fourteenth amendments to the United States Constitution).

That said, this Court could resolve this case by issuing a narrow ruling, as follows: pursuant to HRS § 11-92.3, Defendants Nago and Maeda erred in failing to postpone voting in Precincts 04-03 and 04-04 in Hawai'i County, insofar as Defendants had notice *prior to opening of the polls* on August 9, 2014 that at least some roads in this Precinct were impassable and that

many residents were without power (and as such without television, internet or telephones). As such, these Defendants failed in their statutory obligations to accommodate voters whose right to vote was substantially impaired by a natural disaster. Alternatively, as set forth more fully *infra*, the Court could vindicate Plaintiffs' rights by issuing a broader ruling on other aspects of HRS § 11-92.3 and/or the Hawai'i or United States Constitutions.

It is undisputed that the right to vote is fundamental and requires strict constitutional protection. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Every citizen has "a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (citing *Evans v. Cornman*, 398 U.S. 419, 421-22 (1970)). Plaintiffs respectfully request that this Court order Defendants to allow them – and similarly situated voters – the opportunity to cast their ballots. Plaintiffs do not ask that this Court invalidate the results of the primary election, nor do they ask the Court to enjoin, postpone, or otherwise interfere with the general election scheduled for November 4, 2014. Rather, Plaintiffs ask the Court to rule that, despite Defendants' good-faith efforts, Defendants erred in denying Plaintiffs the opportunity to vote.

The Court may reach this result in any of the following ways:

- By concluding that Defendants Nago and Maeda erred in carrying out their duties as set forth in HRS § 11-92.3 (by failing to postpone the vote in Precincts 04-03 and 04-04), thus disenfranchising voters (prohibited by article I, section 8 and the first and fourteenth amendments to the United States Constitution). The Court may reach this result by concluding either that (a) Defendants should have postponed the vote prior to the opening of the polls, given the knowledge they had regarding the condition of roads in the area and power outages, or (b) Defendants

should have postponed the vote after the polls opened, given the knowledge they obtained that day regarding the condition of roads and power outages in the area (and, further, that Defendants have authority, pursuant to HRS § 11-92.3, to close the polls even after they have opened); or

- Alternatively, by concluding that article II, section 4 of the Hawai‘i Constitution prohibits the Legislature from granting unlimited discretion to the chief election officer, the county clerks, or the governor to determine whether and how to postpone an election, when such unfettered discretion could lead to deprivation of fundamental constitutional rights. By failing to provide appropriate direction to its designee(s) in the wake of a natural disaster, the Legislature failed to carry out its constitutional mandate to prescribe the method of all elections. 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 and the first and fourteenth amendments to the United States Constitution.

Plaintiffs ask only that they (and those voters similarly situated) be allowed to cast their ballots – as they would have done absent a natural disaster – prior to September 19, 2014.

1. One or More Defendants Should Have Postponed Voting in at least Precinct 04-04 Prior to Opening of the Polls on August 9

Assuming that the Legislature delegated its constitutional responsibility to prescribe the method of voting,⁶ then the chief election officer and the county clerk had the legal authority to postpone voting on August 8, prior to the opening of the polls. There is no question that the Legislature intended to accommodate voters whose rights were “substantially impaired” by a natural disaster. HRS § 11-92.3; *see also* Section IV.B.2(a), *infra* (discussing legislative history of HRS § 11-92.3). Defendants Nago and/or Maeda should have exercised that authority, and violated article I, section 8 and the first and fourteenth amendments to the United States Constitution in failing to do so.

Defendant Nago had actual knowledge that roads were closed in Precinct 04-04 on the day *before* the primary election. Gluck Decl. #2, Ex. 8 at 26, ¶ 5. Defendant Nago’s failure to postpone voting in that Precinct – while postponing voting in similarly situated Precincts – was underinclusive, irrational, arbitrary, and capricious. Furthermore to the extent that Defendant Maeda knew of the damage caused by Iselle and the consequent inaccessibility of roads, his failure to act with respect to the County race was similarly underinclusive, irrational, arbitrary, and capricious.

To be clear, Plaintiffs do not contend that any Defendant acted with anything other than a good-faith desire to discharge his duties as set forth by law. Nevertheless, the end result of Defendants’ actions (or lack thereof) is that large numbers of voters were disenfranchised. Such a result – regardless of the rationale – is prohibited by article I, section 8 and the first and fourteenth amendments to the United States Constitution.

⁶As set forth in Section IV.B.3, *infra*, Plaintiffs assert that such delegation violates article II, section 4 of the Hawai‘i Constitution.

2. **One or More Defendants Had Authority to Postpone Voting Even After the Polls Opened on August 9; They Erred in Failing to Exercise that Authority**
 - a. **The Chief Election Officer and County Clerk Had Authority Pursuant to HRS § 11-92.3, and Violated Article I, Section 8 and the First and Fourteenth Amendments to the United States Constitution in Failing to Exercise that Authority**

Defendant Nago contends that he lacked authority to close or postpone the polls once they had been opened.⁷ Gluck Decl. #2, Ex. 8 at 17 ¶ 11 (“I do not have the authority to take action on primary election day; only the Governor can take such action.”). As a general rule, government officials ought to be commended for showing restraint in the exercise of their powers; in the instant case, however, Defendants’ restraint was both unnecessary (insofar as HRS § 11-92.3 authorized him to make changes once the polls had opened) and unlawful (insofar as his failure to act violated voters’ rights pursuant to article I, section 8 and the first and fourteenth amendments to the United States Constitution).

The Legislature amended HRS § 11-92.3 in 1993, in the aftermath of Hurricane Iniki. While the current statutory language is seemingly inconsistent (as explained more fully *infra*), the Legislature’s intent becomes clear when looking at what language existed prior to 1993 (and what language was inserted in that year). Act 304, passed in 1993, provides in relevant part:

SECTION 5. Section 11-92.3, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

⁷ Curiously, however, Defendant Nago’s lawyers said something quite different in their Circuit Court pleading (the opposition to the Motion for Temporary Restraining Order in *Hanabusa v. Nago*, Civ. 14-1-0307 (Aug. 14, 2014)):

What [Plaintiff Hanabusa] is asking this Court to do is to second-guess the judgment of an official who, by law, is the *only person* who can postpone an election after a natural disaster, and determine that an election should be set later instead. Hawaii Revised Statutes (HRS) § 11-92.3.

Gluck Decl. #2, Ex. 8 at 2 (emphasis in original). Plaintiffs do not know Defendant Maeda’s position on this issue at this time.

“(a) In the event of a flood, tsunami, earthquake, volcanic eruption, high wind, or other natural disaster occurring prior to an election which makes a precinct inaccessible, the chief election officer or county clerk in the case of county elections may consolidate precincts within a representative district. If the extent of damage caused by any natural disaster is such that the ability of voters, in any precinct, district, or county to exercise their right to vote is substantially impaired, the chief election officer or county clerk in the case of county elections may postpone the conducting of an election in a precinct, district, or county for no more than seven days; provided that any such postponement shall not affect the conduct of the election, tabulation, or distribution of results for those precincts, districts, or counties not designated for postponement. The chief election officer or county clerk in the case of county elections shall give notice of the consolidation or postponement in the affected county prior to the opening of the precinct polling place by whatever possibly news or broadcast media[.] are available. Precinct officials and workers affected by [the] any consolidation shall not forfeit their pay.”

1993 Haw. Sess. L. Act 304, § 5 at 685 (alterations in original) (underlined text added by Act 304; bracketed text deleted by Act 304).⁸

Reading HRS § 11-92.3(a) as it stands today,⁹ the statute is nonsensical:

⁸ The Legislature made additional changes in 1996, allowing the chief election officer or county clerk to require absentee balloting in the case of a natural disaster, 1993 Haw. Sess. L. Act 215, § 3 at 490, and in 1998, making minor changes to subsection (b). 1996 Haw. Sess. L. Act 2, § 5. The legislative history of the 1983 measure enacting the original version of HRS § 11-92.3 does not appear to lend any insight as to the Legislature’s intent, other than that the Legislature intended “to facilitate the efficient planning and execution of future elections.” Conf. Comm. Rep. No. 43, in 1983 Senate Journal, at 1020; *see also* 1983 Haw. Sess. L. Act 34, § 11 at 43; Sen. Stand. Comm. Rep. No. 806, in 1983 Senate Journal, at 1398; Hse. Stand. Comm. Rep. No. 505, in 1983 House Journal, at 1063-65.

⁹ HRS § 11-92.3(a) (2013) provides:

In the event of a flood, tsunami, earthquake, volcanic eruption, high wind, or other natural disaster, occurring prior to an election, that makes a precinct inaccessible, the chief election officer or county clerk in the case of county elections may consolidate precincts within a representative district. If the extent of damage caused by any natural disaster is such that the ability of voters, in any precinct, district, or county, to exercise their right to vote is substantially impaired, the chief election officer or county clerk in the case of county elections may require the registered voters of the affected precinct to vote by absentee ballot pursuant to section 15-2.5 and may postpone the conducting of an election in the affected precinct for no more than twenty-one days; provided that any such postponement shall not affect the conduct of the election, tabulation, or

1. the first sentence requires that the flood, tsunami, earthquake, etc. occur *prior to* an election (though does not necessarily require that the precinct be made inaccessible prior to the election) and only allows the chief election officer to *consolidate* precincts if the precinct is inaccessible;
2. the second sentence allows the chief election officer or county clerk to require absentee ballots for the affected areas and to postpone the election for up to twenty-one (21) days *regardless* of the timing of the natural disaster (by allowing the chief election officer to act where there is “damage caused by *any* natural disaster” so long as voters’ rights are “substantially impaired”;
3. the third sentence then requires *notice* to voters *prior* to the opening of the polls.

In other words, in 1993, the Legislature authorized the chief elections officer and the county clerk to act to ensure that voters’ rights are not impaired, even if the polls are already open (by allowing for action for *any* natural disaster) but did not adjust a pre-existing requirement that the chief election officer give notice to the public prior to the opening of the polls. The Senate Committee Report (a Joint report by Judiciary and Ways and Means) demonstrates the Legislature’s intent to give the chief election officer and county clerk power to postpone the election in the case of a natural disaster:

distribution of results for those precincts, districts, or counties not designated for postponement. The chief election officer or county clerk in the case of county elections shall give notice of the consolidation, postponement, or requirement to vote by absentee ballot, in the affected county or precinct prior to the opening of the precinct polling place by whatever possible news or broadcast media are available. Precinct officials and workers affected by any consolidation shall not forfeit their pay.

Your Committees have also determined that there is a need for some flexibility regarding election dates after Hurricane Iniki devastated much of Kauai. Had the catastrophe occurred closer to the election date, the right of many to vote might have been impaired. Your Committees have amended the bill by providing the chief election officer and the county clerk the ability to postpone an election to ensure that the right of the people to vote is preserved.

Sen. Stand. Comm. Rep. Rep. No. 1356, in 1993 Senate Journal, at 1261. The Conference Committee was in accord.¹⁰ Conf. Comm. Rep. No. 211, in 1993 Senate Journal, at 814 (“The purpose of the bill is to . . . create more flexibility regarding election dates in the case of a natural disaster[.]” While the Senate also recommended a provision that would allow the chief election officer to require the use of absentee ballots in the case of a natural disaster, that provision was removed in Conference Committee. *See id.*; Sen. Stand. Comm. Rep. Rep. No. 1356, in 1993 Senate Journal, at 1261.

Pursuant to the plain language of HRS § 11-92.3, Defendants Nago and Maeda had express legislative authority to postpone the August 9 election – without limitation as to whether that postponement occurred prior to or after the opening of the polls on August 9 – as set forth in the second sentence (passed after Hurricane Iniki). Any other reading is unreasonable and goes against the plain and unambiguous language of the statute. However, Defendants Nago, Maeda, and Louie appear to take the position that they may only postpone polling if they take action before the polls open in any precinct statewide. That is, once the election has commenced in any precinct statewide, they are without legal authority to take any action based on a natural disaster. This interpretation leads to an absurd result. While the third sentence of HRS § 11-92.3 requires “notice of the consolidation or postponement in the affected county prior to the opening of the precinct polling place,” this provision should reasonably be read to mean that, if voting is

¹⁰ The House Judiciary Committee Report does not appear to contain any information relevant to the instant dispute. *See Hse. Stand. Comm. Rep. No. 527*, in 1993 House Journal, at 1187.

postponed at *any* time for *any* precinct, notice shall be provided to the affected voters prior to re-opening. Such a reading would be consistent with the Legislature's purpose in allowing for flexibility during natural disasters. Defendants' interpretation, on the other hand - if advance notice is unfeasible, then the vote cannot be postponed – allows the tail to wag the dog in the case of natural disasters. The Legislature could not have intended that a voter's right to notice about a postponed election should dictate whether that voter can cast a ballot at all.

In sum, Defendants Nago and Maeda had authority to postpone polling in precincts 04-03 and 04-04 on August 9. As set forth *supra*, they erred in failing to do so. Such failure resulted in the disenfranchisement of the individual Plaintiffs (and others similarly impacted by Hurricane/Tropical Storm Iselle) in violation of article 1, section 8 and the first and fourteenth amendments to the United States Constitution.

b. Alternatively, the Governor Had Authority to Postpone or Extend Voting in Precincts 04-03 and 04-04, and Violated Article I, Section 8 and the First and Fourteenth Amendments to the United States Constitution in Failing to Exercise that Authority

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's failure to exercise that authority/discretion in such a manner as to disenfranchise large numbers of voters in the instant case, thereby violating article I, section 8 of the Hawai'i Constitution and the first and fourteenth amendments to the United States Constitution, for all the reasons set forth *supra*.

3. If HRS § 11-92.3 Vests the Chief Election Officer and the County Clerk with Unlimited Discretion to Determine Whether to Postpone an Election, Such Delegation of Legislative Authority is Unconstitutional Pursuant to Article II, Section 4

The Legislature created the conditions that allowed these constitutional violations to take place, because it failed to fulfill its obligations under article II, section 4 of the Hawai‘i Constitution: “The Legislature . . . shall prescribe the method of voting at all elections.” By vesting unlimited discretion in the Chief Elections Officer, and/or the County Clerk in the case of County elections, as to whether and how to alter voting in the event of a natural disaster (via HRS § 11-92.3), the Legislature has abdicated its constitutional responsibilities. The Legislature cannot authorize the chief election officer or the county clerk to make an unconstitutional decision; if the chief election officer or the county clerk truly do have the authority, pursuant to HRS § 11-92.3, to postpone voting in one Precinct due to a natural disaster (giving those voters an opportunity to cast their ballots at a later time) while prohibiting voters in the next Precinct who are similarly situated (*i.e.*, similarly affected by the natural disaster), then such delegation is itself unconstitutional. In other words, the Legislature cannot confer unlimited discretion to its designee(s) in a manner that could reasonably result in deprivation of a fundamental constitutional right. (Alternatively, if the Legislature has vested unlimited discretion in the Governor to postpone an ongoing election – whether explicitly or implicitly – the Legislature has similarly erred.)

Plaintiffs seek a declaration that HRS § 11-92.3 is unconstitutional, insofar as the Legislature failed to give appropriate direction and set forth the method of voting in the case of natural disasters. Currently, the statute *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. While the Legislature may delegate procedural, ancillary

decisions to executive-branch officials, the Legislature itself must make those decisions required of it by the Constitution. *See, e.g., Ka Pa‘akai O Ka ‘Aina v. Land Use Comm’n, State of Hawai‘i*, 94 Hawai‘i 31, 7 P.3d 1068 (2000) (holding that the Land Use Commission improperly delegated to private developer its constitutional obligation under article XII, section 7 to preserve and protect customary and traditional rights of native Hawaiians); *State v. Johnson*, 68 Haw. 292, 297, 711 P.2d 1295, 1299 (1985) (although sentencing court “may delegate to the Adult Probation Division the function of making recommendations on the amount of restitution and the manner of payment, the court has the exclusive responsibility and function of imposing a sentence”). *Hui Alaloa v. Planning Comm’n of the County of Maui*, 68 Hawai‘i 135, 136, 705 P.2d 1042, 1044 (1985) (holding that the Maui Planning Commission impermissibly delegated its statutory authority to determine whether a development complied with the policies and objectives of the coastal zone management area to the applicants for a special management area permit); *Bencomo v. Bencomo*, 112 Hawai‘i 511, 514, 147 P.3d 67, 70 (App. 2006) (family court improperly delegated parental and court authority over medical, educational and recreational decisions to the guardian ad litem).

HRS § 11-92.3 provides a panoply of discretionary options for the Chief Elections Officer to exercise in the event of a natural disaster. Insofar as HRS § 11-92.3 permits – but does not require – the chief elections officer and/or the county clerk to accommodate voters who are physically unable to cast a ballot due to a natural disaster, the statute violates article II, section 4 of the Hawai‘i Constitution, which provides that “[t]he legislature shall . . . prescribe the method of voting at all elections.” Instead of passing a statute that prescribes the method of voting in the event of a natural disaster to ensure the protection of the fundamental right to vote, the Legislature delegated unlimited discretion to others. Such delegation is unconstitutional.

4. Other States' Statutes Providing for "Emergency" Voting

Given the time constraints in the instant case, counsel has not had the opportunity to conduct a thorough review of other states' provisions regarding voting in the case of natural disasters. Nevertheless, a law review note collecting other states' statutes suggests that other states' statutes and constitutional provisions provide no more clarity than Hawaii's for actions to be taken in the wake of natural disasters. *See* Maya Royal, *The State of Democracy After Disaster: How to Maintain the Right to Vote for Displaced Citizens*, 17 S. CAL. INTERDISC. L.J. 203 (Fall 2007) (attached as Gluck Decl. #2, Ex. 9). Four states – Florida, Kentucky, Louisiana and Mississippi¹¹ – appear to have emergency plans for voting in the case of natural disasters, and Louisiana has an affidavit for use by "displaced" residents after Hurricane Katrina when submitting an absentee ballot, *see* http://www.geneseo.edu/~iompress/Archive/Louisiana:request_absentee_ballot_AFFIDAVIT.pdf, though no states seem to have a clear, constitutional system in place that has survived a real-world test.

V. CONCLUSION

Plaintiffs respectfully request that they – and other voters who were physically prevented from voting in the August 2014 primary election – be given an opportunity to do so. Plaintiffs have no objection to Defendants' exercise of discretion to determine *how* and *when* that vote occurs, only that they be allowed to cast their votes on or prior to September 19, 2014; similarly, Plaintiffs have no objection to the imposition of reasonable safeguards – such as execution of a declaration of hardship, under penalty of perjury – to ensure that only those individuals who intended to vote (and were authorized to vote) on August 9 be allowed to do so. As such,

¹¹ The state statutes and constitutional provisions vary in great degree.

Plaintiffs respectfully request that this Court deny State Defendants' Motion to Dismiss and grant permanent injunctive relief to Plaintiffs.

Dated: Honolulu, Hawai'i, August 25, 2014.

/s/ Daniel M. Gluck

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